

ORIGINAL

In the Supreme Court of Ohio

State of Ohio, :

Appellee, :

-vs- : Case No.: 1998-1475

Brett Hartman, :

Appellant. : **This is a Capital Case.**

Memorandum in Opposition to Motion to Set Execution Date

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FILED

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CLERK OF COURT  
SUPREME COURT OF OHIO

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Brett Hartman requests the Court to deny the state's motion and to refrain from setting an execution date as Brett Hartman presently has litigation pending in three different courts.

The first is a Second Petition for Post Conviction Relief in the Summit County Court of Common Pleas a second petition for postconviction relief. *State v. Hartman*, Case No. 97-09-1987. This petition was filed on March 26, 2009. This petition presents two substantive claims: (1) actual innocence predicated on the perjured testimony of a jailhouse snitch and supported by a request for DNA and other forensic testing of evidence never released to Hartman for testing, and (2) a substantive challenge to Ohio's lethal injection scheme under the recent Supreme Court of the

United States decision in *Baze v. Rees*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1520 (2008), and Ohio's most recent botched execution on September 15, 2009 involving inmate Romell Broom. The Petition also presents substantive and procedural challenges to Ohio's postconviction process. In order for these important issues to be addressed in a thoughtful, deliberative, and conscientious manner, no execution date should be set until the conclusion of the litigation.

The second is a substantive lethal injection challenge pending under 42 U.S.C. §1983 in the United States District Court for the Southern District of Ohio, *Hartman v. Strickland*, Case No. 09-242. This substantive challenge raises new lethal injection claims first brought to light in March 2009 and as demonstrated by the botched execution of Romell Broom on September 15, 2009.

The third is a Petition for Certiorari to be filed this week in the United States Supreme Court challenging Hartman's dismissal from the underlying lethal injection litigation on statute of limitations grounds in *Cooley v. Strickland*, SDOH No. 04-1156.

Therefore, Brett Hartman moves this Court to deny the state's motion for an execution date pending conclusion of the pending litigation.

Respectfully submitted,

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## **Memorandum in Support**

### **I. Background.**

Brett Hartman was sentenced to death in Summit County, Ohio, in September 1998, for his conviction of the aggravated murder of Winda Snipes. Hartman has thus far been unsuccessful in his attempts to obtain relief in state and federal court on the merits of his case.

### **II. Good cause exists to deny the state's motion.**

#### **A. Second Post Conviction.**

On March 26, 2009, Hartman filed a second postconviction petition raising a challenge based on actual innocence and a challenge to Ohio's lethal injection scheme. In order to permit full development of these challenges the judicial system requires time unencumbered by an execution date. Determining, after Mr. Hartman's execution, that he is innocent or that Ohio's lethal injection scheme is unconstitutional is moot given that he will be dead and forcing the courts to review Mr. Hartman's claims under the pressures of an execution date will prevent full and fair review of the claims. Hartman filed his claim in March, 2009. The state has filed two motions to dismiss. As of this writing, the Court of Common Pleas has not acted. Hartman has been diligent in pursuing these claims.

#### **1. Actual Innocence.**

Hartman's actual innocence claim is predicated on recently discovered evidence that a jailhouse informant who testified that Hartman allegedly confessed to him committed perjury. Hartman recently learned that the attorney for the informant had *ex parte* communication with Hartman's trial judge after Tyson testified. It is Hartman's understanding that the attorney advised the trial judge that Tyson had committed perjury in his testimony. The attorney will not reveal further information about the conversation until relieved of the restrictions of the attorney client privilege. However, he did reveal that no one else was present during his meeting. At no time did the trial judge or the attorney reveal to Hartman or Hartman's attorneys this conversation or that the informant perjured himself. This was not discovered until March of 2009.

At trial and since then, the state has repeatedly referred to Tyson's testimony as the critical evidence of Hartman's guilt. The state relied on this evidence in filings to this Court. The state continues to rely on Tyson's perjured testimony in refusing to release physical evidence for DNA testing. (Exhibit A) This new evidence severely undermines the credibility of Tyson and casts doubt on the validity of the conviction.

In addition, significant physical and forensic evidence remains untested. Among the evidence collected at the crime scene were hairs removed from Winda Snipes's right forearm and her left "butt cheek". Hairs were also recovered from the rear leg

of a bloody plastic chair next to her bed. A hair was found in blood on the bottom of the seat of the same chair. A hair was found enmeshed in a pair of pantyhose; a mop sponge contained hairs; a bloody cloth removed from Ms. Snipes's mouth contained hairs; and a long hair was discovered attached to a hair dryer. In addition, while the family and a victim's advocate were cleaning the apartment after the police had stopped their investigation, a used condom was found in a wastebasket in the bathroom. The hairs were delivered to BCI with an express request from the prosecutors that the hairs be tested and compared to known samples from both Hartman and Snipes. To Hartman's knowledge, these hairs were never tested and Hartman has never been given permission to independently test the hairs. The condom was never provided to BCI for testing nor was Hartman ever given leave to test it. Fingerprints were discovered in the apartment and do not match Hartman but he has never been given the opportunity to compare those prints to other suspects.

In correspondence with Hartman's counsel, the Summit County Prosecuting Attorney refused to provide the material for DNA testing absent a court order. However, during Hartman's clemency hearing the Prosecuting Attorney revealed for the first time that her office in fact conducted additional DNA testing on material from an unrelated case in an effort to link Hartman to an unsolved murder in Wisconsin. According to the prosecutor, the tests completely exonerated Hartman of the

Wisconsin case. These results have never been released to Hartman nor was Hartman involved in the testing or even advised of the testing and results until the Clemency Board asked the Prosecutor about the Wisconsin case. Hartman has no idea what the testing involved including whether the specific tests he now seeks were conducted in conjunction with the state's testing.

In *In re Davis*, \_\_\_ U.S. \_\_\_, 2009 U.S. Lexis 5037 (2009), the Supreme Court reiterated that innocence matters in capital cases. The Court remanded Davis's case to the federal district court for a full hearing and review of his innocence claim. As noted in Justice Stevens's concurring opinion this remand was necessary because no state or federal court had reviewed the merits of the claim. *Id.* at 1-2. Similarly, no court has reviewed the merits of Hartman's claim in light of this new and/or untested physical evidence.

This Court currently has before it a case that will determine whether state defendants have a right to seek postconviction testing of DNA materials even if prior DNA testing was conducted. *State v. Prade*, Case No. 2009-0605. Although *Prade* is before this Court for review of Ohio's DNA testing statute, Ohio Rev. Code § 2953.74, the underlying legal principal is the same: whether Ohio's postconviction process can and must permit DNA testing when questions of actual innocence are raised.

There is a reasonable likelihood that this hair evidence, the DNA evidence found in the used condom and other blood evidence and fingerprint evidence that have never been tested will demonstrate that someone other than Brett Hartman committed this crime. Such testing can be accomplished without undue delay or cost. The Office of the Federal Public Defender for the Southern District of Ohio (who also represents Hartman in federal court) has offered to absorb the costs of such testing. There is a reasonable likelihood that this evidence will demonstrate that Brett Hartman is actually innocent of this crime. This evidence combined with the perjured testimony of the jailhouse informant indicates that no reasonable juror would have convicted Brett Hartman on the remaining evidence. This Court must permit Hartman to test these materials, develop the factual record, and vindicate his rights. *In re Davis*.

## **2. Lethal Injection.**

Hartman's second claim is a direct challenge to Ohio's lethal injection scheme. In *Baze v. Rees*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1520 (2008), the plurality concluded that an execution method can be viewed as "cruel and unusual" under the Eighth Amendment" where the petitioner can demonstrate a "substantial risk of serious harm," and a "feasible, readily implemented" alternative that will "significantly reduce" that risk. *Id.* at 128 S.Ct. 1532. The plurality opinion reflects a dramatic change to the Eighth Amendment landscape. Prior to *Baze*, there was no Supreme

Court precedent holding that a death sentenced prisoner could potentially prove, through discovery and a hearing, that a state's lethal injection protocol violated the Eighth Amendment. *Baze*, 128 S.Ct. at 1526.

Prior to *Baze*, Ohio courts routinely summarily dismissed challenges to the constitutionality of Ohio's lethal injection practice. In summarily denying Ohio Constitutional and Eighth Amendment challenges to Ohio's lethal injection practices on the merits, the Ohio courts consistently rejected the claims without analysis and without suggesting that there was any procedural problem. There are currently several cases directly addressing the mechanics of Ohio's protocol pending in state and federal courts. Only now are state and federal courts permitting factual development about how Ohio conducts executions.

Although *Baze* did not find lethal injection to be *per se* unconstitutional, it did recognize for the first time that lethal injection protocols are uniquely susceptible to Eighth Amendment challenges and analysis. The numerous opinions making up the majority generally agree, that the "evidence adduced by [a] petitioner" will in certain circumstances render a state's protocol unconstitutional. *Baze*, 128 S.Ct. at 1556 (Stevens, J., concurring). Similarly, the plurality observes that in the absence of "extensive hearings," it will be difficult to ascertain whether the "risk of pain from maladministration" of lethal injection protocols is sufficient to trigger Eighth

Amendment protections. *Id.*, at 1526 (Roberts, C.J., plurality). This Court must permit Hartman to demonstrate that Ohio's scheme violates the Eighth Amendment and *Baze*. It is clear that if Ohio's lethal injection scheme violates the 8th Amendment and *Baze* it will apply retroactively to all death row inmates in Ohio. *See Penry v. Lynaugh*, 492 U.S. 302, 329-330 (1989). This becomes especially critical in light of the events surrounding the attempted execution of Romell Broom by the State of Ohio on September 15, 2009, a process that had to be halted by the Governor issuing a reprieve.

Likewise, during the week of March 23, 2009, evidence was presented in the United States District Court for the Southern District of Ohio in the case of *Cooley, et al v. Strickland, et al*, Case No. 04-1156. This evidence was presented on behalf of inmate Kenneth Biros to demonstrate the Court should continue its previously granted preliminary injunction to prevent the State of Ohio from carrying out Biros' execution.<sup>1</sup> During the course of this hearing, critical evidence concerning the Ohio protocol and the procedures used for executions in Ohio was revealed publicly for the first time.

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<sup>1</sup> The court limited participation in this hearing to Kenneth Biros. Hartman's Intervenor Complaint had previously been dismissed on statute of limitations grounds. See Section I.C. of this Memorandum.

Although the district court concluded that while there were substantial flaws in Ohio's lethal injection procedures, the district court held that Biros had "failed to demonstrate a strong likelihood of success on the merits of his claims." (Order at 157-58, R. 471, Case No. 04-1156 (S.D. Ohio Apr. 21, 2009); *Cooley v. Strickland (Biros)*, 610 F. Supp. 2d 853, 936 (S.D. Ohio 2009)). The district court, specifically and directly concluded that its ruling did not foreclose future litigation on the merits of the lawsuit. (Order at 158, R. 471, Case No. 04-1156 (S.D. Ohio Apr. 21, 2009); *Cooley v. Strickland (Biros)*, 610 F. Supp. 2d 853, 936 (S.D. Ohio 2009)). A trial for the remaining intervenor-plaintiffs is scheduled for October 26, 2009. It is anticipated that the District Court will rule on the merits of the decision prior to the scheduled December 8, 2009, execution date set for intervenor-plaintiff Kenneth Biros.

In *Baze* it was uncontested that maladministration of sodium thiopental would create "a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Baze*, 128 S.Ct. at 1533. Because Kentucky had no botched executions at the time of *Baze's* suit the Court determined that he had not demonstrated a "substantial risk of serious harm" due to maladministration. Now however, Ohio has significant experience with botched executions creating the factual predicate necessary to prevail under *Baze*. *Cooley (Biros) v. Strickland*, 610 F. Supp.2d 853, 937-938 (S.D. Ohio 2009).

This is not to say that Biros or any of the various plaintiffs involved in this litigation are incapable of ultimately prevailing in this litigation. Ohio's method of execution by lethal injection is a system replete with inherent flaws that raise profound concerns and present unnecessary risks, even if it appears unlikely that Biros will demonstrate that those risks rise to the level of violating the United States Constitution. Thus, although the fact that the evidence at this stage of the litigation does not present a likelihood of Biros prevailing on his claim of a constitutional violation proves dispositive of his request for a continued stay of execution, it does not foreclose the possibility that additional evidence will indeed prove that the problems with Ohio's policies and practices rise to the level of constitutional error.

Today's decision therefore neither holds that Ohio's method of execution by lethal injection is constitutional nor unconstitutional. Rather, today's decision reflects only that at this juncture, Biros has not met his burden of persuading this Court that he is substantially likely to prove unconstitutionality. It would wholly confound this Court and no doubt many if not most of the people of the State of Ohio, however, if Defendants regarded today's interlocutory decision as a wholesale endorsement of Ohio's protocol, practices, and policies, both written and unwritten, and then did nothing to improve them. Such a misconstrued legal victory for Defendants would be Pyrrhic given that Defendants are charged with carrying out humane and constitutional executions and not with simply prevailing in litigation.

Director Collins appears to recognize as much, given that he testified that the ultimate goal is for Ohio to be as humane as possible and as professional as possible in carrying out its lawful executions. These are indisputably correct goals. But Collins also testified that he believes Ohio's procedures are as humane and the best they can be right now, and he is incorrect. Thus, despite Defendants' victory on the narrow issue of injunctive relief today, the aspirations of the State would suggest that the question should not be simply what *must* be done under compulsion by the Constitution, but also what *should* be done to meet the professed laudable goals of the State of Ohio.

See also *Execution delayed 1 week after vein troubles*, [www.onntv.com/live/content/onnews/stories/2009/09/15/execution\\_scheduled.html?sid=102](http://www.onntv.com/live/content/onnews/stories/2009/09/15/execution_scheduled.html?sid=102) (last checked on September 15, 2009).

The *Cooley* court is not the only court to recognize the need for judicial review of this claim. See *State v. Hartman*, 121 Ohio St.3d 1433 (2009) (Pfeifer, J., dissenting as to lethal injection issue). See also *State v. Rivera*, 2009-Ohio-1428 (2009); *Odraye Jones v. Bradshaw* (6th Cir. Case No. 07-3766); *Stanley Adams v. Bradshaw* (6th Cir. Case No. 07-3688). The ongoing validity of Ohio's lethal injection protocol is an issue that must be addressed under the facts that exist today not as they may have existed at the time of Hartman's trial.

The information only became available to Hartman during the course of the *Biros* evidentiary hearing and more significantly after the attempted Broom execution. All of the discovery in the *Biros* litigation in front of Judge Frost was conducted under seal. Counsel for *Biros* were not permitted to divulge any of the information to anyone outside of the *Biros* team until it was divulged through testimony in open court.

This Court also has before it the certified question in *Scott v. Houk*, Case No. 2009-1369. In *Scott* this Court is asked to address what avenues for judicial review exist for those sentenced to death to have to challenge Ohio's lethal injection protocol, especially in light of *Baze*. Of note is the fact that the Attorney General of Ohio has asked this Court to accept the certified question and address the avenues available in

state court to challenge lethal injection. *Scott v. Houk*, Case No. 2009-1369, August 18, 2009 Preliminary Memorandum of Respondent Mark Houk, Warden, In Support of Answering the Certified Question, <http://www.sconet.state.oh.us/tempx/649646.pdf>.

On September 15, 2009, Governor Strickland granted a reprieve to Romell Broom. The reprieve came about because the execution team struggled for two and a half-hours to insert the catheters into Mr. Broom's arms without success. *Execution delayed 1 week after vein troubles*, [www.onntv.com/live/content/onnews/stories/2009/09/15/execution\\_scheduled.html?sid=102](http://www.onntv.com/live/content/onnews/stories/2009/09/15/execution_scheduled.html?sid=102) (last checked on September 15, 2009). See also *Governor Delays Ohio Execution After Vein Troubles*, [http://news.yahoo.com/s/ap/20090915/ap\\_on\\_re\\_us/us\\_ohio\\_execution](http://news.yahoo.com/s/ap/20090915/ap_on_re_us/us_ohio_execution). This most recent example of problems with the application of Ohio's protocol demonstrates that further judicial review of this process is necessary. According to press reports, the reprieve was requested by Ohio Department of Corrections Director Terry Collins. *Id.* The execution team continued to try to insert the catheters even after Collins requested the reprieve. *Id.* Even with Mr. Broom's assistance the execution team could not insert the catheters.

Because there has recently been developed considerable evidence to demonstrate that the Ohio protocols and procedures carry a substantial risk of harm,

i.e. excruciating pain during the execution, improper or impossible insertion of the catheters, it will be unfair and inhumane to permit the state to execute anyone while that procedure is in place. It will be particularly unfair and inhumane to execute Brett Hartman now that new and further questions about Ohio's scheme are now available to him and to the public in general. The state should not be permitted to benefit from its ongoing secrecy and its employment of methods of execution that have a substantial risk of causing undue pain and suffering.

**B. *Hartman v. Strickland*, SDOH Case No. 09-242**

In addition to filing his lethal injection challenge in the state courts of Ohio, see above, Hartman renewed his challenge under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Ohio in light of the information revealed in the *Biros* hearing. This case was also filed in March 2009. The case remains pending. Hartman has again been diligent. The state filed a Motion to Dismiss on September 9, 2009. Hartman has until October 5, 2009 to respond. Hartman intends to supplement the Complaint with information obtained this week following the botched execution of Romell Broom.

**C. *Hartman v. Strickland*, Petition for Certiorari**

Brett Hartman filed a Motion to Intervene in the original lethal injection lawsuit, *Cooley v. Strickland*, SDOH 04-1156. Hartman was eventually dismissed

from the *Cooley* lawsuit in October of 2008. He immediately took an appeal to the United States Court of Appeals for the Sixth Circuit.

On September 15, 2009, the Sixth Circuit affirmed the District Court's dismissal on the basis of its earlier 2009 rulings in *Getsy v. Strickland*, \_\_\_ F. 3d \_\_\_, 2009 WL 2475165 (6th Cir. August 13, 2009), and *Broom v. Strickland*, \_\_\_ F. 3d \_\_\_, 2009 WL 2739603 (6th Cir. September 1, 2009). As this ruling only came down on September 15, 2009 (the same day as the Broom botched execution) Hartman intends to file a Petition for Certiorari in the United States Supreme Court challenging the statute of limitations ruling, especially in light of Broom within the week.

Given the recent legal developments and substantive challenges to Ohio's scheme, Hartman must be given the same opportunity as other death sentenced persons to challenge the Constitutionality of Ohio's scheme. To execute Hartman only to subsequently determine that he would be able to demonstrate in his postconviction petition or elsewhere that his execution should have been barred under *Baze* and the Eighth Amendment is the ultimate arbitrary and capricious imposition of the death penalty. As such it will violate "evolving standards of decency" under the Eighth and Fourteenth Amendments and corresponding sections of the Ohio Constitution. Hartman's lethal injection challenge must be permitted to go forward for full merits review without the impediment of imminent execution.

### III. Conclusion

The only Ohio court authorized to grant a stay of execution once this Court sets an execution date is this Court. In order to permit the lower state courts and the federal courts the opportunity to review the significant legal, factual, and Constitutional questions before them this Court should not set an execution date and impose artificial constraints on judicial review. Hartman has pending significant factual and legal challenges to the conviction and sentence imposed on him. His actual innocence claim deserves full and careful review by the courts in order to ensure that the greatest injustice of all, the execution of an innocent man, is avoided. Further, the growing – and only recently available – body of evidence that Ohio’s lethal injection scheme is deeply flawed mandates an opportunity to allow the courts to properly review how Ohio conducts its executions and determine whether that process complies with the Constitution.

Brett Hartman respectfully requests this Court deny the state’s motion to set an execution date and permit full and careful review of his pending claims.

Respectfully submitted,

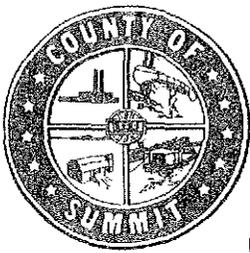
  
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## Certificate of Service

I hereby certify that a true copy of the foregoing Opposition to Motion to Set Execution Date was forwarded by regular U.S. mail to Richard S. Kasay, Assistant Prosecuting Attorney, Summit County Prosecutor's Office, 53 University Avenue, 6th Floor, Akron, Ohio 44308-1680, and also via email at kasay@prosecutor.summitoh.net, and to Thomas Madden and Stephen Maher, Office of the Ohio Attorney General, Capital Crimes, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 18th day of September, 2009.

  
Michael J. Benza 0005839  
**Counsel for Brett Hartman**

# EXHIBIT A



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MAR 23 2009

March 20, 2009

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Mr. David C. Stebbins  
Assistant Federal Public Defender  
10 W. Broad St., Suite 1020  
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RE: Brett Xavier Hartman

Dear Mr. Stebbins:

I am responding to your letter dated March 9, 2009, where you have requested my office to release evidence for additional DNA testing of hairs and a used condom. As you are aware, Federal District Judge James Gwin previously ruled on a similar request made by your client. At that time, Judge Gwin ordered testing of semen obtained from the vaginal and anal swabs of the victim, and did not order testing of the hairs. As we both know, the nuclear DNA that can be obtained from bodily fluids, such as semen, provides the most reliable and irrefutable results possible.

The semen from the vaginal and anal swabs had not been tested at the time of trial on this case since your client had admitted to having vaginal sex with the victim (but claimed it was consensual). However, during the appeal process, your client insisted that he did not have anal intercourse with the victim and that the testing of the semen from the anal cavity of the victim would prove the identity of the "real killer". Thus, the testing was done and as we all know, it absolutely confirmed that the source of the semen in the anal cavity was Brett Hartman.

The testing demonstrated that the likelihood that someone else had anal sex with the victim was 1 in 17.1 quadrillion (17,100,000,000,000,000). It is also important to consider other factors that bring this case additional clarity. In the Summit County Jail, Hartman admitted to another inmate that he had killed the victim. He told the inmate that he had "tried to make it look like a burglary, . . . cutting off the victim's hands," and he mentioned a hacksaw. He commented that, "the tongue can sting you but it's the hands that hurt you."

Mr. David C. Stebbins  
March 20, 2009  
Page Two

Moreover, the testimony from Hartman's co-worker was very compelling when he relayed the discussion he had with Hartman about the O.J. Simpson case. Hartman told his co-worker, only a month prior to Winda's murder "If I was going to do that, the easiest way to get rid of the evidence is to just cut their hands off and then there wouldn't be any DNA under the nails".

I understand that you have a job to do but your client is faced with clear and overwhelming evidence of his guilt. I know that you are aware that hair is easily transferable and is typically all over a house's floor, bed, clothes, and other places. Further, the used condom means nothing, as we do not know where it came from, or when the condom was thrown away.

This office will comply with any order issued by a court but we will not agree to further DNA testing without such an order.

Sincerely,

A handwritten signature in cursive script that reads "Sherri B. Walsh".

Sherri Bevan Walsh  
Summit County Prosecutor

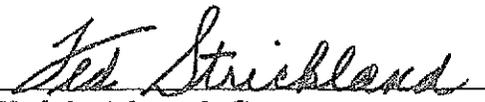
Encs.

## **EXHIBIT B**



## WARRANT OF REPRIEVE

1. Romell Broom is currently in the custody of the Ohio Department of Rehabilitation, has been sentenced to death, and the Ohio Supreme Court scheduled his execution for September 15, 2009.
2. Difficulties in administering the execution protocol necessitate a temporary reprieve to allow the Department to recommend appropriate next steps to me.
3. Ohio Revised Code Section 2967.08 provides that the Governor may grant a reprieve for a definite time to a person under sentence of death, with or without notices or application.
4. Accordingly, I direct that the sentence of death for Romell Broom be reprieved until September 22, 2009.
5. Mr. Broom should remain incarcerated in the custody of the Ohio Department of Rehabilitation and Correction. The Department should carry out Mr. Broom's sentence on that day unless further reprieve or clemency is granted.
6. I signed this Warrant of Reprieve on September 15, 2009, in Columbus, Ohio

  
Ted Strickland, Governor

Filed on the \_\_\_th day of September 2009 with the Cuyahoga County  
Common Pleas Clerk of Court by Jose A. Torres.