ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee,	)	Supreme Court No. 1996-0452
-vs-	)	On Appeal from the Trumbull County Court of Appeals Eleventh Appellate District
RODERICK DAVIE, (A.K.A. Abdul Hakiym Zakiy) Defendant-Appellant.	)	Court of Appeals No. 92-T-4693

MOTION TO SET DATE FOR EXECUTION

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SUPREME COURT OF OHIO

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee,	)	Supreme Court No. 1998-2332
-vs-	)	On Appeal from the Trumbull County Court of Appeals Eleventh Appellate District
RODERICK DAVIE, (A.K.A. Abdul Hakiym Zakiy) Defendant-Appellant.	)	Court of Appeals No. 97-T-175

MOTION TO SET DATE FOR EXECUTION

I. Introduction

Defendant-Appellant Roderick Davie ("Appellant"), also known as Abdul Hakiym Zakiy, is an Ohio Death Row inmate who was convicted and sentenced to death for the June 27, 1991, aggravated murders of John Ira Coleman and Tracey Jefferys. Appellant has exhausted all state and federal remedies. The State of Ohio respectfully requests that this Court issue an order and Death Warrant setting an execution date.

II. Procedural History

A. Indictment

On July 1, 1991, the Trumbull County Grand Jury indicted Appellant on the following ten counts: Counts 1 and 2 alleged the aggravated murder of John Ira Coleman and Tracey Jefferys, respectively, in violation of R.C. 2903.01(A); Counts 3 and 4 alleged the aggravated murder of John Ira Coleman and Tracey Jefferys, respectively, in violation of R.C. 2903.01(B); Count 5 alleged the attempted aggravated murder of William J. Everett in violation of R.C.

2923.02 with a firearm possession specification pursuant to R.C. 2941.141; Counts 6, 7, and 8 alleged the kidnapping of John Ira Coleman, Tracey Jefferys, and William J. Everett, respectively, in violation of R.C. 2905.01(A)(2) and (3); Counts 9 and 10 alleged the aggravated robbery of Tracey Jefferys and William J. Everett, respectively, in violation of R.C. 2911.01(A) and (B). Counts 1 through 4 were accompanied by specifications of multiple victims pursuant to R.C. 2929.04(A)(5), kidnapping pursuant to R.C. 2929.04(A)(7)), aggravated robbery pursuant to R.C. 2929.04(A)(7), and aggravated burglary pursuant to R.C. 2929.04(A)(7). The case was assigned number 91-CR-288 in the Trumbull County Common Pleas Court.

B. Trial

Appellant's jury trial began on March 2, 1992. Following the testimony at the guilt phase, the jury returned a verdict of guilty on all counts and specifications listed in the indictment. Counts 3 and 4 were removed from the jury prior to the commencement of the penalty phase in response to the State's motion to dismiss these counts.

On March 19, 1992, the penalty phase commenced on Counts 1 and 2 and on the four specifications as to each count. After the mitigation evidence was presented, the jury recommended that a sentence of death be imposed on Appellant for each count. On March 25, 1992, the trial court held that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt as to both Counts 1 and 2, and accordingly sentenced Appellant to death on Count 1 and sentenced appellant to death on Count 2. Appellant was also sentenced to an indeterminate period of incarceration of seven to twenty-five years on Count 5 with three years actual incarceration to be served prior to and consecutive with the principal sentence and to an indeterminate period of incarceration of ten to twenty-five years each on Counts 6, 7, 8, 9, 10,

and 11. The trial court ordered all sentences to be served consecutively to each other and all terms of imprisonment be actual incarceration.

C. Direct Appeal

Appellant filed timely notice of appeal to the Eleventh District Court of Appeals. After reviewing twenty-nine assignments of error and independently weighing the aggravating circumstances and mitigating factors, a three-judge panel unanimously affirmed Appellant's conviction and death sentence in *State v. Davie* (Dec. 27, 1995), 11th Dist. No. 92-T-4693, unreported. Appellant did not timely file his notice of appeal in this Court. He waited until February 26, 1996, when he filed a notice appeal in this Court and an accompanying motion for delayed appeal. This Court permitted him to file the delayed appeal and considered his brief containing twenty-eight propositions of law. On Nov. 26, 1997, this Court, with Justice Paul Pfiefer writing, unanimously affirmed Appellant's conviction and death sentence in *State v. Davie,* 80 Ohio St. 3d. 311, 1997-Ohio-341.

This Court set an execution date for February 24, 1998, but stayed the execution to accommodate his postconviction proceedings and appeal to the federal courts. This Court revoked its stay of execution and set a second execution date for Aug. 7, 2000, but reinstated the stay at Appellant's request on July 12, 2000, to again accommodate litigation in the federal courts.

Long after this Court's affirmation, Appellant returned to the Eleventh District Court of Appeals and filed an App. R. 26(B) application to reopen his case in that court on March 1, 2000. The Eleventh District overruled his application September 27, 2001. This Court declined review in *State v. Davie,* 96 Ohio St. 3d 133, 2002-Ohio-3753.

D. Postconviction Proceedings

During the pendency of his direct appeal, Appellant returned to the Trumbull County Court of Common Pleas and filed his first petition for post-conviction relief, on Sept. 3, 1997. He asserted six claims. Trial Judge John Stuard dismissed the petition without hearing. The Eleventh District Court of Appeals once again upheld the trial court in *State v. Davie* (Sept. 25, 1998), 97-T-0175, unreported. This Court declined to review this Court's affirmation of the postconviction dismissal. *State v. Davie* (1999), 84 Ohio St.3d 1483, motion for reconsideration denied, *State v. Davie* (1999), 85 Ohio St.3d 1411.

In a blatant attempt to stall his case in the state system, Appellant on March 1, 2000, filed a 43-claim, successive post-conviction petition with the trial court which Judge Stuard again denied without hearing on July 17, 2000. The Eleventh District again affirmed the trial court's decision in *State v. Davie* (Dec. 21, 2001), 11th Dist. No. 2000-T-0104, unreported, and this Court again declined jurisdiction and dismissed his appeal April 17, 2002, in Case Number 2002-0240.

In a failed attempt to retroactively reap the benefit of this Court's decision in *State v. Roberts,* 110 St. 3d 71, 2006-Ohio-3665, Appellant requested leave to file "a motion for new sentencing hearing" on April 30, 2007. Judge Stuard sentenced to death both Appellant and Donna Roberts, and Appellant sought to exploit the *Roberts* decision by incorrectly asserting that Judge Stuard delegated the drafting of Appellant's sentencing entry to the local prosecutor's office. Judge Stuard overruled Appellant's request for leave on June 8, 2007, noting that he personally authored Appellant's sentencing entry. The Eleventh District Court of Appeals affirmed Judge Stuard's decision on Dec. 21, 2007, in *State v. Davie* 11th Dist. No. 2007-T-

0069, 2007-Ohio-6940, and this Court declined jurisdiction and dismissed his appeal Aug. 6, 2008, in Case Number 2008-0321.

E. Federal Habeas Corpus Proceedings

Following his unsuccessful effort to obtain reversal of his conviction and sentence through the foregoing state court challenges, Appellant turned his attention to the federal courts. In an 83-page opinion, the U.S. District Court for the Northern District of Western Ohio rejected 54 claims and found Appellant's habeas petition without merit and denied habeas relief in *Davie v. Mitchell,* 291 F. Supp. 2d 573 (N.D. Ohio 2003), on Aug. 6, 2003. On June 29, 2004, the U.S. District Court for the Northern District, Western Division, granted a Certificate of Appealability to the U.S. Sixth Circuit Court of Appeals. *Davie v. Mitchell* 324 F. Supp. 2d 862. (N.D. Ohio 2004). The Sixth Circuit, in a 2 to 1 decision rendered Nov. 12, 2008, likewise denied habeas relief. *Davie v. Mitchell* , 547 F.3d. 297 (6th Cir. 2008).

Most notably, and most recently, the United States Supreme Court denied Appellant's petition for writ of certiorari on November 2, 2009, in *Davie v. Mitchell* ---S.Ct. --- , 2009 WL 2761630, U.S. Supreme Court Case No. 09-6184. (See State's Ex. 1) This decision exhausts all of Appellant's federal appeals.

F. The Lethal Injection Challenge

Like numerous other Ohio Death Row inmates, Appellant has sought to delay his execution by filing a 42 U.S.C.§1983, civil rights action in the federal court system, arguing that death by lethal injection constitutes cruel and unusual punishment. On February 25, 2008, Judge Gregory Frost, of the U.S. District Court for the Southern District of Ohio, Eastern Division, permitted Appellant to file as an intervenor in a previous action filed by Death Row inmate Richard Cooey in a case captioned *Cooey v. Strickland,* Case No. 2:04-CV-1156. But

Appellant's status in this case was short lived. Pursuant to a motion filed by the Ohio Attorney General's Office, Judge Frost dismissed Appellant from the lawsuit Aug. 25, 2008, after concluding that the statute of limitations had expired, Appellant raised no argument to save his claim, and he was time barred. Id. (State's Ex. 2).

He did not appeal Judge Frost's dismissal to the U.S. Sixth Circuit Court of Appeals. The State is unaware of any pending litigation regarding Appellant's status as a litigant in this, or any other action challenging Ohio's method of execution.

G. Clemency

The Ohio Parole Board conducted a clemency hearing in this matter March 2, 1998. By a vote of 10 to 0, the board recommended to former Ohio Governor George V. Voinovich that clemency be denied. "The Parole Board in its review of this case on March 2, 1998, could not find any information that would mitigate Mr. Davie's actions in his convictions and found no justification for recommending that the sentence of death be commuted."

Conclusion:

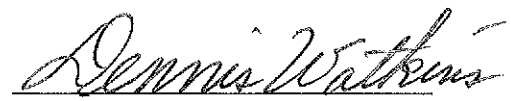
With this procedural history, it is clear Appellant has exhausted all of his state and federal court reviews of his conviction and death sentence and has not sought a stay from this Court. In *State v. Steffen* (1994), 79 Ohio St. 3d 398, 412, this Court held that once a capital defendant has exhausted his direct appeal, postconviction review and delayed reconsideration review, any further filings are likely to be interposed for purposes of delay, and that a capital defendant would have to petition this Court for a stay to allow such further litigation. As of this writing, Appellant has not sought a stay from this Court.

Appellant's actions on the morning of June 27, 1991, violently and abruptly ended the lives of two of his former co-workers and very nearly took the life of a third. The citizens of

Ohio need to see a firm and final resolution to this dreadful example of workplace violence. William J. Everett and the grieving survivors of Tracey Jefferys and John Ira Coleman have patiently waited for justice and closure for 18 years. In its affirmation and independent weighing of the trial court's sentence of death, this Court minced no words: "There is absolutely nothing mitigating in the nature and circumstances of the offense-the evidence and circumstances portray a horrific course of criminal conduct by Davie at his former job against three innocent people, two of whom had considered Davie to be their friend. Everett's testimony indicates that Coleman fell prey to Davie's murderous intent merely because Coleman worked for VCA. The utter brutality Davie inflicted on Tracey Jefferys was staggering. Davie's pursuit of Everett seemed to indicate that he wanted no one alive to bear witness to his criminal rampage. The remaining statutory mitigating factors offer little weight. The aggravating circumstances in the murders of Coleman and Jefferys plainly outweigh the mitigating factors in this case. Davie's actions in these crimes merit the capital penalty to which he was sentenced." *State v. Davie* (1994), 80 Ohio St.3d 311, 334.

Accordingly, the State of Ohio respectfully moves this Court for an order and Death Warrant setting an execution date without further delay.

Respectfully submitted,



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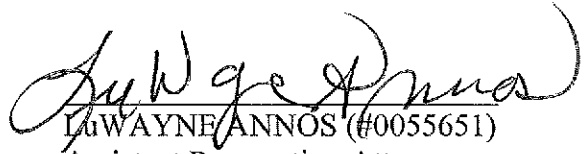

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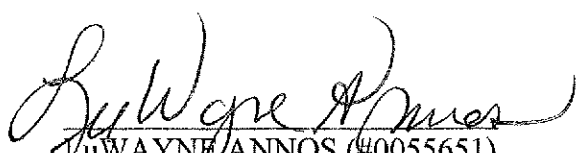
PROOF OF SERVICE

I do hereby certify that a copy of the foregoing motion was sent by ordinary U.S. Mail to Atty. David C. Stebbins (#0005839), 10 West Broad St., Suite 1020, Columbus, Ohio, 43215, and Kathleen McGarry (#0038707), McGarry Law Office, P.O. Box 310, Glorieta, New Mexico, 87535, on this 13th Day of November, 2009.



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Westlaw.

--- S.Ct. ----, 2009 WL 2761630 (U.S.), 78 USLW 3252
(Cite as: 2009 WL 2761630 (U.S.))

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Only the Westlaw citation is currently available.

Supreme Court of the United States
DAVIE, RODERICK V. **MITCHELL**, WARDEN.
No. 09-6184.

Nov. 2, 2009.

*1 The petition for writ of certiorari is denied.

U.S.,2009.
Davie v. Mitchell
--- S.Ct. ----, 2009 WL 2761630 (U.S.), 78 USLW 3252

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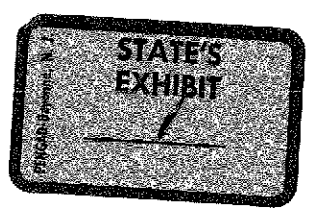

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD COOEY, et al.,

Plaintiff,

v.

TED STRICKLAND, et al.,

Defendants.

Case No. 2:04-cv-1156
JUDGE GREGORY L. FROST
Magistrate Judge Mark R. Abel

OPINION AND ORDER

This matter is before the Court for consideration of Defendants' Motion to Dismiss (Doc. # 296), Plaintiff Abdul Hakiym Zakiy[1] (aka Roderick Davie)'s memorandum in opposition (Doc. # 305), and Defendants' reply memorandum (Doc. # 325). For the reasons that follow, this Court finds the motion well taken.

Zakiy asserts claims under 42 U.S.C. § 1983 challenging multiple facets of the lethal injection protocol by which the State of Ohio intends to execute him. Defendants move for dismissal under Federal Rule of Civil Procedure 12(b)(6) on the ground that the Sixth Circuit's decision in *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. 2007), requires dismissal of the § 1983 claims asserted here. Previously, this Court issued an Opinion and Order in this litigation that discussed at length the Sixth Circuit's construction in *Cooey* of the statute of limitations for such § 1983 claims. (Doc. # 344.) The Court adopts and incorporates herein the entirety of that decision and attaches it to the instant decision for ease of reference.

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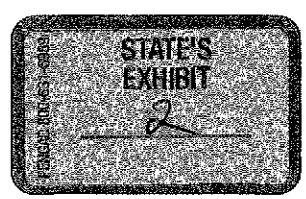
[1] Defendants' motion to dismiss also spells Plaintiff's name as "Abdul Hakiym Zakie." (Doc. # 296.) The Court uses the spelling set forth in the intervenor complaint, "Abdul Hakiym Zakiy." (Doc. # 268.)



As this Court noted in that prior decision, *Cooey* teaches that § 1983 claims of the sort asserted in this case begin to accrue upon conclusion of direct review in the state courts and when a plaintiff knows or has reason to know about the act providing the basis of his or her injury. *Id.* at 422. Even in light of recent changes to the lethal injection protocol and the United States Supreme Court's issuance of *Baze v. Rees*, 128 S. Ct. 1520 (2008)–the latter of which pre-dated issuance of the *Cooey* mandate–the court of appeals issued *Cooey* as binding authority. This authority reasons that a plaintiff knew or had reason to know about the act providing the basis of his or her injury when Ohio made lethal injection the exclusive method of execution in December 2001. *Cooey*, 479 F.3d at 422. Consequently, review of the briefing and the record indicates that the following dates are relevant to the statute of limitations issue:

(1) Date of Zakiy's conviction and sentence: March 25, 1992.

(2) Date the Ohio Supreme Court affirmed Zakiy's conviction and sentence: November 26, 1997.

(3) Month in which the time for filing a petition for *certiorari* with the United States Supreme Court expired: February 1998.

(4) Date the Sixth Circuit has held inmates like Zakiy should have been aware of their § 1983 lethal injection protocol claims: December 2001, at the latest.

In light of the foregoing, this Court concludes that the rationale of *Cooey* applies to Zakiy's § 1983 claims. The statute of limitations on these claims therefore expired, at the latest, in December 2003. Zakiy has raised no arguments to save his claims that the Court did not previously consider and reject in its attached and incorporated Opinion and Order. Thus, because Zakiy's assertion of his § 1983 claims is time-barred, the Court **GRANTS** Defendants'

Motion to Dismiss. (Doc. # 296.)

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE