

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

NO. 87-0447

Plaintiff-Appellee

vs.

Death Penalty Case

JEROME HENDERSON

Defendant-Appellant

MOTION TO SET EXECUTION DATE

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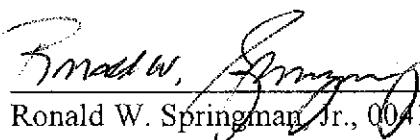
JEROME HENDERSON :
Defendant-Appellant :

MOTION TO SET EXECUTION DATE

The State of Ohio respectfully requests this Court to set an execution date for Defendant, Jerome Henderson. The reasons in support of this motion are stated in the attached memorandum.

Respectfully submitted,

Joseph T. Deters, 0012084P
Prosecuting Attorney


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Attorneys for Plaintiff-Appellee

MEMORANDUM IN SUPPORT

INTRODUCTION

Jerome Henderson was convicted of aggravated murder and sentenced to death by the Hamilton County Court of Common Pleas for the murder of Mary Acoff in her home at 1944 Highland Avenue in Cincinnati, Ohio on or about March 3, 1985. In the twenty three years since his sentence and conviction, Henderson's attorneys have pursued all available avenues of appeal afforded under both Ohio and federal law. The conviction and sentence have been upheld, and Henderson has now completed all state litigation and one round of federal habeas litigation. A federal district judge subsequently permitted a collateral attack on the first federal habeas denial, but the Sixth Circuit recently vacated the district court's judgment, thus confirming that Henderson is not entitled to pursue further federal habeas remedies. Further, Henderson was permitted to join a lawsuit challenging Ohio's lethal injection protocol. That lawsuit has been resolved and its been determined that Ohio's method of execution is constitutional. Because Henderson has exhausted all state and federal proceedings, the State of Ohio hereby requests this Court set an execution date for Jerome Henderson.

STATE COURT PROCEEDINGS

The Hamilton County Court of Appeals affirmed Henderson's conviction and sentence of death on January 14, 1987. *State v. Henderson* (Hamilton App. 1987), 1987 Ohio App. LEXIS 5519. This Court affirmed the conviction and sentence on September 28, 1988. *State v. Henderson* (1988), 29 Ohio St.3d 24, 26, 538 N.E.2d 1237, 1240. The U.S. Supreme Court denied Henderson's petition for a writ of certiorari. *Henderson v. Ohio* (1989), 489 U.S. 1072.

Henderson pursued post-conviction relief, and after an evidentiary hearing on December 17 and 18, 1990, the trial court denied relief. Henderson appealed, and on March 7, 1991, the Hamilton County Court of Appeals dismissed the appeal as untimely. This Court dismissed a further appeal as well as a request for rehearing.

Henderson also pursued an application for delayed reopening, which the Hamilton County Court of Appeals denied, and this Court affirmed. *State v. Henderson* (1993), 67 Ohio St.3d 1485, 621 N.E.2d 407.

FEDERAL COURT PROCEEDINGS

On February 14, 1994, Henderson filed a petition for writ of habeas corpus in the Southern District of Ohio, Western Division, under Case No. 94-CV-106. On August 4, 1999, Judge S. Arthur Spiegel granted Henderson a conditional writ of habeas corpus as to the death sentence based on a supplemental charge to the jury when it was deadlocked during its penalty phase deliberations. *Henderson v. Collins* (S.D. Ohio 1999), 101 F. Supp.2d 866, 913-18. After both parties appealed, the Sixth Circuit reinstated Henderson's death sentence and upheld the district court's denial of guilt-phase relief. *Henderson v. Collins* (C.A. 6 Cir. 2001), 262 F.3d 615. On April 15, 2002, the Supreme Court denied Henderson's petition for a writ of certiorari. *Henderson v. Collins* (2002), 535 U.S. 1002.

On April 24, 2002, after completion of Henderson's habeas proceedings, the Warden filed a motion before the Southern District of Ohio to explicitly lift the stay of execution that was granted to Henderson during his original habeas action. Henderson opposed and filed a "Rule 60(b) Motion for Relief from Judgment," which asked the district to reconsider its original denial of relief and reimpose its grant of relief on the penalty-phase instruction claim. After a great deal of litigation and

DNA testing, on July 10, 2003, the district court denied habeas relief, but issued a certificate of appealability based on the DNA Report (which had confirmed the presence of the victim's blood on Henderson's coat but did not confirm the presence of Henderson's sperm in the victim). The Court also vacated its previous denial of Henderson's "Rule 60(b) motion" and granted him a conditional writ of habeas corpus based on appellate counsel's failure to raise the "acquittal first" jury instruction.

Both parties appealed, and on June 9, 2006, the Sixth Circuit again reversed the district court's grant of relief. The Sixth Circuit held that no relief was warranted for the jury instruction claim, and the court held that the district court properly denied relief on the DNA testing claim. *Henderson v. Collins* (C.A. 6 2006), 2006 U.S. App. LEXIS 16015. Ultimately the Sixth Circuit construed Henderson's various requests to be for permission to litigate a second habeas petition, and the court denied it.

On August 21, 2006, Henderson moved to intervene in the case of *Cooey, et al. vs. Strickland, et al.*, 2:04-cv-01156 (S.D. Ohio), a lawsuit filed by inmate Cooey challenging the constitutionality of Ohio's lethal injection protocol. On October 25, 2006, Henderson filed a second motion to intervene in District Court, and moved for a preliminary injunction. On November 9, 2006, the Federal District Court granted Henderson's motion to intervene, but denied his motion for a preliminary injunction. On December 1, 2006, the Sixth Circuit Court of Appeals granted Henderson's motion to stay execution of sentence.

Following its December 1, 2006 stay, the Sixth Circuit stayed all further proceedings in Henderson's case pending resolution of the Cooey lawsuit. On April 21, 2008, the United States Supreme Court denied Cooey's petition for writ of certiorari. On April 24, 2008, a copy of the

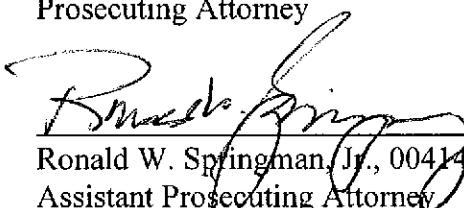
Supreme Court's order denying Cooey's petition on statute of limitation grounds was filed with the Sixth Circuit. Under the Federal Rules of Appellate Procedure, the Sixth Circuit must issue a mandate and dismiss Cooey's lawsuit. Since Henderson's complaint is likewise barred on statute of limitations grounds, the State anticipates that the Sixth Circuit will vacate its previous issued stay of execution and affirm the District Court's denial of a preliminary injunction.

CONCLUSION

Since Henderson has fully litigated to completion one round of federal habeas review and he currently lacks a federal stay or entitlement to additional federal review, there is then no impediment to prevent this Court from setting an execution date.

Respectfully submitted,

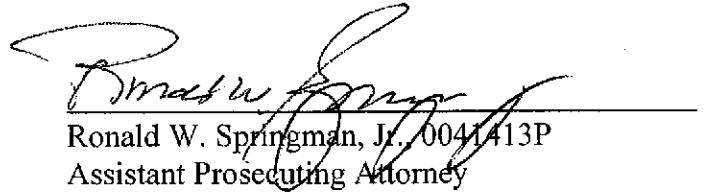
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Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing MOTION TO SET EXECUTION DATE, by United States mail, addressed to David C. Stebbins and Harry R. Reinhart, 400 S. Fifth Street, Suite 202, Columbus, Ohio 43215-5430, counsel of record, this 7th day of May, 2008.


Ronald W. Springman, Jr. 0041413P
Assistant Prosecuting Attorney