

**CASE NO. 09-4300**  
***DEATH PENALTY CASE***

**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE SIXTH CIRCUIT**

RICHARD COOEY, KENNETH BIROS (Intervenor),  
Plaintiff-Appellee

v.

TED STRICKLAND, Governor, ET. AL,  
Defendants-Appellants

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On Appeal from the United States District Court  
for the Southern District of Ohio, Eastern Division  
(Columbus)  
Case No. 2:04-cv-01156

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**DEFENDANTS-APPELLANTS' MEMORANDUM IN OPPOSITION TO**  
**BIROS' PETITION FOR REHEARING *EN BANC***

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Respectfully submitted,

**RICHARD CORDRAY**  
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s/ *Charles L. Wille*

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## **I. Introduction**

Appellee Kenneth Biros (hereinafter "Appellee" or "Biros") is under a sentence of death for the 1991 murder of Tami Engstrom. Biros is scheduled to be executed on Dec. 8, 2009. On October 19, 2009, the district court issued an order staying Biros' execution, in conjunction with the underlying lawsuit brought under 42 U.S.C. § 1983 in which Biros claimed that the State's "three-drug protocol" to carry out his execution would violate his constitutional rights. Defendants-Appellants (hereinafter "defendants" or "the State") then filed a timely notice of appeal to this Court.

In the meantime, the State altered its execution procedures by eliminating the previous "three-drug protocol" and substituting procedures using a single drug administered intravenously or an alternate intramuscular injection of a combination of other drugs. Based on these changes, on November 25, 2009, a panel of this Court vacated the stay issued by the district court on the grounds that Biros' challenges to the previous "three-drug protocol" are moot. Biros now seeks *en banc* reconsideration of the panel's order.

There is no need for *en banc* reconsideration. The core of Biros' suit is the alleged substantial risk of severe pain posed by the administration of the second and third drugs in the so-called "three-drug protocol," and that therefore, in view of the State's discontinued use of the second and third drugs, the conjectured risk of

harm cannot occur in the manner alleged by the suit. Further, there is absolutely no evidence that the State will go back to its constitutionally sound "three-drug protocol" to execute Biros, and, indeed, as the panel recognized, asserting that such a possibility keeps the suit alive defies common sense.

Contrary to Biros' arguments, the panel did not err in vacating the stay on an incomplete record. The Supreme Court of the United States and this Court have recognized that where prisoners like Biros challenge the particular method proposed by the State to execute them, and the State appears willing to execute the prisoner in a manner deemed acceptable by the prisoner, no extensive factual development is necessary. The State now proposes to execute Biros using a "one-drug" protocol that is consistent with alternatives proposed by Biros' counsel. In any event, as noted by the panel, Biros is free to bring another suit to challenge the State's revised procedures.

As for Biros' other arguments, the State does not attempt to benefit from "invited error." Defendants objected to the stay at the district court, and it is well-established that it is the nature of the order and not the nomenclature used which determines whether the order is subject to appeal. Finally, the panel's vacation of the stay does not conflict with the Court's recent stay of the execution of another prisoner, as that case occurred before the State modified its execution procedures.

In sum, as more fully explained below, the petition for rehearing *en banc* should be denied.

## **II. Statement of the Case and Facts**

### **A. Cooley's Lawsuit.**

In a 42 U.S.C. § 1983 complaint filed on June 10, 2004, inmate Richard Cooley alleged that the defendants would violate his Eighth Amendment rights by implementing a lethal injection protocol that could cause him to endure cruel and unusual punishment during the course of his otherwise lawful execution. On January 4, 2005, the defendants moved to dismiss the complaint, arguing, among other things, that Cooley's suit was barred by the two-year statute of limitations for suits under § 1983.

On March 28, 2005, the district court denied the defendants' motion but granted them permission to pursue an interlocutory appeal. On March 2, 2007, this Court issued an opinion reversing the district court's decision and ordered that Cooley's complaint be dismissed as time-barred. The Court subsequently denied Cooley's petition for rehearing *en banc*, but stayed the mandate, pending the filing and disposition of a petition for a writ of certiorari. On April 21, 2008, the Supreme Court of the United States denied Cooley's petition. *See Cooley v. Strickland*, 479 F.3d 412 (6th Cir. 2007), cert. denied, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2047 (2008). Cooley then filed a second complaint under § 1983 in which he again

alleged that his execution by lethal injection would violate his constitutional rights. The district court dismissed the complaint upon defendants' motion and that decision was upheld by this Court. *See Cooley v. Strickland*, 544 F.3d 588 (6th Cir. 2008). On October 14, 2008, Cooley was executed by lethal injection.

**B. The Intervention of Biros and Other Prisoners and the District Court's Previous Preliminary Injunction Proceedings.**

Subsequent to the filing of Cooley's suit, the district court granted motions by Plaintiff Kenneth Biros and other condemned prisoners to intervene in the instant case. (*See* Complaints of Plaintiff Intervenors, Documents 125, 127, 209, 228, 229, 231, 431, 432, 433 and 434). On December 21, 2006, the district court issued an order (Document 151) preliminarily enjoining Biros' execution. On March 23 through March 27, 2009, the district court convened an evidentiary hearing concerning the continuation of the preliminary injunction previously issued on Biros' behalf. (*See* Minute Entries, Documents 465, 466, 467, 468 and 469). On April 21, 2009, the district court issued an opinion and order in which it vacated the preliminary injunction. In so holding, the district court found that Biros failed to show a substantial likelihood that he would prevail on his claim that his execution by lethal injection would violate the Eighth Amendment. However, the district court left open the possibility that Biros could substantiate his claim. (*See* Opinion and Order Vacating Injunction, Document 471).

On June 1, 2009, consistent with the scheduling order issued by the district court, defendants filed answers to the complaints of Biros and the other prisoners. (*See* Defendants' Answers, Documents 492, 493, 494, 495, 496, 497, 498, 499, 500 and 501). On June 23, 2009, the district court issued a preliminary scheduling order setting forth dates for the conduct of discovery, the filing of motions and trial on the merits. *See* Order (Document 512). On September 17, 2009, following the postponement of the execution of Romell Broom, the district court issued an order (Document 553) granting plaintiffs' motion to reopen discovery and to amend the schedule to provide for the filing of amended dispositive motions. In the meantime, this Court stayed the execution of Lawrence Reynolds, another capital-sentenced prisoner who has challenged his execution by Ohio's "three-drug" protocol, and whose complaint had been dismissed by the district court as time barred.

On October 19, 2009, after it became apparent that defendants could alter their execution procedures in light of the postponement of Broom's execution, the district court issued an order (Document 590) again staying the December 8, 2009, execution of Kenneth Biros, over defendants' objections, and rescheduling the trial date. However, in its order, the district court recognized the possibility that the stay of Biros' execution could be vacated, in the event changes in defendants' execution procedures rendered Biros' constitutional challenges to the "three-drug

protocol" moot. The State subsequently filed a timely appeal to this Court of the district court's order, and moved this Court to vacate the stay of Biros' execution.

**C. The Changes to Ohio's Execution Procedures and this Court's Determination that Biros' Challenges to Ohio's "Three-drug Protocol" Are Moot.**

On October 23, 2009, defendants notified the district court of their consideration of possible changes to defendants' procedures for the execution of condemned prisoners. (Document 594) On November 13, 2009, defendants notified the district court that effective November 30, 2009, Terry Collins, the Director of the Ohio Department of Rehabilitation and Correction, had directed changes in the procedures used to carry out the execution of condemned prisoners. (Document 601-1.) The changes include the discontinuation of the use of pancuronium bromide and potassium chloride in the execution process. The altered execution procedures provide, as alternative methods, the intravenous administration of five (5) grams of thiopental sodium and the intramuscular administration of 10 milligrams ("mg") of midazolam and 40 mg of hydromorphone. The alternative procedures were described in detail in the affidavit of Director Collins. (Document 601-1.)

Also on November 13, 2009, defendants filed with the district court a motion for summary dismissal of the complaints of Biros and the other plaintiffs on the ground of mootness. (Document 601.) Defendants also requested an

expedited briefing schedule. (*Id.*) The district court immediately denied the request for expedited briefing. (Doc. 602.) Defendants then argued to this Court, in conjunction with defendants' motion to vacate the stay, that Biros' suit was rendered moot by the changes in the State's execution procedures.

On November 18, 2009, this Court ordered counsel for Biros to file a memorandum in reply to defendants' arguments that the suit was moot. On November 20, 2009, Biros' attorney filed a memorandum in reply. On November 25, 2009, the Court issued an opinion and order vacating the stay issued by the district court. On November 30, 2009, defendants provided to the district court and counsel for Biros and the other plaintiffs a copy of defendants' revised written directive on execution procedures. (*See* Notice, Document 607.)

**III. The panel correctly determined that Biros' challenge to the State's "three-drug protocol" no longer presents the "live issues" necessary to demonstrate a case or controversy.**

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Voluntary cessation of allegedly illegal conduct will render a case moot if it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *City of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), citing *United*

*States v. W.T. Grant, Co.*, 345 U.S. 629, 633 (1953) and *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (internal quotation marks omitted). A suit may be held moot where it is apparent that the plaintiff has "already received everything he had asked for." *Corgain v. Miller*, 708 F.2d 1241, 1247 (7th Cir. 1983), citing *Shimabuku v. Britton*, 503 F.2d 38, 44 (10th Cir. 1974).

The panel held that because the State no longer follows the principal procedures that Biros challenges, Biros' suit and whether his execution should be enjoined to permit litigation of the suit no longer present a "live" dispute. *Cooley v. Strickland*, \_\_\_ F. 3d \_\_\_, 2009 U.S. App. LEXIS \_\_\_\_\_ (6<sup>th</sup> Cir, Nov. 25, 2009). The panel's determination is indisputably correct. Even a cursory review of Biros' complaint shows that the core of his suit is the alleged substantial risk of severe pain posed by the administration of the second and third drugs in the so-called "three-drug protocol." In his Complaint at paragraph 32(d), he asserts:

If sodium thiopental has not first been properly administered in a dose sufficient to cause death or at least the loss of consciousness for the duration of the execution procedure, then the use of pancuronium bromide places Plaintiff at risk for consciously experiencing paralysis, suffering and the excruciating pain of the intravenous injection of high dose potassium chloride.

(Biros Complaint, Document 95-2, ¶ 32(d).)

That complaint also seeks as one form of relief: "...permanent injunction barring Defendants...from carrying out Plaintiff's execution in the manner they currently utilize for carrying out lethal injections including that manner set forth in

the [three-drug] DRC Execution Protocol.” (Biros Complaint, Document 95-2, p. 18, ¶ B.) He specifically wants a lethal injection process that does not use pancuronium bromide or potassium chloride. (*Id.* at ¶¶ F, G *and see* ¶ J.) As explained by Director Terry Collins, Ohio has changed its execution procedures which now no longer uses pancuronium bromide or potassium chloride. (Collins Affidavit, Document 601-1.)

Further, as found by the panel, there is absolutely *no* evidence that the State will go back to a "three-drug protocol" to execute Biros, and, as the panel recognized, asserting that such a possibility keeps the suit alive defies common sense. As correctly found by the district court, the revised procedures were instituted after years of grueling litigation, in response to repeated charges by Biros' attorneys and others that the State was unconscionably refusing to consider changes to the so-called "three-drug protocol." Thus, the panel undoubtedly was correct in finding that Biros' constitutional challenges to the previous procedures and whether his execution should be stayed to permit those challenges to go forward no longer present a "live" case or controversy.

Biros, for the most part, argues that the panel erred because the panel found his constitutional challenges moot based on an "undeveloped record." But the cases cited by Biros are factually distinguishable. None present circumstances remotely similar to the unique circumstances presented by Biros' constitutional

challenges to Ohio's lethal injection procedures. In such circumstances, where the prisoner does not challenge the State's right to execute him, but only the particular method used, "[a]n evidentiary hearing will in all likelihood be unnecessary" if the State is "willing to implement [the prisoner's] proposed alternatives." *Nelson v. Campbell*, 541 U.S. 637, 646 (2004). *See also In re Williams*, 359 F.3d 811, 814 (6th Cir. 2004) (Suhrheinrich, J. Concurring) ("If the Warden is ordered to follow the method advanced by the petitioners' chosen expert, then the procedural question of whether the claim is properly considered a § 1983 action or a successive habeas petition will be moot, as the petitioners would have received the relief that they request."); *Dennis v. Taft*, Case No. 04-4184, Order, page 8 (Noting district court's recognition of the "unique context of the Section 1983 action at issue here: a method-of-execution case in which the complainant concedes that execution by other means would be constitutional.").

Biros says that there must be both discovery and an evidentiary hearing on the State's altered procedures, to determine whether the changes "completely and irrevocably address the alleged violations at issue." (Petition at 7.) Biros' arguments ring hollow, as defendants' intention to administer a five (5) gram dose of thiopental sodium, and to eliminate the second and third drugs, corresponds to the relief actually requested by one of Biros' attorneys on behalf of another intervening prisoner:

Defendants could and should shift to a one-drug protocol designed to cause death by means of an overdose of an anesthetic adequate to painlessly and swiftly shut down all bodily functions and cause death ... Here, Plaintiff stands ready to present and fully litigate facts proving that the successful delivery of a massive dose of a barbiturate would achieve the goal of execution by a means compatible with Plaintiff's constitutional rights. For example, Oregon's physician-assisted suicide protocol calls for administration of a single-drug barbiturate overdose. And, California uses a 5 gram dose of sodium thiopental in its protocol. *See Rivera*, Case No. 04CR065940, Judgment Entry at p. 4. (Exhibit 1). Additionally, after a two-day evidentiary hearing in *Rivera*, the trial court found that "[i]f pancuronium bromide and potassium chloride are eliminated from the lethal injection protocol, a sufficient dosage of sodium thiopental will cause death rapidly and without the possibility [sic] causing pain to the condemned." *Id.*

*See* Intervenor Complaint of Nathaniel Jackson (Document 368-1), pages 25-26.

In any event, as found by the panel, the State's revised procedures are not at issue in the present lawsuit, and Biros is free to file a new suit if he believes he can substantiate a constitutional challenge to the revised procedures. Notably absent in Biros's current complaint is any allegation that the administration of the thiopental sodium itself, or the steps necessary to obtain IV access, in and of themselves could cause or pose the threat of punishment in violation of the Eighth Amendment. And, as recognized by the panel and noted above, the State's revised procedures in part are a response to protracted litigation in which the plaintiffs have repeatedly alleged that the State has unconscionably refused to consider alternatives to its "three-drug protocol." And even if Biros chooses to reverse course, he cannot transform his present suit into a constitutional challenge to the

revised procedures and thereby justify a stay of his execution. As correctly held by the panel, to obtain a stay on this basis, Biros must advance specific allegations in a new suit and also demonstrate a likelihood that he will prevail on the merits.

Finally, as for Biros' other arguments, the State does not attempt to benefit from "invited error." Defendants objected to the stay at the district court, and, for the reasons stated by the panel, it is well-established that it is the nature of the order and not the nomenclature used which determines whether the order is subject to appeal. Nor does the panel's vacation of the stay conflict with the Court's recent stay of the execution of Lawrence Reynolds, another prisoner who challenged the State's previous "three-drug protocol." The Court granted the stay in *Reynolds* before the State altered its execution procedures. *See Reynolds v. Strickland*, 583 F.3d 956 (6th Cir. 2009). Moreover, as *Reynolds* concerned whether the prisoner's challenge to the previous "three-drug protocol" was time-barred, this Court could well conclude that the prisoner's appeal is also moot, given the State's revision of its procedures, and the possibility of initiating a new suit.

#### **IV. Conclusion**

For all the foregoing reasons, Biros' petition for rehearing *en banc* should be denied.

Respectfully submitted,

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s/ *Charles L. Wille*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been forwarded to counsel for Kenneth Biros via the Court's electronic filing system, this 1st day of December 2009.

*s/ Charles L. Wille*

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