

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

Plaintiff,

v.

**JOHN G. SPIRKO,**

Defendant.

Case No. 89-722

***DEATH PENALTY CASE***

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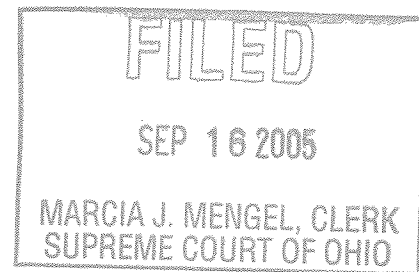
**MEMORANDUM IN OPPOSITION TO SPIRKO'S SEPTEMBER 6, 2005  
MOTION TO "RESCHEDULE EXECUTION DATE"**

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JOHN G. SPIRKO

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

Appellant, John G. Spirko, Jr., was convicted of aggravated murder and sentenced to death. On direct appeal as of right, the court of appeals affirmed the conviction and sentence. *State v. Spirko* (Mar. 6, 1989), Van Wert App. No. 15-84-22, unreported, 1989 WL 17734. This Court affirmed when he appealed. *State v. Spirko* (1991), 59 Ohio St.3d 1, 570 N.E.2d 229, certiorari denied (1991), 502 U.S., 112 S.Ct. 312, 116 L.Ed.2d 254. Spirko then petitioned the trial court for post conviction relief under R.C. 2953.21; that petition was denied, and the court of appeals dismissed his appeal by entry. *State v. Spirko* (Apr. 29, 1993), Van Wert App. No. 15-93-2, unreported, jurisdictional motion overruled (1993), 67 Ohio St.3d 1479, 620 N.E.2d 852.

Next, Spirko filed a motion for delayed reconsideration of his direct appeal in the court of appeals, pursuant to *App.R. 26(B)*, claiming he had been denied effective assistance of counsel when that court first considered his case in 1989. (See *State v. Murnahan* [1992], 63 Ohio St.3d 60, 584 N.E.2d 1204.) The court of appeals denied that motion for reconsideration, *State v. Spirko* (Feb. 15, 1994), Van Wert App. No. 15-84-22, unreported, and this Court affirmed that judgment, (1994), 69 Ohio St.3d 1448, 633 N.E.2d 542. Then Spirko claimed before this Court that he lacked effective assistance of counsel in his 1991 direct appeal to this Court. On November 9, 1994, this Court denied Spirko's claim.

In the interim, pursuant to a request made under the federal Freedom of Information Act (FOIA), 5 U.S.C.A. § 552, Spirko obtained access to United States Postal Service Inspector (USPSI) records relating to the federal government's investigation into the abduction and murder of Betty Jane Mottinger. Spirko then filed a second petition for post conviction relief. After a detailed review of the record, the trial court dismissed Spirko's petition on October 6, 1997. On April 29, 1998, the Ohio Court of Appeals affirmed the decision of the trial court. *State v. Spirko*

(1998), 127 Ohio App. 3d 421; 713 N.E.2d 60. This Court subsequently denied Spirko's discretionary appeal. *State v. Spirko* (1998), 83 Ohio St. 3d 1430, 699 N.E.2d 946.

In the interim, Spirko also filed with the federal court a petition for a writ of habeas corpus. On July 11, 2000, the United States District Court for the Northern District of Ohio denied Spirko's petition. *Spirko v. Anderson*. 2000 U.S. Dist. LEXIS 13182. On May 17, 2004, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. *Spirko v. Mitchell* (6th Cir. 2004), 368 F.3d 603. On March 28, 2005, the Supreme Court of the United States denied Spirko's petition for a writ of certiorari. *Spirko v. Bradshaw*, 2005 U.S. LEXIS 2794.

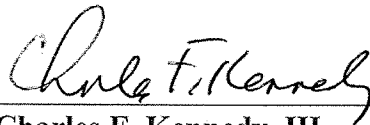
On April 11, 2005, following the issuance of a mandate by the Sixth Circuit, the State filed with this Court a motion to set a date for the execution of Spirko's sentence. On April 27, 2005, Spirko filed with the federal district court a motion for relief from its prior judgment denying Spirko habeas corpus relief. On or about April 30, 2005, Spirko filed with this Court a memorandum in opposition, or, in the alternative, a motion to hold the State's request for the setting of an execution date in abeyance, pending the decision of the federal district court on a motion by Spirko to reopen its original judgment. On May 25, 2005, the Court granted the State's motion, setting Spirko's execution for September 20, 2005.

On August 2, 2005, Spirko filed a motion to reschedule his execution to permit consideration of his clemency application after the federal court ruled on his motion for relief from judgment. On August 25, 2005, the Court denied Spirko's motion. In the interim, on August 23, 2005, the Ohio Parole Board convened a clemency hearing to consider Spirko's clemency application. On September 8, 2005, the Ohio Parole Board requested that the governor grant a reprieve of Spirko's sentence to permit a rehearing of Spirko's clemency application. On

the same date, the governor issued a warrant of reprieve which rescheduled Spirko's execution for November 15, 2005.

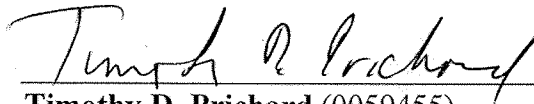
**II. Argument and Request for Relief**

In light of the reprieve issued by the governor, Spirko's motion to reschedule his execution is moot. *See Sterling v. Drake*, 29 Ohio St. 457 (1986), syllabus (governor properly provided for a new date of execution in warrant of reprieve, and warrant authorized the sheriff to carry out the execution on the new date specified, without further order of the court); *but also see* Ohio Revised Code (O.R.C.) 2949.22 (death sentence shall be carried out "on the day designated by the judge passing sentence or otherwise designated by a court ..."). Accordingly, the State respectfully requests that the Court deny Spirko's motion, and issue a new warrant of execution consistent with the governor's warrant of reprieve.



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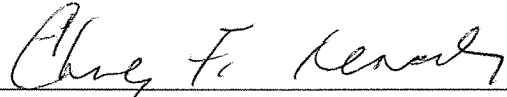
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**COUNSEL FOR PLAINTIFF STATE OF OHIO**

**CERTIFICATE OF SERVICE**

On the 16th day of September, 2005, copies of the foregoing were served by first-class U.S. Mail to Thomas C. Hill, Esquire, 2300 N Street, N.W., Washington, D.C., 20037-1128; Counsel for Inmate John G. Spirko, Jr.



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