ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

KENNETH WAYNE SMITH,

Appellant.

CASE NOS. 96-677, 96-678

A Capital Case on Appeal from the Court of Common Pleas of Butler County, Case No. CR95-05-0471

MOTION TO SET EXECUTION DATE

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FILED
FEB 26 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, **CASE NOS. 96-677, 96-678**

Appellee,

vs.

KENNETH WAYNE SMITH,

Appellant.

A Capital Case on Direct Appeal from the Court of Common Pleas of Butler County, Case No. CR95-05-0471

MOTION TO SET EXECUTION DATE

I. Introduction

Defendant-Appellant Kenneth Wayne Smith is an Ohio Death Row inmate who was convicted and sentenced to death for the aggravated murders of Lewis Ray and Ruth Ray committed on May 12, 1995, in the city of Hamilton, Butler County, Ohio. Appellant has exhausted all state and federal remedies. The State of Ohio respectfully requests that this Honorable Court issue an order and Death Warrant setting an execution date for Appellant.

II. Procedural History

A. Indictment

On June 16, 1995, the Butler County Grand Jury indicted the Appellant on all the following charges: Count One, for aggravated murder as to Lewis Ray in violation of R.C. 2903.01(B) with death penalty specifications under R.C. 2929.04(A)(3) (offense committed for the purpose of escaping detection for another offense), R.C. 2929.04(A)(5) (course of conduct involving the purposeful killing of two or more persons), and R.C. 2929.04(A)(7) (offense committed during the commission of an aggravated robbery); Count Two, for aggravated murder as to Ruth Ray in violation of R.C. 2903.01(B) with death penalty specifications under R.C. 2929.04(A)(3) (offense committed for the purpose of escaping detection for another offense), R.C. 2929.04(A)(5) (course of conduct involving the purposeful killing of two or more persons), and R.C. 2929.04(A)(7) (offense committed during the commission of an aggravated robbery); and Counts Three and Four, two counts of aggravated robbery as to each victim in violation of R.C. 2911.01(A)(2) with prior-offense specifications under R.C. 2941.142. The case was assigned number CR95-05-0471 in the Court of Common Pleas of Butler County.

B. Trial

On January 18, 1996, the trial began. On January 25, 1996, the jury returned its verdicts finding the Appellant guilty as charged of two counts of aggravated murder in violation of R.C. 2903.01(B) with the accompanying death specifications under R.C. 2929.04(A)(3), R.C. 2929.04(A)(5), and R.C. 2929.04(A)(7), and guilty of two counts of aggravated robbery with prior-offense specifications in violation of R.C. 2911.01(A)(2).

Prior to the mitigation hearing, and pursuant to a motion by the defense, the three death specifications were merged into a single aggravating circumstance pursuant to ***State v. Jenkins*** (1984), 15 Ohio St.3d 164, 473 N.E.2d 264, paragraph five of the syllabus. On January 30, 1996, a full mitigation hearing was held. After closing arguments and instructions of law, on February 1, 1996, the jury returned with a recommendation for the imposition of capital punishment as to each of the two counts of aggravated murder.

In a written decision filed on February 8, 1996, the Honorable Judge Anthony Valen, after an independent review, found that the imposition of death was the appropriate penalty for both counts of aggravated murder. Appellant was also sentenced to a minimum term of fifteen years and a maximum term of twenty-five years of actual incarceration as to each of Counts Three and Four of the indictment, to run consecutively with each other. A judgment of conviction entry imposing sentence was filed on February 9, 1996 (see 1996 WL 34434849), and amended on February 20, 1996 (see 1996 WL 34434848).

C. Direct Appeal

Appellant filed a notice of appeal purporting to invoke the jurisdiction of the Court of Appeals of Butler County, Twelfth Appellate District of Ohio. On March 19, 1996, the court of appeals dismissed that appeal for lack of jurisdiction pursuant to the Ohio Constitution, see ***State v. Smith*** (Mar. 19, 1996), Butler App. No. CA96-02-024, unreported.

Appellant then filed his direct appeal as of right to this Honorable Court (No. 96-677) and also appealed from the court of appeals's dismissal of his appeal to that court (No. 96-678); the State cross-appealed, contending that the trial court improperly merged the R.C. 2929.04(A)(5) (multiple murder) specification with the other two death specifications in both aggravated murder counts. In a decision released on October 15,

1997, this Court unanimously affirmed the Appellant's convictions and sentences, affirmed the dismissal of his appeal to the court of appeals, and sustained the State's cross-appeal. See ***State v. Smith***, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio-355, reconsideration denied on December 10, 1997, see 80 Ohio St.3d 1471, 687 N.E.2d 299 (Table).

Thereafter, the Supreme Court of the United States denied certiorari on May 18, 1998. See ***Smith v. Ohio*** (1998), 523 U.S. 1125, 118 S.Ct. 1811, 140 L.Ed.2d 949.

D. Postconviction Proceedings

Appellant filed his post-conviction proceedings, pursuant to R.C. 2953.21, in the Court of Common Pleas of Butler County on October 14, 1996, and an amended petition for postconviction relief was filed on October 23, 1996. On November 4, 1996, the State filed an answer denying the allegations of the petition and moving to dismiss the petition. Appellant filed a response and a request for voluntary recusal of the original trial judge, Anthony Valen; upon such recusal the matter was reassigned to the Honorable Judge John R. Moser, who issued a decision on November 3, 1997, dismissing all postconviction claims without an evidentiary hearing. See 1997 WL 34661539.

Appellant appealed this dismissal to the Twelfth District Court of Appeals. On August 31, 1998, a unanimous Twelfth District affirmed the trial court's dismissal of Appellant's petition. See ***State v. Smith*** (Aug. 31, 1998), Butler App. No. CA97-12-223, 1998 WL 549964. This Court declined jurisdiction on January 20, 1999. See ***State v. Smith*** (1999), 84 Ohio St.3d 1469, 704 N.E.2d 578 (Table), reconsideration denied on March 3, 1999, see ***State v. Smith*** (1999), 85 Ohio St.3d 1410, 706 N.E.2d 791 (Table). Certiorari was not sought in the Supreme Court of the United States.

E. Murnahan Appeal

Appellant did not seek to reopen his direct appeal.

F. Federal Habeas Proceedings

On April 26, 1999, Appellant filed a Notice of Intent to File a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Ohio. On October 4, 1999, Appellant filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, asserting nineteen grounds for relief. The case was referred to a magistrate judge, who recommended that the petition be denied on all grounds. Appellant filed objections to the magistrate judge's report and recommendation, but on August 15, 2005, the district court, Honorable Chief Judge Walter H. Rice presiding, denied all nineteen grounds and dismissed the habeas corpus action; a Certificate of Appealability ("COA") was granted on one of the nineteen grounds. See ***Smith v. Mitchell*** (S.D.Ohio Aug. 15, 2005), No. C-1-99-832, 2005 WL 1969309, and ***Smith v. Mitchell*** (S.D.Ohio Sept. 30, 2003), 2003 WL 24136073 (neither decision reported in F.Supp.2d).

Appellant appealed the District Court's denial of his Writ of Habeas Corpus to the United States Court of Appeals for the Sixth Circuit, which subsequently expanded the COA to include four additional claims. On June 5, 2009, a three judge panel unanimously affirmed the District Court's denial of the Writ. See ***Smith v. Mitchell*** (C.A.6, 2009), 567 F.3d 246. Appellant did not petition the Sixth Circuit for rehearing or rehearing en banc. The Supreme Court of the United States denied certiorari on November 13, 2009. See ***Smith v. Mitchell***, ___U.S.____, 130 S.Ct. 742, 78 USLW 3319.

III. Conclusion

With this procedural history, it is clear that the Appellant has exhausted all of this state and federal court reviews of his conviction and capital sentence and has not sought a stay in this Court. . In ***State v. Steffen***, 70 Ohio St.3d 399, 412, 639 N.E.2d 67, 1994-Ohio-111, this Court held "when a criminal defendant has exhausted direct review, one round of postconviction relief, and one motion for delayed reconsideration under ***State v. Murnahan*** in the court of appeals and in the Supreme Court, any further action a defendant files in the state court system is likely to be interposed for purposes of delay and would constitute an abuse of the court system. In order to prevent such abuse, this court will fashion appropriate relief upon application by the prosecuting authority."

Accordingly, as no stay has been sought, the State of Ohio respectfully moves for an order and Death Warrant setting an Execution Date for Kenneth Wayne Smith.

Respectfully submitted,

ROBIN N. PIPER (0023205)
Butler County Prosecuting Attorney

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion to Set Execution Date was sent to Randall L. Porter, Counsel of Record for Appellant, 250 East Broad Street, Suite 1400, Columbus, OH 43215, this 23rd day of February, 2010.

DANIEL G. EICHEL (0008259)
Assistant Prosecuting Attorney