

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 96-677
 Appellee, : Case No. 96-678
 v. :
 KENNETH WAYNE SMITH, : THIS IS A DEATH PENALTY CASE
 Appellant. :

MOTION TO STAY SETTING OF EXECUTION DATE

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FILED
 MAR 18 2019
 CLERK OF COURT
 SUPREME COURT OF OHIO

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MEMORANDUM IN SUPPORT OF MOTION TO STAY
SETTING OF EXECUTION DATE

The State has moved this Court to set an execution date asserting Mr. Smith has exhausted all of his state and federal court reviews and that he has not sought a stay in this Court. By this Motion, Kenneth Wayne Smith, seeks to stay setting his execution date for the following reason.

Present counsel for Appellant Smith were only appointed to represent Mr. Smith by the United States District Court for the Southern District of Ohio on March 15, 2010—*three* days ago. Counsel filed their motion to be appointed as counsel for Mr. Smith after all of his prior counsel indicated their desire to withdraw from his case and their desire to not be involved in any post-certiorari or clemency proceedings. Undersigned counsel, Carol Wright, met Mr. Smith for the first time on March 16, 2010. She has no familiarity with his case, his history or his current

circumstances.¹ Additionally, Attorney Sharon Hicks was just assigned to the case by Ms. Wright. She has no familiarity with Mr. Smith's case, history or current circumstances and has not yet had an opportunity to meet him. In fact, arrangements have not yet been completed to transfer prior counsel's case files to new counsel.

Based on this very recent appointment, counsel requests this Court stay setting any execution date for a minimum of six months or until such time as counsel can at the very least, obtain and familiarize their selves with the record and investigate and develop the information necessary to properly represent Mr. Smith in any additional legal proceedings and in clemency proceedings. As counsel for a death-sentenced inmate, current counsel has an obligation to fully investigate the facts of Mr. Smith's conviction and his life history in order to develop information necessary for his clemency petition and the Governor's clemency review.

In *Harbison v. Bell*, 129 S. Ct. 1481 (2009), the United States Supreme Court recognized the need for competent counsel's assistance in the investigation and preparation for a clemency proceeding. *Id.* at 1491 ("In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system.") (citation omitted). The Court in *Harbison* noted that federally appointed counsel who had represented the client in federal habeas corpus proceedings and who had fully investigated and developed information necessary for the effective representation of the client would be in a much better position to properly represent

¹Counsel Wright met Mr. Smith on March 16, 2010. At that meeting counsel learned that Mr. Smith has had a laryngectomy within the last year and that he reports a diagnosis of throat cancer. Mr. Smith also reported additional cancer spots on his lung and in his neck. Given the time frame, counsel has not yet been able to obtain his medical records to determine the severity of Mr. Smith's physical condition.

death sentenced individuals in clemency proceedings than counsel totally unfamiliar with the case and client. *Id.* In fact, the Court specifically recognized that Congress, in authorizing federally funded counsel to represent death sentenced individuals in state clemency proceedings, indicated its intent that “condemned men and women [would not] be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.” *Id.* (citation omitted).

Mr. Smith has been abandoned by counsel familiar with his case. It is only with time and resources that present counsel will be able to properly fulfill their obligation to Mr. Smith in his post-certiorari proceedings. For this reason, Mr. Smith respectfully requests this Court stay setting an execution for a minimum of six months to allow counsel to become familiar and properly prepare and develop the information necessary for effective representation of Mr. Smith at this stage in his capital proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. Mail to Michael Oster and Daniel Eichel, Assistant Butler County Prosecutors, Government Services Center, 315 High Street, 11th Flr., Hamilton, Ohio 45012-0515 on this 18th day of March, 2010.



CAROL A. WRIGHT
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