

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 98-677
Appellee,	:	96-0677
v.	:	
KENNETH WAYNE SMITH,	:	<u>THIS IS A DEATH PENALTY CASE</u>
Appellant,	:	

NOTICE OF STATUS OF INVESTIGATION

CAROL A. WRIGHT (0029782)
 Supervising Attorney (Counsel of Record)
 and
 SHARON A. HICKS (0076178)
 Assistant Federal Defender
 Capital Habeas Unit
 Federal Public Defender's Office
 Southern District of Ohio
 10 W. Broad Street, Ste. 1020
 Columbus, Ohio 43215
 (614) 469-2999
 (614) 469-5999 (Fax)

ROBIN N. PIPER (0023205)
 Butler County Prosecutor
 MICHAEL A. OSTER, JR. (0076491)
 Assistant Prosecuting Attorney
 DANIEL G. EICHEL (0008259)
 Assistant Prosecuting Attorney
 315 High Street, 11th Floor
 Hamilton, Ohio 45012-0515
 (513) 887-3474
 (513) 887-3489 (Fax)

COUNSEL FOR Kenneth Wayne Smith

COUNSEL FOR STATE OF OHIO

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 CLERK OF COURT
 SUPREME COURT OF OHIO

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On March 18, 2010, Kenneth Wayne Smith filed a Motion To Stay Setting of an Execution Date. In that motion, Smith explained that present counsel had just been appointed and were completely unaware of his case, his history or his current circumstances. Counsel requested this Court stay, for at least six months, the setting of an execution date. That motion remains pending. Counsel files this Notice of Status of Investigation to inform the Court of the progress of the investigation.

Counsel have obtained the court records and files from prior counsel. Additionally, counsel have obtained some records from the Ohio Department of Rehabilitation and Corrections. Those records are not complete, however, and counsel is attempting to reach an agreement with the Office of the Attorney General to receive all DRC records and, particularly, Smith's medical records. As previously noted Smith suffers from laryngeal cancer and had a full laryngectomy and partial lobe thyroidectomy in April of 2009. Smith is being monitored on an ongoing basis for potential metastatic process. Counsel has received records verifying the

diagnosis and procedure but is still investigating ongoing treatment and prognosis. The records are voluminous and not yet complete.

Additionally, counsel have learned that there is a co-defendant in Smith's case who received a life sentence. This intra-case disproportionality requires an investigation into the co-defendant's case for purposes of clemency.

Counsel have worked diligently to obtain these records. Counsel have made significant progress but have not been able to obtain all records. Additionally, Smith's unique circumstances, including laryngeal cancer and a life-sentenced co-defendant, require additional investigation and consultation with experts. Given the voluminous and not yet complete record, counsel have been unable to complete their review or their investigation.

Counsel have an obligation to conduct a thorough and independent investigation relating to guilt and penalty at every stage including clemency. 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Case, §10.7. ("ABA Guidelines") Counsel cannot meet the prevailing standards by simply appearing at a state clemency hearing and begging for mercy. Instead, counsel must review all records, interview potential witnesses, consult with experts and arrange for appropriate testing if called for by the client's mental or physical condition. ABA Guideline 10.11F2.

In order to insure that Smith has had every opportunity to demonstrate that imposition of the sentence of death is not warranted and that the clemency system in Ohio is indeed a fair, fail-safe check on arbitrariness in the system, his counsel must be given sufficient time to investigate, to obtain expert assistance, and to make a full presentation to the Ohio Parole Board and the Governor. In light of counsels' caseload and the time a complete independent investigation will demand, counsel requests the court not act on the pending motion for an additional six months.

Respectfully submitted,



CAROL A. WRIGHT (0029782)
Supervising Attorney (Counsel of Record)
and

SHARON A. HICKS (0076178)
Assistant Federal Defender
Capital Habeas Unit
Federal Public Defender's Office
Southern District of Ohio
10 W. Broad Street, Ste. 1020
Columbus, Ohio 43215
(614) 469-2999
(614) 469-5999 (Fax)
Carol_Wright@fd.org

COUNSEL FOR KENNETH WAYNE SMITH

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 30th day of August, 2010.



CAROL A. WRIGHT
COUNSEL FOR KENNETH WAYNE SMITH