

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	CASE NO. 1996-0285
)	
Plaintiff-Appellee,)	
)	THIS IS A CAPITAL CASE
-vs-)	
)	EXECUTION SCHEDULED FOR
JOHN ELEY,)	JULY 26, 2012
)	
Defendant-Appellant.)	EMERGENCY REQUEST
)	

**MOTION FOR AN ORDER TO PERMIT DR. JEFFREY SMALLDON
TO OBSERVE JOHN ELEY'S CLEMENCY INTERVIEW WITH
THE OHIO PAROLE BOARD ON MAY 31, 2012 AT 10:00 A.M.**

Counsel for Defendant John Eley request an order from this Court directing the Ohio Parole Board to allow Dr. Jeffrey Smalldon to observe the interview by the Parole Board with Mr. Eley on May 31, 2012, at 10:00 a.m. Counsel for Mr. Eley have grave concerns about Mr. Eley's current mental functioning. On May 17, 2012, counsel requested of Cynthia Mausser, Chair of the Ohio Parole Board, that Dr. Smalldon be permitted to observe Mr. Eley's interview with the Parole Board in order to assess as best he can Mr. Eley's current mental functioning. *See* Exhibit 1, Letter to Cynthia Mausser. The request did not seek the Parole Board to act in an extraordinary fashion, as the Board already permits counsel to observe this interview. On May 25, 2012, Chair Mausser denied the request. *See* Exhibit 2, Email from Cynthia Mausser. For the reasons detailed below, counsel request this Court exercise its inherent authority over this case and order the Ohio Parole Board allow Dr. Smalldon to observe the interview with Mr. Eley.

MEMORANDUM IN SUPPORT

Mr. Eley's competency was first raised in 1986 by his trial counsel. They had concerns that he was not able to fully understand his legal situation and that he was not able to rationally assist them at trial. The trial court granted their request to have him evaluated by a psychologist to assess his competency to stand trial. However, Mr. Eley refused to cooperate fully with any evaluation or psychological testing. After the trial court ordered Mr. Eley to cooperate with an evaluation, the only psychological testing that has ever been conducted was in May 1987 by Dr. Doug Darnall.

After the defense rested their mitigation case, the prosecutor requested the case be continued until the next day so that Dr. Darnall could testify about his evaluation. "I don't believe a matter this serious, either way, for the benefit of the defendant or the benefit of the State of Ohio, should be concluded without hearing from the individual that did the psychological evaluation." *State v. Eley*, Mitigation Tr. at 104. Although Dr. Darnall found Mr. Eley to know right from wrong, he also testified that "his personality was such that he may exercise poor judgment and impulsively act out." *State v. Eley*, Mitigation Tr. at 128. In response to a question about whether Mr. Eley understood that he confessed to the murder, Dr. Darnall testified "I don't think [Eley] intellectually understood what would or would not be incriminating." *State v. Eley*, Mitigation Tr. at 126. Dr. Darnall was not asked whether Mr. Eley was competent at the time. See Exhibit 3, Transcript Excerpts from *State v. Eley*.

At a deposition in 1996, one of Mr. Eley's trial counsel John Shultz, testified about the difficulty he had with his client. Shultz described Eley as "very difficult", and "uncooperative" and that he did not believe Mr. Eley had a full understanding of the situation. See Exhibit 4, Deposition of John Shultz. Both Shultz and his co-counsel Thomas Zena found Mr. Eley to be very frustrating

and uncooperative. Shultz had concerns that Mr. Eley did not comprehend the legal concepts that were being explained to him. Counsel had to talk to Mr. Eley as if he were a child, and would talk to him slowly and using basic one syllable words. For example, Shultz noted that Mr. Eley was not able to understand the terms “venue” or “jurisdiction.”

In 1996, during state post conviction proceedings, post conviction counsel had Mr. Eley evaluated by Dr. Jeffrey Smalldon. See Exhibit 5, Affidavit of Dr. Jeffrey Smalldon, and Testimony of Dr. Jeffrey Smalldon, *State v. Eley*, Post Conviction Transcript. Although Mr. Eley refused to cooperate again with any psychological testing, Dr. Smalldon reviewed various documents pertaining to Mr. Eley and he met with Mr. Eley for almost four hours. Part of that time, one of Mr. Eley’s post conviction counsel was present thereby allowing Dr. Smalldon to witness the interaction between Mr. Eley and his counsel. *State v. Eley*, Post Conviction Tr. at 52-53. At the conclusion of his review of the records and the meeting with Mr. Eley, Dr. Smalldon concluded “there is ample reason to doubt whether he has the rational appreciation for his legal circumstances that it’s my understanding he needs to be able to demonstrate in order to produce a legal finding that he’s competent to proceed.” *State v. Eley*, Post Conviction Tr. at 79. Further, Dr. Smalldon found “the rational appreciation for his legal situation, the ability to weigh the choices facing him and so on, is where I have a major question about his competency to proceed. . . . and I also have very significant doubts about his ability to assist counsel.” *State v. Eley*, Post Conviction Tr. at 80. “[M]y review of the history suggests to me that whatever deficit appears presently in 1996 were in all probability present in 1987 as well. There are any number of things which support that impression, for example, the early educational records which repeatedly describe how intellectually slow and limited Mr. Eley was.” *State v. Eley*, Post Conviction Tr. at 82-83.

PROSECUTOR: So is it your testimony you feel that this man cannot make rational decisions?

SMALLDON: It's my testimony that for a variety of reasons that I've discussed, I have very serious questions about his ability to rationally appreciate his legal circumstances.

Tr. at 92.

Habeas counsel David Doughten had grave concerns about Mr. Eley's mental health and competency from early in his representation, and especially now with the scheduled execution for July 26, 2012. *See* Exhibit 6, Declaration of David L. Doughten. As detailed by Doughten, Mr. Eley has not assisted with his case and is not able to comprehend rationally his current situation. Doughten made repeated requests that Mr. Eley at least speak to Dr. Smalldon, all of which were rejected by Mr. Eley for irrational reasons. The prison records reflect also that Mr. Eley has refused all mental health evaluations in recent years in that institution.

As noted above, John Eley has a long history of irrational behavior and inability to assist counsel with his defense. Based on counsel's observations and other anecdotal evidence, Mr. Eley may be incompetent to be executed. Because the parole board has refused to permit Dr. Smalldon to sit in on the remote feed of Mr. Eley's clemency interview in Columbus, the state runs the risk of executing an incompetent person in violation of the United States Constitution and the laws of the State of Ohio.

In *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986), the Supreme Court announced two important tenets of law that epitomized the common law tradition but demanded affirmative proclamation. First, the Court held that it was unconstitutional under the Eighth Amendment for a state to execute a man who is mentally incompetent. *Id.* at 418. Second, the Court held that a state

court must have sufficient procedures in accordance with the due process clause of the Constitution to allow defendants to challenge their competency to be executed. *Id.*

In *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007), the Supreme Court clarified the decision in *Ford*, holding that a defendant must possess a rational connection between the crime and his execution, and that the defendant must be able to rationally assist counsel with his case.

Ohio Revised Code § 2949.28 attempts to satisfy the Eighth Amendment and due process requirements set forth by *Ford*. O.R.C. § 2949.28(A) defines insanity to mean “the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict.”

The definition of insanity in O.R.C. § 2949.28(A) provides two criteria that Mr. Eley must meet in order to be found competent to be executed: (1) Defendant must understand the nature of the death penalty *and* (2) Defendant must understand why the death penalty is being imposed upon him.

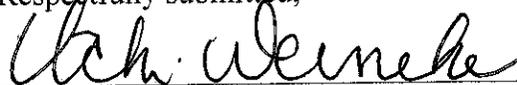
In order to satisfy Ohio’s threshold to obtain a competency hearing, Mr. Eley does not need to prove with certainty that he satisfies one or both of the two criteria stated above. Rather, he only needs to show that “probable cause” exists regarding his ability to understand one or both of these questions to obtain a hearing. O.R.C. § 2949.28. If granted a hearing, Mr. Eley will need to show by a preponderance of the evidence that he is not competent to be executed. O.R.C. § 2949.29.

Every attorney who has represented Mr. Eley has believed him to be mentally ill. However, because of his mental illness and borderline intellectual functioning, Mr. Eley refused time and again to cooperate with experts, and has therefore never been fully diagnosed or even evaluated. It is imperative that Dr. Smalldon be able to at least observe Mr. Eley at his clemency interview to

enable counsel to properly litigate the *Ford* claim.¹

For the foregoing reasons, Mr. Eley simply asks this Court to exercise its inherent authority over this case and issue an order directed to the Parole Board to permit Dr. Smalldon to observe Mr. Eley's interview, or in the alternative, to allow the proceeding to be videotaped so that it may be provided to Dr. Smalldon. Without such an order from this Court, Dr. Smalldon will only be able to assess Mr. Eley's current mental functioning through reports from counsel.

Respectfully submitted,



VICKI RUTH ADAMS WERNEKE (0088560)

Assistant Federal Public Defender

Capital Habeas Unit

Office of the Federal Public Defender

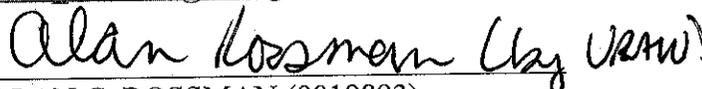
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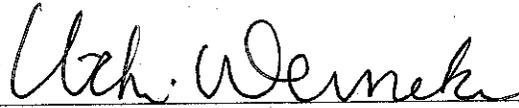
alan_rossman@fd.org

COUNSEL FOR JOHN ELEY

¹ Counsel also have concerns that Mr. Eley may be mentally retarded as well.

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2012, the original and 10 copies of the foregoing Motion for an Order to Permit Dr. Jeffrey Smalldon to Observe John Eley's Clemency Interview with the Ohio Parole Board on May 31, 2012, at 10:00 A.M. were sent by Fedex to the Office of the Clerk, Supreme Court of Ohio, 65 South Front Street, 8th Floor, Columbus, Ohio 43215-3431, and a copy was served on PAUL J. GAINS, Mahoning County Prosecutor, RALPH M. RIVERA, Assistant Prosecutor, Office of the Mahoning County Prosecutor, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503-1426.



VICKI RUTH ADAMS WERNEKE
Assistant Federal Public Defender

EXHIBIT 1
Letter to Cynthia Mausser

**Office of the
FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF OHIO**

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*Thomas D. Lambros Federal Building and
United States Courthouse
125 Market Street
Youngstown, Ohio 44503-1780
Phone: 330-746-6399
Fax: 330-746-6391
(By Appointment Only)*

May 17, 2012

Cynthia Mausser, Chair
Ohio Parole Board
770 Broad Street
Columbus, Ohio

Re: Application for Clemency for
John Jeffrey Eley, #A198441

Dear Chair Mausser:

In preparation for the Parole Board interview with Mr. Eley, we offer the following information for the consideration of the Board members. And we have an unusual request that is specific to Mr. Eley's unique situation.

We have concerns about Mr. Eley's intellectual functioning, and at the least he is borderline mentally retarded. We also have concerns that he may be mentally ill and not able to fully comprehend the full depth of his situation. We have not been able to have him evaluated fully by a psychologist as he has refused any such interaction, which has been consistent in his case for years. We therefore request that our retained psychologist, Dr. Jeffrey Smalldon be allowed to join one of the attorneys to observe Mr. Eley's interview with the Parole Board on May 31, 2012, at the Parole Board offices in Columbus, Ohio. In the alternative, we request that we be allowed to record the interview electronically while we observe the interview.

Dr. Smalldon was able to conduct a psychological assessment of Mr. Eley during the post conviction proceedings despite the fact Mr. Eley refused to cooperate with the neuropsychological testing. Dr. Smalldon's assessment at that time was that Mr. Eley was not competent, as he was not able to rationally assist counsel or to understand the complexities of his legal situation. See Affidavits of Dr. Jeffrey Smalldon, dated September 18, 1996, and January 14, 1997. Although a full battery of neuropsychological testing in which Mr. Eley would cooperate would be the ideal, Dr. Smalldon can make an assessment by observing Mr. Eley's interaction with the Board members at the interview. See Declaration of Jeffrey Smalldon, Ph.D., dated May 17, 2012. We, as Mr. Eley's attorneys, are not sufficiently trained in psychology to make an accurate assessment of Mr. Eley's current functioning.

The issue of Mr. Eley's competency has been a common theme throughout his litigation.

Every attorney who has ever represented Mr. Eley, from trial counsel to current habeas counsel, have expressed their concerns about his ability to comprehend fully and to rationally assist counsel. See Affidavit of Thomas Zena, Esq. Mr. Eley's sister, Susan Laury, had to file a Next Friend Petition for Writ of Habeas in 2002 because an execution date had been set and Mr. Eley would not avail himself of his right to litigate his case in federal court. The judge assigned to that case stayed his execution based on her initial filing. See Next Friend's Motion for a Competency Evaluation and for the Appointment of a Mental Health Expert, *Susan Laury, sister, as next friend for John Jeffrey Eley v. Bagley*, Case No. 02-1994, filed March 19, 2003; Affidavit of Gregory Meyers.

Your assistance with this issue by granting our unique request would ensure that the State of Ohio does not execute a potentially incompetent man. We are available should the Board need further information or if you have concerns about our request.

Sincerely,



Vicki Werneke
Assistant Federal Public Defender



Alan Rossman
Assistant Federal Public Defender

VW:omo
Enclosures

cc: Kim Kutschbach, Deputy Legal Counsel for Governor Kasich
David Doughten, Co-counsel for Mr. Eley
Charles Wille, Assistant Attorney General

Declaration of Jeffrey Smalldon, Ph.D.

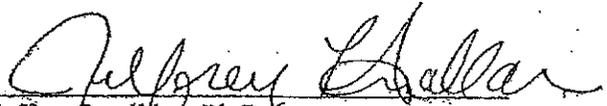
I, Jeffrey Smalldon, Ph.D., declare under penalty of perjury the following is true and correct to the best of my knowledge and belief.

1. I am a licensed psychologist in the State of Ohio.
2. I have been retained by the Office of the Federal Public Defender for the Northern District of Ohio to assist in the clemency case for John Eley, #A198441.
3. I was previously involved in Mr. Eley's case during his state post conviction proceedings before the Mahoning County Court of Common Pleas.
4. During the post conviction proceedings, I was asked by his post conviction counsel to ascertain whether Mr. Eley may have been incompetent at trial, and whether he was incompetent at the time of the post conviction proceedings. I reviewed several records concerning Mr. Eley and interviewed him for about three hours. I attempted to do psychological testing of Mr. Eley at that time, but he refused to participate in any such evaluation.
5. Based on my interview with Mr. Eley and my review of the records, I had serious questions and concerns about Mr. Eley's competency. It was clear to me at that time Mr. Eley lacked the ability to rationally appreciate his legal situation and to make rational and informed decision as they relate to his conviction and death sentence, and to assist his counsel in his post conviction proceedings.
6. I have been informed by current counsel with the Office of the Federal Public Defender that the Parole Board will be conducting an interview with Mr. Eley on May 31, 2012. Because Mr. Eley has refused to allow any further psychological evaluation or to even meet with counsel, it would greatly assist and inform my

Page 1 of 2 Declaration of Jeffrey Smalldon

assessment as to his current functioning if I could at least observe Mr. Eley's interaction with the Parole Board. Because of my training and experience, I will be able to assess Mr. Eley's current functioning far more effectively if able to watch the interview first hand, rather than receive any reports from other untrained eyes who may observe the interview.

5/16/12
Date


Jeffrey Smalldon, Ph.D.

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO,
PLAINTIFF-RESPONDENT,
-vs-
JOHN JEFFREY ELEY,
DEFENDANT-PETITIONER.

Case No. 86-CR-484
JUDGE MARY CACIOPPO

AFFIDAVIT OF DR. JEFFREY L. SMALLDON

STATE OF OHIO :
COUNTY OF FRANKLIN, SS :

I, Dr. Jeffrey L. Smalldon, after being duly cautioned and sworn according to law, depose and state the following:

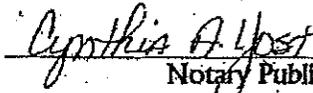
1. On July 15, 1996, I spent over three hours with John Eley, on Death Row at the Mansfield Correctional Institution.
2. I have reviewed Mr. Eley's sentencing phase transcript, the exhibits admitted as evidence during his sentencing phase, and the records and reports collected by the Office of the Ohio Public Defender for Mr. Eley in his post conviction proceedings.
3. On September 18, 1996, I prepared and signed an affidavit which included my opinion that there is ample reason to question whether John Eley possesses at present the ability to rationally appreciate his legal situation, and to make rational, informed decisions relating to his case. See Exhibit 5 attached.
4. There have been no changes since the time I signed that affidavit.

5. Due to my clinical background, my time spent with John Eley, and my review of his background materials, it is still my opinion that John Eley lacks the ability to rationally appreciate his legal situation and to make rational, informed decisions as they relate to his conviction and death sentence, and to assist his counsel in his post-conviction proceedings. Those are the abilities and capacities, of course, that are necessary for a legal finding of competency.

Further Affiant sayeth naught.


DR. JEFFREY L. SMALLDON

Sworn and subscribed before me this 14 day of January, 1997.


Notary Public
CYNTHIA A. YOST
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration

JEFFREY L. SMALLDON, PH.D.
Clinical, Forensic, and Neuropsychological Consultation

David J. Teunissen, Ph.D., and Associates
5151 Reed Road, Suite A-211 - Columbus, Ohio 43220-2553
Telephone 614 451-6517 - Telecopier 614 451-5387

COURT OF COMMON PLEAS, MAHONING COUNTY, OHIO

STATE OF OHIO)

State of Ohio v. John Jeffrey Eley

FRANKLIN COUNTY)

Case No. 86-CR-484

I, Dr. Jeffrey L. Smalldon, after being duly cautioned and sworn according to law, depose and state the following:

1. I am a psychologist licensed to practice in the state of Ohio. My professional practice is located at 5151 Reed Road, Suite A-211, Columbus, Ohio 43220. I received my Ph.D. from The Ohio State University in 1989, and I have been licensed (#4376) since 1990. I would estimate that since receiving my Ph.D., I have conducted clinical, forensic, and neuropsychological evaluations of well in excess of one thousand individuals.
2. One area of practice in which I have sought and obtained specialized training, knowledge, and skill is forensic clinical and neuropsychological assessment. I am asked frequently to evaluate individuals who have been indicted or convicted on capital murder charges. To date, I have provided some variety of consultation on approximately eighty death penalty cases.

EXHIBIT

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3. I was retained in July of 1996 by Cynthia A. Yost, Esq. and Jennifer A. Hite, Esq. acting on behalf of the Office of the Ohio Public Defender to conduct a neuropsychological assessment of their client, John J. Eley, who is currently housed on Ohio's death row at the Mansfield Correctional Institution, having been convicted in 1987 on a charge of aggravated murder with specifications stemming from an offense which occurred in Mahoning County during the previous year.
4. On July 15, 1996, I was introduced to Mr. Eley by his legal representative, Ms. Yost. She had accompanied me to this first meeting in part because of her client's expressed reluctance to be seen by a psychologist who he feared was going to try "walking through his head." Mr. Eley had also reportedly expressed concerns over the moral propriety of being "judged by another man," by which he was apparently referring to my intent to perform a battery of neuropsychological tests. My plan on the day when Ms. Yost accompanied me to see Mr. Eley was to simply introduce myself in a non-threatening context, then to spend some one-on-one time with Mr. Eley during which I hoped I could develop sufficient rapport so that Mr. Eley would agree to work with me toward completion of the neuropsychological evaluation at a later date. All told, I spent between three and four hours with Mr. Eley on July 15.
5. Unfortunately, even though I had left my session with him on July 15 feeling at least mildly optimistic about the prospect of his agreeing to collaborate with the testing, he eventually refused to do so. Consequently, I have no hard test data on which to base the inferences contained in this affidavit. I do, however, have not only my own clinical

impressions, but also a variety of background materials which have been supplied for my review by his post-conviction counsel.

6. Among the materials that were provided for my review are the following:

- An extensive series of notes summarizing interviews conducted by staff from the Public Defender's office with family members, acquaintances, childhood friends, a parole officer, the prosecutor who tried Mr. Eley's case, a former school principal, and a variety of other collateral informants;

- The pre-sentence report which was done prior to the penalty phase of Mr. Eley's 1987 trial by Parole Officer Guy S. Trammell;

- A memorandum prepared on behalf of their client by Mr. Eley's trial counsel;

- Handwritten interview notes documenting the statement which Mr. Eley gave to the police in August of 1986;

- A May 1987 psychological evaluation of Mr. Eley which was prepared at the request of his trial counsel by Douglas C. Damall, Ph.D., ostensibly for the purpose of identifying "possible mitigating factors that may help in the deliberation of the sentencing phase of the trial"; and

- A small collection of educational records.

7. There are a number of factors in Mr. Eley's medical, educational, and psychosocial histories which must at least raise very serious questions about the possible presence of brain impairment, perhaps of such a magnitude that it could have significantly affected his decision-making capabilities at the time of the offense for which he eventually received the death penalty. Among them are the following:

- He was a forceps delivery;

- He has a history of significant head traumas associated with falls, a motor vehicle accident where he may have sustained a mild concussion, and four years spent boxing as a teenager. These traumas include more than one episode where he

reportedly lost consciousness for unspecified periods of time. After a fall at age twelve, he was reportedly hospitalized because of a fractured skull.

He has a very significant, well-documented history of both alcohol and drug dependence, including use of heroine, morphine, and other highly addictive substances.

8. Despite the fact that I was unable to secure Mr. Eley's cooperation with formal testing, his behavior and style of interaction during the hours that I spent with him still left an indelible clinical impression. In my opinion there is ample reason to question whether he possesses at present the ability to rationally appreciate his legal situation, and to make rational, informed decisions related to the appeal of his conviction and death sentence. I will try to spell out in somewhat greater detail below the foundation for this conclusion.
9. For one thing, he evinces no understanding whatsoever of why it is critical that he cooperate with a neuropsychological assessment that could very well reveal evidence of significant brain impairment. Of course in the event that such evidence was produced, it would have important potential implications for his appeal, but Mr. Eley persists in expressing the belief that a decision to collaborate with testing would, in effect, mean that he was lending sanction to "one man judging another man," which he says is contrary to his religious beliefs. His position on this matter seems totally refractory to logical appeal, and in my opinion it implies a gross misunderstanding of the nature and uses of neuropsychological testing.
10. Although I never personally performed formal psychological or neuropsychological assessment of Mr. John Glenn, another Ohio death row inmate, I saw Mr. Glenn at the

request of his then-appellate counsel on several different occasions in 1993 and 1994. In the same manner that Mr. Eley does, Mr. Glenn attempted during those discussions to mask his very significant intellectual deficits by speaking in often elliptical, nonsensical, pseudo-philosophical constructions that he clearly hoped would leave the listener with the impression that he was a deeply thoughtful, highly intelligent individual. Like Mr. Eley, he seemed to have no insight whatsoever into how transparently false many of his grandiose claims were, and into how very thin his pretensions to intelligence would actually appear to an informed listener.

11. Mr. Glenn is brain-impaired, and in many respects Mr. Eley's clinical presentation mirrors his. I will provide by way of illustration some specific examples which may serve the purpose of conveying the disjointed quality of Mr. Eley's thinking, as well as the frequently incomprehensible nature of his verbalizations.
12. At one point fairly early on in our discussion, Mr. Eley attempted to make a point by shifting very rapidly back and forth between references to omelets, sunny sides up, a "fine political structure wall," scrambling, and an assortment of other apparently disconnected metaphors and figures of speech that he had apparently decided might work well together. The result, needless to say, was utterly incomprehensible, but he demonstrated no insight whatsoever into that fact. On the contrary, he beamed as though he had just said something that was sure to be perceived as very profound.
13. At another early juncture, he began making pronouncements about "the fatal flaw of Western logic," in the course of doing so suggesting that he personally had been able

to see through this "fatal flaw" in order to determine the path that would be best for him. He was unable to make any more explicit the insight that he had been able to achieve.

14. "We're all human, we're all guilty," he said at one point, apparently intending this declaration as an explanation for why agreeing to collaborate with neuropsychological testing was not a step he was willing to take. In this same context, he lamented the "sophistry" which he believes causes people to lose sight of God's will. In describing religious discussions that he had once carried on with an "atheist" inmate, he indicated, "Everything in life is inherently dualistic. (Tell me what you mean.) Everything dualistic brings gravity impact One extreme to another It's night and day!" Moments later he continued, "Sweet and sour, mixed. It's absolute! A tart kind of thing!" Suffice to say that it never became any clearer what point he was attempting to make here; again, however, he beamed as though the words he had just spoken were extremely profound.
15. At one point he attempted to convince me that the power of the mind was what really counted, not whether or not his body survived the judgment of Man. His manner of doing so was to say, "Anyone can have the behind. Where the mind goes, the behind gonna follow. That's the spiritual thing right there!"
16. He apparently feels quite cynical about the mental health professions: "I don't wanna be understood! I just wanna be respected! . . . We're all flesh! I'm not homogeneous,

I'm heterogeneous Really, I'm going on to the next level! He faults the judge at his trial for basing his final sentencing decision on "a syllogism of conclusion."

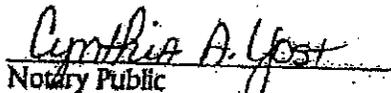
17. I know from speaking with Mr. Eley's post-conviction counsel that verbalizations of just this sort are what come from Mr. Eley whenever his attorneys attempt to engage him on the subject of what needs to be done in order to pursue post-conviction relief. Based on the accounts of Ms. Yost and Ms. Hite of their attempts to discuss legal matters with Mr. Eley, he does not seem grounded in the sort of rational appreciation for his legal circumstances which is necessary in order for him to participate meaningfully in these adversarial proceedings. He appears to have little if any appreciation for the finer (or even the less fine) points of what is required to pursue his appeals, first through the state courts, and then eventually in the federal courts; but he is apparently convinced that he knows more about what remedies are and are not available through the legal system than his attorneys do.

18. I want to state as strongly as I can my belief in the absolute necessity of securing Mr. Eley's cooperation with neuropsychological assessment in order to investigate further my working hypothesis that he is brain impaired, this impairment likely reflecting the combined influence of multiple factors, including possible trauma sustained at the time of his birth, multiple head traumas, and a long, very serious history of alcohol and drug dependence. In the meantime, it is my hope that counsel for Mr. Eley will pursue with the higher courts a claim of incompetency to proceed.

Further affiant sayeth naught.


Dr. Jeffrey L. Spaldon

Sworn and subscribed before me this 18th day of September, 1996.


Notary Public

CYNTHIA A. YOST
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO, :

PLAINTIFF, :

V. :

Case No. 86 - CR - 484

JOHN JEFFREY ELEY :

DEFENDANT. :

AFFIDAVIT OF THOMAS ZENA, ESQ.

STATE OF OHIO :

COUNTY OF MAHONING, SS :

I, Thomas Zena, after first being duly cautioned and sworn according to law, depose and state the following:

1. I am an attorney licensed to practice law in the State of Ohio.

2. I was court appointed as lead trial counsel to represent John Eley in his capital case.

Co-counsel was John Shultz. I have tried numerous murder trials and a large number of aggravated murder trials and John Eley's case still stands out in my memory as the worst case where the most injustice occurred, where the wrong defendant ended up on Death Row and the culpable defendant who should have been sent to prison was acquitted.

3. Prosecuting Attorney Gary Van Brocklin made several offers to work out a plea agreement, to reduce the charges from the aggravated murder charge with death specifications to a lesser included offense, in exchange for John Eley's testimony in the co-defendant Melvin Green's trial. One of the offers presented by Prosecutor Van Brocklin was a reduction to a

EXHIBIT

25

charge of voluntary manslaughter, with no specifications, and a request to the Court that Eley serve only a six (6) year sentence. Prior to the trial, throughout the trial and even after the trial, Prosecutor Van Brocklin tried to get Eley to accept a plea agreement and to testify against Melvin Green. John Eley would not accept any of the offers, stating that his religion would not let him sacrifice another, that his religion would not allow him to bear witness against another, or that to testify would have him judge another and that only God could be the judge. The beliefs and reasons stated by John Eley were completely illogical. The way he phrased his reasons were completely irrational. None of these beliefs or sayings by John made any sense to me, to co-counsel, or to anyone else who would hear him make these statements.

4. I was completely frustrated in my representation of John Eley, due to John Eley's actions and attitude. John would not cooperate with me, with co-counsel, or with any of our experts who we hired to try to assist us in understanding John's attitude and his religious views. Anytime John felt like he was being pressed too hard to cooperate, or to consider the offer on the table from the Prosecutor, John would start quoting jumbled up Bible passages or religious principles that we could not understand, or had no basis in any religious texts. I did what I could to try to explore his competency, however Eley resisted all attempts. The record in part should reflect that John was not cooperating during his competency examinations, or with Dr. Darnell, but it does not reflect that his lack of cooperation and his resistance to working with his legal counsel or even the fact that he was working against his own best interests.

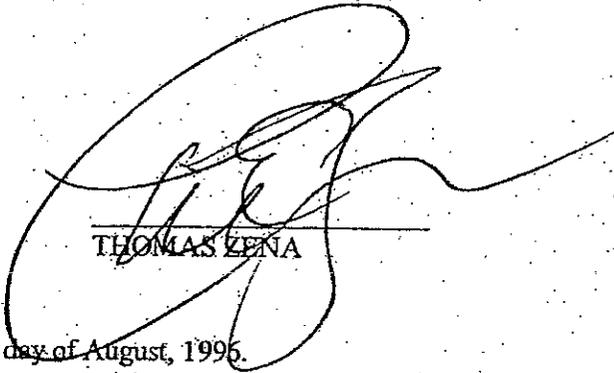
5. Another example of when John would not assist us in his own defense, in addition to John's resistance to cooperate with the Prosecutor and the experts was in his waiver of his right to a jury trial. Co-counsel and I did not want to waive his right to a trial by a jury, but that is

what John wanted. In hindsight I believe John wanted to go before three judge panel due to his remorse for his accidental killing of the victim in an effort to get the trial over quicker. I still do not believe that John made a rational decision in waiving his right to a jury trial.

6. Even Detective Fajack spoke to John during the trial, trying to get him to consider the Prosecutor's offer of a sentence less than death in exchange for his testimony in a trial against Melvin Green. Fajack told Eley that he would get the electric chair if he did not take the deal and that all Eley had to do was to tell the truth regarding Melvin Green's involvement in this crime.

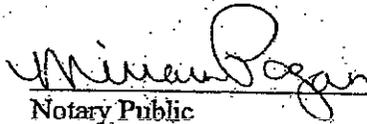
7. The only information that John Eley gave us regarding this crime was that he had drank a quart of wine and smoked marijuana before the crime. John refused to supply us with any information about his family or his past. I thought it significant at the time that whenever John was charged with a crime, he would plead guilty, that he never went to trial except for this matter.

Further Affiant sayeth naught.



THOMAS ZENA

Sworn and subscribe before me on this 29 day of August, 1996.



Miriam Pagan
Notary Public

MIRIAM PAGAN
Notary Public, State of Q-1
My Commission Expires September 8, 1998

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

SUSAN LAURY, sister, as next friend)	
for JOHN JEFFREY ELEY,)	
)	
Petitioner,)	Case No. 4-02-01994-JGC
)	
vs.)	
)	JUDGE CARR
MARGARET BAGLEY, WARDEN -)	
MANSFIELD CORRECTIONAL INSTITUTE,)	
)	
Respondent.)	

NEXT FRIEND'S MOTION FOR A COMPETENCY EVALUATION AND
FOR THE APPOINTMENT OF A MENTAL HEALTH EXPERT
TO DETERMINE WHETHER JOHN J. ELEY IS COMPETENT TO
WAIVE FEDERAL HABEAS REVIEW OF HIS CONVICTION AND DEATH SENTENCE

Next Friend, on behalf of her brother, Petitioner John J. Eley, respectfully requests that this Court appoint a mental health expert for Mr. Eley and then conduct a competency evaluation of Mr. Eley to determine whether Mr. Eley is competent to waive federal habeas review of his conviction and sentence of death. Next Friend requests that the expert be appointed pre-hearing and the competency hearing be held before a habeas petition must be filed in order to adjudicate the issue of Mr. Eley's competency in a timely manner.

Respectfully submitted,

DAVID H. BODIKER
OHIO PUBLIC DEFENDER

s/ Robert K. Lowe
ROBERT K. LOWE (0072264)
Assistant Public Defender
Rob.lowe@opd.state.oh.us

s/ Gregory W. Meyers
GREGORY W. MEYERS (0014887)
Senior Assistant Public Defender
meyersg@opd.state.oh.us

8 East Long Street
Columbus, Ohio 43215
Phone: (614) 466-5394
Fax: (614) 728-3670

COUNSEL FOR JOHN J. ELEY
THROUGH NEXT FRIEND

MEMORANDUM IN SUPPORT

Next Friend, on behalf of her brother, Petitioner John J. Eley, respectfully requests that this Court appoint a psychological expert for Next Friend and Mr. Eley to determine whether Mr. Eley is competent to waive federal review of his convictions and death sentence. After the psychological expert has time to evaluate Mr. Eley, Next Friend requests that this Court conduct a competency hearing to determine if Mr. Eley is competent to waive his right to federal review. This Court is expressly authorized to provide such services pursuant to 28 U.S.C. § 848. In reviewing § 848, the Supreme Court of the United States held:

The services of investigators and other experts may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) clearly anticipates that capital defense counsel will have been appointed under § 848(q)(4)(B) before the need for such technical assistance arises, since the statute requires "the defendant's attorneys to obtain such services"

from the court. § 848(q)(9). In adopting § 848(q)(4)(B), Congress thus established a right to pre-application legal assistance for capital defendants in federal habeas corpus proceedings.

McFarland v. Scott, 512 U.S. 849, 855 (1994).

Next Friend believes that her brother is not competent to make a decision that would result in his execution, which would be the outcome of his apparent decision to waive his right to pursue federal habeas review of his capital conviction and death sentence. See Exhibits 1 and 2, Affidavits of Next Friend (one dated 2-18-03, the other 7-10-02).

A psychological evaluation and competency hearing is necessitated by the evidence indicating Mr. Eley is not making rational, competent decisions relevant to his right to pursue federal habeas review of his state capital conviction and death sentence. Mr. Eley's competence has been questioned since his trial counsel raised the issue in 1986. After he was convicted, a Pre-sentence Investigation report was ordered. The report indicates that a 1963 intelligence exam indicated an IQ of 73 – borderline mental retardation. The PSI also indicates the long history of Eley's alcohol and drug abuse. Although Mr. Eley was never adjudicated incompetent in State court proceedings, since competence changes over time (it is not a static phenomenon) and since he has consistently behaved in ways since his arrest to this day that caused many to question his competence, this Court should undertake a formal evaluation of Mr. Eley.

Over the past year or so, evidence indicating Mr. Eley's incompetence escalated relevant to the mixed, irrational, and inconsistent positions he has taken regarding his desire to pursue further challenges to his capital conviction and death sentence.

Once during his pending appeal of his postconviction litigation, he wrote a letter to the Ohio appellate court saying he wanted to drop his appeal and be executed, a decision he later rescinded. Then, for a while, he seemed so eager to file a federal habeas petition that he insisted

on the irrational position of waiving his right and responsibility to exhaust his State remedies by seeking discretionary appellate review from the Ohio Supreme Court in his postconviction case. His counsel tried to explain why he could not effectively pursue federal review of his postconviction claims if he abandoned his state litigation short of exhausting available remedies. In counsels' opinion, Mr. Eley reacted to these explanations with irrational, illogical expressions of paranoia and incomprehensible religious ideations.

As a result of Mr. Eley's apparent incompetence, his counsel were forced to perfect his right to file a timely request for discretionary appeal against the stated wishes of a client whom they believed to be incompetent. Along with filing a timely notice of appeal (and Memorandum in Support of Jurisdiction) in the Ohio Supreme Court, his counsel also filed a motion describing the facts underlying counsels' perception of Mr. Eley's incompetence and asking the Ohio Supreme Court to evaluate Mr. Eley's competence at that juncture. See Exhibit 4, APPELLANT'S COUNSELS' MOTION REQUESTING A COMPETENCY EVALUATION OF JOHN J. ELEY DUE TO MR. ELEY'S CURRENT DESIRE TO WAIVE FURTHER OHIO POST-CONVICTION REVIEW and exhibits attached thereto. That Court denied the motion and rejected discretionary appellate review.

As further evidence of Mr. Eley's incompetence, within a very short time after his State remedies were exhausted, he surprisingly adopted the position that he did not want to pursue habeas litigation. In turn, this position has been occasionally and irrationally modified by his expressed wish to pursue habeas litigation if and only if his family would retain counsel to represent him, which they cannot afford to do. At other times, he simply says that he does not want to file a habeas corpus petition; he would rather die.

There are many reasons why Next Friend and counsel question Mr. Eley's competency to appreciate his current legal status. At the time when Next Friend filed her first pleadings in federal court (July of 2002; assigned to Judge Gaughan), Mr. Eley and long been saying that he wanted to litigate his case in federal court. But when his case was ripe for federal review, and when he faced a real execution date of August 1, 2002, he would not take appropriate actions to initiate federal habeas review. By July of 2002, Next Friend and counsel repeatedly failed to convince Mr. Eley that, despite his irrational insistence to the contrary, the state courts had the authority to set an execution date prior to the date on which his AEDPA statute of limitations would run for filing a writ of habeas corpus. As his now-stayed execution date of August 1, 2002, neared, Mr. Eley seemed to adopt the lethally irrational position ("seemed to" because it is difficult to comprehend what Mr. Eley thinks based on what way he speaks and what he says) that he could think about his options for federal filing until March 20, 2003, without being executed on August 1, 2002. He appeared unable to appreciate his legal status due to mental illness.

Things got no better after Judge Gaughn stayed his August execution and eventually dismissed his first set of Next Friend habeas pleadings. Despite repeated efforts, Mr. Eley continued to express positions against willingly pursuing habeas that ranged from the ridiculous, to the perplexing, to the incomprehensible. He expressed his most recent position to attorney Robert Lowe when he met with Mr. Eley on February 28, 2003, in the hopes that Mr. Eley would agree to let counsel file a habeas petition for him by the AEDPA statute date of March 20, 2003. That meeting ended quickly - Mr. Eley simply refused and terminated the meeting. Then he sent a letter to attorney Lowe dated March 9, 2003, that angrily instructed him and all Ohio Public Defender lawyers not to file any habeas pleadings for him. See Exhibit 3.

Surprisingly, that letter seems to indicate that Mr. Eley wants to proceed with habeas, but with other court appointed counsel. Undersigned counsel sincerely hope that that is Mr. Eley's position and that, if this Court were to appoint other counsel, it would end the Next Friend litigation. But, based on past experiences with Mr. Eley, it is simply impossible for counsel to place any confidence in anything he says about his willingness to go forward with habeas litigation. Counsel is simply at a loss when it comes to understanding Mr. Eley. Perhaps in lieu of immediately undertaking efforts to evaluate his competency, the Court might consider simply appointing new counsel to see if Mr. Eley would embrace representation on his own behalf. As it stands, undersigned counsel remain convinced that their ethical duty is to present this Court with Next Friend pleadings in order to meet the statute of limitations deadline and in order to ask this Court to adjudicate the question of Mr. Eley's competence.

Overall, the dramatic and irrational vacillations in his position give Next Friend and undersigned counsel substantial reasons to believe Mr. Eley is not competent to waive his right to file a federal habeas petition -- a decision which, if carried out, would mean his certain execution pursuant to his Ohio capital conviction and death sentence. See Exhibit 5, Affidavit of Gregory W. Meyers, Esq.

This Court should grant this Motion in keeping with the principles and procedures set forth in Whitmore v. Arkansas, 495 U.S. 149 (1990), and Rees v. Peyton, 384 U.S. 312 (1966). Mr. Eley is entitled to have his competency evaluated in order to protect his constitutional rights to due process, equal protection, and to be free from arbitrary and capricious punishment. U.S. Const. amends. V, VI, VIII, IX, and XIV. This is all the more so here because Mr. Eley's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five

Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests). Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Mr. Eley's competence cannot be fully and fairly adjudicated without counsel being appointed.

For these reasons, Next Friend respectfully requests that this Court grant this Motion.

Respectfully submitted,

DAVID H. BODIKER
OHIO PUBLIC DEFENDER

s/ Robert K. Lowe
ROBERT K. LOWE (0072264)
Assistant Public Defender
Rob.lowe@opd.state.oh.us

s/ Gregory W. Meyers
GREGORY W. MEYERS (0014887)
Senior Assistant Public Defender
meyersg@opd.state.oh.us

8 East Long Street
Columbus, Ohio 43215
Phone: (614) 466-5394
Fax: (614) 728-3670

COUNSEL FOR JOHN J. ELEY
THROUGH NEXT FRIEND

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been electronically filed this 19th day of March, 2003. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. In addition, copies have been sent via U.S. Mail to: Daniel R. Ranke, Assistant Attorney General, Capital Crimes Section, 615 W. Superior Ave., 11th Floor, Cleveland, Ohio 44113.

s/ Robert K. Lowe
ROBERT K. LOWE (0072264)
Assistant Public Defender

COUNSEL FOR JOHN J. ELEY
THROUGH NEXT FRIEND

177118

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

SUSAN LAURY, sister, as next friend)
for JOHN JEFFREY ELEY,)
)
Petitioner,) Case No. 4-02-01994-JGC
)
vs.)
) JUDGE CARR
MARGARET BAGLEY, WARDEN -)
MANSFIELD CORRECTIONAL INSTITUTE,))
)
Respondent.)

**GREGORY W. MEYERS', ESQ., AFFIDAVIT IN SUPPORT OF
NEXT FRIEND'S MOTION FOR APPOINTMENT OF A PSYCHOLOGICAL EXPERT
AND FOR A COMPETENCY HEARING**

State of Ohio,
County of Franklin, SS:

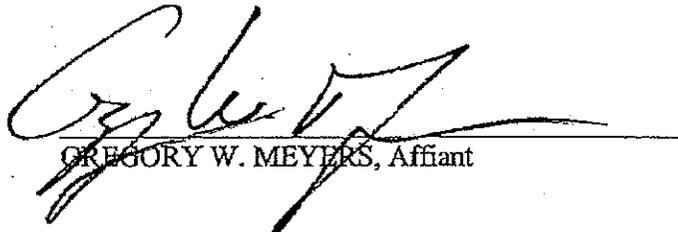
I, Gregory W. Meyers, after being first duly sworn and cautioned, due hereby swear and affirm as follows:

1. I am a lawyer licensed to practice law in the State of Ohio, Supreme Court Registration Number 0014887, and admitted to practice in the United States District Court for the Northern District of Ohio. Since March of 1996, I have served as Chief Counsel of the Death Penalty Division of the Office of the Ohio Public Defender. In that capacity, I have both directly represented John J. Eley and supervised other Assistant Public Defenders directly representing John J. Eley in various stages of litigation in Ohio courts related to Mr. Eley's collateral challenge to his Ohio capital conviction and death sentence.
2. I have met with Mr. Eley on a number of occasions over the years; I have discussed his case with other attorneys and professional support staff members from this Office over the years; I have met with his sister, Next Friend Susan Laury. Among other matters, I have carefully attended to the question of whether facts exist to indicate Mr. Eley is mentally incompetent. Questions surrounding Mr. Eley's competence have been at issue in his litigation since the trial phase back in 1986. Every lawyer who has ever represented Mr. Eley has found reason to question his competence to think rationally and comprehend advice from his counsel.



3. Although I am not a trained mental health professional, it is my opinion that Mr. Eley suffers from mental illness to such an extent that he is incapable of making rational decisions related to the question of whether he should proceed to challenge his Ohio capital conviction and death sentence by means of filing a federal habeas corpus petition.
4. On Mr. Eley's and Next Friend's behalf, I had final responsibility for preparing NEXT FRIENDS' MOTION FOR A COMPETENCY EVALUATION AND FOR THE APPOINTMENT OF A MENTAL HEALTH EXPERT TO DETERMINE WHETHER JOHN J. ELEY IS COMPETENT TO WAIVE FEDERAL HABEAS REVIEW OF HIS CONVICTION AND DEATH SENTENCE to which this affidavit is attached. To the best of my knowledge, all facts set forth in that motion are true.

FURTHER AFFIANT SAYETH NAUGHT.


GREGORY W. MEYERS, Affiant

Sworn to and subscribed before me on this 19th day of March, 2003.



MARY L. DUNNING
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES OCT 18, 2005

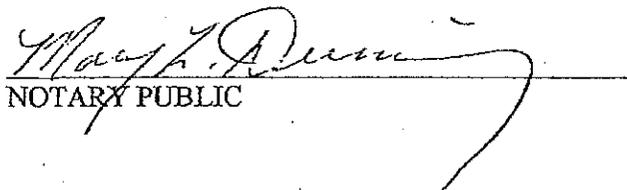

NOTARY PUBLIC

EXHIBIT 2
Email from Cynthia Mausser

From: [Mausser, Cynthia](#)
To: Vicki_Werneke@fd.org
Cc: [Robinson, Vernise](#)
Subject: Request for Dr. Smalldon to observe interview with John Eley #198-441
Date: 05/25/2012 01:21 PM

Ms. Werneke:

I apologize for replying to your request in an email as opposed to official letterhead. I am out of the office this week. Ms. Robinson informed me a few days ago that you were anxious for a quick reply, so I decided to do so in email.

Our policy governing death penalty clemency hearings clearly states that inmate interviews will be observed by case attorneys only, in addition to a representative(s) from the Governor's office. Your request for an exception to this policy is not persuasive. Therefore, your request to have Dr. Smalldon observe the interview is denied.

Sincerely,

Cynthia Mausser
Ohio Parole Board Chair

Please note that an e-mail message, or a portion thereof, may be releasable as a public record in accordance with Chapter 149 of the Ohio Revised Code.

EXHIBIT 3
Transcript Excerpts from
State v. Eley

87 CA 122

CLERK OF COURTS
MAHONING COUNTY, OHIO
FILED
JUL 13 1987
ANTHONY VIVC. CLERK

1 STATE OF OHIO)
2 COUNTY OF MAHONING) SS

3 IN THE COURT OF COMMON PLEAS

4 CASE NO. 86 CR 484

5 STATE OF OHIO,)
6 Plaintiff,)
7 -vs-)
8 JOHN ELEY, aka ROBERT ELEY,)
9 Defendant.)

TRANSCRIPT OF PROCEEDINGS
ON APPEAL AND EXHIBITS
HEARING ON
MITIGATION OF PUNISHMENT
VOLUME III OF III

11 APPEARANCES: ON BEHALF OF THE PLAINTIFF,
12 Attorney Gary L. VanBrocklin.
13 ON BEHALF OF THE DEFENDANT,
14 Attorney Thomas Zena and
15 Attorney John Schultz.

16 BE IT REMEMBERED that at the hearing of the
17 above-entitled cause, in the Court of Common Pleas, Mahoning
18 County, Ohio, beginning on the 13th of July, 1987, and
19 continuing thereafter, as hereinafter noted, before the
20 HONORABLE ELWYN V. JENKINS, the HONORABLE WILLIAM G. HOUSER
21 and the HONORABLE PETER C. ECONOMUS, the above-appearances
22 having been made, the following proceedings were had:
23

1 he should be shortly leaving Chicago. I have
2 received a copy of the psychological evaluation. I
3 have not been able to contact and discuss the contents
4 with Dr. Darnell because of various schedules, but
5 I don't believe a matter this serious, either way,
6 for the benefit of the defendant or the benefit of
7 the State of Ohio, should be concluded without hearing
8 from the individual that did the psychological
9 evaluation. I would, therefore, move to continue this
10 hearing until tomorrow morning when Dr. Darnell could
11 appear, and, of course, I think the statute provides
12 that the court, defense counsel or the prosecution,
13 can call and cross examine the preparer of such a
14 report.

15 JUDGE JENKINS: I believe so.

16 MR. ZENA: In response to what
17 Mr. Van Brocklin says, and I realize that there is
18 no more serious of a matter than what we are
19 conducting, we have submitted a report. It is in
20 evidence. You have it. The contents of that
21 report is treated like any other evidence that you
22 are to receive, be it by way of testimony or
23 admission of an exhibit. If what Mr. Van Brocklin

1 at the start, in light of the situation, in fact, that that
2 was not the case here. That there seems to be a situation
3 existing with John Ely that he would not have been, let's
4 call it what it is, an attempt to deceive you, attempt to
5 play, in essence, to his best possible situation? Would that
6 also include the fact that Mr. Ely would appreciate the fact
7 that his statement was very incriminating?

8 A I don't think he intellectually understood what
9 would or what would not be incriminating, to be honest with
10 you.

11 Q Would he know that the statement would put him in
12 a position of jeopardy?

13 A That's a judgment.

14 Q Sure.

15 A I think he would be able to understand or comprehend
16 some statements that he made that could have potentially put
17 him in jeopardy, but I think that would have to have been
18 explained to him first.

19 Q Do you think he would have understood, in light of
20 your examination of Mr. Ely, that when questioned by the
21 police about this event, which resulted in a shooting, that
22 to then say, yes, he did shoot him, would place him in a
23 position of jeopardy, yes, it was me?

1 relative to Mr. Ely's reaction or potential reaction to
2 situations. And I believe you stated, for example, if
3 subjected to excessive stress, Mr. Ely would be put to
4 interpret the situation as potentially threatening; his
5 personality is such that he may exercise poor judgment and
6 impulsively act out?

7 A Correct.

8 Q Then you state, even though there was a finding on
9 your part--I'm sorry, there could not have been a finding
10 that he was under the influence of anything--that if
11 intoxicated or under the influence of drugs, he would have
12 minimal judgment or control of his behavior?

13 A His judgment, I think, would be very poor and
14 he would have very poor control.

15 Q And there's no question, correct, in light of the
16 situation that you have seen, that if the rendition of fact
17 given by Mr. Ely in his statement were set forth and
18 consistent, as you stated, that if Mr. Ely had thought
19 somebody was reaching for a gun to shoot him, he would
20 consider that a threatening situation?

21 A Correct.

22 Q Now, as to the issue of remorse. I believe you
23 best put it when you stated that you look for somebody to

EXHIBIT 4
Deposition of John Shultz

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IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
CASE NO. 86-CR-484

STATE OF OHIO)
)
 Plaintiff)
 vs.)
 JOHN JEFFREY ELEY)
 Defendant)

DEPOSITION OF
JOHN F. SHULTZ

CLERK OF COURTS
MAHONING COUNTY OHIO
FEB 27 1998
FILED
ANTHONY VIVO, CLERK

Deposition taken before me,
Christine Breinz, Notary Public within and for the
State of Ohio, on the 15th day of November, 1996, at
1:15 PM, pursuant to subpoena, taken at the offices
of Simoni Court Reporting, 301 Legal Arts Centre,
Youngstown, Ohio, to be used in accordance with the
Ohio Rules of Civil Procedure or the agreement of the
parties in the aforesaid cause of action pending in
the Court of Common Pleas within and for the County
of Mahoning and State of Ohio.

SIMONI COURT REPORTING
WARREN/YOUNGSTOWN, OHIO
(216) 399-1400, 746-0934

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A P P E A R A N C E S

On Behalf of the Plaintiff:
Michele G. Cerni, Attorney at Law
OFFICE OF MAHONING COUNTY PROSECUTOR

On Behalf of the Defendant:
Jennifer P. Hite, Attorney at Law
Cynthia A. Yost, Attorney at Law
Gregory W. Meyers, Attorney at Law
OHIO PUBLIC DEFENDER COMMISSION

SIMONI COURT REPORTING

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I N D E X

DEPONENT -- John F. Shultz	PAGE NO.
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INDEX OF OBJECTIONS

DEPONENT -- John F. Shultz

Keyword index for: Object

Page #32 21 MS. CERNI: Objection. Go ahead.

Page #79 7 MS. CERNI: Objection.

Page #80 4 MS. CERNI: Objection.

Page #83 8 MS. CERNI: Objection.

Page #89 15 MR. MEYERS: Objection for the

Keyword index for: object

Page #58 7 objection, we tried to inject some

Page #82 20 objection. Some clients seem to be of

Page #86 2 MR. MEYERS: I object at this stage

SIMONI COURT REPORTING

P R O C E E D I N G S

JOHN F. SHULTZ

having been duly sworn according to law, on his oath, testified as follows:

MS. YOST: Let the record reflect again, please, the parties that are present in the room; the witness, John Shultz, Assistant Prosecuting Attorney Michelle Cerni, Assistant State Public Defenders Jennifer Hite, Greg Meyers and Cynthia Yost.

DIRECT EXAMINATION BY MS. YOST:

Q. Would you please for the record state your name and your address?

A. Okay. It's John Shultz, S H U L T Z, middle initial is F. My business address is 219 West Boardman Street, Youngstown, Ohio, 44503. My residence address is 5231 Royal Palm Drive, Boardman, Ohio, 44512.

Q. And I know a lot of the questions I'm asking you are rather perfunctory, but if you would for the record, please, let us know what your occupation is.

SIMONI COURT REPORTING

1 A. I'm an attorney.

2 Q. And what type of a practice do you engage in?

3 A. I'm a solo practitioner. It's a general
4 practice consisting mainly of criminal
5 defense, personal injury and domestic
6 relations.

7 Q. Would you be able to let us know approximately
8 what percentage of your work is criminal
9 versus civil litigation?

10 A. Oh, I would say that at least fifty percent.

11 Q. Fifty percent is criminal?

12 A. Yes.

13 Q. And one of your criminal cases, of course, the
14 one we're here on, was John Eley?

15 A. That's correct.

16 Q. Okay, I know we're asking you to go back ten
17 years, but can you let us know what your
18 recollection is on your representation of
19 John? How did you become involved on
20 John's case?

21 A. All right. To the best of my recollection, I
22 believe I was appointed second chair on

SIMONI COURT REPORTING

1 this case.

2 Q. That's correct.

3 A. Tom Zena was the first chair. Tom had
4 contacted me and asked me if I would sit
5 as a second chair on a court appointed
6 aggravated murder case, that being Eley's
7 case, and I believe -- again, as I can
8 recall -- that I became involved in the
9 case somewhere down the line of its
10 progression. I think he had already been
11 indicted and that's when I was appointed,
12 because I can't recall being involved in
13 it at the preliminary stages.

14 Q. I believe from the records that we have you
15 weren't appointed until sometime in
16 October.

17 A. Okay.

18 Q. The crime occurred in August and you were
19 appointed rather late in October.

20 A. And I don't know if this is accurate or not.
21 Did I replace somebody?

22 Q. The record reflects that John Eley wanted

1 Attorney Scott Krichbaum to represent
2 him.

3 A. Okay, and he represented the co-Defendant.

4 Q. That is correct.

5 A. Because I sat through that co-Defendant's
6 case. I remember that.

7 Q. Okay. What are some of your first thoughts or
8 recollections in working on John's case?

9 A. Well, John was a dull person. He wasn't very
10 -- he had street savvy, but he was
11 difficult to communicate with, and the
12 one thing I specifically recall about
13 this case is that John -- we were offered
14 a plea bargain, and it was a rather
15 attractive plea bargain, and I remember
16 even talking at the time to the
17 detective. I think it was Fajack. He
18 told me that he really didn't think that
19 John's actions warranted the imposition
20 of the death penalty, and I think that,
21 quite frankly, Fajack lobbied with the
22 prosecutor's office to try and assist us

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1 . to resolving this matter, and we did
 2 ultimately receive an offer of a plea
 3 bargain, the specific terms of which I
 4 can't recall. I don't know if they were
 5 going to drop the death spec. and reduce
 6 the charge. However, I do recall that it
 7 entailed or involved his testifying
 8 against the co-Defendant, and I think --
 9 was that Melvin Green?

10 Q. That is correct.

11 A. And he adamantly, vehemently refused to do
 12 that, and John and I had a little
 13 physical confrontation in the County jail
 14 about it. Mr. Zena had to intercede. I
 15 pretty much told John that my posture
 16 was -- and, again, I think John had
 17 confessed to this also, his involvement.

18 Q. That is correct.

19 A. And after our attempts to suppress the
 20 confession were unsuccessful, you know, I
 21 thought that the plea bargain was the
 22 only way to go, and John then would refer

1 to some abstract religious ideals.
2 whenever he would respond to that.

3 Q. He was a very frustrating client to work with?

4 A. Yes, very, very. I guess, you know, for lack
5 of better terminology, ~~he was very~~
6 ~~hardheaded~~. I mean, if you told him
7 something and he didn't agree with it --
8 I don't care if you told him this is
9 Friday and it's daylight outside; if he
10 was of different mind set, he would sit
11 there and just refuse to accept that.

12 Q. Have you ever dealt with other clients --

13 A. Sure.

14 Q. -- that are so hardheaded?

15 A. I had one last Fall that put himself in the
16 electric chair, Steve Vnable. You know,
17 they don't want to cooperate. That's
18 another thing too. I think that Eley --
19 we attempted to have Eley assessed. And,
20 again, I'm going back. I think John was
21 very uncooperative with whomever we --
22 because I remember Zena and I going to

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1 see the psychiatrist, and I don't know
2 who it was. He was up -- I don't know
3 who we had appointed, but I remember he
4 expressed his frustrations. We had a
5 couple court hearings on it. The court,
6 of course, took out its frustrations on
7 us, you know, and we just couldn't get
8 John to cooperate with us on that.

9 Q. He just was ~~very difficult, uncooperative?~~

10 A. Yes.

11 Q. On that basis, do you think he had a full
12 understanding? You're saying that there
13 was a plea bargain. ~~Do you believe that~~
14 ~~he had a full understanding of the plea~~
15 ~~bargain?~~

16 A. ~~I don't know.~~ I mean, the only thing that I
17 can tell you that I know is that I'm
18 sure, ~~I'm confident in myself that I~~
19 ~~tried to explain it the best way I could.~~
20 Whether or not he comprehended it -- I'm
21 also -- and, again, you know, you would
22 have to check records. I'm pretty sure

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1 we asked his mother to intercede on our
2 behalf too. You should probably check
3 the records to see if she went up to
4 visit him, because I remember going to
5 his mother's house, and I remember where
6 his Mom lived. She lived up by the
7 Stambaugh auditorium, one of the streets
8 behind there. And sitting in her living
9 room it appeared to me there was a
10 mother, sister and a brother-in-law, and
11 they all thought that we were proceeding
12 in the right direction with the dismissal
13 of the death spec, but I don't know if
14 they were able to convey anything to him.

15 Q. Not only with the plea bargain, but was he
16 also, for lack of a better term, rather
17 dense about legal concepts or
18 proceedings?

19 A. Well, he was -- ~~I think John was pretty slow~~
20 ~~on a lot of learned things.~~ I remember
21 that John, I think, had a very difficult
22 time reading, because whenever I took

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1 something up there to show him I know he
2 had a very difficult time reading, you
3 know, and I think a lot of vocabulary
4 just went through him, you know. If we
5 took up maybe a more sophisticated
6 newspaper article, he would have no idea
7 what a lot of the words meant, but I
8 think he was proud enough not to ask you
9 what they meant, too, you know.

10 Q. Not only with John Eley, but with some other
11 people have you ever dealt with many
12 clients or Defendants or Plaintiffs or
13 people within your profession that have a
14 combination of mental illnesses, or
15 retardation, or brain damage? Is this
16 something that you deal with quite often,
17 or are these kind of new things to you?

18 A. Well, that's a good question. I mean, when
19 you walk into a case new you don't know
20 what to expect. A lot of times I think
21 it takes a long time to ascertain whether
22 or not the client is proceeding under

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1 some sort of impairment. I don't know
2 how to answer that. I'm going to be real
3 frank with you. I would say that you run
4 into difficult clients, and what that
5 difficulty may be attributable to, I
6 don't know.

7 Q. Okay. According to what I understand from
8 you -- there's a term that I have heard
9 by psychologists that those in the mental
10 profession use describing the way a lot
11 of people deal with their problems, and
12 the term they use is called masking, that
13 they hide a lot of their deficits behind
14 a show. As you said, John exhibited a
15 lot of street smarts, but not a lot of
16 smarts per se?

17 A. Yes.

18 Q. Do you think that this is something that John
19 does, is he masks his deficits?

20 A. He could very well do that. I mean, let me
21 tell you, ~~John was not a real~~
22 ~~communicative person~~. It was a very rare

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1 occasion -- there was one or two times --
2 I used to go up to the jail at night,
3 because it's quiet, there isn't a hustle
4 hustle. The attorneys' room in the old
5 jail was generally free at night, and I
6 would go up there, and maybe on one of
7 two occasions he opened up with me, but
8 not about this situation. He would talk
9 about other things, you know.

10 Q. But never talk about the crime?

11 A. No, never talk about the crime.

12 Q. Was he someone who was easily distracted, that
13 if there was another sound or something
14 going on it would catch his attention and
15 you would not be able to communicate with
16 him, that he was paying attention to
17 everything except what you were saying?

18 A. I don't know if he needed an external
19 distraction. I mean, he could tune you
20 out like a child can tune out a parent.
21 That's what he reminded me of. You could
22 talk to him and if he didn't want to hear

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1 it, he wasn't going to listen.

2 (OFF THE RECORD)

3 Q. Let me start off with this thought. Prior to
4 your co-representation of John Eley, how
5 many capital Defendants had you
6 represented?

7 A. One.

8 Q. And who would that have been?

9 A. Richard Helms, and he was acquitted of all
10 charges, and at that juncture -- when was
11 Eley's case, about ten years ago?

12 Q. The crime occurred August 26, 1986, but the
13 trial occurred May of '87.

14 A. I think at the time that Mr. Zena asked me to
15 co-counsel on this there maybe were at
16 best a half dozen certified capital
17 defense counsel. That's why I was asked.

18 Q. So, you had one capital case prior to John?

19 A. 1985 was the first capital case I ever tried.

20 Q. And since John's case, how many capital cases
21 have you tried?

22 A. Okay. Let's see. Helms, and Eley, then Bray,

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1 and after Bray there was Meyers. Then,
2 let's see, Duley. I guess after that
3 I've been involved in six more, of which
4 I tried four or five of those. Let's
5 see. Let me run through. There was
6 Richard Helms, then there was John Eley,
7 then there was Ira Bray, then there was
8 James Meyers, then there was Ralph Duley,
9 Steve Vrable, Harris and then Getsy. So,
10 I have been involved in eight total. Of
11 the eight, I think two plead out and six
12 went to trial.

13 Q. Okay. You've had a lot of -- I mean, as we
14 sit here now ten years later, you have
15 had a lot of experience then on capital
16 cases?

17 A. Yes.

18 Q. Can you use those experiences to reflect back
19 on John, and are there things that you
20 might have done differently on John's
21 case?

22 A. Even on cases I have won I can look back and

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1 tell you there's things that I probably
2 would have done differently. I mean,
3 that's just -- you know, at the time when
4 you're confronted in a trial situation
5 you have to make spur of the moment
6 decisions. Hindsight is 20/20. At the
7 time you make the decision. You go with
8 experience, knowledge, your gut reaction,
9 whatever. So, yes, I'm sure I could say
10 that about John's case. I could say that
11 about just about every case.

12 Q. In John's case you had waived his right to a
13 jury trial and had gone before a
14 three-judge panel?

15 A. That's correct.

16 Q. Would you be able to let us know any

17 ~~information you had about what came about~~
18 ~~with this waiver?~~

19 A. I believe at the time -- I remember Zena and I
20 discussed that hard and heavy. For some
21 reason we felt -- and, again, I don't
22 have the benefit of dates and all that.

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1 I believe the waiver occurred after our
2 motion to suppress was overruled. Is
3 that accurate?

4 Q. I'm sorry, I don't have that memory.

5 A. For some reason that sticks in my mind. Now
6 whether or not that's accurate -- but I'm
7 sure that played a very instrumental role
8 in that decision, and based on the nature
9 of the incident at the time we just felt
10 that a three-judge panel, based on the
11 volume of cases and the nature of cases
12 that they would hear, would not be as
13 offended by the type of shooting during
14 this grocery store robbery that a jury
15 would be. It also seemed to me about
16 that time is when we started with an
17 escalation of the local crime rate, and
18 they were already starting with
19 everything from MADD Mothers on up the
20 line. So, there were a lot of
21 neighborhood block watches and all that.
22 So, we were a little sensitive to the

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1 community's reaction to crime, criminals,
2 criminal Defendants. Again, it appeared
3 that at that point the public was not
4 only vocal about their outrage, but
5 critical of the judicial system, things
6 like that. So, that's why we were trying
7 to temper that reaction.

8 Q. Was there a strong reaction from the Arab
9 community directed to John?

10 A. I recall something like that, but I don't
11 recall exactly what it was. It appeared
12 to me that the victim in this matter
13 wasn't even from this area. I think he
14 was from overseas. There were various
15 representatives of the Arab community
16 present in the courtroom, but I don't
17 even know if they were relatives. I
18 think they were like friends or
19 co-workers or whatever. They were
20 present.

21 Q. So, they were making their presence known
22 throughout the trial?

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1 A. Yes. They made their presence known. And
2 this is something you may be able to
3 research. I think also there was a
4 newspaper article where some
5 self-declared leader of the American Arab
6 community locally had some remarks about
7 this type of crime, that they
8 generally -- in this area most of the
9 Arabs run these stores, these convenient
10 type stores, and I think they were
11 subjected to a rash of robberies and
12 shootings and things like that, and I
13 think he was expressing his dismay about
14 this trend. So, I'm pretty sure that
15 occurred. It was either on TV or --
16 because I do recall that too.

17 Q. Well, let's relate that to the three-judge
18 panel then. First, did you have any say
19 in the draw of the judges on the panel?

20 A. I can't recall. I doubt it.

21 Q. And once you found out who your panel was did
22 you have any reaction to that?

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1 A. I'm trying to think. Was it Jenkins --

2 Q. Correct.

3 A. -- was on it? Was McNally on that also?

4 Q. No.

5 A. Who was?

6 MS. CERNI: McNally was Spivey.

7 A. Who was on this? Jenkins, Economus.

8 Q. And Houser.

9 A. Okay. There was a reason why I mistakenly
10 felt pretty comfortable about that panel,
11 okay?

12 Q. Can you let us know?

13 A. Yes. It was my understanding that

14 Judge Economus was opposed to the death
15 penalty. I'll be real frank with you.
16 That had been the common perception.

17 Q. At the time you waived his right to a jury
18 trial and you were going to a panel, had
19 you developed any theory of the case?

20 A. I'm sure we did, but what it was -- I mean, as
21 I recall the basic facts that John
22 related to me is that John actually

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1 reacted to the clerk reaching for a gun,
2 and I remember when we went down to the
3 store -- the store is located up in the
4 Briar Hill section. I remember Zena and
5 I looking underneath that counter and,
6 sure enough, there was a wad of tape up
7 there, which is common for the store
8 owners -- you know, they wrap the tape
9 with the adhesive on the outside, and
10 they would stick it up there. From what
11 John told us, this guy went to reach for
12 a gun. That's why John shot him. I can
13 tell you John didn't go in there planning
14 to kill him. I know that. John went in
15 there planning to rob him.

16 Q. I mean, is this one of those things that you
17 thought -- I mean, might as well,
18 everybody knows we have been talking to
19 you about this. One of the things that
20 you had said is about how John had been
21 so drugged up and drunk up --

22 A. Yes.

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1 Q. -- prior to this time that he was just truly
2 setup for this by Melvin Green?

3 A. And Melvin Green, I think, really used him in
4 the situation, and that's where I became
5 upset with John, because John had the
6 opportunity -- well, first of all, Melvin
7 Green -- we attempted to talk to Melvin.
8 His attorney at the time was
9 Scott Krichbaum. In fact, I sat through
10 Melvin Green's entire trial, and there
11 was a jury waiver on that. That was
12 tried to Judge Bannon. I did that for
13 two purposes; number one, I wanted to get
14 an idea of the State's case and; number
15 two, I was trying to get an opportunity
16 to talk to Melvin Green, and I never did
17 have that opportunity. He just didn't
18 want to talk to us. Because I thought
19 any assistance he could render --
20 because, I mean, there was no doubt
21 Melvin was with him at least at certain
22 portions of that day, even though Melvin

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1 exonerated himself from the actual
2 crime -- he claimed that he never went in
3 the store or whatever, but I mean people
4 had seen them together and all that. I
5 wanted to get some idea of, you know,
6 what John was acting like or whatever,
7 but Melvin wouldn't talk to me.

8 Q. And John wouldn't talk to you about the crime
9 either?

10 A. Yes, John was very closed mouthed about it
11 too. Melvin was a lot smarter than John,
12 I'll tell you that. He was a pretty
13 suave guy.

14 Q. Did you ever hear, know, or investigate, or
15 follow up on any leads that you might
16 have known from the Briar Hill community
17 that Melvin was the actual shooter and
18 John was making a false confession to
19 protect him?

20 A. No, I had never heard that. I had never heard
21 that. I do recall going up there, and I
22 do recall -- there was a pathway through

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1 some wooded area for some reason we went
2 through, and I don't know why we walked
3 that. I went up there with Zena. We
4 walked, and we walked down a hill, and I
5 remember we talked to a woman. There
6 was, I believe, a black woman that we
7 talked to, but specifics escape me at
8 this point.

9 Q. Sure. How did you and Mr. Zena divide up the
10 case on John?

11 A. I don't know. I mean, pretty much however it
12 appears in the transcript is probably the
13 net result of how we had proceeded. I
14 mean, I know that I participated in some
15 of the trial and he did. I mean, I don't
16 know if it was evenly distributed or
17 what. I don't know.

18 Q. How did you prepare for mitigation?

19 A. I remember talking to his mother and I also
20 think we talked to -- was it Doug
21 Darnall? Was Doug Darnall involved in
22 this?

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1 MS. HITE: He was the psychologist.

2 A. Psychologist. Also, there was a medical
3 doctor, and I think is it Dr. Morrison --

4 MS. HITE: Yes.

5 A. -- that we talked to? Because I remember that
6 guy. He's a big weight lifter type guy.
7 I think he testified in the trial, either
8 in the trial or in mitigation. Did
9 Dr. Morrison?

10 MS. HITE: Not that I'm aware of,
11 no. Dr. Darnall did, I believe.

12 A. Darnall did? Morrison for some reason -- I
13 don't know what we utilized him for, but
14 I remember talking to him.

15 Q. Well, you tried to have John cooperate with
16 some mental health officials?

17 A. And he wouldn't. Yes. He wouldn't. I think
18 we tried that on more than one occasion.

19 Q. Correct.

20 A. And I think it got to the point where John was
21 becoming offended because we were
22 pursuing that, you know, and he was

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1 becoming offended, and the court was
2 becoming perturbed because we weren't
3 succeeding with this. So, I mean, it's
4 like you keep trying and trying, but your
5 client won't cooperate. I mean, so we
6 were like in a Catch-22 situation.

7 Q. Okay. When did you start your mitigation
8 preparation?

9 A. I couldn't tell you. I mean, I'm sure in that
10 case it was pretty much from the
11 beginning, because with the confession
12 and -- you know, it just didn't appear to
13 be a real optimistically triable case as
14 far as a favorable result. I know we
15 proceeded to try it. In that type of
16 situation you're always looking for a
17 conviction on lesser included and avoid
18 the entire mitigation proceeding, but as
19 far as when I commenced preparation --
20 keep in mind ~~this was the first capital~~
21 ~~case I had go to mitigation~~ so, I was
22 ~~scrambling around trying to find out~~

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1 ~~because at that point mitigation was~~
2 ~~relatively new in that there weren't very~~
3 ~~many attorneys that were experienced in~~
4 ~~it.~~

5 Q. So, this is something that you think as soon
6 as you got on the case you started
7 preparing for the mitigation phase?

8 A. I'm sure that it was -- ~~I can't tell you~~
9 ~~exactly when I started mitigation, but it~~
10 ~~seems to me that it was definitely before~~
11 ~~we started the trial, the actual trial.~~
12 So, I'm pretty sure of that.

13 Q. Can you recall what your theory of mitigation
14 was?

15 A. No, no, but it seems to me, though, something
16 about his drug inducement, and I believe
17 John also had an alcohol abuse problem.
18 I know that those were factors that we
19 looked into, possibly with Dr. Morrison.

20 Q. Okay. Going back to his jury waiver, you've
21 kind of indicated that you've got a
22 client here that is fighting the doctors

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1 who are trying to do some evaluations on
2 him; you don't believe that he
3 understands some of these things. What
4 exactly -- not exactly, but ~~what do you~~
5 ~~think John understood about his jury~~
6 ~~verdict?~~

7 A. I don't know what he understood. I think that
8 we -- ~~I don't know what he understood.~~ I
9 honestly -- again, I'm trying to recall
10 specifically even how we presented it to
11 him or where, and I don't recall. I
12 don't think it was concluded in one
13 conversation with John. I think it was a
14 couple conversations. You know, there's
15 something else, too, and I have to verify
16 this with Zena. At one point -- I don't
17 know, maybe you better ask John. His
18 recollection may be better than mine. I
19 think at one point we argued with him
20 that -- he wanted to plead guilty and
21 proceed to mitigation, and we were trying
22 not to -- you better check that out,

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1 because again my cases, my memory is
2 blending together now.

3 Q. You've had so many capital cases that they all
4 blend?

5 A. Yes.

6 Q. Regarding the plea offer that you had, I know
7 you've indicated you don't remember the
8 exact specifics on that.

9 A. But I know the death spec was out and he had
10 to testify against Melvin Green.

11 Q. Do you know if other people that might have
12 talked to John about taking the plea
13 bargain?

14 A. I believe his mother did. I'm pretty sure we
15 had his mother talk to him, yes.

16 Q. Okay. Do you know if the prosecuting
17 attorney, VanBrocklin, ever had a chance
18 to talk to John about it?

19 A. I can't recall specifically if he did or
20 didn't.

21 Q. Do you recall if any of the police officers
22 might have talked to John about it?

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1 A. I think, but I'm not sure. I think maybe
2 Fajack may have spoken to him in my
3 presence during one of the hearings, one
4 of the rooms. I'm almost sure that
5 Fajack -- yes, I recall vaguely some
6 conversation where we sat around and
7 Fajack was talking to John, because
8 Fajack had known John from prior events.
9 John Eley and Joe Fajack were not
10 strangers. I knew that. In fact Fajack,
11 I think, liked John Eley, you know, and
12 they got along pretty well. Fajack just
13 realized that John got himself in a
14 little more serious situation than he
15 generally was getting into. Joe wasn't a
16 real aggressive prosecutorial witness in
17 that particular case.

18 Q. Was it a general feeling of the two
19 Defendants, Melvin and John, that Melvin
20 was far more culpable than John?

21 MS. CERNI: Objection. Go ahead.

22 A. Culpable in what sense? I mean, that Melvin

1 was the master mind?

2 Q. Yes.

3 A. See, it's always been my understanding -- and
4 this is strictly from what John had told
5 me -- that Melvin never entered the
6 store. Melvin was sort of like the look
7 out, stayed outside. However, I think
8 that Melvin Green is the one that schemed
9 this and that he's also the one that made
10 sure that John consummated the robbery
11 aspect of it. Melvin, as I stated, I
12 think he was a lot more intelligent than
13 John was.

14 Q. Okay. ~~Do you remember how many times you~~
15 ~~spoke with the family members preparing~~
16 ~~them for mitigation?~~

17 A. No. I couldn't tell you. I vaguely I
18 remember going to John's mother's house.
19 I also remember meeting with them in
20 Zena's office, which used to be located
21 in this building. ~~I couldn't tell you~~
22 ~~how many times.~~

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1 Q. Did you have any mitigation expert assist you
2 in this case?

3 A. No, not that I recall.

4 Q. Do you remember or recall any records you
5 might have attempted to collect?

6 A. Yes. I do know we tried to get records, but
7 what they were -- again, ~~Doug Baccala~~, I
8 think, ~~gave us some direction on what~~
9 ~~type of records to seek or what he~~
10 ~~needed~~, whatever.

11 Q. Do you recall any instances where John had any
12 head traumas or head injuries?

13 A. I can't recall right now. He may have told me
14 about something then. I don't know. It
15 seemed to me -- was John in the service?

16 Q. No.

17 A. Or was he in the peace corps or job corps?

18 Q. Job corps. He was in the job corps.

19 A. ~~I remember trying to get some records off the~~
20 job corps, something along that nature.

21 (OFF THE RECORD)

22 Q. If I could, I would like to follow up on a

1 couple of different things that you had
2 said earlier.

3 A. Sure.

4 Q. Number one, I know we didn't put it on the
5 record, but when were you licensed as an
6 attorney?

7 A. November 19, 1976.

8 Q. Do you recall when you were first Rule 65
9 certified?

10 A. I can tell you one thing. I tried my first
11 capital murder case before I was Rule 65
12 certified. I do know that, because
13 somehow I was mistakenly appointed to a
14 case, because for some reason they
15 thought I was certified and I wasn't, and
16 the other counsel wasn't. We tried the
17 case and the Defendant was acquitted, and
18 then we found out that neither of us were
19 certified, thinking that we both were,
20 and then I found out that there was some
21 sort of certification process you had to
22 go through.

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1 Q. How many criminal trials had you had before
2 Eley, if that's --

3 A. Before Eley?

4 Q. Yes.

5 A. I was designated a special prosecutor in a
6 criminal unit from 1978 to 1980, '81.
7 During that two and a half years of
8 prosecuting I think I tried 37 jury
9 trials. As far as defense counsel, I
10 couldn't tell you. I mean, I have tried
11 a few cases.

12 Q. Well, could you give me some more of your
13 history and background as an attorney?

14 A. I was sworn in 1976, was in private practice
15 from 1976 to about 1978. I was appointed
16 to this criminal unit, which at the time
17 they were pretty common throughout the
18 country. Summit County, I know, had one.
19 We had bi-County jurisdiction with
20 Trumbull, Mahoning Counties. We dealt
21 with repeat felon offenders and we were
22 funded by the LEAA out of Washington, Law

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1 Enforcement Assistant Administration. We
2 were prohibited in the terms of our grant
3 from plea bargaining. So, you either
4 plead as charged by the indictment or
5 proceeded to trial. Thus, we tried a lot
6 of cases.

7 Q. So, you were there from '78 to '81 you say?

8 A. During the entire term of the grant, and then
9 at the conclusion of the grant the office
10 was dissipated. Wyatt McKay, who is one
11 of the staff attorneys, went to the
12 Trumbull County Prosecutor's office.
13 John Dixon and myself were the Mahoning
14 County attorneys on that, and I believe
15 both of us left, went into private
16 practice. Quite frankly, the prosecutor
17 at the time, Vince Gilmartin, offered me
18 a job in the civil division. I said,
19 "No, thank you." During those two years
20 I had become married, bought a house and
21 had a baby. So, I had to get out and
22 make a living. The days of living on

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1 minimum salaries were over.

2 Q. You had indicated earlier regarding the waiver
3 that it was only after that you had the
4 waiver that you found out that Economus
5 was on your panel?

6 A. I think. See, I'm very -- that, I'm very hazy
7 about. I'm very hazy about that. I know
8 that we don't get to choose who our
9 panels are, because if we would have, the
10 panel composition would have been totally
11 different than what it was, I can tell
12 you that.

13 Q. Well, let's go into that then.

14 A. Really. I mean, there are judges that -- I
15 mean, it's no secret that there are
16 judges that we feel are more liberal than
17 other judges, and I just felt that I knew
18 that -- this case was assigned to -- was
19 this Jenkins?

20 Q. Yes, it was.

21 A. Well, Eldon Jenkins was a very strict, very
22 strict guy. However, the thing I knew

1 about Eldon Jenkins, he always followed
2 the prosecutor's recommendations,
3 particularly in plea bargains. So, I
4 felt comfortable with that. And
5 Alan Jenkins -- I had tried a lot of
6 cases in his court, both as a prosecutor
7 and as a defense counsel. So, I felt
8 comfortable about him. Judge Houser at
9 that time, I think, maybe would have been
10 maybe one of the newer members of the
11 bench and I didn't -- you know,
12 Judge Houser I didn't know how to read.
13 I bet you he wasn't on the bench a year
14 at that point, and I'm sure this was
15 probably his first capital case. Judge
16 Economus -- again, it was my
17 understanding that he had some
18 difficulties with the death penalty. I
19 know that he presided over the first
20 death penalty case here in Mahoning
21 County, and in that case the facts were
22 much more hostile than these. It was a

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1 woman that was alleged and convicted of
2 having burned her two children.

3 Q. Rosalie Grant?

4 A. Yes, and I know when I sat at his sentencing
5 when he affirmed the recommendation of
6 the jury, you could see -- I could see
7 visibly he was very upset about having to
8 do that. Pete Economus also had tried
9 some defense cases too. I know that.

10 Q. You had said earlier something about the court
11 was venting their frustration on you
12 because of some of Eley's actions?

13 A. Well, we would file these motions to get funds
14 approved for this or that, which the
15 court would do, and then John wouldn't
16 cooperate with us. It's like after a
17 while the court would say, "Well, why are
18 you filing this motion when your client
19 won't do it?" They'll permit it, they'll
20 authorize it, but John wasn't following
21 through. So, I mean, we weren't being
22 chastised or screamed at or whatever, but

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1 the court was like, "What's going on?
2 You want this expert, but your client
3 will go up there and won't talk to him."
4 I think specifically with Darnall there
5 was more than one occasion when he just
6 wouldn't talk to Doug Darnall, and it was
7 getting frustrating, and I think
8 Mr. Darnall was getting a little
9 frustrated with it, because obviously
10 he's got a schedule to attend to.

11 Q. Did this trigger or indicate more and more to
12 you that you had a client that had some
13 problems, or was it something that with
14 the court's frustration, with John Eley's
15 obstinacy that you didn't know which way
16 to go?

17 A. ~~I wouldn't pinpoint~~, you know, ~~the origin of~~
18 ~~his non-cooperative attitude.~~ There were
19 times I thought he was afraid of Melvin
20 Green. ~~There were times I thought he was~~
21 ~~a religious nut,~~ because he was very big
22 in the religion. In fact, at his unsworn

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1 statement in mitigation he spewed forth
2 some "Biblicalization" that I never
3 understood. ~~sometimes John was just~~
4 ~~obstinate, and sometimes John just was~~
5 ~~very candid and said, "Hey, I did it, I'm~~
6 ~~going to pay the price."~~

7 Q. Was this one of those things that you think
8 John was trying to just get it over with?

9 A. At times I had that impression.

10 Q. Because you had said that John wanted to plead
11 guilty?

12 A. Yes. I'm pretty sure John somewhere along the
13 line wanted to know why we were going
14 through the rigors of a trial.

15 Q. ~~Did he understand that he was going to get~~
16 ~~death?~~

17 A. ~~I don't think we could have made it much~~
18 ~~clearer or explained it more definitely~~
19 ~~than what we had attempted to do.~~

20 Q. But he didn't think he was going to get death
21 for some reason?

22 A. I don't know what he thought. I mean, we

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1 tried to tell him what the options were,
2 you know. Whether or not he comprehended
3 them -- it's hard to say what another
4 person is thinking or understands.

5 Q. I mean, you say that -- of course, the record
6 reflects what he said at trial --

7 A. Uh huh.

8 Q. -- of course, and the mitigation hearing with
9 his religious thoughts and things. Did
10 you come up with different conversations
11 with him where he would revert back to
12 religious thoughts and ideas?

13 A. Yes, particularly when we were talking about
14 the plea bargain.

15 Q. What did he say?

16 A. Something about not bearing witness, couldn't
17 bear witness against his neighbor or
18 something like that.

19 Q. Were there other religious statements that
20 were common theme?

21 A. Yes.

22 Q. What were they?

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1 A. I'll be real frank with you. Even though I
2 went to Catholic school, I'm not very
3 well versed in the Bible to have those
4 references in my memory. He said things,
5 and I wouldn't recognize them or
6 whatever, and I knew that they were of a
7 Biblical origin, but I just wouldn't
8 memorize them.

9 Q. Would they come up like hodgepodge things he
10 was putting together?

11 A. Many times, and also he belonged to a church
12 that I never could find; I attempted to
13 find. He said there was this church.

14 Q. Church of his own mind?

15 A. No, a church up in Warren. I was looking for
16 a specific reverend and everything. I
17 went up there and questioned people and
18 all that. He could never give me the
19 location of this church. I was always
20 stopping at gas stations and things and
21 asking people if they heard of this
22 church. It wasn't in the directory. It

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1 wasn't in the phonebook, and I just tried
2 to track it down as well as the reverend.
3 I was unsuccessful.

4 Q. But this was a common theme with John, that he
5 would make various statements that
6 sounded like they had an origin --

7 A. Of religion.

8 Q. -- of religion?

9 A. Yes.

10 Q. But they weren't things that you recognized?

11 A. Yes.. I mean, they weren't -- ~~a lot of them~~
12 ~~were't things that I recognized,~~ you
13 know. I mean, like again ~~his comments~~
14 ~~and his statement at mitigation,~~ I'm sure
15 ~~he even stated that these are quoted from~~
16 ~~the Bible,~~ but I didn't understand one
17 ~~word he said and I don't think anybody~~
18 ~~...~~

19 Q. Let's go back to the plea bargain. You
20 indicated earlier that in the course of
21 discussing the plea bargain with John
22 that you kind of had an almost physical

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1 confrontation with him?

2 A. ~~He just told us that he was refusing to~~
3 ~~testify against Melvin Green, even if it~~
4 ~~would save his life,~~ and what perturbed
5 me is, you know, that was at a point when
6 Melvin's case had just commenced and I
7 told John, I said, "John, I have
8 attempted to talk to Melvin Green to see
9 if he would assist us, and the guy
10 wouldn't give me the time of day,
11 wouldn't give you the time of day. So,
12 why are you protecting somebody that
13 wouldn't help you?" And John was just
14 very adamant. He was not going to
15 testify against Melvin Green or anybody
16 else.

17 Q. Did you think about subpoenaing Melvin to
18 testify at John's case?

19 A. Melvin Green, the day he was acquitted,
20 vacated this jurisdiction so quick you
21 wouldn't believe. We went looking for
22 him. And I tell you he popped up a few

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1 weeks probably after Eley's case. I
2 think he got involved in a situation up
3 around Farrell, Pennsylvania. That was
4 the next time I was able to track him
5 down. He completely -- he just blew the
6 town. He blew town, because he knew that
7 I was going to try and snatch him.

8 Q. Well, you sat through Melvin's trial. Were
9 there things that you learned in Melvin's
10 trial?

11 A. Oh, yes, a lot. I mean, I got to, if nothing
12 else, observe the various witnesses, many
13 of whom were the same witnesses in John's
14 case, and got to see -- I'm trying to
15 think who prosecuted that case. I think
16 it was Ted Macejko, the prosecutor. It
17 was about a five or six day trial, and I
18 sat through it all, took notes.

19 Q. And it was Judge O'Bannon?

20 A. Judge Bannon.

21 Q. Okay. And was this a jury trial --

22 A. No.

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1 Q. -- or trial to the court?

2 A. Trial to the court.

3 Q. And not a three-judge panel?

4 A. Not a three-judge panel, because he was not
5 charged with the death spec. He had not
6 confessed. It was John Eley who had
7 confessed, and that's who they put the
8 death spec on. See, John confessed to
9 being the shooter, and I think -- and,
10 again, I haven't read John's confession
11 in years. I think maybe even John
12 exonerated Melvin to the extent of never
13 putting him in the store. You know, John
14 took full blame and responsibility for
15 the incident within the store.

16 Q. Could you tell me a little bit more, knowing
17 that you've got this confession, how that
18 related to going before a three-judge
19 panel versus going before a jury?

20 A. Well, John, number one, had been cooperative
21 with the police and also was pretty
22 confident, at least with Fajack, that

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1 Fajack if he were to testify -- and maybe
2 Joe did testify under mitigation phase.

3 I'm not sure. Did he?

4 Q. I believe he did, yes.

5 A. I think I remember Joe was pretty

6 non-adversarial with us in that
7 situation. I mean, Joe was -- if you
8 could read between the lines in Joe's
9 testimony, it was, "I don't think he's a
10 candidate either for the death penalty."

11 Q. And you say that Fajack knew Eley?

12 A. Yes. I know that for a fact, that they were
13 acquainted with one another, because
14 Fajack was an old-time type policeman.
15 He wasn't old. He was older in age, but
16 he was also an old-time cop. He had a
17 lot of street contacts. I got to develop
18 a relationship with Joe when I was a
19 prosecutor. I mean, Joe had snitches,
20 informants, everything. He knew who was
21 with who and whatever, and Joe had had
22 prior dealings with Eley, and he liked

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1 John.

2 Q. Did he say anything to you about the
3 confession that John gave him?

4 A. I think that Joe -- one thing I can say about
5 Joe, Joe always impressed me as being an
6 honest cop. His word was always good and
7 he would tell you when a pinch was good
8 or bad. He expressed to me and Zena, we
9 were present together, that he thought
10 the confession was a good one, you know,
11 that he had followed the rules, dotted
12 the I's and crossed the T's, and that
13 John was unfortunately very cooperative.

14 Q. Did he say anything? I mean, you had
15 presented during the motion to suppress
16 that John was completely out of it with
17 drugs and alcohol?

18 A. Did who say anything?

19 Q. Did you talk to Fajack about whether he really
20 thought that John Eley knew what was
21 going on?

22 A. I'm sure I talked to him. I can't

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1 specifically recall it, but I'm sure I
2 did.

3 Q. And you also --

4 A. In fact, I have never seen a transcript of
5 that suppression hearing. Was there a
6 line of questioning along that way? I
7 would presume there was.

8 Q. A lot of the questioning related to
9 John Eley's intoxication.

10 A. Uh huh.

11 Q. And that comes up to another thing. During
12 the trial neither you nor Mr. Zena made
13 an opening statement or presented any
14 witnesses. So, therefore, the record was
15 really non-existent as far as any
16 information or evidence as to John Eley's
17 intoxication and the pills and things
18 that he had taken prior to the crime.

19 A. Was that at the trial phase or mitigation?

20 Q. The trial phase and neither the mitigation
21 presents any evidence as to his
22 intoxication. I mean, I know from my

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1 record in going through it then that the
2 record is completely non-existent as far
3 as John being completely out of it at the
4 time of the crime with drugs and the
5 alcohol. He had taken on a one-week
6 binge?

7 A. I thought that we had put that in. Again, I
8 haven't reviewed the transcript ever, so
9 I don't know. I mean, I'm sure -- well,
10 I'm not sure of anything at this point.

11 Q. Right. I realize I'm asking you to go back
12 ten years and I have read the transcript
13 a little bit. But maybe just to build up
14 the record right now, do you recall what
15 John might have told you about his
16 intoxication or the amount of drugs that
17 he had done prior to the crime and prior
18 to his statement?

19 A. I think John indicated to us or to me that,
20 you know, this incident occurred during a
21 period of drug and alcohol intoxication.
22 I mean, he had imbibed prior to, during

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1 and after, because it seems to me they
2 didn't even apprehend John for a few days
3 after this incident.

4 Q. Correct.

5 A. And he got real far. He went from the north
6 side to the south side. He thought that
7 he had run away or something.

8 Q. Can you let us also know for the record ~~why~~
9 ~~did you ask for the competency~~
10 ~~evaluation?~~

11 A. I think with John there was something that
12 triggered, at least in our minds, the
13 necessity of having it done. What it
14 was, again I can't recall after this many
15 years, but I'm sure ~~maybe it's because of~~
16 ~~his ingestion of drugs and alcohol or~~
17 ~~maybe his dull capabilities or whatever?~~
18 but there was something --

19 Q. Or his babbling of abstract religious ideas?

20 A. Yes. There was something there that we felt
21 mandated that something be -- ~~if nothing~~
22 ~~else, just to satisfy our own curiosities~~

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1 because, like I said, ~~he was a rather~~
2 ~~difficult client to work with at times.~~

3 Q. Speaking of difficult, how was your working
4 relationship with Mr. Zena? Had you
5 worked with him before, since, after?
6 Will you work with him again?

7 A. I should have had him analyzed along the
8 way -- no. Tom and I have become good
9 friends. That was probably the first
10 case I ever worked with Tom, and since
11 then Tom and I have become good friends,
12 and Tom and I have been -- we were
13 co-counsel on a case as recently as this
14 Summer, that Harris case, and Tom and I
15 have also been involved representing
16 co-Defendants in capital murder cases.
17 Right now he's going to trial on one in
18 Trumbull County where I just went to
19 trial, had the co-Defendant. There was
20 one in 1990. I tried the James Meyers
21 case. He had Franklin. I can't recall
22 Franklin. He was a co-Defendant. We

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1 went to trial on both of those. Those
2 were both separate capital murder cases.
3 We've had a lot of interconnection, and
4 also there's a murder case I'm on now
5 where he represents the co-Defendant. I
6 mean, there's a lot of interaction. But,
7 again, keep in mind, too, that the number
8 of defense counsel that try criminal
9 cases -- not only court appointed, but
10 even retained, because I do a fair amount
11 of retained cases -- is pretty limited
12 anymore. A lot of attorneys just don't
13 do them anymore.

14 Q. What's the court system up here? Are they
15 normally pretty tight with money for
16 funds for experts, for mitigation
17 experts?

18 A. It depends from judge to judge, County to
19 County. I mean, I just had an experience
20 with a Trumbull County court where I
21 tried a capital murder case for six
22 weeks. I put in a motion for

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1 extraordinary fees; it was denied, and
2 also all of my experts were cut
3 significantly, their bills.

4 Q. Makes it rather hard to practice when you
5 don't have --

6 A. Well, it's making it virtually impossible to
7 practice.

8 Q. And relating that now back to John, is it --

9 A. I don't think we had a problem there. One
10 thing I will always say -- and I
11 respected Judge Jenkins for this. I
12 think if you'll look through the record,
13 I don't recall of any instance where he
14 denied any of our motions for like
15 appointment of an investigator or
16 appointment of this.

17 Q. Even though he was frustrated with the way
18 your client was acting?

19 A. Well, he was frustrated in that he would grant
20 these things -- we would ask them, he
21 would grant them, and then we couldn't do
22 anything with them. You know, John

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1 wouldn't cooperate with Darnall or he
2 wouldn't do this or do that. I've been
3 through that subsequent to John's case,
4 and it is frustrating.

5 Q. Yes. I mean, working with difficult clients
6 really is.

7 A. Yes.

8 Q. One last question, as far as I'm concerned.
9 Since John's trial -- and you've handled
10 eight others -- ~~have you ever used~~
11 ~~mitigation experts to assist you in~~
12 ~~capital trial since John's case?~~

13 A. ~~Yes.~~ I used the one I just tried in Warren,
14 Dr. Eisenberg and, you know,
15 unfortunately that case was unsuccessful.
16 One thing I'll say about Dr. Eisenberg
17 from up front is I think he was very
18 realistic about his approach to the
19 situation. I mean, he kept me apprised
20 of his opinion. Yes, I used Eisenberg
21 there. I tried to use Dr. Darnall with
22 Steve Vrable, but Steve Vrable ultimately

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1 fired me after the trial, and I had to
2 sit there through mitigation and not say
3 anything, and Steve literally cast aside
4 everything that we had had Dr. Darnall
5 do. We did have Darnall testify for us
6 in the trial, though. Over Steve's
7 objection, we tried to inject some sort
8 of insanity defense, but we used Darnall
9 there. I'm sure that in other cases --
10 see, ~~I have only had three go to~~
11 ~~mitigation, and you run into situations~~
12 ~~where a lot of times the courts commonly~~
13 ~~won't provide you the funds until~~
14 ~~somebody is convicted.~~ In fact, Zena is
15 having a big problem up in Trumbull
16 County right now. I'm supposed to
17 testify on their behalf next week on
18 that. At that juncture you're confronted
19 with the problem where you can't get a
20 mitigation expert. They want to get in
21 at ground zero right when the case
22 commences, and they want the time to

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1 conduct whatever they have to conduct.
2 And then there's another thing too.
3 There's always financial concerns with
4 these Counties.

5 Q. Well, I mean, you have attended some of the
6 death penalty seminars?

7 A. Oh, yes.

8 Q. So, you know that the theory is that once they
9 are capitally indicted you begin at that
10 point preparing for mitigation?

11 A. That's correct. In fact, I just arraigned
12 somebody on a capital indictment Tuesday
13 and I told my second chair -- I met with
14 him yesterday and told him to contact so
15 and so. However, we are running into the
16 problem there where we just lost our
17 piggy back sales tax here, and I don't
18 know what finances are going to be
19 available.

20 Q. And it makes it really frustrating --

21 A. Yes, it does.

22 Q. -- to try a case when you don't have the funds

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1 for the experts that you know you need?

2 A. Exactly.

3 Q. This is a question in hindsight, I realize,
4 but ~~if you had the time now would you~~
5 ~~have hired a mitigation expert to assist~~
6 ~~you on John's case?~~

7 A. Yes, I probably would have. I probably would
8 have, if nothing else to have acted --
9 you know, mitigation experts have a knack
10 to become closer with the client. I
11 guess because they're not the bearers of
12 bad news. We're the ones that always
13 have to go over and say, "Well, you've
14 been indicted on this and here is your
15 plea offer. It's not great, but it's" --
16 you know. I think mitigation experts,
17 they get to sit down and talk to clients
18 more informally, talk to them about
19 families and history and good times and
20 bad times. So, I think the mitigation
21 experts that I have had in the past
22 cases, they've been good bridges between

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1 the attorney and the client. And, if
2 nothing else, maybe a mitigation expert
3 could have assisted us in opening up
4 John's mind, getting him to be a little
5 more receptive to things, because John
6 wasn't receptive to what we were talking
7 to him about.

8 Q. And you didn't really have the time to spend
9 with him to develop that rapport?

10 A. Well, a lot of times your time is spent in
11 preparing a lawsuit, trying the case and,
12 yes, they probably have more time, more
13 opportunity.

14 MR. MEYERS: Can I ask a few, do you
15 mind?

16 (OFF THE RECORD)

17 DIRECT EXAMINATION BY MR. MEYERS:

18 Q. Are you going up for Zena to play that role of
19 the witness talking into the record about
20 the importance of preparing mitigation
21 from up front?

22 A. Yes. They have asked me to testify. It's the

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1 20th.

2 Q. That's what we're preaching now for this

3 obvious reason that you and Tom are --

4 A. I'll tell you another thing, too, that we're

5 running into. There's not very many

6 mitigation experts out there.

7 Q. Not in private. There are very few that are

8 not connected to a public defender's

9 office.

10 A. Yes.

11 Q. I think early on to Cindy you mentioned that

12 back in the '87 era, which was pretty

13 much on the heels of Rule 65 anyway, and

14 I know the State PD at that time had been

15 doing seminars that then got sanctified

16 for that certification, but you remarked

17 that historically, if you will, there

18 weren't a lot of folks that had to face

19 the fire of mitigation from the lawyer's

20 chair. There had been some, but not near

21 as many as now. Had you and Tom prepped

22 up your mitigation from the jump, or is

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1 that something where you get your money
2 for Darnall after the verdict at trial?

3 A. I can't recall. ~~I know for a fact we talked~~
4 ~~to Darnall before we went to trial?~~ So,
5 I mean, we obviously had something in
6 mind.

7 Q. Was that in the mode of mitigation, or was he
8 the competency evaluator?

9 A. I think probably for both. You know, Darnall
10 has done some mitigation. He may not be
11 a recognized acknowledged expert in that
12 area, but he's pretty accommodating.

13 Q. It sounds to me like ~~through the course of~~
14 ~~your work for Eley that that pattern of~~
15 ~~at best stubborn and at worst just not~~
16 ~~comprehending never changed and, indeed,~~
17 ~~it might have escalated?~~

18 A. ~~I think it escalated.~~ I really do.

19 Q. I mean, I have had my share of battles with
20 clients. It sounds like you had a few
21 hard ones with John.

22 A. Yes. John was probably the second most

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1 difficult client I ever dealt with.

2 Q. Do you think he processed? I mean, do you
3 think what you said was sinking in, or
4 was it that very doubt that led you to
5 even request the competency?

6 A. Yes. I couldn't tell you what was going on.
7 I mean, ~~I didn't know if he was listening~~
8 ~~and not hearing or understanding or what.~~
9 I mean, a lot of times when you would sit
10 there and talk to him, he wouldn't
11 respond. He wouldn't show any
12 ~~expression.~~ I mean, you would get the
13 same result if you talked to a wall.

14 Q. Would you ever force him to parrot back just
15 to make sure that --

16 A. Yes.

17 Q. Would he do that, or is that again the
18 stubborn child image?

19 A. I mean, there was some bantering that went on.
20 He and I bantered.

21 Q. You mentioned at one point that John
22 apparently was looking towards -- he

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1 didn't know why you were going through
2 the rigors of trial was the phrase that
3 stuck.

4 A. Yes. I'm pretty sure that was the case, where
5 at one point he expressed to us he didn't
6 know why we were trying the case.

7 Q. I think you said to Cindy that he at one point
8 wanted to plead guilty and wanted just to
9 go to mitigation?

10 A. I think he wanted to plead guilty and just go
11 right to -- answer for his sins.

12 Q. ~~What did you and Tom hope to gain through the~~
13 ~~trial?~~

14 A. ~~Possibly a lesser included.~~ Here is the
15 thing. I have tried eight of them. I
16 have gotten a couple outright acquittals,
17 and two or three have come back on lesser
18 included. There's always the possibility
19 of -- not appellate, but somewhere along
20 the line the prosecutor may not prove all
21 the elements. I mean, I'm a firm
22 believer -- and this will probably get me

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1 in trouble, but I don't care. I don't
2 have much faith in the appellate process.
3 I think that you should win it at the
4 trial or try to win it. You know, this
5 regimen of making a record, it sounds
6 good, but I would like to know what
7 percentage of cases, and particularly
8 capital murder cases, are overruled and
9 sent back. I'm a firm -- I have had some
10 unique verdicts. I have had some unique
11 verdicts and some favorable verdicts, and
12 I think if you give it your gusto at the
13 trial you would be surprised what may
14 happen.

15 Q. I tend to agree with that 110 percent. Was
16 your first an acquittal, the first one
17 you tried was an acquittal?

18 A. An acquittal.

19 Q. To a jury or panel?

20 A. That was to a jury. Second one was Eley.

21 Q. In this case it would seem from the confession
22 that he pretty much fessed up to the

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1 elements of the offense?

2 A. There was no doubt about that.

3 Q. He dotted the I's and crossed the T's?

4 A. Yes, or the police did for him.

5 Q. Yes, one or the other. We have talked to the
6 good Joe Fajack already today. Some
7 thoughtful prosecutor finally bought them
8 video, because no one thought about
9 getting them tape recorders in the old
10 days.. Anyhow, he confessed?

11 A. Yes.

12 Q. And if you look at the writing on the sheet
13 and know it's coming into the case, know
14 it's coming into the fact finder, it has
15 there on its face staring at you the
16 elements of the offense?

17 A. Uh huh.

18 Q. Holding that this way, then, let's put over
19 here the fact that, as you've said -- and
20 many of us have been fortunate to pull
21 some teeth out of juries before, get
22 quasi verdicts. Let me ask you this.

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1 Did you think there was actually a
2 factual lesser in this fact pattern
3 legally? In other words, if you had gone
4 to a jury, could you have won the fight
5 to get a lesser included with that
6 confession in there?

7 A. To a jury, no. This is my experience, whether
8 it be right or wrong. I think that
9 judges as triers of facts are a little
10 more liberal in the application and/or
11 interpretation of the elements than
12 jurors are.

13 Q. But when you know generally and, in effect,
14 specifically for Eley that you've got a
15 confession that hands the State on a
16 platter their case, the State in turn has
17 handed you a deal that your client won't
18 take and now you're going to trial with
19 no real legal, factual wiggle room for a
20 genuine lesser, why not throw that to a
21 panel and hope for one out of twelve
22 instead of three, where it sounds like a

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1 couple of them at any rate were pretty
2 strict guys?

3 A. Well, you know ~~at the time it was a judgment~~
4 ~~stage.~~

5 Q. Based on what? What would you gain?

6 A. I was probably -- to the best of my
7 recollection, ~~I was hoping that the~~
8 ~~judges would be more lenient in a~~
9 ~~situation like this, which was not the~~
10 ~~most heinous of crimes that they have~~
11 ~~ever sat on,~~ as opposed to a jury, where
12 chances are it was the first time they
13 ever sat on a --

14 Q. So, leniency with the focus falling onto the
15 ~~mitigation stage?~~

16 A. ~~That's correct.~~

17 Q. Not the trial stage?

18 A. ~~That's correct.~~

19 Q. Then why not fall on the sword at trial, why
20 not give it up at trial, especially if
21 John was thinking that way already?

22 A. Again --

SIMONI COURT REPORTING

1 Q. Hope of mercy, "Make it easy, Your Honors."

2 Try that case?

3 A. In a situation like that, I think, without
4 specifically being able to recall I
5 probably was of the opinion that maybe
6 the more the judges knew about this case
7 the more it may benefit us in that there
8 was some favorable facts that would come
9 out -- you know, John was drunk, he was
10 high, he was being led around by this
11 street snake. John certainly didn't flee
12 to central America. I mean, he went from
13 one side of town to the other. When he
14 was picked up, he was cooperative with
15 the police. He confessed.

16 Q. If you had fallen, hypothetically, knowing
17 about the hindsight piercing vision, but
18 if you had fallen on the trial sword,
19 would you not have gained more control
20 over telling that tale as you saw fit at
21 mitigation?

22 A. I don't know.

SIMONI COURT REPORTING

1 Q. You guys did bring Fajack on?

2 A. Yes.

3 Q. In other words, if you forced the State to go
4 through its picking the cherries off the
5 cherry tree, you have no control at that
6 trial phase and you really have no ground
7 to gain and the leniency variable falls
8 over here at mitigation. You know you're
9 going to get there.

10 A. Well, there's always the hope that you're not.

11 Q. How did you guys deal with this with John?

12 All this, what you and I have just done
13 as a couple of trial lawyers, is tap
14 topics that we understand. We're very
15 conversed. How the hell did you talk to
16 John about this stuff?

17 A. ~~With John you had to be very primary. You had~~
18 ~~to be very primary in your language.~~
19 I'll tell you another thing too. With
20 John, as I recall, for some reason ~~I~~
21 ~~would address John as I would one of my~~
22 ~~children -- you know, I mean slow, use~~

SIMONI COURT REPORTING

1

~~very basic terms.~~

2

MS. YOST: One syllable words?

3

THE WITNESS: Yes.

4

A. I mean, there was no way you could use -- like

5

I'm sure the term venue or jurisdiction

6

would knock him for a loop. I mean, for

7

sure you would lose him in a

8

conversation.

9

Q. The legal construct is enough to make folks

10

even conversant with this stuff fairly

11

dizzy at times --

12

A. That's correct.

13

Q. -- who bears what burden by what degree in the

14

mitigation and all those kind of weird

15

interplays of preponderance beyond a

16

reasonable doubt. ~~Did John fight you~~

17

~~folks on the jury waiver in any way~~

18

~~parallel to the battles he put up on the~~

19

~~plea bargain discussions?~~

20

A. ~~I don't think so. No, I don't think so at~~

21

~~all.~~

22

Q. Once you guys drew your panel, which pulled

SIMONI COURT REPORTING

1 in --

2 A. See, I don't know when we drew that panel. I
3 wish I knew when. I don't recall.

4 Q. You mean when at least vis-à-vis the ruling on
5 the suppression?

6 A. Well, I'm sure it was after the ruling on the
7 suppression hearing, but I don't know if
8 it was before or after we waived the
9 jury.

10 Q. That you knew who the panel would be?

11 A. Yes, that we knew who the panel was.

12 Q. My whole turf is Franklin County. We used to
13 be able to play that game. We used to be
14 able to get the assignment commissioner
15 to pull our panel before we entered the
16 waiver. That, to some extent, has been
17 yanked now and discontinued.

18 A. Yes. See, that, I --

19 Q. Did you guys play it up here that way? I
20 mean, could you have known the panel
21 before you tendered the waiver?

22 A. We could have, but I don't know if we did.

SIMONI COURT REPORTING

- 1 Q. Of course, even after the waiver tendered --
- 2 A. I can't answer that question. I don't know.
- 3 Q. Was the panel so distressed -- Jenkins, I
- 4 guess, was pretty tough love?
- 5 A. Jenkins was tough, but I'll tell you what, I
- 6 think Jenkins was fair.
- 7 Q. But it sounds like from the picture you paint
- 8 coupled with what we know from Fajack,
- 9 his sense of fairness literally included
- 10 an eye for an eye. If the guy did the
- 11 deed, he wasn't going to have trouble
- 12 imposing the death penalty, where you
- 13 thought Economus might?
- 14 A. I thought Economus was the more liberal of the
- 15 three.
- 16 Q. What, if anything, further do you remember
- 17 about any interaction with John regarding
- 18 the jury waiver issue? Does anything
- 19 strike you as memorable, if you will?
- 20 A. No, nothing memorable. But, again, my memory
- 21 may fail me.
- 22 Q. Well, I'm almost done. When Cindy asked you

SIMONI COURT REPORTING

1 about your relationship with Zena, I got
2 the impression that -- you said you've
3 now become friends. Let me focus on back
4 then.

5 A. We were friends then.

6 Q. How was this then?

7 A. I mean, we're much closer now.

8 Q. Was it a good working relationship?

9 A. Yes, it was a good working.

10 Q. Tense working relationship?

11 A. No, it was a good working relationship.

12 Q. Without asking you any specifics, we have all
13 had co-counsel relationships that were
14 enlivening.

15 A. I have had co-counsel that I could have almost
16 killed.

17 Q. Some enlivening and some you almost want to
18 kill?

19 A. Yes. No, Tom, number one, is a very bright
20 individual. Number two, he's a very hard
21 working guy, which are attributes I feel
22 comfortable with.

SIMONI COURT REPORTING

1 Q. On balance, did you or Tom proportionally have
2 more contact with John Eley?

3 A. I'm going to throw this out, and you better
4 verify it with Tom. I think there was a
5 point where John and I had a serious
6 disagreement and maybe I didn't even go
7 visit him for a few days. I think that
8 Tom may have visited with John more and
9 had established a stronger rapport with
10 him.

11 Q. It sounds like you had, at least in certain
12 chapters of the book of this case, at
13 least times of contact with him?

14 A. Oh, yes.

15 Q. You talked about going in at night?

16 A. Generally at night, sure.

17 Q. I have had cases where co-counsel may never go
18 in, and sometimes that's okay.

19 A. No, I saw John a lot.

20 Q. But Tom did as well?

21 A. Oh, yes. But there were times where I was
22 probably so frustrated with John.

SIMONI COURT REPORTING

1 Q. What, if anything, troubles you about the
2 whole thing? Does hindsight give you a
3 glimpse on anything that shakes you about
4 this one?

5 A. Well, yes. ~~I wish John could have taken the~~
6 ~~idea bargain.~~ I mean, that's the one
7 thing that really upsets me. I mean, I
8 personally am not professing that John is
9 innocent in this particular situation. I
10 just think that John didn't deserve the
11 sentence that was imposed upon him.

12 Q. I misspeak my ignorance of this record with
13 the following question. ~~Was there,~~
14 ~~actually a competency finding in this~~
15 ~~case?~~

16 MS. YOST: ~~No.~~

17 A. ~~He wouldn't cooperate.~~

18 Q. ~~So, the question was raised into the record~~
19 ~~and never answered?~~

20 MS. YOST: ~~Correct.~~

21 A. ~~Yes, he would never cooperate.~~ He would never
22 cooperate.

SIMONI COURT REPORTING

1 Q. Given the liability here, should that button
2 have been pushed far enough to put him
3 into a local mental health forensic
4 center?

5 A. I'm thinking that maybe we filed a motion for
6 that.

7 MS. CERNI: Uh huh.

8 A. Yes.

9 Q. To have him moved in?

10 A. Yes.

11 Q. The court wouldn't do it?

12 A. Wouldn't do it. I mean, ~~the court's posture~~
13 ~~at that time was, "hey, he hasn't~~
14 ~~cooperated. Why should we go further?"~~

15 Q. So, the Judge read that more or he reacted
16 more with the frustration of culpable
17 blame almost? He wouldn't cooperate. I
18 guess maybe it's my defense lawyer
19 instincts that I would be inclined to
20 say, "That's the sign of the sickness.
21 I'm giving it the whole hearted effort.
22 I'm trying to talk to the guy. I can't

SIMONI COURT REPORTING

1 get through with him. I fight the fight
2 with him. I run the gamut with him. I
3 try. I talk the religious talk with him.
4 I meet his mother, and I can't get
5 through to him." Almost the sign of the
6 illness.

7 MS. CERNI: Objection.

8 Q. Was that your experience with Mr. Eley?

9 A. Well, John was -- ~~my experience with John was~~
10 ~~he was very frustrating.~~

11 Q. Frustrating with what?

12 A. Pardon me?

13 Q. You said he was frustrating or he was
14 frustrated?

15 A. He was frustrating me. I mean, ~~we had been~~
16 ~~offered a significant plea bargain and he~~
17 ~~didn't want to hear it. He wasn't~~
18 ~~cooperating with our efforts that we were~~
19 ~~directing on his behalf in the~~
20 ~~competency. It gets frustrating after a~~
21 ~~while~~

22 Q. Would it be at least within shooting range to

1 suggest that John's pattern was the kind
2 of behavior you see from the human being
3 who just ain't processing right?

4 MS. CERNI: Objection.

5 A. I mean, ~~it was abnormal to what I was used to,~~
6 I can tell you that.

7 Q. From what I gather, you've dealt with some
8 tough nuts. You weren't green at the
9 time?

10 A. No. I mean at that time --

11 Q. It's not like you were cutting your teeth?

12 A. At that point I had been a lawyer 10, 12
13 years. ~~Some was just a particularly~~
14 ~~difficult client.~~

15 Q. So, is it fair to say that one of the -- I
16 don't know if I want to call it the
17 pressure points or spotlight falling in
18 hindsight, but is that maybe he should
19 have been pushed into a mental health
20 facility to get -- ~~did the guy really~~
21 ~~know what he was doing when he waived the~~
22 ~~right, when he took the stand in the~~

1 ~~understand?~~ Did he have any real
2 ~~understanding~~ of what was happening?

3 A. ~~I don't know what John was understanding.~~
4 ~~That's why I think we were trying to have~~
5 ~~his competency evaluated. I mean, that's~~
6 ~~exactly what we were trying to do.~~

7 Q. Let me end it this way. In your experience
8 have you had clients for whom you really
9 have little doubt that they get the
10 drift, you've managed to find that
11 successful course of communication?
12 There might not be the brightest bulb in
13 the room, but you don't doubt their
14 competency or the fact that they have
15 processed what you've said to them?
16 We've got categories of clients.

17 A. Sure.

18 Q. Sure, we do. We have people -- well, let me
19 say it this way with a question mark at
20 the end. It sounds like John didn't fall
21 into that category?

22 A. No. ~~John was a difficult client.~~

SIMONI COURT REPORTING

1 Q. ~~But in part because there was a question about~~
2 ~~whether he was competent to communicate~~
3 ~~with his attorneys?~~

4 A. ~~That was one of many questions we had.~~

5 Q. Whether or not he was really able to
6 communicate -- and I use the word broadly
7 to mean to listen, to process, to
8 respond?

9 A. ~~It remains even whether or not he was hearing~~
10 ~~us or listening to us. You know, you~~
11 ~~jumped ahead to communication. I don't~~
12 ~~know if he was listening to what we were~~
13 ~~telling him, or if he was hearing it, or~~
14 ~~if he was understanding it. Lord knows~~
15 ~~we tried every form of manner we could to~~
16 ~~explain things to him, but I don't know~~
17 ~~whether or not he was comprehending that.~~

18 Q. Some clients -- and, again, I'll throw a
19 question mark on it, maybe draw an
20 objection. Some clients seem to be of
21 that kind, because they're just really
22 belligerent, hard-minded people. Am I

1 correct that -- would you agree that this
2 case has the feel of a client who is not
3 listening or whatever, not communicating?
4 It's not because he was just a complete
5 flaming jerk; it was like there was a
6 question about whether Eley had enough
7 going on upstairs to get the drift.

8 MS. CERNI: Objection.

9 Q. Is that your experience with Eley?

10 A. Well, my experience was -- and even ~~in talking~~
11 ~~to his mother, John was the least~~
12 ~~accomplished of her children.~~ I think
13 John quit school. John went into various
14 social, working type programs that were
15 all menial labor. ~~John was not a very~~
16 ~~academic type person, and I think John~~
17 ~~didn't have much of a connection with his~~
18 ~~family, and I think John's subsequent~~
19 ~~lifestyle and his habits and the people~~
20 ~~he was hanging around with -- I think~~
21 that he just was ~~of a totally different~~
22 ~~set.~~ I mean, ~~he just wasn't very~~

SIMONI COURT REPORTING

1 ~~communicative, educated, bright, smart.~~

2 Q. I keep saying I'm done, but I've got to follow
3 this. The physical confrontation in one
4 of the heated interactions over the plea
5 bargain -- touching, physical, pushing?

6 A. No, I mean it didn't go -- I don't believe it
7 went --

8 Q. Rising from chairs, yelling?

9 A. Oh, yes. You can get me out of a chair easy.
10 I have gotten out of chairs after
11 prosecutors; she'll tell you that. Yes,
12 it was like -- it was a reaction on my
13 part. I mean, ~~John was very placid~~ just
14 sitting there. And it was over this
15 plea, and it's like, "God damnit John,
16 you know, this is what we're being
17 offered. What's wrong with you? Why
18 don't you take this?" It's like, "We're
19 trying to save your life. Don't you want
20 to save your life?" I'll tell you
21 what -- and that's the prosecutor that I
22 dealt with out there. We worked hard to

SIMONI COURT REPORTING

1 get him to that point, because this for
2 the prosecution was an open and shut case
3 with that confession.

4 Q. They were carrying the aces on this one. They
5 didn't have any fact reason, I suppose,
6 to offer the deal, but for they wanted
7 the testimony?

8 A. That was the reason. They wanted his
9 testimony and they needed it for Melvin
10 Green, because this guy here, Eley, he
11 was pretty much behind the eight ball.

12 MR. MEYERS: All right. Thanks.
13 I've got nothing else.

14 MS. CERNI: Well, if I can, I've got
15 just a few questions, if we quickly do this. I'll
16 try to be very brief, John. First of all, the
17 State will stipulate that you are eminently
18 qualified as an attorney and as a death penalty
19 counsel.

20 CROSS EXAMINATION BY MS. CERNI:

21 Q. John, at any time during your handling of this
22 case did John Eley tell you that he did

SIMONI COURT REPORTING

1 not pull the trigger on that gun?

2 MR. MEYERS: I object at this stage
3 on the relevancy to the issues put by the
4 post-conviction hearing.

5 A. I can't recall. I really can't recall.

6 Q. While we've discussed the difficulty in
7 handling John and his obstinacy, and while
8 you've indicated that this may have been
9 indicative of a certain ability on his
10 part not to comprehend, yet ~~we don't know~~
11 ~~for sure or you don't know for sure that~~
12 ~~he did not comprehend you?~~

13 A. No, I don't know.

14 Q. And that he did not understand?

15 A. No. I don't think anybody can answer that
16 other than John.

17 Q. Just to clarify, even though there may have
18 been members of the Arab community
19 present during the trial, do you feel
20 that they would have had any influence on
21 the judges by their very presence in the
22 courtroom?

1 A. I don't know what influence anybody in a
2 courtroom has upon anyone. I really
3 don't. It just seemed to me, as I
4 recall -- and somebody should check this
5 out. I think that there was a
6 self-appointed representative of the Arab
7 community that was publicly making an
8 issue about how they were being
9 victimized in their store situations, and
10 I'm pretty sure it was with this case.
11 How that influences the judges, again, I
12 don't know.

13 Q. I was just referring to the presence. I mean,
14 it's not uncommon for people who are
15 interested in a particular case, no
16 matter who they might be, members of the
17 family or community -- when you have
18 certain high profile crimes, those people
19 come into the courtroom and are present
20 in the courtroom?

21 A. Yes.

22 Q. So, the very presence of the Arab community in

1 the courtroom or presence of members of
2 the Arab community in the courtroom was
3 not unusual, because the victim in this
4 case was an Arab?

5 A. But I do know he had no relatives here. I do
6 remember, because somebody testified
7 about that, maybe his employer or whoever
8 identified the photos of the deceased or
9 whatever, because I remember they shipped
10 the body of the deceased back to Arabia
11 or whatever.

12 MS. YOST: Palestine.

13 A. Palestine, yes. I do recall that.

14 Q. Do you recall that there was an inordinate
15 presence of Arabs in the courtroom?

16 A. There was a substantial number, at least to
17 the extent to have gotten my attention,
18 because a couple of times -- I'll be real
19 frank with you -- I asked Zena if we had
20 any cause for concern, you know. I mean,
21 you just don't know what people will do
22 in courtrooms in situations like that.

SIMONI COURT REPORTING

1 And, don't forget, this is prior to
2 courthouse security and things of that
3 nature. So, I didn't know if we should
4 have -- well, I know that somewhere along
5 the line I asked Zena if we should
6 consider some sort of self-defensive
7 measures or whatever.

8 Q. For your client or for you?

9 A. For me.

10 Q. Even though Melvin Green may have been the
11 mastermind behind the robbery that
12 triggered this death, that doesn't
13 necessarily mean that John Eley did not
14 pull the trigger in this particular case?

15 MR. MEYERS: Objection for the
16 record to the relevancy of the matters put at issue
17 by the post-conviction position.

18 MS. CERNI: I'll go on to something
19 else.

20 THE WITNESS: Do you want me to
21 answer that?

22 MR. MEYERS: Not if she's

SIMONI COURT REPORTING

1 withdrawing it.

2 (OFF THE RECORD)

3 Q. John, as the good attorney you are, when you
4 are faced with the situation that you
5 were faced with and given the fact that
6 John may have been taking drugs and
7 drinking prior to going to the store and
8 afterwards and during that couple of days
9 prior to his arrest, is it possible that
10 you certainly would -- knowing these
11 facts, in examining your defensive
12 posture, how you're going to present this
13 case, would you not have taken this fact,
14 the drugs and the alcohol, and used it to
15 its full extent in order to try to
16 provide a defense or --

17 A. Mitigation, yes.

18 Q. -- rationale?

19 A. Yes.

20 Q. And played it certainly as much as you
21 possibly could have?

22 A. Sure. I think we're obligated to do that.

SIMONI COURT REPORTING

1 MS. CERNI: Exactly. I think you
2 clarified a lot of the things that I might have
3 wanted to ask you in your statement, and so I
4 really don't have any other questions at this time.

5 MR. MEYERS: Thanks.

6 THE WITNESS: I'll waive.

7 (WHEREUPON THE DEPOSITION OF JOHN F. SHULTZ WAS
8 CONCLUDED AT 3:05 PM AND SIGNATURE WAIVED)

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SIMONI COURT REPORTING

EXHIBIT 5
Affidavit of
Dr. Jeffrey Smalldon, and
Testimony of
Dr. Jeffrey Smalldon

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO,)
)
 PLAINTIFF-RESPONDENT,)
)
 -vs-)
)
 JOHN JEFFREY ELEY,)
)
 DEFENDANT-PETITIONER.)

Case No. 86-CR-484

JUDGE MARY CACIOPPO

AFFIDAVIT OF DR. JEFFREY L. SMALLDON

STATE OF OHIO :

COUNTY OF FRANKLIN, SS :

I, Dr. Jeffrey L. Smalldon, after being duly cautioned and sworn according to law, depose and state the following:

1. On July 15, 1996, I spent over three hours with John Eley, on Death Row at the Mansfield Correctional Institution.
2. I have reviewed Mr. Eley's sentencing phase transcript, the exhibits admitted as evidence during his sentencing phase, and the records and reports collected by the Office of the Ohio Public Defender for Mr. Eley in his post conviction proceedings.
3. On September 18, 1996, I prepared and signed an affidavit which included my opinion that there is ample reason to question whether John Eley possesses at present the ability to rationally appreciate his legal situation, and to make rational, informed decisions relating to his case. See Exhibit 5 attached.
4. There have been no changes since the time I signed that affidavit.

5. Due to my clinical background, my time spent with John Eley, and my review of his background materials, it is still my opinion that John Eley lacks the ability to rationally appreciate his legal situation and to make rational, informed decisions as they relate to his conviction and death sentence, and to assist his counsel in his post conviction proceedings. Those are the abilities and capacities, of course, that are necessary for a legal finding of competency.

Further Affiant sayeth naught.


DR. JEFFREY L. SMALLDON

Sworn and subscribed before me this 14 day of January, 1997.


Notary Public
CYNTHIA YOST
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration

JEFFREY L. SMALLDON, PH.D.
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COURT OF COMMON PLEAS, MAHONING COUNTY, OHIO

STATE OF OHIO) State of Ohio v. John Jeffrey Eley
FRANKLIN COUNTY) Case No. 86-CR-484

I, Dr. Jeffrey L. Smalldon, after being duly cautioned and sworn according to law, depose and state the following:

1. I am a psychologist licensed to practice in the state of Ohio. My professional practice is located at 5151 Reed Road, Suite A-211, Columbus, Ohio 43220. I received my Ph.D. from The Ohio State University in 1989, and I have been licensed (#4376) since 1990. I would estimate that since receiving my Ph.D., I have conducted clinical, forensic, and neuropsychological evaluations of well in excess of one thousand individuals.
2. One area of practice in which I have sought and obtained specialized training, knowledge, and skill is forensic clinical and neuropsychological assessment. I am asked frequently to evaluate individuals who have been indicted or convicted on capital murder charges. To date, I have provided some variety of consultation on approximately eighty death penalty cases.

EXHIBIT
5

3. I was retained in July of 1996 by Cynthia A. Yost, Esq. and Jennifer A. Hite, Esq. acting on behalf of the Office of the Ohio Public Defender to conduct a neuropsychological assessment of their client, John J. Eley, who is currently housed on Ohio's death row at the Mansfield Correctional Institution, having been convicted in 1987 on a charge of aggravated murder with specifications stemming from an offense which occurred in Mahoning County during the previous year.
4. On July 15, 1996, I was introduced to Mr. Eley by his legal representative, Ms. Yost. She had accompanied me to this first meeting in part because of her client's expressed reluctance to be seen by a psychologist who he feared was going to try "walking through his head." Mr. Eley had also reportedly expressed concerns over the moral propriety of being "judged by another man," by which he was apparently referring to my intent to perform a battery of neuropsychological tests. My plan on the day when Ms. Yost accompanied me to see Mr. Eley was to simply introduce myself in a non-threatening context, then to spend some one-on-one time with Mr. Eley during which I hoped I could develop sufficient rapport so that Mr. Eley would agree to work with me toward completion of the neuropsychological evaluation at a later date. All told, I spent between three and four hours with Mr. Eley on July 15.
5. Unfortunately, even though I had left my session with him on July 15 feeling at least mildly optimistic about the prospect of his agreeing to collaborate with the testing, he eventually refused to do so. Consequently, I have no hard test data on which to base the inferences contained in this affidavit. I do, however, have not only my own clinical

impressions, but also a variety of background materials which have been supplied for my review by his post-conviction counsel.

6. Among the materials that were provided for my review are the following:

- An extensive series of notes summarizing interviews conducted by staff from the Public Defender's office with family members, acquaintances, childhood friends, a parole officer, the prosecutor who tried Mr. Eley's case, a former school principal, and a variety of other collateral informants;
- The pre-sentence report which was done prior to the penalty phase of Mr. Eley's 1987 trial by Parole Officer Guy S. Trammell;
- A memorandum prepared on behalf of their client by Mr. Eley's trial counsel;
- Handwritten interview notes documenting the statement which Mr. Eley gave to the police in August of 1986;
- A May 1987 psychological evaluation of Mr. Eley which was prepared at the request of his trial counsel by Douglas C. Darnall, Ph.D., ostensibly for the purpose of identifying "possible mitigating factors that may help in the deliberation of the sentencing phase of the trial"; and
- A small collection of educational records.

7. There are a number of factors in Mr. Eley's medical, educational, and psychosocial histories which must at least raise very serious questions about the possible presence of brain impairment, perhaps of such a magnitude that it could have significantly affected his decision-making capabilities at the time of the offense for which he eventually received the death penalty. Among them are the following:

- He was a forceps delivery;
- He has a history of significant head traumas associated with falls, a motor vehicle accident where he may have sustained a mild concussion, and four years spent boxing as a teenager. These traumas include more than one episode where he

reportedly lost consciousness for unspecified periods of time. After a fall at age twelve, he was reportedly hospitalized because of a fractured skull.

He has a very significant, well-documented history of both alcohol and drug dependence, including use of heroin, morphine, and other highly addictive substances.

8. Despite the fact that I was unable to secure Mr. Eley's cooperation with formal testing, his behavior and style of interaction during the hours that I spent with him still left an indelible clinical impression. In my opinion there is ample reason to question whether he possesses at present the ability to rationally appreciate his legal situation, and to make rational, informed decisions related to the appeal of his conviction and death sentence. I will try to spell out in somewhat greater detail below the foundation for this conclusion.
9. For one thing, he evinces no understanding whatsoever of why it is critical that he cooperate with a neuropsychological assessment that could very well reveal evidence of significant brain impairment. Of course in the event that such evidence was produced, it would have important potential implications for his appeal, but Mr. Eley persists in expressing the belief that a decision to collaborate with testing would, in effect, mean that he was lending sanction to "one man judging another man," which he says is contrary to his religious beliefs. His position on this matter seems totally refractory to logical appeal, and in my opinion it implies a gross misunderstanding of the nature and uses of neuropsychological testing.
10. Although I never personally performed formal psychological or neuropsychological assessment of Mr. John Glenn, another Ohio death row inmate, I saw Mr. Glenn at the

request of his then-appellate counsel on several different occasions in 1993 and 1994. In the same manner that Mr. Eley does, Mr. Glenn attempted during those discussions to mask his very significant intellectual deficits by speaking in often elliptical, nonsensical, pseudo-philosophical constructions that he clearly hoped would leave the listener with the impression that he was a deeply thoughtful, highly intelligent individual. Like Mr. Eley, he seemed to have no insight whatsoever into how transparently false many of his grandiose claims were, and into how very thin his pretensions to intelligence would actually appear to an informed listener.

11. Mr. Glenn is brain-impaired, and in many respects Mr. Eley's clinical presentation mirrors his. I will provide by way of illustration some specific examples which may serve the purpose of conveying the disjointed quality of Mr. Eley's thinking, as well as the frequently incomprehensible nature of his verbalizations.
12. At one point fairly early on in our discussion, Mr. Eley attempted to make a point by shifting very rapidly back and forth between references to omelets, sunny sides up, a "fine political stragg wall," scrambling, and an assortment of other apparently disconnected metaphors and figures of speech that he had apparently decided might work well together. The result, needless to say, was utterly incomprehensible, but he demonstrated no insight whatsoever into that fact. On the contrary, he beamed as though he had just said something that was sure to be perceived as very profound.
13. At another early juncture, he began making pronouncements about "the fatal flaw of Western logic," in the course of doing so suggesting that he personally had been able

to see through this "fatal flaw" in order to determine the path that would be best for him. He was unable to make any more explicit the insight that he had been able to achieve.

14. "We're all human, we're all guilty," he said at one point, apparently intending this declaration as an explanation for why agreeing to collaborate with neuropsychological testing was not a step he was willing to take. In this same context, he lamented the "sophistry" which he believes causes people to lose sight of God's will. In describing religious discussions that he had once carried on with an "atheist" inmate, he indicated, "Everything in life is inherently dualistic. (Tell me what you mean.) Everything dualistic brings gravity impact One extreme to another It's night and day!" Moments later he continued, "Sweet and sour, mixed. It's absolute! A tart kind of thing!" Suffice to say that it never became any clearer what point he was attempting to make here; again, however, he beamed as though the words he had just spoken were extremely profound.
15. At one point he attempted to convince me that the power of the mind was what really counted, not whether or not his body survived the judgment of Man. His manner of doing so was to say, "Anyone can have the behind. Where the mind goes, the behind gonna follow. That's the spiritual thing right there!"
16. He apparently feels quite cynical about the mental health professions: "I don't wanna be understood! I just wanna be respected! . . . We're all flesh! I'm not homogeneous,

I'm heterogeneous Really, I'm going on to the next level!" He faults the judge at his trial for basing his final sentencing decision on "a syllogism of conclusion."

17. I know from speaking with Mr. Eley's post-conviction counsel that verbalizations of just this sort are what come from Mr. Eley whenever his attorneys attempt to engage him on the subject of what needs to be done in order to pursue post-conviction relief. Based on the accounts of Ms. Yost and Ms. Hite of their attempts to discuss legal matters with Mr. Eley; he does not seem grounded in the sort of rational appreciation for his legal circumstances which is necessary in order for him to participate meaningfully in these adversarial proceedings. He appears to have little if any appreciation for the finer (or even the less fine) points of what is required to pursue his appeals, first through the state courts, and then eventually in the federal courts; but he is apparently convinced that he knows more about what remedies are and are not available through the legal system than his attorneys do.

18. I want to state as strongly as I can my belief in the absolute necessity of securing Mr. Eley's cooperation with neuropsychological assessment in order to investigate further my working hypothesis that he is brain impaired, this impairment likely reflecting the combined influence of multiple factors, including possible trauma sustained at the time of his birth, multiple head traumas, and a long, very serious history of alcohol and drug dependence. In the meantime, it is my hope that counsel for Mr. Eley will pursue with the higher courts a claim of incompetency to proceed.

Further affiant sayeth naught.


Dr. Jeffrey L. Smallton

Sworn and subscribed before me this 18th day of September, 1996.


Notary Public

CYNTHIA A. YOST
Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration

STATE OF OHIO) IN THE COURT OF COMMON PLEAS
) ss.
COUNTY OF MAHONING) CASE NO. 86 CR 484

STATE OF OHIO)
)
Plaintiff) DEFENDANT'S
)
-vs-) TRANSCRIPT OF PROCEEDINGS
)
JOHN J. ELEY)
)
Defendant)

APPEARANCES: Atty. Michele Cerni
Atty. Janice T. O'Halloran
On behalf of the State

Atty. Gregory Myers
Atty. Cynthia Yost
Atty. Jennifer Hite

On behalf of the Defendant

BE IT REMEMBERED that at the hearing of the above entitled cause, in the Court of Common Pleas, Mahoning County, Ohio, beginning on the 28th day of January, 1997, and continuing thereafter, as hereinafter noted, before the Honorable Mary Cacioppo, the above appearances having been made, the following proceedings were had:

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1 WHEREUPON, the Defendant
2 called

3
4 DOCTOR JEFFREY SMALLDON,

5
6 who, being first duly sworn testified
7 as follows:

8
9 DIRECT EXAMINATION:

10 BY MR. MYERS.

11 Q Doctor, now that you're sworn in could you
12 state your name for the record, your occupation and
13 your primary office location?

14 A Yes. My name is Jeffrey L. Smalldon,
15 S-M-A-L-L-D-O-N. I'm a psychologist. My office
16 location in Columbus is at 5151 Reed, R-E-E-D Road,
17 Suite A, as in apple, 211, Columbus Ohio, 43220.

18 Q And Dr. Smalldon, could you please -- you
19 have testified before in what we could call a forensic
20 psychology setting; is that correct?

21 A Yes, I have.

22 Q And you have been qualified as an expert
23 before?

1 A Yes.

2 Q Roughly do you know how many times?

3 A My estimate would be somewhere between 30
4 and 50 times.

5 Q All right. Could you please share with
6 Judge Cacioppo your qualifications under that heading
7 of an expert witness? Tell us about your education
8 and other matters that are germane to your expertise
9 in this case.

10 A Okay. I'll start with my education. I
11 received my undergraduate degree from Valparaiso
12 University in 1975 with a major in English and minor
13 in psychology. Following year in 1976 I received my
14 Master's degree from Purdue University. Following
15 that year I returned to Valparaiso for a year where I
16 taught in the English department. In the following
17 year I received post-graduate fellowship to study at
18 the University of Dublin, Dublin, Ireland. From 1980
19 until 1982 I worked on completion of my Master's
20 degree, health services administration at George
21 Washington University in, Washington, D.C. For the
22 latter portion of that degree I did a residency at
23 Riverside Methodist Hospital in Columbus, which is

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1 what landed me for the first time in central Ohio.
2 From 1983 until '85 I served -- was vice president for
3 Mental Health and Alcoholism Services at Riverside
4 Methodist Hospital in Columbus. In 1985 I began
5 working on my Ph.D. in psychology at Ohio State, and
6 finished that degree in 1989 and was licensed for
7 independent --

8 THE COURT: From Ohio State?

9 A Yes, and was licensed for independent
10 practice in Ohio the following year in 1990. While
11 working toward my Ph.D. at Ohio state, I deliberately
12 sought out clinical experiences that would train me to
13 do work in forensic psychology. Among those were
14 practicums at the Timothy B. Moritz Forensic
15 Psychiatric Hospital in Columbus, two different
16 practice placements at the Court Diagnostic Clinic.

17 Q Let me -- with respect to Moritz and the
18 Court Diagnostic Center, could you share with us what
19 you know about their affiliation or Moritz's part of
20 the --

21 THE COURT: The Court is aware of those
22 institutions. I want to know his
23 qualifications. I know about the

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1 institutions. Go ahead, Doctor.

2 A The point I was going to make is that a
3 large part of my training during the two practicum
4 experiences I had at the Court Diagnostic Clinic were
5 in performing criminal responsibility assessments and
6 competency to stand trial assessments. Like everyone
7 in the State of Ohio, it is necessary -- it was
8 necessary for me to do a one-year pre-doctoral
9 clinical internship. I did that at a state
10 psychiatric hospital in Connecticut. One of the
11 reasons for my choice of that setting is I was able to
12 get a primary assignment on the forensic unit of that
13 hospital.

14 THE COURT: What hospital?

15 THE WITNESS: That's Connecticut Valley
16 Hospital in Middletown, Connecticut.

17 THE COURT: Mid town?

18 THE WITNESS: Middle -- M-I-D-D-L-E --
19 town, Connecticut.

20 THE COURT: Thank you.

21 A One other practicum placement that I did
22 prior to receiving my Ph.D. was in the practice of
23 David J. Tennenbaum in Columbus, who is a Diplomate in

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1 forensic psychology. I specifically chose an
2 affiliation with that practice because of the
3 additional opportunities for training in forensic
4 psychology.

5 Following receipt of my Ph.D. in 1989, I
6 divided my one year post-doctoral year, which is
7 necessary prior to licensure, between working at Dr.
8 Tennenbaum's practice where I received additional
9 training in forensic psychology at Riverside Methodist
10 Hospital's Neurological Rehabilitation Center where
11 much of my work was with brain-damaged clients, and
12 received specific training under the supervision of a
13 clinical neurologist and neuropsychological
14 assessment. I've been in independent practice since
15 early 1991. I received my license in December of
16 1990.

17 THE COURT: You have been in practice
18 full time as a psychologist?

19 THE WITNESS: Yes, I have.

20 THE COURT: The Court finds him
21 qualified.

22 BY MR. MYERS.

23 Q Thank you. If I may, not to belabor the

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1 qualifications -- share a little more, Dr. Smalldon,
2 about your neuropsychological training. What that
3 means in your profession is the distinction between a
4 psychologist and a neuropsychologist?

5 A Well, neuropsychology is a sub branch within
6 the larger field of psychology that specifically is
7 concerned with the use of standardized methods for
8 investigating brain behavior relationships, methods
9 which allow -- oftentimes anyway -- allow for
10 inferences to be drawn about the possibility of
11 underlying brain impairment of one sort or another.

12 My training in neuropsychology began with a
13 three-course sequence at Ohio State in
14 neuropsychology. During my pre-doctoral internship in
15 Connecticut, I received my first formal training in
16 specific methods of neuropsychological assessment.
17 That training continued and took place -- was far more
18 in depth during my post-doctoral year. I worked under
19 the supervision of a clinical neuropsychologist who
20 had trained at Braintree in Massachusetts and received
21 extensive training in neuropsychological assessment.
22 Since that time I have devoted a significant portion
23 of my work to neuropsychological assessment regularly

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1 in a variety of different continuing education
2 activities, including advance training with Ralph
3 Reitan, who is the co-developer of the most widely
4 used battery of neuropsychological tests, the
5 Halstead-Reitan battery.

6 Q And again, speaking not only to our Judge
7 and everyone in this room today but to the record
8 eventually, am I correct that the neuropsychological
9 testing battery is employed to determine whether there
10 is organic versus inorganic damage; is that correct?

11 A Organic is a term that doesn't really have
12 the currency now that it did at one time. It used to
13 be used as sort of a shorthand way of referring to
14 underlying structural damage to the brain. And what
15 neuropsychological testing allows for is inferences
16 about the possibility of underlying structural brain
17 damage. Neuropsychologists, for example, are not
18 trained or qualified to do magnetic resonance imaging
19 or CAT scan or EEG or any of those kind of medical
20 procedures which actually allow for --

21 THE COURT: You do it through testing?

22 THE WITNESS: We do testing that allows
23 them for inferences about brain performance,

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1 but these tests are very well established as
2 a battery for allowing inferences about
3 underlying brain integrity.

4 BY MR. MYERS.

5 Q And ultimately you, in a sense, at least
6 from my lawyer perception you are -- you have dual
7 talents, if you will. You can do what every
8 psychologist can do in terms of figuring out where any
9 one of us may --

10 THE COURT: The Court has -- just a
11 moment. The Court has very good knowledge
12 of what this gentleman does. I don't need
13 any dissertations in the record from
14 anybody. Go ahead.

15 Q Now --

16 A I think I was done with answering.

17 Q Yeah. That's right. I was be laboring it.
18 Doctor, tell us now -- let's move on to our case.
19 What contact have you had, at whose request, with John
20 Jeffrey Eley and what conclusions or impressions have
21 you formulated as a result of your contact with this
22 case and with our client?

23 A Well, my contact with Mr. Eley consisted of

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1 one and only one personal encounter in the middle of
2 July.

3 Q One encounter of this year?

4 A July of 1996.

5 THE COURT: At whose request?

6 THE WITNESS: At the request of
7 Mr. Eley's post-conviction counsel, Jennifer
8 Hite and Cynthia Yost of the Ohio Public
9 Defender's Office.

10 THE COURT: All right.

11 Q And were you also provided any records or
12 documents?

13 THE COURT: Let's not lead.

14 Q What were you provided with, Doctor?

15 A I was provided with a variety of records
16 pertaining both to Mr. Eley's more remote history as
17 well as to events of his trial.

18 I received a variety of early educational
19 records documenting his performance, specifically
20 during elementary school. I received a variety of
21 medical records which, again, spoke, as I recall it,
22 to events beginning with his birth records up through
23 the early to mid 1980s. There were a variety of

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1 different contacts that he had with medical
2 professionals throughout those years for a variety of
3 different things.

4 In addition to educational records and
5 medical records I was provided with notes documenting
6 interviews conducted by staff from the Ohio Public
7 Defender's Office, a variety of different family
8 members, friends, acquaintances of Mr. Eley's. I was
9 provided with a copy of a deposition which was taken
10 of one of Mr. Eley's trial level attorneys. I was
11 provided with the entire transcript of Mr. Eley's
12 mitigation hearing as well as transcripts from several
13 other brief pretrial hearings. I was provided with a
14 copy of a 1987 presentence report written by a
15 gentleman by the name of Guy Trammel. I was provided
16 with a social history, criminal responsibility
17 evaluation and a competency evaluation performed at
18 the forensic -- I'm not certain of the exact name but
19 the Court Diagnostic Clinic in Mahoning County around
20 the time of Mr. Eley's original trial. I was provided
21 with a copy of the psychological report completed, as
22 I understand it at the request of the defense, by a
23 Dr. Darnell prior to the sentencing hearing at

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1 Mr. Eley's original trial. I believe that that's
2 the -- at least the major categories of background
3 records that were provided to me.

4 THE COURT: Did you analyze those
5 records, read and analyze?

6 THE WITNESS: Yes, I did.

7 THE COURT: And then you visited the
8 defendant in this case?

9 THE WITNESS: Yes. And I didn't have
10 all these records at the time.

11 THE COURT: You did not?

12 THE WITNESS: When I went to see
13 Mr. Eley?

14 THE COURT: Do you have any
15 recollection as to what you did have at the
16 time you visited him, or did your visit
17 occur and then you acquired all this
18 information?

19 THE WITNESS: No. I had some of those
20 records. I'm not certain with much accuracy
21 that I can tell you exactly which of them I
22 had.

23 THE COURT: Very well. Go ahead.

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1 MR. MYERS: This is a writing by the
2 witness that could refresh his recollection.

3 THE COURT: That would be fine.

4 THE WITNESS: Yes, that would.

5 BY MR. MYERS.

6 Q Dr. Smalldon, I'm showing you --

7 MS. CERNI: Could I see it, please?

8 MR. MYERS: That's not in that. It was
9 attached -- because his testimony was here
10 today, it is attached as Exhibit 5 in the
11 appendix to the petition, a number different
12 than the --

13 Q Dr. Smalldon, as I understand, that is your
14 affidavit that you prepared at our request that
15 summarizes your impressions as of the date of that
16 affidavit?

17 A As of the date of this affidavit, yes. This
18 gives me a better summary that I was just able to
19 provide the Judge of the materials that I have, but
20 I'm still not absolutely sure that some of these
21 didn't come after my visit.

22 THE COURT: That's fine.

23 A But before composition --

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1 MR. MYERS: Your Honor, I have another
2 copy if the Court would like to see it.

3 THE COURT: Please. Thank you.

4 Q At any rate, I believe, if I remember right,
5 Dr. Smalldon, there is a reference in that affidavit
6 to the documentary kind of background evidence you had
7 available?

8 A Yes, and there are a couple of things here
9 which I neglected to mention a minute ago, and I
10 should, that I certainly did review in the course of
11 my work on this case. One was a memorandum prepared
12 on behalf of their client by Mr. Eley's trial counsel
13 at the time of his original trial. There were also
14 some police records related to the time of his arrest
15 on the instant charges, including handwritten
16 interview notes, which I took to have been recorded by
17 one of the interviewing police officers who took a
18 statement from Mr. Eley in August of 1986.

19 Q Okay. So again by reference to that
20 affidavit -- which reminds me, what date did you sign
21 that?

22 A The 18th of September, so close to two
23 months after the actual date of my contact with

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1 Mr. Eley.

2 Q And if I remember where -- I have sort of
3 interrupted the flow by tendering that document to
4 you. Do you remember -- I think the Judge -- what
5 documents you had before you went in to see Mr. Eley
6 versus what you might have gotten after that as we
7 developed our --

8 THE COURT: He's just indicated it is
9 very difficult for him to tell me what he
10 had before.

11 A I'm not absolutely certain even of these
12 which I had before.

13 Q Let me just ask, all those documents that
14 you just made reference to, are those in your practice
15 among the standard sorts of kinds of documents and
16 records that you would normally employ or rely upon in
17 formulating an impression or opinion of a client in a
18 forensic psychological setting?

19 A Yes, they are.

20 Q Share with the Judge, if you would, what
21 your encounter with Mr. Eley led you to conclude as it
22 relates to whether you question his competency to
23 undertake this very proceeding here today?

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1 A I'll be -- let me begin my response to that
2 question by just setting the stage a little bit for
3 what my understanding was of what this meeting was to
4 accomplish, what my hopes were going into it. I had
5 had no prior contact with Mr. Eley. It was
6 specifically arranged that I would be accompanied for
7 introductions by one of his attorneys, Cynthia Yost,
8 and my hope was that -- it was my hope, with the
9 request made of me by his post-conviction attorneys,
10 that he would agree to my conducting a psychological,
11 slash neuropsychological evaluation.

12 THE COURT: You didn't do that?

13 THE WITNESS: I was not able to do
14 that, but that was my going-in objective.

15 THE COURT: When you arrived -- I
16 assume you went to the penitentiary?

17 THE WITNESS: Yes.

18 THE COURT: When you arrived at the
19 penitentiary and you were given access to
20 the defendant, what did you specifically do
21 with him?

22 THE WITNESS: I ended up spending
23 approximately three -- somewhere between

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1 three and four hours with him. The first
2 portion of that was with his attorney
3 present. And during the initial portion
4 while she was present, I didn't do a lot. I
5 was introduced to him and participated, but
6 in a fairly limited way, in the discussion.

7 What I was informed initially was
8 Mr. Eley was seeing me with someone who he
9 already had had a chance to develop a
10 rapport with and realized that I had been
11 retained by his attorneys. I had been told
12 before attending this meeting that he had
13 expressed some reluctance to be seen by a
14 psychologist, which is one reason I had his
15 attorney there. That is not something that
16 always happens when I go to see someone who
17 is on death row. I've often had the
18 attorney inform their client ahead of time
19 that I'm coming. They're not always there
20 to introduce me. This is an additional step
21 taken to make him comfortable in working
22 with me.

23 After his attorney left with sort of

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1 his very tentative agreement to at least
2 talk with me -- after she left and sort
3 of -- you know, he would see whether he was
4 going to proceed or not. I attempted --
5 made the first steps toward taking a very
6 brief history about his background, asked
7 him some questions about his background.
8 Those attempts were in a very friendly but
9 very firm manner.

10 THE COURT: He did not want to --

11 THE WITNESS: He did not want me -- he
12 did not want to talk with me about his
13 background. He was very hesitant to answer
14 any questions about his background. We
15 spoke about my role. I explained what I
16 did. I explained, when I talked with him,
17 about neuropsychological assessments -- I
18 believe that's the way in which I presented
19 it to him -- and that his attorneys felt
20 that it was important at this stage of
21 representing him that they have as accurate
22 a profile as possible of his strengths and
23 weaknesses, what kinds of things were --

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1 THE COURT: Did you ascertain how far
2 this man had gone in school?

3 THE WITNESS: Yes, I did.

4 THE COURT: What school level did he
5 attain?

6 THE WITNESS: My recollection is -- and
7 I would like to confirm that this is
8 accurate -- that he went as far as the ninth
9 grade. I believe that that's accurate.

10 BY MR. MYERS.

11 Q Doctor, did you have an opportunity to
12 review school records?

13 A Yes, I did.

14 MR. MYERS: Those records, for the
15 Court's convenience, are in the binder as
16 Exhibit 29.

17 Q Doctor, you can look at your copy or --

18 THE COURT: I would suggest he look at
19 his copy.

20 A Let me refresh my memory on that. Yeah,
21 ninth grade.

22 MS. CERNI: What's the number?

23 MR. MYERS: 29 in the big binder.

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1 THE COURT: What else did you ascertain
2 from him?

3 He wasn't much of a student, was he?

4 THE WITNESS: No. My understanding of
5 his educational difficulties come almost
6 exclusively from my review of the
7 educational records sent to me and from what
8 has been told to investigators from the
9 Public Defender's Office by family members
10 and so on. I learned very little from him
11 about that. He was very reluctant to talk
12 with me about any of his learning --

13 THE COURT: Does he speak well?

14 THE WITNESS: Reasonably well.

15 THE COURT: Okay. And he knew who you
16 were? At least he got a proper introduction
17 from his lawyer?

18 THE WITNESS: Yes.

19 THE COURT: And you were able to
20 conduct some sort of conversation with him?

21 THE WITNESS: I was certainly able to
22 have a conversation with him, yes.

23 THE COURT: What did his conversation

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1 with you -- what did you talk about?

2 THE WITNESS: Well, we talked about, in
3 a very gentle way -- much of that time was
4 taken up with my sort of repeated gambits in
5 an attempt to engage his cooperation on what
6 I was there to do, which was an evaluation.
7 I wasn't pushing that agenda that day. I
8 felt if I left that day with him feeling as
9 though this I was someone who he could
10 work --

11 THE COURT: Trust?

12 THE WITNESS: -- trust enough to work
13 with me, that would have been my main
14 objective that day, if accomplished, and
15 then I would come back to do the testing. I
16 didn't even specifically intend that day to
17 get in any formal testing, but Mr. Eley -- I
18 found he was very inclined to go off on
19 tangents with a very sort of -- what I would
20 describe sort of pseudophilosophical
21 statements that were often couched in
22 religious terms, often very difficult to
23 understand, frankly, what was the point that

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1 he was attempting to make. And all the time
2 I was with him, he was very pleasant; he was
3 frequently smiling; he was --

4 THE COURT: He was not erratic?

5 THE WITNESS: He was not erratic
6 behaviorally, no.

7 THE COURT: He spoke to you and didn't
8 want to talk about your being a doctor and
9 you trying to find out anything; is that
10 substantially it?

11 THE WITNESS: He wanted to explain to
12 me why he didn't want to cooperate with
13 testing.

14 THE COURT: Why didn't he want to --
15 did he explain that to you?

16 THE WITNESS: He said at one point that
17 he believed that by cooperating with any
18 testing that he would be submitting himself
19 to judgment by another human being, which he
20 viewed as incompatible with his religious
21 beliefs.

22 THE COURT: And what were his religious
23 beliefs? Did he indicate them to you?

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EXHIBIT 6
Declaration of
David L. Doughten

Declaration of David L. Doughten

I, David L. Doughten, do declare under penalty of perjury the following is true and correct to the best of my knowledge and belief.

I am a licensed attorney in the State of Ohio. I am qualified to represent capital defendants under the Supreme Court of Ohio's Rule 20 as lead counsel in both trial and appellate representation. I have represented numerous capital defendants at all stages of capital litigation, including federal habeas procedures, since 1982.

I was not originally assigned to represent Mr. Eley in his habeas proceedings. Attorney's Jeffrey Gamso and Jeffrey Helmick were his attorneys at the time his original habeas filing. I was appointed on July 14, 2004 by Judge Christopher Boyko of the Northern District of Ohio as substitute counsel for Mr. Gamso. I have represented Mr. Eley since, including legal actions through the Supreme Court of the United States.

My relationship with John has run hot and cold, but for the most part has been cordial. John has often informed me that he did not want counsel. On the other hand, he has often complained that we were not doing enough as counsel to aid his case. There have also been times that he was very happy with our representation. More often than not, he informed me that he did not need legal counsel as Jesus would rectify the wrongs being done to him. When I asked him how or when Jesus would help him, he rambled on with various cites from the Bible, as he did in his unsworn statement in the penalty phase at trial. If I asked him to explain further, he would become frustrated and talk louder, but without further explanation. Mostly, I would sit

and listen. John would talk as long as he could until interrupted about the religious implications to his case.

This kind of attorney-client relationship between John and counsel has been consistent with all counsel in both state and federal court. For example, when I was first appointed, Mr. Helmick and I visited John. John had numerous complaints about his trial counsel. However, it was difficult to determine the nature of his complaints. For instance, we inquired of John as to why his trial attorneys had advised him to waive a jury at the trial level and try his case to a three-judge panel instead. John became very agitated and informed us that his trial attorneys had attempted to persuade him to give up "his constitutional right to a three-judge panel." When we tried to explain to him that the constitutional right was to have a jury, he became angrier, basically accusing us of doing the same thing his trial attorneys did, that is, deprive him of his constitutional right to a three-judge panel.

I do not believe that John had even a minimal understanding of basic legal concepts. At any point during our representation, if we attempted to discuss these concepts, John would cut me/us off and begin his diatribe about the requirements of the judges to be part of the judicial tree. If the federal judges did not follow the constitution, they are like a "limb of a tree that should be cut-off" or words to that effect. The judges were all part of the "constitutional tree", and if they did not follow the constitution, they were "a rot that would kill the tree" if it were not cut out. This was a typical avoidance tactic. Rather than answer a direct question about an issue, John would engage in his allegories. At no time did John ask us a single question related to his case, his petition or the procedures of his case. When we attempted to explain them to him, he did not want to hear it and would segue to an unrelated topic.

I do not believe that John had any concept of basic habeas procedures. The angriest that John ever became towards me occurred when he thought I had dropped an issue that had been raised in state court. In fact, we agreed with him and had raised the claim. John could not see that we had raised the claim. He did not recognize the claim because we did not cite any state case law in support of it. Instead, as required, we cited federal case law in an attempt to federalize the issue. I tried to explain that the key issue was raised and that the same challenge was being made only under federal law as is required by the habeas statute. He could not understand this concept and sent me a number of letters and/or calls angry that I had not raised a key issue. It is the only specific issue John challenged us about throughout the federal process.

I went to the prison to discuss this issue with John. He could not verbalize why he thought we had dropped an issue. I thought we had the issue settled. It was not mentioned again until during the current pendency of the clemency process. Relatively recently, John again expressed distrust of us because of our failure to raise the issue previously addressed.

When I went to see John in prison throughout my representation, he discussed the same basic issues throughout the process; the judiciary and religion. However, more recently John became enamored with another issue. He believes that his rights under the Thirteenth Amendment have been violated. The Courts have rendered him to be a slave, as he is being held without due process and being institutionalized without being paid. He expressed this issue to me the last two times I visited with him and on at least one phone conversation. He spent about twenty minutes on the subject on my visits until I was able to move the discussion to another topic.

Throughout our representation, John refused to discuss the specifics of the case with us in

any detail. He never discussed the facts of his case with us in even a general manner. If I asked him a question about the offense in question, he refused to answer. He would not discuss his family, his mental health or even his background in general. The only subject that he would discuss in regards to his case were how ineffective his lawyers were in general. When pressed for specifics, he would turn to religious rhetoric and not answer the question.

At no time did John indicate to Mr. Helmick and/or myself that he wanted to be a volunteer, that is, give up his legal battle. He clearly wants to live. At numerous times he indicated that it did not matter what we did on his behalf because Jesus would ensure that the end would be just. Contrarily, there were those times when he did indicate frustration for what we had or had not done such as the dropped claim misunderstanding and which issues we should raise on his petition for certiorari to the Supreme Court. (He wanted us to raise a single question, we presented two) But at no time prior to the clemency did he request that we not represent him.

When I began to discuss clemency with John, he steadfastly stated that he wanted to represent himself to the board. When I tried to explain the clemency procedure him, he again made clear that he did not want me to educate him as to the process. At first he met with me and accepted phone calls from me and placed phone calls to me. One such call was made on or about December 13, 2011. My notes reflect the following conversation. I had asked him what he would say to the parole board for his interview. I had asked him to think about it so he could be prepared. The parenthesis were added to assist in reader comprehension.

John called. . . he wants us to only to file what he approves and only exculpatory information. he wants us to do nothing.(for clemency) He says he is going to tell him (parole board) the obvious, he rode on down there on a race car and wants to them to ride

a race carpet out of there. the judges (on appeal) didn't comprehend nothing. they diverted from the law. they went into an alice in wonderland conviction like amanda knox in italy. He says he has been in wonderland, but he is going to say that the judges were like rip van winkle, they were sleeping for 25 years and haven't woke up yet.

He also wants me to send him a small money order. the judges are hooked to "the auxiliary", whatever the hell that is. dont do anything behind his back. He is asking for a precatory request from the parole board, to emancipate him. he was surprised that I did not know what a "precatory request" was. Justice should be a two way street, gotta be, rebuttal, not a one way street, he will explain that they convicted him on a one--way street., a machination of lies, have enslaved him, noxia, which is a slave word, because the master had to pay if the slave destroyed something, he is no longer a slave, the judge is not a master, he is not Dred Scott, John Brown's ancestors were Quakers or Amish, he is not sure. He wants a harmonica which costs 67 dollars and he wants it for there. then he said thank you.

This was a typical John Eley discussion. The "race car" was his misinterpretation of the term playing the "race card." Mixed metaphors were not unusual in his conversations.

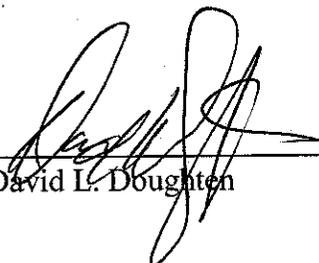
John continued to have phone conversations with me through early 2012, but after learning that the defense team had been interviewing family members to assist in his clemency, John has instructed me that he does not want me to appear on his behalf at his interview or the hearing. He has refused phone calls and instructed me that he will not accept a visit.

In January 2012, Judge Boyko granted my request to have the Capital Habeas Unit of the Office of the Federal Public Defender appointed to assist with the clemency and other end litigation. I could tell that I was going to need help with John's case. I had no funding for mental health experts. Dr. Jeffrey Smalldon had prepared a mental health report on John during the state postconviction petition. I was aware that the capital habeas unit may be able to assist in his retention. Also, because of John's lack of cooperation, I believed I would need assistance in completing the investigation properly.

I tried to talk John into meeting with Dr. Smalldon. I told him it was essential to his clemency preparation. He refused to meet with him.

I do not believe that John was ever able to assist counsel in preparing his defense at any stage at any proceeding. He did not assist counsel in preparing any aspect of his case, or more accurately, allow counsel to assist him in his defense or appeal of the charges and conviction. John's refusal to even discuss specific facts of the case or issues on appeal were, in my opinion, his means of masking his inability to understand the legal issues or the application of the constitution to his defense. I understand that I am not a mental health expert. Nevertheless, I have grave concerns about John's current mental functioning. I do not believe that John is currently competent to understand the situation he is currently facing and the urgency of that situation.

5-25-12
Date



David L. Doughten