

**BEFORE THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

PLAINTIFF-APPELLEE

-vs-

**JOHN J. ELEY**

DEFENDANT-APPELLANT

CASE NO.: 1996-0285

DEATH PENALTY CASE

EXECUTION SET FOR  
JULY 26, 2012

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**STATE OF OHIO'S RESPONSE TO APPELLANT JOHN ELEY'S MOTION  
FOR AN ORDER TO PERMIT DR. JEFFREY SMALLDON TO OBSERVE  
JOHN ELEY'S CLEMENCY INTERVIEW**

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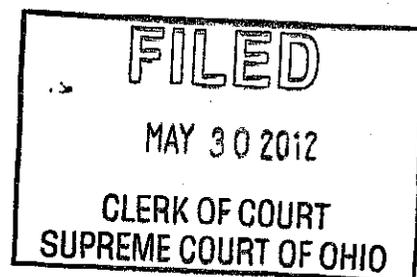
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Defendant-Appellant John J. Eley is an Ohio Death Row inmate who was convicted and sentenced to death for the August 26, 1986 Aggravated Murder of Ihsan Aydah in Youngstown, Mahoning County, Ohio.

On July 5, 2011, this Honorable Court ordered that Appellant's death sentence be carried into execution on July 26, 2012, after Appellant had exhausted all of his state and federal remedies.

On May 29, 2012, Appellant filed a Motion for an Order to Permit Dr. Jeffrey Smalldon to Observe his Clemency Interview with the Ohio Parole Board scheduled for May 31, 2012, at 10:00 a.m.

For the reasons the State's response contains, the State of Ohio requests this Honorable Court to Deny Appellant's Motion for an Order to Permit Dr. Jeffrey Smalldon to Observe his Clemency Interview with the Ohio Parole Board.

### Memorandum in Support

In *State v. Steffen*, this Court held that “[w]hen a criminal defendant has exhausted direct review, one round of postconviction relief, and one motion for delayed reconsideration under *State v. Murnahan* in the court of appeals and in the Supreme Court, any further action a defendant files in the state court system is likely to be interposed for purposes of delay and would constitute an abuse of the court system.” *State v. Steffen*, 70 Ohio St.3d 399, 412 (1994). This is precisely what Appellant has done in filing such a request at this point in time. Appellant’s motion to have his clemency interview observed by Dr. Smalldon is nothing more than “an abuse of the court system,” and “interposed for purposes of delay.” *See id.*

### Statement of the Case and Facts

On September 26, 1986, the Mahoning County Grand Jury indicted Defendant-Appellant on one count of Aggravated Murder, with an Aggravated Robbery Specification, in violation of R.C. §2929.04(A)(7); and a Firearm Specification, in violation of R.C. §2929.71. *State v. Eley*, 77 Ohio St.3d 174, 176 (1996). In addition, Appellant was indicted on one count of Aggravated Robbery, in violation of R.C. §2911.01(A)(1) & (2), with a Firearm Specification; and one count of Conspiracy, in violation of R.C. §2923.01(A), with a Firearm Specification. *Id.*

In May 1987, Appellant waived his right to a jury trial and opted instead to be tried to a three-judge panel. *Id.* Thereafter, Appellant entered into a plea of not guilty, thereby withdrawing his previous plea of not guilty by reason of insanity. On May 11-12, 1987, the three-judge panel heard the State’s evidence, while defense counsel chose not

to present any. *Id.* At the conclusion, the three-judge panel found Appellant guilty of Aggravated Murder, Aggravated Robbery, the Felony-Murder Capital Specification, and two of the three Firearm Specifications. The three-judge panel, however, found Appellant not guilty of Conspiracy. *Id.*

During the mitigation hearing, several family members testified on his behalf, which included his mother and sister. *Id.* Dr. Douglas Darnall, a clinical psychologist, ranked Appellant in the twelfth percentile on the Wechsler Adult Intelligence Test (WAIT). *Id.* at 177. Dr. Darnall testified that Defendant-Appellant had a history of chronic alcohol and polysubstance abuse, but exhibited “no evidence of psychosis or major defective disorder.” *Id.* Dr. Darnall found Appellant to be remorseful, but only to his family rather than the victim.

After the mitigation hearing concluded, the three-judge panel unanimously found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. The three-judge panel then sentenced Appellant to death. *Id.*

On December 20, 1995, the Seventh District affirmed Appellant’s convictions and sentence of death. *State v. Eley*, 7<sup>th</sup> Dist. No. 87 CA 122, 1995 WL 758808 (Dec. 20, 1995). Thereafter, this Court also affirmed Appellant’s convictions and sentence of death. *Eley*, 77 Ohio St.3d at 190. The United States Supreme Court denied *certiorari* on June 27, 1997. *Eley v. Ohio*, 521 U.S. 1124 (1997). On January 29, 1997, this Court denied Defendant-Appellant’s Motion for Reconsideration. *State v. Eley*, 77 Ohio St.3d 1549 (1997).

On September 20, 1996, Appellant filed a petition for postconviction relief pursuant to R.C. 2953.21 in the Mahoning County Common Pleas Court. *State v. Eley*, 7<sup>th</sup>

Dist. No. 99 CA 109, 2001 Ohio 3447, \*1. Thereafter, Appellant filed a motion with the trial court to have his competency evaluated to ensure that he was competent to participate in postconviction proceedings. The trial court denied the motion after an evidentiary hearing, and later granted the State's motion for summary judgment. *Id.*

The Seventh District affirmed the trial court's denial of Appellant's petition for postconviction relief, and its denial of the competency evaluation on November 6, 2001. *Id.* at \*17. This Court then declined jurisdiction on March 20, 2002. *State v. Eley*, 94 Ohio St.3d 1506 (2002). Appellant did not appeal the denial to the United States Supreme Court.

On June 9, 2003, Appellant filed a successive petition to vacate his death sentence pursuant to *Atkins v. Virginia* in the Mahoning County Court of Common Pleas. On September 24, 2003, the State filed its response. Appellant then filed a motion on December 20, 2004, for dismissal of his *Atkins* petition. The trial court granted the motion on January 5, 2005.

On March 19, 2003, after the completion of his state appeals, Appellant filed his Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Northern District of Ohio in which he raised eight claims for relief. *Eley v. Bagley*, N.D. Ohio No. 4:02CV1994, 2006 WL 2990520 (Oct. 18, 2006).

That same day, Appellant filed a motion for a competency evaluation to determine whether he was competent to waive federal habeas review of his conviction and death sentence. The Warden filed her response in opposition to Defendant-Appellant's motion on March 27, 2003. Appellant replied on March 28, 2003. On April

23, 2003, the District Court issued an order denying Appellant's motion for a competency evaluation without prejudice.

On June 2, 2005, Appellant filed an Amended Petition in which he raised fourteen claims for relief. On August 1, 2005, the Warden filed her Return of Writ, along with thirteen volumes of appendix and three volumes of transcripts. On October 10, 2005, Defendant-Appellant filed his Traverse. The Warden filed a Sur-reply on November 1, 2005. On October 18, 2006, the District Court dismissed Defendant-Appellant's Petition for Writ of Habeas Corpus and issued a certificate of appealability as to his Second and Eighth Claims for Relief. *Id.*

On November 13, 2006, Appellant filed a notice of appeal to the United States Sixth Circuit Court of Appeals. *Eley v. Bagley*, 604 F.3d 958 (6<sup>th</sup> Cir., 2010). On December 28, 2006, Appellant filed a motion to expand the certificate of appealability to include his First Claim for Relief raised below. The Warden opposed Appellant's motion on January 9, 2007. On April 8, 2008, the Sixth Circuit denied Appellant's motion and declined to expand the certificate of appealability to include his First Claim for Relief.

On July 21, 2008, however, Appellant raised his First Claim for Relief in his Proof Brief even though a certificate of appealability was not granted for it. On October 6, 2008, Appellant filed a petition for en banc rehearing, requesting that the certificate of appealability be expanded to include his First Claim for Relief. The Sixth Circuit granted Appellant's petition the same day, expanding the certificate of appealability to include his First Claim for Relief, and allowing the Warden to file a supplemental brief regarding that claim. Defendant-Appellant filed his Proof Reply Brief on October 14, 2008.

On May 14, 2010, the Sixth Circuit affirmed the District Court's denial of Defendant-Appellant's Writ of Habeas Corpus. *Id.* The Sixth Circuit then denied Defendant-Appellant's motion for rehearing and an *en banc* hearing on June 23, 2010. *Id.*

The United States Supreme Court denied *certiorari* on December 13, 2010. *Eley v. Houk*, 131 S.Ct. 822 (2010).

On July 5, 2011, this Honorable Court ordered that Appellant's death sentence be carried into execution on July 26, 2012, after Appellant had exhausted all of his state and federal remedies. Appellant's interview with the Ohio Parole Board is scheduled for May 31, 2012, and Appellant's Clemency Hearing is scheduled for June 12, 2012.

On May 29, 2012, Appellant filed a Motion for an Order to Permit Dr. Jeffrey Smalldon to Observe his Clemency Interview with the Ohio Parole Board scheduled for May 31, 2012, at 10:00 a.m.

For the reasons the this memorandum contains, the State of Ohio requests this Honorable Court to Deny Appellant's Motion for an Order to Permit Dr. Jeffrey Smalldon to Observe his Clemency Interview with the Ohio Parole Board.

### **Law and Argument**

Appellant's Motion for an Order to Permit Dr. Jeffrey Smalldon to Observe his Clemency Interview with the Ohio Parole Board must be denied, because his motion is nothing more than "an abuse of the court system," and "interposed for purposes of delay." *See Steffen*, 70 Ohio St.3d at 412. Appellant's motion contends that his counsel has "grave concerns" about his current mental functioning. (Appellant's Motion at 1.) But, the issue of Appellant's competency at trial, competency during postconviction, and

mental retardation have either already been litigated or knowingly and voluntarily waived.

On direct appeal, Appellant argued that the trial court should have conducted a hearing to determine if he was competent to stand trial. *See Eley*, 77 Ohio St.3d at 183. Regarding Appellant's request, this Court concluded that he "'knowingly and intelligently' withdrew 'any challenge to his competency to proceed with the trial of this action.' Thus, Eley affirmatively waived his right to a competency hearing that he previously requested pursuant to R.C. 2945.37." *Id.*

Thus, this Court concluded that any error in the trial court's failure to hold a hearing was harmless: "Even if we were to find Eley's waiver invalid, any error by the trial court in not conducting a hearing was harmless, since the record fails to reveal sufficient indicia of incompetency." *Id.* at 184, citing *State v. Bock*, 28 Ohio St.3d 108, paragraph one of the syllabus (1986). This Court specifically found that *Appellant failed "to cite any portion of the record which reveals any suggestion of incompetency."* *Eley*, 77 Ohio St.3d at 184. (Emphasis added.)

Furthermore, during mitigation, Dr. "Darnall testified that Eley was literate, could function day to day, and *was sane and competent at the time of the murder*. Moreover, Darnall opined that it did not appear that Eley was in any alcohol- or drug-induced blackout when the murder took place." (Emphasis added.) *Id.* at 185.

In postconviction, Appellant continued to argue that defense counsel was ineffective and the trial court erred in regards to the lack of a competency hearing. *See Eley*, 2001 Ohio 3447, *supra*. Appellant argued that there was sufficient evidence, specifically his uncooperativeness, to require counsel to litigate the competency issue.

*See id.* at \*5. In postconviction, (like Appellant does here) Appellant relied upon Dr. Smalldon's affidavit that he suspected that Appellant suffered from brain damage. *See id.* at \*6.

The Seventh District recognized, however, that Appellant had already been given an opportunity to be examined by a psychologist, Dr. Darnall. *See id.* Dr. Darnall testified during mitigation that "[t]here was no evidence of psychosis or major defective disorder. Thus, he has good contact with reality." *Id.* at \*7. "Moreover, after reading the suppression hearing transcript, at which Eley took the stand in his own defense, it appears he was capable of assisting counsel. He seemed very lucid and gave coherent, reasonable answers, even on cross-examination." *Id.*

Even today, the only evidence Appellant presented that could possibly support his claim is his uncooperativeness and his seemingly poor decisions regarding his defense. *See id.* at \*7.

The Seventh District properly recognized that "[i]ncompetency should not be equated with 'mere mental or emotional instability or even with outright insanity.'" *Id.* at \*7, quoting *Bock*, 28 Ohio St.3d at 110. Accordingly, "a defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel." *Eley*, 2001 Ohio 3447, *supra.* at \*7.

Therefore, as to Appellant's competency before he was convicted, he "'knowingly and intelligently' withdrew 'any challenge to his competency to proceed with the trial of this action.' Thus, Eley affirmatively waived his right to a competency hearing that he previously requested pursuant to R.C. 2945.37." *Eley*, 77 Ohio St.3d at 183. "Even if we were to find Eley's waiver invalid, any error by the trial court in not conducting a hearing

was harmless, *since the record fails to reveal sufficient indicia of incompetency.*” *Id.* at 184, citing *Bock*, 28 Ohio St.3d at 108, paragraph one of the syllabus.

Furthermore, as to Appellant’s competency after he was convicted, Ohio law does not allow for competency evaluations in postconviction.

This Court has previously recognized that “a postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment.” *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999), citing *Steffen*, 70 Ohio St.3d at 410, citing *State v. Crowder*, 60 Ohio St.3d 151 (1991). And “[s]tate collateral review itself is *not* a constitutional right.” *Calhoun*, 86 Ohio St.3d at 281, citing *Steffen*, 70 Ohio St.3d at 410, citing *Murray v. Giarratano*, 492 U.S. 1 (1989). “Therefore, a petitioner receives no more rights than those granted by the statute.” *See Calhoun*, 86 Ohio St.3d at 281.

This Court has further recognized that post-conviction proceedings must be guided by the Revised Code, because of their inherent difficulty in prosecuting and defending against such claims and the finality of a defendant’s conviction. *Id.* at 282, quoting *State v. Milanovich*, 42 Ohio St.2d 46, 51 (1975). Therefore, unlike pre-conviction, in postconviction proceedings, the petitioner [defendant] bears the initial burden of demonstrating by competent and credible evidence dehors the record of his actual innocence or of a constitutional violation pursuant to R.C. 2953.21. *See id.* at 283, citing *State v. Jackson*, 64 Ohio St.2d 107, 112 (1980).

The Second District Court of Appeals previously held that a defendant’s motion to stay postconviction proceedings until his competency has been restored is not a proper matter for post-conviction. *See State v. Franklin*, 2<sup>nd</sup> Dist. No. 19041, 2002 Ohio 2370, ¶ 59. The Second District reasoned that post-conviction “proceedings are designed to

investigate the validity of [the defendant]'s conviction." *Id.* And "competency has no bearing on whether his conviction was validly obtained." *Id.*

The Seventh District Court of Appeals likewise concluded that "the right to a determination of competency to assist with post-conviction proceedings must be provided for by statute. However, the only time competency is deemed relevant by statute are at the time of the offense and at the time of trial." *Eley*, 2001 Ohio 3447, *supra* at \*14; *accord State v. Ahmed*, 7<sup>th</sup> Dist. No. 05 BE 15, 2006 Ohio 7069, ¶ 54 (stating "this court has made clear that a postconviction petitioner is not constitutionally entitled to a competency determination").

The Seventh District reasoned that "[s]ignificantly, state post-conviction review is not a constitutional right. Accordingly, in a post-conviction proceeding, a convicted defendant has only the rights granted to him by the legislature." *Eley*, 2001 Ohio 3447, *supra* at \*14, citing *State v. Moore*, 99 Ohio App.3d 748, 751 (1<sup>st</sup> Dist. 1994). (Internal citations omitted.) And the Ohio Legislature has not granted defendants a right to a competency evaluation during postconviction proceedings.

Here, nothing that Appellant has presented to this Court reasonably establishes that Appellant does not understand the nature of the death penalty, or that he does not understand why the death penalty is being imposed upon him. Appellant has the full understanding that the death penalty is being imposed upon him for the August 26, 1986 Aggravated Murder of Ihsan Aydah in Youngstown, Ohio.

Therefore, the Ohio Parole Board's decision to deny Appellant's request to have Dr. Smalldon observe his clemency interview must stand in light of the Ohio Parole Board's apparent authority to regulate clemency interviews.

**Conclusion**

With this procedural history, it is clear that Defendant-Appellant John J. Eley has exhausted all of his state and federal court reviews of his convictions and death sentence. Appellant's motion to have his clemency interview observed by Dr. Smalldon is nothing more than "an abuse of the court system," and "interposed for purposes of delay." See *Steffen*, 70 Ohio St.3d at 412.

**WHEREFORE**, the State of Ohio requests this Honorable Court to Deny Appellant's Motion for an Order to Permit Dr. Jeffrey Smalldon to Observe his Clemency Interview with the Ohio Parole Board on May 31, 2012; and in the alternative, Deny Appellant's request to allow the proceeding to be videotaped and provided to Dr. Jeffrey Smalldon.

Respectfully Submitted,

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MAHONING COUNTY PROSECUTOR BY:

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**Certificate of Service**

I certify that a copy of the State of Ohio's Response was sent by ordinary U.S. Mail and Electronic Mail to counsel for Defendant-Appellant, **Vicki Ruth Adams Werneke, Esq.**, and **Alan C. Rossman, Esq.**, at their above address, on May 30, 2012.

So Certified,

*BY S. MAHER*  
*0032279*  
Ralph Rivera

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