

IN THE
SUPREME COURT OF OHIO

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| STATE OF OHIO | : | NO. 1998-0147 |
| Plaintiff-Appellee | : | |
| vs. | : | Death Penalty Case |
| JAMES O'NEAL | : | |
| Defendant-Appellant | : | |

MOTION TO SET EXECUTION DATE

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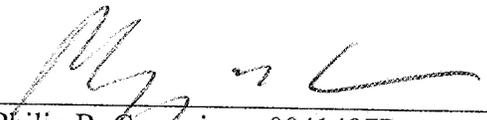
STATE OF OHIO : NO. 1998-0147
Plaintiff-Appellee :
vs. : Death Penalty Case
JAMES O'NEAL :
Defendant-Appellant :

MOTION TO SET EXECUTION DATE

The State of Ohio respectfully requests this Court to set an execution date for Defendant, James O'Neal. The reasons in support of this motion are stated in the attached memorandum.

Respectfully submitted,

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Counsel for Plaintiff-Appellee, State of Ohio

MEMORANDUM IN SUPPORT

FACTUAL BACKGROUND

This Court on direct appeal summarized the facts as follows:

On November 14, 1992, appellant, James Derrick O'Neal, and Carol O'Neal were married. Initially, they lived together in Corryville, Ohio, with Carol's four children.

In September 1993, Carol, individually, entered into a lease agreement for a home at 4938 Plainville Road in Madisonville. Subsequently, Carol, appellant, and Carol's four minor children moved into the home. Thereafter, two of appellant's minor children also moved into the home.

By December 1993, the marital relationship between appellant and Carol had deteriorated due, in part, to discord among the children and problems between appellant and Carol's oldest son, Ricardo. During this time, Carol worked at Ampco Parking during the day and at a convenience store at night. Patricia Carr, a friend of Carol's and a coworker at Ampco, stated that Carol acted tired and stressed and that she wanted to end her marriage with appellant.

On December 7, 1993, an altercation occurred between Carol and appellant. As a result, Officer Michael Mercer from the Cincinnati Police Department responded to a call for assistance at the Plainville Road residence. Mercer found Carol to be "very upset" and "very fearful" of appellant. Carol told Mercer that she had argued with appellant over food stamps and that she had asked him to leave. Carol also informed Mercer that appellant had struck her in the face numerous times, choked her, shoved her to the ground, and kicked her. Mercer noticed that Carol's face and neck were bruised. Carol also advised Mercer that appellant had recently moved out of the house.

The same day, December 7, 1993, Carol filed, in the Hamilton County Municipal Court, a domestic violence complaint and a temporary protection order against appellant. A warrant was then issued for appellant's arrest.

Carr testified that she saw Carol at Ampco Parking on December 7 and noticed that her jaw was swollen and that Carol was "very upset." Carol told Carr that when appellant tried to take food stamps out of her purse, they argued and appellant hit her in the jaw.

According to Carr, Carol planned to change the locks on the house and was "scared [appellant] would kill her." Carr also stated that every day thereafter Carol was nervous, shaky, and drained, and explained that whenever the telephone rang at work, "[Carol] would be shaking, scared, thinking it was going to be [appellant] on the phone."

On December 11, 1993, appellant telephoned Carol at her place of employment. Jamie Wright, who worked with Carol and also knew appellant, answered the telephone and advised Carol that she suspected the caller was appellant. The telephone was then placed in speaker mode so that both Carol and Wright could hear the conversation. Wright testified that after Carol said hello, appellant stated, "Bitch, it ain't over yet." Appellant then started laughing and hung up. According to Wright, Carol stumbled backward, appeared to nearly faint, and was shaking and "nervous and jittery" the rest of the work day.

Later that evening, appellant broke the glass portion of the front door and entered the residence at 4938 Plainville Road. At the time, Carol was coming down the stairs. When the glass broke, Carol ran upstairs screaming, and she and her three youngest children retreated into a bedroom. Carol directed the children into a closet and she stood pushing on the bedroom door trying to keep appellant from entering. Two of Carol's children, who were looking out of the closet, testified that appellant fired a shot at the bedroom door and that Carol fell to the floor behind the bedroom door. Appellant then entered the bedroom and, while standing over Carol, fired two or three shots at her. One of the bullets struck Carol in the upper left chest.

Appellant left the bedroom and confronted Carol's oldest child, Ricardo, who was then fourteen years old. According to Ricardo, appellant pointed the gun at his neck and pulled the trigger at least twice. When the gun did not fire, appellant hit him in the face with the gun and left the house.

State v. O'Neal, 87 Ohio St.3d 402, 721 N.E.2d 73, 77-81 (2000).

STATE COURT PROCEEDINGS

O'Neal was indicted on December 15, 1993, by the Hamilton County Grand Jury on four counts, including purposely causing the death of Carol O'Neal during the commission of an aggravated burglary under Ohio Revised Code § 2903.01(A) and purposely causing the death of Carol O'Neal with prior calculation and design under Ohio Revised Code § 2903.01(B). Each count had two death penalty specifications, one alleging a course of conduct involving the purposeful attempt to kill two or more persons under Ohio Revised Code § 2929.04(A)(5), and the other alleging murder during an aggravated burglary under Ohio Revised Code § 2929.04(A)(7). He was also indicted on one count of attempted murder of Ricardo Lee and one count of aggravated burglary. Each of these counts carried a firearm specification.

A jury found O'Neal guilty on both counts of aggravated murder, on both aggravated burglary death penalty specifications, of the firearm specifications, and of the aggravated burglary charge. They found him not guilty on the attempt murder charge and the course-of-conduct death penalty specifications. After a sentencing hearing, the jury recommended death. The court accepted the jury's recommendation and sentenced O'Neal to death on counts one and two, to a term of 10-25 years with 10 years of actual incarceration on the fourth count, and a consecutive term of three years for each of the firearm specifications.

After reviewing the merits of O'Neal's propositions of law, re-weighting the aggravating circumstances against the mitigating factors, and independently assessing the appropriateness of the penalty of death, this Court affirmed the conviction and death sentence. *State v. O'Neal*, 87 Ohio St.3d 402, 721 N.E.2d 73 (2000).

O'Neal then filed an application to reopen his direct appeal under Ohio R. App. P. Rule 26(B) and *State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). The application was denied by the Hamilton County Court of Appeals and this Court declined review. *Id.* at 34, 37, 584 N.E.2d 1204.

O'Neal sought post-conviction relief under Ohio Revised Code § 2953.21.

The trial court denied O'Neal's Petition for Post-Conviction Relief. The court of appeals affirmed and this Court declined review. *Id.* at 313, 584 N.E.2d 1204.

On November 15, 2002, O'Neal sought post-conviction relief based on the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held that execution of the mentally retarded constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. After a hearing on O'Neal's petition, the trial court concluded that O'Neal is not mentally retarded under

the criteria identified by this Court in *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011 (2002). O'Neal appealed and the state court of appeals affirmed the trial court's decision. *State v. O'Neal*, Case No. C-050840 (Dec. 1, 2006). He further appealed to this Court, which declined to accept jurisdiction. *State v. O'Neal*, Case No. 2007-80 (May 2, 2007).

FEDERAL COURT PROCEEDINGS

O'Neal filed his Notice of Intention to seek habeas relief on March 29, 2002, and followed with the Petition on May 21, 2002. He filed an Amended Petition on May 31, 2007. The United States District Court for the Southern District of Ohio, Michael R. Barrett, J., 2011 WL 1288111, denied the petition and granted in part and denied in part petitioner's application for certificate of appealability (COA), 2011 WL 3667359. Petitioner appealed.

On December 23, 2013, the United States Court of Appeals affirmed. *O'Neal v. Bagley*, 743 F.3d 1010 (2013) 2013 WL 6726904.

On October 6, 2014, the United States Supreme Court denied O'Neal's petition for writ of certiorari. *O'Neal v. Bagley*, 135 S.Ct. 69 (Mem), 83 USLW 3186, U.S.; October 6, 2014 (No. 13-10044).

OTHER LITIGATION

O'Neal is a plaintiff in the ongoing lethal injection litigation before Judge Frost in the United States District Court but has not received a stay of execution based on this litigation.

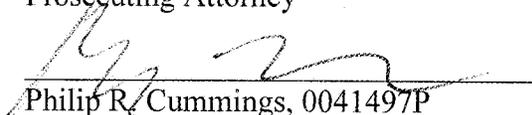
CONCLUSION

The procedural history in this case shows that O’Neal has exhausted his state and federal reviews of his conviction and death sentence. In *State v. Steffen*, (1994), 79 Ohio St.3rd 399, 412, this Court held that once a capital defendant has exhausted his direct appeal, post-conviction review, and delayed reconsideration review, any further filings are likely to be interposed for the purposes of delay, and that a capital defendant would have to petition this Court for a stay to allow further litigation. O’Neal does not have any pending petition for stay before this Court.

Since O’Neal has exhausted his state and federal review, there is no impediment to prevent this Court from setting an execution date. Accordingly, the State moves this Court to set an execution date in this case.

Respectfully submitted,

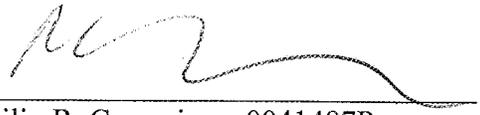
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Counsel for Plaintiff-Appellee, State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of January, 2015, I have sent a copy of the foregoing Motion to Set Execution Date to counsel for the defendant, by United States mail, addressed Kirstie N. Young, Attorney at Law, Bieser, Greer and Landis, LLP, 6 North Main St. #400, Dayton, Ohio 45402, and to Lawrence J. Greger, Attorney at Law, Greger Law Office, 120 W. 2nd St. #1100, Dayton, Ohio 45402.


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