

DATE TYPED: June 19, 2012
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IN RE: JOHN JEFFREY ELEY, CCI #A198-441

**STATE OF OHIO
ADULT PAROLE AUTHORITY
COLUMBUS, OHIO**

Date of Meeting: June 12, 2012

Minutes of the **SPECIAL MEETING** of the
Adult Parole Authority held at 770 West Broad Street,
Columbus, Ohio 43222, on the above date.

IN RE: John Jeffrey Eley, CCI #A198-441

SUBJECT: Death Sentence Clemency

CRIME, CONVICTION: Aggravated Murder with death penalty and gun specifications; Aggravated Robbery with gun specification.

DATE, PLACE OF CRIME: August 26, 1986, Youngstown, Ohio

COUNTY: Mahoning

CASE NUMBER: 86CR484

VICTIM: Ihsan Aydah (Age 28) – deceased

INDICTMENT: Count 1: Aggravated Murder with death penalty and gun specifications; Count 2: Aggravated Robbery with gun specification; Count 3: Conspiracy to Commit Aggravated Robbery with gun specification.

TRIAL: May 11-12, 1987, found guilty by three-panel judge as to counts 1 and 2; not guilty as to count 3.

DATE OF SENTENCE: July 14, 1987

SENTENCE: Count 1: DEATH;
Count 2: 10-25 years

ADMITTED TO INSTITUTION: August 25, 1987

JAIL TIME CREDIT: 361 days

TIME SERVED: 24 years, 10 months (does not include JTC)

AGE AT ADMISSION: 38 years old

CURRENT AGE: 63 years old

DATE OF BIRTH: February 4, 1949

JUDGE: Honorable Elwyn V. Jenkins
Honorable Peter C. Economus
Honorable William Houser

PROSECUTING ATTORNEY: Prosecutor Paul J. Gains

FOREWORD:

Clemency in the case of John Eley, #A198-441, also known as Robert Eley or Jeff Eley, was initiated by the Ohio Parole Board, pursuant to Sections 2967.03 and 2967.07 of the Ohio Revised Code and Parole Board Policy #105-PBD-01.

On May 31, 2012, John Eley was interviewed via video-conference by the Parole Board at the Chillicothe Correctional Institution. A Clemency Hearing was then held on June 12, 2012, with eight (8) members of the Ohio Parole Board participating. Arguments in support of and in opposition to clemency were then presented.

The Parole Board considered all of the written submissions, arguments, information disseminated by the presenters at the hearing, as well as judicial decisions and deliberated upon the propriety of clemency in this case. With eight (8) members participating, the Board voted five (5) to three (3) to provide an unfavorable recommendation for clemency to the Honorable John R. Kasich, Governor of the State of Ohio.

DETAILS OF THE INSTANT OFFENSE (86CR484):

The following account of the instant offense was obtained from the Ohio Supreme Court Decision, decided December 18, 1996:

“On August 26, 1986, John Jeffrey Eley, shot and killed Ihsan ‘Easy’ Aydah during a robbery of the Sinjil Market in Youngstown, Ohio. Eley confessed to the killing, and was subsequently convicted of aggravated murder and aggravated robbery, and sentenced to death.

During the early afternoon of August 26, 1986, Eley was visiting Melvin Green at the home of Green's girlfriend in Youngstown. According to Eley, he and Green were just sitting around when Green suggested that they go down to the ‘Arab store.’ Eley and Green left the house and proceeded down a path through the woods leading to the Sinjil Market. Along the way, Green showed Eley a ‘Black Snub nose gun,’ and told Eley he ‘was going to take the Arab off.’ Since the proprietor of the store, Ihsan Aydah, knew Green's face, Eley agreed to go in alone and rob the store while Green waited outside.

Eley entered the store and told Aydah to put his hands up and to turn and face the wall. Green had told Eley that Aydah had a gun under the store counter, so when Aydah lowered his hands and went under the counter, Eley fired a shot. Eley claimed that he aimed at Aydah's shoulder. However, the shot hit Aydah on the right side of his head, approximately four inches above the earlobe. Aydah died the next day of shock and hemorrhage due to a gunshot wound to the head.

Just before Eley fired the gun, Green entered the store. After the shot, Green ran behind

the counter and got into the cash register. He took Aydah's wallet while Aydah lay wounded on the floor. As the two left the store, Green gave Eley a brown paper bag with the money and wallet. According to Eley, they went up the street, 'got to the path and ran up the woods.'

Around 2:00 to 2:30 p.m. that day, Cheryl E. Cooper left home for the Sinjil Market with her three children. Cooper saw Melvin Green and another man enter the path to the store 'walking fast in front of us.' Cooper saw the pair turning the corner heading to the store, and noticed that neither man was carrying anything at that time. Shortly thereafter, Cooper saw Melvin Green and the other man, who was carrying a brown paper bag, come around the corner, passing them halfway on Davis Lane. When Cooper arrived at the Sinjil Market, she saw magazines and cigarettes strewn all over the floor. She looked over the counter and saw Aydah lying on the floor.

Christopher Cretella lived half a block from the Sinjil Market, and around 2:30 p.m. that day was outside washing a car in his driveway. He saw Melvin Green and 'another fellow' walking away from the store, and then running toward the path, right into the woods. Cretella noticed the pair holding a bag and passing something back and forth. Two weeks before the murder, Cretella had seen Green and Aydah '[having] some words,' and 'Easy told him to get out and not to come back.'

Several days after the murder, Eley was arrested by Youngstown police at the residence of his cousin's girlfriend, Carlotta Skinner. After his arrest, Eley told police that he and Green had split the money taken in the robbery, which was around \$700. However, Eley later gave the money back to Green 'because he said it was all on him and he had to get out.'

After apprehending Eley, Lt. Robert Kane, Detective Joseph Fajack, and Detective James Pasquale of the Youngstown Police Department brought Eley into the roll call room at police headquarters. There, Eley was given his *Miranda* rights, and signed two forms. In the first form, Eley waived his *Miranda* rights; in the second, Eley indicated that he could read and write English and reiterated the waiver of *Miranda* rights and his desire to make a voluntary statement.

Eley told the detectives that he wanted to talk about his involvement in the Aydah murder. Although there were tape-recording and video-equipment devices available nearby, Fajack stated that he and the officers present 'did not have access' to them. Therefore, Fajack conducted his interview with Eley by writing down each of the questions asked. Below each question, Fajack transcribed Eley's response verbatim.

In his voluntary statement Eley admitted that he and Green had robbed the Sinjil Market, and that he shot Aydah. Fajack testified that Eley did not appear to be under the influence of alcohol or drugs during the interview and was 'very calm' and 'passive.'

The grand jury indicted Eley on one count of aggravated murder with a specification that the murder was committed during, or immediately after, the commission of an aggravated

robbery (R.C. 2929.04), and that Eley was the principal offender. This count also carried a firearm specification. In addition, Eley was indicted on one count of aggravated robbery (R.C. 2911.01[A][1] and [2]) and one count of conspiracy (R.C. 2923.02[A]). Each count carried a firearm specification.

In May 1987, Eley waived his right to a jury trial and opted for a trial before a three-judge panel. Eley pled not guilty to the charges against him, thereby withdrawing a prior plea of not guilty by reason of insanity. In May 1987, the trial court rejected Eley's motion to suppress his confession and found that Eley had made a knowing, intelligent, and voluntary waiver of his rights at the time of the confession.

Trial was held before a three-judge panel on May 11-12, 1987, but the defense chose not to present any evidence. The panel found Eley guilty of aggravated murder, aggravated robbery, the felony-murder capital specification, and two of the three firearm specifications, but not guilty of conspiracy."

PRIOR RECORD

Juvenile Offenses: John Eley has the following known juvenile arrest record:

<u>Date</u>	<u>Offense</u>	<u>Location</u>	<u>Disposition</u>
02/1960 (Age 11)	Tardiness	Mahoning County, Ohio	Advised
09/1963 (Age 14)	Damage to Property and Taking wiring	Mahoning County, Ohio	Warned
05/1966 (Age 17)	Fighting at School	Mahoning County, Ohio	Reprimanded

Dismissed, Nollied and/or Unknown Dispositions:

Eley was referred in December 1964 to the Mahoning County Juvenile Court for a charge of Ungovernable. This was the result of a family argument in which Eley stabbed his step-father with scissors. The charge was dismissed; the family worked out the difficulties.

Adult Offenses: John Eley has the following known adult arrest record:

<u>Date</u>	<u>Offense</u>	<u>Location</u>	<u>Disposition</u>
01/16/1969 (Age 19)	Assault and Battery	Youngstown, Ohio	\$5 fine and costs suspended.
06/20/1969 (Age 20)	Receiving Stolen Property	Youngstown, Ohio	\$10 and costs, 30 days county jail.

03/19/1977 (Age 28)	Theft	Youngstown, Ohio	\$25 fine and costs, 30 days county jail, fine suspended, 6 months probation.
09/16/1981 (Age 32)	Aggravated Assault (81CR815)	Youngstown, Ohio	1-29-82; 6 months to 5 years cc w/81 CR997.
11/07/1981 (Age 32)	Breaking and Entering (81CR997)	Youngstown, Ohio	1-29-82; 6 months to 5 years cc w/81 CR815.
10/31/1982 (Age 34)	Assault	Youngstown, Ohio	11-9-83; \$5 fine and costs, 30 days jail, 25 suspended on payment of fines & costs, 6 months probation
03/24/1984 (Age 35)	Breaking and Entering (84CR214)	Youngstown, Ohio	7/23/84; 1 year sentence; 1/11/85; 3 years shock probation.
08/26/1986 (Age 37)	Aggravated Murder; Aggravated Robbery; Specifications (86CR484)	Youngstown, Ohio	INSTANT OFFENSE

Dismissed, Nollied and/or Unknown Dispositions:

November 1969: Malicious Destruction of Property, complaining witness failed to go forward; April 1976: Complicity reduced to Menacing, dismissed on 7/6/1976; December 1978: Carrying Concealed Weapon, dismissed; September 1979: Assault and Aggravated Robbery, dismissed; January 1983: Assault, dismissed when complaining witness failed to go forward; July 1985: Felonious Assault, dismissed when complaining witness failed to come forth.

Institutional Adjustment:

John Eley was admitted to the Department of Rehabilitation and Correction on August 25, 1987. His work assignments while incarcerated included Porter, Orientation, and Library Aide. He is currently a Porter at the Chillicothe Correctional Institution.

Since his admission, Eley has accumulated the following disciplinary record which resulted in placement in disciplinary control:

- 5/13/2002: Eley was fighting with another inmate and punches were thrown. Eley had to be transported to an outside hospital for medical attention. Eley states that the other inmate was the aggressor. He received seven (7) days in disciplinary control for this rule infraction;
- 6/17/2007: While Eley's cell was being searched as part of a shake down, he had a pair of glasses that had the ear piece broken off and one end of it was sharpened to a point. He received seven (7) days in disciplinary control for this rule infraction;
- 1/14/2012: Eley violated Rule 60 by aiding two other inmates who were actively fighting by closing the porter closet so the Correctional Officers could not see them fighting. Eley received ten (10) days in disciplinary control for this rule infraction.

Eley has numerous other conduct reports for institutional rule violations that did not result in placement in disciplinary control. They include: Possession of contraband in 1988, 1991, 1992, 2003, 2006, 2012; Disobedience of a direct order(s) in 1987, 1989; Dealing in 1987; Malicious destruction, alteration, or misuse of property in 1989; Violation of mail/visiting rules in 1989; Disrespect to staff in 2001 and 2011.

APPLICANT'S STATEMENT:

On May 31, 2012, an interview was conducted by six (6) Board Members with the applicant, via video conference, from the Chillicothe Correctional Institution. After introductions, but prior to the interview starting, Eley noted that two (2) Board Members appeared to be absent and asked if it was fair to go forward without them, because these absent Members might have voted in his favor. The Chairperson explained that two (2) Board Members were off work that day, but that one of them would be participating in his upcoming clemency hearing, and that absent Member would be provided an overview of this interview in advance. Since a majority of the Board was present, the interview of Eley proceeded.

During the interview, Eley requested a full executive pardon alleging that he is innocent of the murder of Mr. Aydah and that he did not participate in the robbery of the store. Furthermore, Eley stated the following: that his statements, constituting his confession and signed by him, were fabricated by the police; that he doesn't know how his signature was obtained because he never left the bar he was in at the time; that there is no evidence, facts or proof about his guilt; that he was convicted on mob or lynch law and based upon racism; and that he has been enslaved for twenty-five (25) years.

Eley noted that he has spent most of his time while incarcerated reading scripture, playing the harmonica, and staying to himself. He indicated that he has studied and taught himself the law, the constitution, and psychology. Although Eley has not completed any programs, he stated that he has completed some community service by making puppets for children and volunteering at AA (Alcoholics Anonymous). Finally, he stated that he

remains close to his family and communicates with them mainly via phone calls, but they have exchanged some letters and they have been able to visit on occasion.

The interview was concluded by the Chairperson thanking Eley for his participation, and by giving him a final opportunity to tell the Board Members anything else he felt was important. Eley responded by stating: that he is innocent; that he does not want his prior attorneys to be able to appear at his clemency hearing on his behalf, and to just let the prosecutor say what he wants.

ARGUMENTS IN SUPPORT OF CLEMENCY:

Vicki Werneke, Assistant Federal Public Defender, appeared at the clemency hearing on behalf of Eley. In addition, the following individuals appeared, in person, and provided statements: Dr. Stephen Greenspan, Psychologist; Dr. Jeffrey Smalldon, Psychologist; Donzella Anuszkiewicz, Investigator, Federal Public Defender's Office; and, Jan Mitchell, Investigator, Federal Public Defender's Office.

The following individuals appeared via videotape which consisted of their statements made to staff members of the Federal Public Defender's Office: Gary Van Brocklin, former Mahoning County Prosecutor; Cindy Yost, former post-conviction counsel for Eley; Gregory Myers; former post-conviction counsel for Eley; Robert Lowe, former post-conviction counsel for Eley; and, James Walden, former childhood friend of Eley. An audio taped statement of Thomas Zena, former trial counsel for Eley was also presented.

The following arguments were presented by Vicki Werneke, Assistant Federal Public Defender, in the order they were presented, in support of clemency:

- A post-conviction petition was filed on June 11, 2012, in state court, seeking to vacate Eley's death sentence based, in part, on the assertion that he is mentally retarded;
- Everyone believes that Melvin Green was the leader during this crime, including the original prosecutor who submitted an affidavit in Eley's post-conviction case. Eley was not a career criminal, like Green, and he had no serious prior convictions, other than breaking into a pharmacy and drinking cough syrup. Guy Trammell, the former Parole Officer who wrote the Pre-Sentence Investigation, did not feel that a death sentence was an appropriate recommendation, based upon his prior knowledge of supervising Eley and his brother on other criminal convictions, but did so as instructed by the prosecutor.
- Jan Mitchell stated: she spoke with Trammell who said to her that Green was a bad guy; she also spoke with retired Detective Fajack who stated that Eley has been on his mind for half his life; she said that Fajack stated that Green was a bad guy and that the police knew he shot other people, but they could not gather enough evidence to charge him; she said that Fajack was going to give a

declaration but then his wife became ill and was taken to the hospital; she also went to NCCI to speak with Green but he refused, stating he had nothing to say.

- Gary Van Brocklin, former Mahoning County Prosecutor, provided a video-taped statement which was played at the hearing. He stated: that he never knew exactly what happened in the store but he surmised that Aydah moved towards his gun and he was shot; that Green was a well-known thug who was tied to several shootings but there was never enough evidence to connect him to them; a plea deal was offered before trial to Eley in an attempt to obtain sufficient information to successfully prosecute Green, and after conviction Eley was offered assistance with seeking a commutation of his sentence if he helped with Green's trial; and, that he currently feels it is not appropriate to execute Eley;
- Vicki Werneke stated that mitigation material was not presented at Eley's trial but was developed over the years by the Ohio Public Defender's Office during the post-the conviction process; this mitigation includes severe substance abuse, probable brain impairment or damage that cannot be diagnosed because Eley will not agree to any psychological testing, and that Eley is mentally retarded (intellectually disabled). Mitigation material was also obtained by Donzella Anuszkiewicz by interviewing family and friends;
- Donzella Anuszkiewicz stated: Eley's family was not present at the clemency hearing because they love him and want to honor his wishes that the family not participate in this process; they wish to show him that he has self-worth and to honor his decision; instead, family and friends have provided reports and participated in interviews. These reports stated that Eley had severe social introversion and was exploited by bullies in the neighborhood;
 - Eley's friends, Will and Taylor, noted that he attended slow classes with them in school; Arthur McClendon noted that Eley lived by a code wherein he would not tell on his friends, and that he wouldn't have done this crime on his own;
 - Barbara Willis noted that Eley drank a lot, that they worked together occasionally at a horse stable, and that she was not in support of his execution;
 - Carlotta Skinner stated that Eley was arrested at her house, that he drank and she gave him pills because he didn't have heroin, and he wanted to sleep but was not able. Ms. Skinner also indicated that Eley was not a trouble maker, and that during his arrest Eley spent time explaining to the police how she was not involved in the crime;
- James Walden, former childhood friend of Eley, provided a video-taped statement which was played at the hearing. He stated: as kids, they all had fun together as a group and that Eley was the main character; Eley was a loyal friend growing up and since childhood, he lived by a code which meant that he would not tell on anyone; he remained his friend even after Eley beat him up as a kid; Walden also relayed a story that when they were younger and had done something they should

not have been doing at a hospital, Eley said that if they get caught he (Eley) would take the blame because he was the man; Walden expressed his opinion that Eley should not be executed;

- Vicki Werneke next stated that Eley's records reveal factors that could indicate that he suffered from brain impairment. These factors included: he was delivered at birth via forceps; he participated in boxing as a teenager; he had a head injury; he abused alcohol and drugs, and hospital records from 1976-1984 show that he was hospitalized several times due to alcohol and infections related to alcohol use; these factors also support that Eley is mentally retarded and Dr. Greenspan was asked to provide further comments;
- Dr. Greenspan, provided a report, but also stated that the more he looked at Eley's records the more he became concerned and that he believes that Eley meets the criteria for a mental retardation diagnosis; he said it was rare that he finds a case when he is approached where he believes, like Eley's, that such a finding is appropriate; he also distinguished and disputed the other psychological reports of Eley conducted by Dr. Darnall and Dr. Ott, by noting that they only looked at isolated behaviors and failed to take into account other examples which demonstrated impairment. Dr. Greenspan also noted the following with regard to Eley:
 - Adaptive functioning consists of three areas-conceptual, practical, and social adaptive behaviors-but a major deficiency in only one area is sufficient for a disability finding;
 - All prior I.Q. tests and scores for Eley are deficient for a number of reasons and if the Flynn Effect is taken into account, Eley's scores would be lowered to the 70-75 percentile range, applicable to most states, which would qualify him;
 - Review of the records indicates that Eley profoundly lacked risk appreciation; he lacked the capacity to understand his Miranda rights; individuals who are mentally retarded tend to want to go along with others, are eager to please, and will say yes to anything; when Eley spoke with police, he stuck to the code of not talking about anyone else's involvement, and he didn't understand the risk he was putting himself in at the time; this is clearly a characteristic of someone who is mentally retarded;
 - Gullibility is also a strong factor of mental retardation and present with Eley. There are numerous examples of his behavior that could be cited such as when Eley apparently consulted with Green about whether or not he should testify in Green's case while they were both in jail. Another example was that all of Eley's friends were younger than him;
 - If evaluated for competency using today's more sophisticated testing, Eley would be found incompetent; he does not have a rational understanding of what is happening; he may also be mentally ill, as there is a higher likelihood of mental illness in individuals who are mentally retarded, and diagnostic over-shadowing of mental illness can occur because behaviors are attributed to mental retardation.

- Thomas Zena, Eley's trial counsel, provided an audio-taped statement which was played at the hearing. He stated: there were substantial problems with representing Eley such as Eley could not comprehend the case fully; he arranged for Eley to be evaluated for competency but Eley would not cooperate; he was offered a plea bargain because Green was known by prosecutors as a heartless, cold-blooded killer and they wanted to obtain a conviction of Green; hours were spent explaining this to Eley, but Eley would not cooperate, indicating that it would be wrong to bear witness against another; he feels badly for Eley because he was not the type of person to commit such a crime;
- John Shultz, Eley's trial counsel, provided an audio-taped statement which was played at the hearing. He stated: Eley had a hard time comprehending things he would tell him and that he had to keep explaining things to him before Eley understood; Green was the mastermind but tried separately because Green was not indicted with a death specification as was Eley; he believes Green put Eley up to the offense while in a drug induced state, and that Eley did not go into the store with the intention to shoot; the prosecutor was aware that Green was the primary suspect, which is why he offered to drop the death specification if Eley agreed to testify against Green; Eley was not concerned about his trial as evidenced by his statement to the court consisting of unexplainable religious comments in an attempt to sound smart;
- Cynthia Yost, Eley's post-conviction attorney, provided a video-taped statement which was played at the hearing. She stated: Eley did not understand legal concepts, and he just did not get it; he has been manipulated a lot by other inmates on death row during his incarceration; Eley was also close to Green while both were housed at the county jail and there was a lot of communication between them and a lot of manipulation of Eley by Green; Eley is not competent;
- Greg Meyers, Eley's post-conviction attorney, provided a video-taped statement which was played at the hearing. He stated: Eley wanted to raise challenges to his capital conviction only in federal court, and refused to accept the fact that he was required to exhaust his claims in state court before proceeding to federal court; Eley was mentally ill-he did not process anything; he had Dr. Smalldon conduct a review for Eley's post-conviction petition which revealed multiple reasons to look at Eley's competence both at the time of trial and at the time of his post-conviction petition; during the direct appeal of his post-conviction petition denial, Eley sent a letter to the appeals court seeking to "pull the plug"; finally after exhausting his claims in state court, which allowed him to proceed to federal court, as Eley wanted, Eley would no longer allow a post-conviction petition to be filed in federal court; he opined that Eley may have been tired of the process, or his mental illness impacted this decision, or Eley was not making a mentally competent decision; he and co-counsel wrestled with how to legally handle this situation, and decided on filing as a next friend and requested that counsel be appointed for Eley so that his

competency could be addressed; Eley filed his own post-conviction petition and the court appointed him counsel;

- Robert Lowe, Eley's post-conviction attorney, provided a video-taped statement which was played at the hearing. He stated: Eley did not want to sign the paperwork needed to file a post-conviction petition, and he did not understand that if he did not sign it, he could not file a petition in federal court as he previously wanted; a next friend petition was filed, and Eley filed his own petition; Eley is not logical-he just does not make sense;
- Dr. Jeffrey Smalldon, Psychologist, presented the following information, in person, at the clemency hearing: He stated: Eley has probably refused to participate in any psychological evaluations because he does not want anyone walking around in his head; he provided an overview of his prior affidavit, submitted in the post-conviction petition proceeding, and believes that Eley still presents as he did in 1996 when he met with Eley; Dr. Smalldon also noted the following:
 - After reviewing Eley's records, he arrived at the opinion that Eley lacked the rational capacity to make decisions and was not competent; he does not have an opinion on his current mental functioning because he has not seen Eley in 16 years, but that he would have the same concerns today that he expressed in 1996;
 - He reviewed the notes from Eley's interview with the Parole Board, as provided by Eley's counsel, and noted that Eley's responses were illogical; for example, Eley complained that his attorneys will not come visit him, and he lacks the understanding that he created the problem by not allowing his current attorneys to come see him;
 - Eley's responses to questions and his statements to the Parole Board reflect the jumbled nature of his communication and thinking;
 - Eley's statement in his interview that he does not know Green and that his conviction was the result of a racist conspiracy, after giving a full confession at the time of his arrest, is not plausible and further supports that he likely does not appreciate the effect this current statement will have on his clemency request;
 - It appears that Eley's affect is a settled or stable aspect of who he is as an individual and is unlikely to change;
- Vicki Werneke concluded the presentation by stating the following: David Daughten, prior post-conviction counsel, had grave concerns about Eley's functioning at the time of his petition; Judge Economus, one of the judges on the three-judge panel that convicted Eley and sentenced him to death, indicated that if he was aware of the additional mitigating evidence outlined in Eley's clemency petition, he would have voted for a sentence less than death; but for Melvin Green, Aydah would not have been murdered; Eley is mentally retarded and, therefore, his execution would be unconstitutional; and that Eley is also mentally ill and could be incompetent.

ARGUMENTS IN OPPOSITION TO CLEMENCY:

Ralph Rivera and Marty Desmond, Assistant Mahoning County Prosecutors appeared at the clemency hearing along with Stephen Maher, Assistant Attorney General.

The following arguments were presented by Ralph Rivera in opposition to clemency:

- Eley is a career criminal, who despite his current denial of the crime, not only admitted his guilt in his confession to the police on the day of his arrest but also to court psychologist Dr. Palumbo who was conducting an evaluation relative to Eley's initial plea of Not Guilty by Reason of Insanity (NGRI);
- Eley is not mentally retarded and he has never been evaluated by either Dr. Greenspan or Dr. Smalldon to diagnose such a disability. Eley, through counsel, filed a post-conviction petition in state court in 2004, asserting that he was mentally retarded and requested an *Atkins* hearing. Eley's request for funds for expert assistance was approved by the court, and Dr. Ott was hired to evaluate him. Eley cooperated and participated in this evaluation which concluded that he did not meet the criteria to be diagnosed as mentally retarded, using the *Atkins* criteria. Eley's counsel then filed a motion to dismiss his post-conviction petition, which was granted;
- Dr. Ott also noted in his evaluation that it was Eley's choice not to follow rules, and the abuse of drugs and alcohol, not mental retardation, contributed to his behaviors. Dr. Darnall's psychological evaluation [dated May 18, 1987], also found his full-scale I.Q. score to be 82 which is significantly above the cut-off I.Q. score of 70 needed to substantiate a claim of mental retardation;
- Eley is competent. Dr. Palumbo found him competent which caused Eley to withdraw his initial plea of NGRI. Eley assisted his trial counsel in having Ms. Skinner testify on his behalf to support his claim that he had been drinking and using drugs. Eley participated in his suppression hearing, and remembers very clearly the things that will not hurt him, but claims he does not remember the things that can hurt him, such as his confession. Dr. Darnall's report did not support Eley's assertion that he was in an alcohol or drug induced blackout;
- Eley is also competent as evidenced by the content of three (3) audio-taped conversations he had with his sister, Jill Carter, which occurred prior to the clemency hearing, but after he transferred to Chillicothe Correctional Institution. [The three (3) audio-taped conversations were played]. After listening to these conversations, it is clear that Eley has lied because he knows Melvin Green. Eley can clearly communicate, and he knows the judicial and executive branch processes, and he really does want a full pardon and release from prison. The best way for Eley to try and receive a pardon is to lie about his role in the offense.

The following arguments were presented by Stephen Maher in opposition to clemency:

- The various grounds advanced by Eley in his petition for clemency have been raised and rejected in state and federal courts;
- The written evaluation reports by Dr. Palumbo and Dr. Darnall negate incompetency claims;
- Eley's performance as a witness in his suppression hearing, in the presence of the presiding judge who is obligated to *sua sponte* determine a defendant's competence if it appears in doubt, supports the finding that Eley is competent; Eley, after a question and answer dialogue on the record with his counsel, expressly withdrew any claim of incompetence after the suppression hearing and before his criminal trial started;
- Eley's I.Q. far exceeds any threshold level to support a finding of mental retardation, as noted by Dr. Darnall's report, at the time of trial. Dr. Ott's report, in 2004 during Eley's post-conviction petition, looked at the *Atkins* criteria and Eley's counsel withdrew the petition because he did not meet any prong. Eley is requesting clemency today for the reasons that have already been evaluated and rejected by the courts.
- Dr. Smalldon's testimony did not support Eley's prior post-conviction petition in 1996. His presentation to the Parole Board is the same as his prior testimony in court in 1997. The court did not find that Dr. Smalldon's information supported a claim of incompetency then and nothing has changed since;
- Judge Economus's letter does not reference that the judge reviewed the State's Exhibit's in its Response to Eley's Clemency Petition. The Board should consider that context when evaluating the weight to be given to the letter.

VICTIM'S REPRESENTATIVE:

A victim representative did not participate in the clemency hearing or submit any additional comments or material for review or consideration.

PAROLE BOARD'S POSITION AND CONCLUSION:

The Parole Board considered all of the written submissions, arguments, information disseminated by presenters at the hearing and subsequent to the hearing, the interview with Eley, prior investigative findings as well as judicial decisions rendered regarding Eley's criminal convictions and death sentence, and deliberated upon the propriety of clemency in this case.

Clemency is not recommended by the five (5) member majority of the Board for the following reasons:

- Eley is asking for commutation of his death sentence to life in prison for his crimes of conviction. While the applicant asked for a full pardon in his interview with the Board and denies the crime, his legal team does not dispute the facts that he was the trigger man in this aggravated murder and aggravated robbery;
- The majority members weighed the following: the trial prosecutor admits that he was willing to accept something less than death in this case at the time of trial if Eley testified against Green; Judge Economus, one of the members of the three-judge panel who convicted and sentenced Eley to death, is now supportive of clemency being granted after speaking to members of the Federal Public Defender's Office and reviewing Eley's clemency petition; the detective who investigated the crimes is now in favor of clemency. However, these new assertions do not outweigh the fact that Eley took the gun from Green, entered the store with the intent to rob the victim, knew that the victim had a gun and might try and use it, and then shot him in the head;
- Eley's prior claims of incompetence, mental retardation, and mental illness have been addressed and rejected by both state and federal courts including his post-conviction petition asserting that he was mentally retarded pursuant to the *Atkins* criteria;
- Eley's behavior can be explained due to his antisocial personality traits and not necessarily due to a mental disability. The majority agrees with the findings made in 2010 by the Sixth Circuit Court of Appeals, in *Eley v. Bagley*, that retroactive determinations of competency are difficult and that the information provided by Eley's psychologist in 1996 has virtually no probative value, and that the evaluation conducted by Dr. Darnall just before Eley's sentencing is probative of his competency;
- The undisputed facts of the crime indicate that the plan was for Eley to enter the store with Green's gun, secure the victim so that Green could enter the store and complete the robbery. Neither Green nor Eley was disguised and the victim had previous negative interactions with Green. It is doubtful that Green and Eley intended to leave the victim alive after the robbery;
- The factors of Eley's head injuries, the possibility of residual doubt, an unpunished co-defendant and prosecutorial misconduct that Eley has provided to demonstrate that there was mitigation evidence that was not presented to the three-judge panel are not consistent with the trial transcripts or the state and federal court decisions. The merits of this argument were denied by several courts and a retroactive analysis conducted by the various courts found that this information would not be sufficient to outweigh the aggravating circumstances in this case.

Three (3) members of the Board are in favor of recommending clemency in the form of a commutation of Eley's sentence to Life without Parole for several inter-related reasons. While perhaps none of these reasons would be enough to warrant a favorable recommendation individually, taken together, the three Board Members are led to conclude that Eley's execution would not be in the best interest of the state of Ohio for the following reasons:

- **Opposition to Execution from Key Mahoning County Former Officials**
 - Several parties involved with the case at the time, including Judge Economus, a member of the three Judge panel, Former Mahoning County Prosecutor Gary Van Brocklin and the lead Detective Joseph Fajack favor clemency;
 - But for Eley's confession, they would not have been able to convict him. There was minimal material evidence beyond some eye witnesses observing someone dressed like him before and after the offense. The police did not record his confession. Retired Detective Joseph Fajack who took the confession has stated recently that he also does not believe Eley should be executed;
 - Some of this may be "buyer's remorse" because at the time the death penalty was pursued for the primary purpose of compelling Eley's testimony against Melvin Green. When he did not testify against Green, they were compelled to pursue the capital case against Eley.

- **Influence of Melvin Green**
 - But for Melvin Green giving the gun to Eley and suggesting they "take off" the victim, Eley would not have committed the crime on his own. Melvin Green has a very serious criminal record (as does Eley), and information presented indicates that Eley would be particularly susceptible to suggestion, especially while under the influence of drugs and alcohol. Yet Melvin Green was acquitted of all charges relating to this offense.

- **Prosecutor Offered Plea Bargain**
 - If Eley had testified against Melvin Green, there might not have been the push for the death penalty. Even after conviction, the prosecutor tried to get Eley to testify against Green in exchange for a commutation recommendation. The prosecutors "played a bluff" all the way to the end, and when Eley did not cooperate, they were stuck with the death penalty conviction. Due to his refusal to testify, he was tried and sentenced to death. Eley failed to cooperate at any level with his attorneys, which led him to reject a plea deal that was in his best interest.

- **Mental Retardation**
 - In their petition for clemency, Eley's attorneys claim that he is mentally retarded under the law, with some support from an expert. All the evidence and discussion about his mental disability has never been supported by any mental health intervention over the years he has been in prison. But he does appear to be intellectually limited in ways that do not impact his day to day

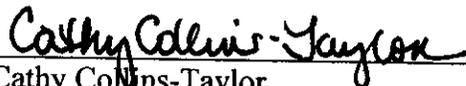
decision making, but may have been a factor in the crime and his response to his attorneys' efforts to spare his life. He wants to appear more intelligent than he in fact is, and has learned to cope with what the experts call a "cloak of competence;"

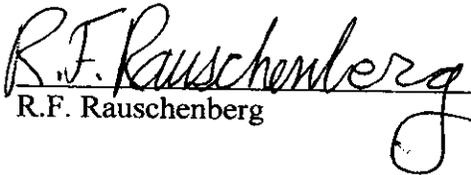
- While Eley may not meet the legal standard of mental retardation (that would be up to the judicial branch of government to decide), he is intellectually challenged. And there is evidence that he was led into this crime by Melvin Green.
- Not the Worst of the Worst
 - There are many prisoners on death row for Aggravated Murder during the course of a store robbery. Many of those have seriousness factors that are not present in this case (such as execution style or multiple slayings) that aggravate them. This case does not have circumstances to make it the worst of the worst.
 - The only evidence as to whether Eley truly intended to kill the victim when he walked into the store is what he said during his police interview. He said "...the Arab took his hands down and went under the counter. (Melvin) had told me he had a gun under the counter. I shot at him, trying to hit his shoulder." Later, after describing how Green took the victim's money and wallet, Eley said "I was in shock and just stood in front of the counter." This is hardly the reaction of someone who entered the store intending to kill the victim.
 - Judge Peter Economus points out that "Mr. Eley's trial attorneys did not present any substantive mitigating evidence for us to consider when weighing the aggravating and mitigating circumstances." A strong mitigation case would have been difficult, given the client's uncooperativeness, but had there been more substantive mitigation and the availability of a sentence of Life without Parole, there is a good chance that the death sentence would not have been imposed.
 - In order to convict co-defendant Melvin Green, the prosecution was willing to accept a punishment of less than death. The retributive needs of the state to condemn this very serious crime can be met with a punishment of life imprisonment without parole.

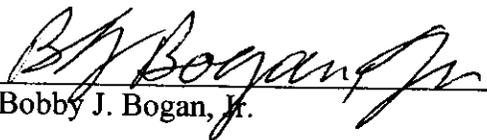
RECOMMENDATION:

The Ohio Parole Board, with eight (8) Board Members participating, by a vote of five (5) to three (3) recommends to the Honorable John R. Kasich, Governor of the State of Ohio, that executive clemency be denied in the case of John Jeffrey Eley #A198-441.

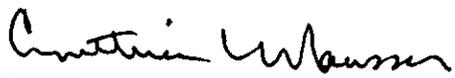
Adult Parole Authority
Ohio Parole Board Members
Voting **Favorable**


Cathy Collins-Taylor


R.F. Rauschenberg

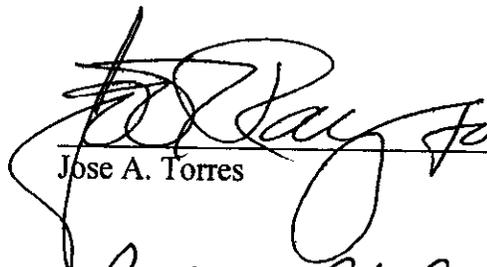

Bobby J. Bogan, Jr.

Ohio Parole Board Members
Voting **Unfavorable**


Cynthia Mausser


Kathleen Kovach


Trayce Thalheimer


Jose A. Torres


Richard Cholar, Jr.