

DATE TYPED: April 09, 2013  
DATE PUBLISHED: April 10, 2013

**IN RE: STEVEN T. SMITH, CCI #A369-054**

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

Date of Meeting: April 2, 2013

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: Steven T. Smith, CCI #A369-054**

SUBJECT: Death Sentence Clemency

CRIME, CONVICTION: Aggravated Murder

DATE, PLACE OF CRIME: September 29, 1998 in Mansfield, Ohio

COUNTY: Richland

CASE NUMBER: 98CR601

VICTIM: Autumn B. Carter, deceased

INDICTMENT: Count 1: Aggravated Murder  
Count 2: Aggravated Murder  
Each count also contained four (4) specifications of Aggravating Circumstances

TRIAL: Found guilty by Jury of one count Aggravated Murder with 2 Aggravating Circumstances

DATE OF SENTENCE: March 25, 1999

SENTENCE: DEATH

ADMITTED TO INSTITUTION: March 26, 1999

JAIL TIME CREDIT: 1 day

TIME SERVED: 169 months (does not include jail time credit)

AGE AT ADMISSION: 32 years old

CURRENT AGE: 46 years old

DATE OF BIRTH: February 9, 1967

JUDGE: Honorable James DeWeese

PROSECUTING ATTORNEY: James Mayer

**FOREWORD:**

Clemency proceeding in the case of Steven T. Smith, A369-054 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 March 19, 2013 Smith was interviewed via videoconference by the Parole Board at the Chillicothe Correctional Institution. A Clemency Hearing was then held on April 2, 2013 with ten (10) members of the Ohio Parole Board participating. Arguments in support of and in opposition to clemency were presented.

The Parole Board considered all of the written submissions, arguments, and information disseminated by presenters at the hearing, as well as judicial decisions and deliberated upon the propriety of clemency in this case. With ten (10) members participating, the Board voted ten (10) to zero (0) to provide an unfavorable recommendation for clemency to the Honorable John R. Kasich, Governor of the State of Ohio.

**DETAILS OF THE INSTANT OFFENSE (98CR601):** The following account of the instant offense was obtained from the Ohio Supreme Court opinion, issued December 13, 2002:

In April 1998, defendant-appellant, Steven Smith, met and started dating Kesha Frye. A short time later, Smith moved in with Frye and her two young daughters, Ashley, age two, and Autumn, six months. In the middle of September 1998, Frye asked Smith to move out due to his heavy drinking. However, Smith moved back in after he promised Frye that he would stop drinking. Around this same time, Smith was fired from his job and began watching Frye's children while she was at work.

On September 28, 1998, Frye arrived home from work at 2:30 p.m. According to Frye's account of what occurred that afternoon and evening, she and Smith left the apartment with her two children. They ran some errands, ate dinner at Burger King, and visited one of Smith's friends, Brett Samples. While visiting Samples, Smith drank three beers and played pool. They left Samples' home at 7:30 p.m. On the way home, Smith purchased a twelve-pack of Busch Ice at a gas station and drank one of the beers in the car.

Upon arriving home around 8:00 p.m., Frye locked the apartment's two outer doors. Smith changed Autumn's diaper, fed her, and dressed her in a pink sleeper. At around 10:15 p.m., Smith took Autumn upstairs and put her to sleep in her crib. Frye put Ashley to bed at 10:30 p.m. Frye went back downstairs and watched television with Smith, who drank more beer. Shortly thereafter, she and Smith went upstairs. Smith removed his cutoff shorts and red underwear, and they had sexual intercourse. Smith did not ejaculate, but Frye stated that he did not seem upset.

Frye and Smith then went back downstairs, watched more television, and

Smith consumed more beer. Frye went upstairs to sleep at 11:00 p.m., while Smith remained downstairs watching television. Frye checked in on her children and brought Ashley into her bed to sleep with her. Frye left Autumn in her crib. At around 3:22 a.m. on September 29, 1998, Frye was awakened by Smith, who was standing next to her bed, naked. Smith placed Autumn, who was also naked, down beside Frye in bed. Frye went to pick Autumn up and noticed that Autumn's head fell over her arm. She then placed her hand on Autumn's stomach and realized that the baby was not breathing. Frye told Smith that he had killed her baby. In response, Smith threw the alarm clock and said that the baby was not dead.

Frye quickly left the apartment with Autumn and Ashley and went to the apartment of neighbors Mya Brooks and Jeff Pierce. Brooks testified that when she opened the door, Frye screamed, "He killed my baby, he killed my baby, Mya, help me." Frye entered the apartment with her children, and Brooks called 911. Before the ambulance arrived, Smith came to Brooks' door, asked what Frye was doing, and exclaimed that "he didn't do anything" and "why was she fucking lying." Brooks shut the door on Smith.

Emergency medical personnel arrived and discovered Autumn's nude, lifeless body lying on a blanket. They observed injuries on her head and bruising around her eyes. They began CPR, and Autumn was transported to the hospital. The emergency room doctor testified that upon her arrival, Autumn had no pulse and had suffered a retinal hemorrhage. In addition to her visible bruising, the physician also stated that Autumn had bruising around her rectum and that the opening of her vagina was ten times the normal size for a baby her age—injuries that are consistent with sexual abuse. After trying to resuscitate Autumn for close to an hour, medical personnel pronounced her dead.

In the meantime, shortly after EMS arrived at the scene, Pierce observed Smith throw a trash bag in a dumpster. He heard Smith say that he did not do anything and that he was leaving. Pierce told Smith to stay with him, which he agreed to do.

Soon thereafter, the police arrived at the crime scene. Officers entered Frye's apartment and saw no signs of forcible entry. They found that the television had been left on and was extremely loud. Police also discovered the victim's pink baby sleeper under the coffee table and Smith's cutoffs and jeans near the couch. They also found whitish-colored material, later determined to be pieces of shredded diaper, scattered on the floor in the same area near the baby swing and sofa. Small piles of the victim's hair were found on the coffee table. The police also retrieved a garbage bag from the outside trash dumpster that contained a torn baby diaper, Smith's tee shirt, and ten empty cans of Busch Ice.

Officer Joseph Dean Petrecky approached Smith, who was standing outside the apartment. Before asking him any questions, Smith told the officer, "I

didn't do it, I didn't do it." Smith smelled of alcohol, was disheveled, and swayed back and forth while speaking with the officer. The officer arrested Smith for public intoxication. Later that morning, at 11:00 a.m., Smith's blood-alcohol level was tested and found to be .123.

At the police station, Detective Robert Burks interviewed Smith. He told the detective that he had drunk four beers during the entire day and night. He stated that he and Frye had gone to bed at midnight and that he was awakened by Frye, who was accusing him of killing her daughter. On October 27, 1998, Smith gave police a second statement. In that statement, he changed his version of what had occurred. He told police that he had consumed three beers at Samples' house and six additional beers when he returned to the apartment. Smith said that later that evening, after they had returned home, they put Autumn to sleep in the baby swing and Ashley to sleep on the downstairs love seat. Smith also said they had had sexual intercourse on the living room couch while the two children were asleep in the same room. According to Smith, he woke up at 3:25 a.m. and, believing that something was wrong with Autumn, carried her upstairs while he yelled for Frye. At that point, Frye grabbed Autumn and accused him of killing her.

On November 3, 1998, Smith signed and verified the October 27 statement. In answer to follow-up questions, Smith denied putting trash in the dumpster the morning of the crime and said that the cotton materials found on the living room floor were baby wipes put there by Ashley.

The grand jury indicted Smith on two counts of aggravated murder, with two death penalty specifications, under R.C. 2929.04(A)(7) (murder during rape or attempted rape) and R.C. 2929.04(A)(9) (purposely causing the death of someone under the age of 13). Each count also contained a sexual motivation specification and a sexually violent predator specification.

### **PRIOR RECORD**

**Juvenile Offenses:** Smith has no known juvenile arrests or adjudications.

**Adult Offenses:** Smith has the following known adult arrest record:

<b><u>Date</u></b>	<b><u>Offense</u></b>	<b><u>Location</u></b>	<b><u>Disposition</u></b>
10/22/85 (Age 18)	C.C.W.	Richland County, Ohio	Sentenced to 10 days, fined \$250, 10 days jail suspended, \$200 of fine suspended, no similar violations for one year, assessed costs

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9/25/86 (Age 19)	Petit Theft	Richland County, Ohio	Sentenced 30 days, assessed costs
02/05/87 (Age 19)	Breaking & Entering	Richland County, Ohio	Sentenced one year, suspended, granted 3 years probation, 30 days county jail, alcohol assessment, halfway house if appropriate
01/29/88 (Age 20)	D.W.I.	Richland County, Ohio	Sentenced 60 days, suspended, \$500 fine, attend a Jail Alternative Program, license suspended 60 days/no similar violations for two years
07/23/88 (Age 21)	1) No MC Endorsement 2) Operating MV under Suspension 3) No Eye Protection	Richland County, Ohio	1) \$129 fine & costs, \$50 suspended 2) Sentenced 30 days, assessed \$100 fine & costs, jail time suspended 3) \$10 fine plus costs, no similar violations for one year
10/16/89 (Age 22)	Warrant Probation Violation	Mansfield, Ohio	Actual Disposition is unknown; it appears that Smith served 24 days in jail before being Released
09/20/90 (Age 23)	1) False Alarms 2) Gambling 3) Disorderly by Intoxication	Mansfield, Ohio	1) Sentenced 60 days, 50 days suspended, \$150 fine and costs 2) \$100 fine, no costs 3) \$25 fine, no costs
10/03/93 (Age 26)	1) Domestic Violence/Assault 2) Obstructing Official Business 3) Disorderly by Intoxication	Mansfield, Ohio	1) Sentenced to 30 days, 29 days suspended, TPO for female victim attend domestic violence counseling, \$200 fine and costs, probation one year. 2) Assessed fines and costs 3) Assessed fines and costs

09/20/94 (Age 27)	Probation Violation	Mansfield, Ohio	Continued on probation
09/29/98 (Age 31)	Aggravated Murder (98CR601)	Richland County, Ohio	INSTANT OFFENSE

Smith was also convicted of the following offenses by the Mansfield Municipal Court:

10/30/87	Intoxication, fines and costs
11/06/87	No Operator's License, fines and costs
04/05/93	No Operator's License, fines and costs
05/16/93	Intoxication, fines and costs
03/15/98	Intoxication, fines and costs

The following case dispositions are unknown:

08/17/91	Warrant/Failure to Comply/Appear
03/12/94	Warrant/Failure to Appear/Fines

The following case was dismissed:

10/03/93	Disorderly Conduct
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### **Institutional Adjustment:**

Smith was admitted to the Ohio Department of Rehabilitation and Correction on March 26, 1999. His work assignments while incarcerated at the Mansfield Correctional Institution included Laundry Attendant, Recreation Worker, Material Handler 2, and Porter. While incarcerated at the Ohio State Penitentiary, inmate Smith was a Porter.

Smith is presently a Porter at the Chillicothe Correctional Institution. No program or community service completion was noted. Records indicate Smith graduated from high school on June 8, 1985.

Since his admission, Smith has accumulated no disciplinary infractions resulting in placement in disciplinary control. However, Smith has received the following two conduct reports that did not result in placement in disciplinary control. Those rule infractions include:

- Possession of contraband in October 2000. Smith was found in possession of a television cable that had been altered. He was given a verbal warning for this infraction.
- Gambling or possession of gambling paraphernalia and possession of contraband in March 2007. Smith was found to be in possession of some gambling items and a

contraband metal piece during a cell shakedown. He was given a verbal warning for this infraction.

**APPLICANT'S STATEMENT:**

On March 19, 2013, nine (9) members of the Ohio Parole Board conducted an interview with Smith via video conference from the Chillicothe Correctional Institution.

The following individuals observed the interview via videoconference, but did not participate: Brenda Leikala from the office of the Ohio Attorney General; David Henry from the office of the Ohio Attorney General; Samuel Porter from the office of Governor John Kasich; James Maher, Richland County Prosecutor; Jill Cochran, Assistant Richland County Prosecutor; Joseph Wilhelm, Assistant Federal Public Defender; Alan Rossman, Assistant Federal Public Defender; Vicki Werneke, Assistant Federal Public Defender; Tyson Fleming, Assistant Ohio Public Defender; Kyle Hauswirth, Death Row Case Manager; and Alvin Thomas, Ohio Parole Board Parole Officer.

Chair Cynthia Mausser opened the interview by introducing herself to Smith and thanking him for participating. Chair Mausser informed Smith of the identities of those individuals who were present for the interview, but who would not be participating. Chair Mausser explained the Parole Board's role in the clemency process, noted that the Board would be conducting a hearing on Smith's clemency application in several weeks, and explained the purpose of the interview in the clemency process.

Chair Mausser asked Smith what he would like the Board to consider when deciding whether to make a favorable or unfavorable recommendation for clemency in his case. Smith responded that he would like to have his death sentence commuted to life. Smith then read from a prepared statement.

In his prepared statement, Smith stated that when police officers first approached him on the night of the crime, he had no recollection of what happened. He was so intoxicated that he had completely blacked out while committing the offense. Police officers could smell the alcohol on his breath, Smith noted. Smith stated that, in his lifetime, he had a history of blacking out from intoxication and awakening with no recollection of what occurred in the preceding hours. He said he had no intention to kill Autumn and never formulated any intention to kill her. After he was charged, Smith could not admit, even to himself, that he had taken Autumn's life in the way he did and insisted that, had he been in his right mind on the night of the offense, Autumn would still be alive today. Smith noted that, before he took Autumn's life, he had never hurt a child. Every day he must live with the memory of what he did. Smith stated that he is remorseful and would ask Autumn for forgiveness if he could.

Chair Mausser then permitted each of the other Board members to pose questions to Smith. Several of the Board members posed questions to him.

When asked to tell the Board what he remembers from the night of the crime, Smith stated that he does not remember very much from that night. He remembers drinking many beers, everyone retiring to bed, and then continuing to drink after everyone went to bed. Smith speculated that he must have removed the baby from her crib, but does not recall doing so.

According to Smith, the next thing he remembers from the night of the crime is Kesha Frye running out of their home with Autumn in her arms, yelling that he had killed her baby. Later in the interview, Smith stated that he also recalls taking Autumn up to Frye's bedroom and setting the baby's body upon the bed. Smith claims not to remember his actual assault upon the child.

Smith was asked why clumps of Autumn's hair were found throughout the living room in which the assault occurred, including upon the coffee table. Smith offered no explanation. Likewise, when asked why he attempted to clean the living room immediately before the police arrived, throwing away beer cans and the remnants of Autumn's torn diaper, Smith offered no explanation, stating only that people do strange things sometimes.

Smith acknowledged that in his initial statements to law enforcement, he suggested that Frye must have taken Autumn's life. According to Smith, he initially accused Frye because he had no inkling of how Autumn could have been killed. Smith noted that at first he did not believe that he killed Autumn, but a year or two after committing the crime, he came to realize that he had in fact taken the girl's life.

Smith insisted that he loved both Autumn and Ashley, despite having no biological connection to them. He harbored no resentment toward the children. Smith stated that he feels bad about what he did to Autumn and wishes that he could do something to take it back.

When asked what kind of defense he raised at trial, Smith responded that he raised intoxication as a defense, essentially arguing that he was too intoxicated to form the requisite intent to kill Autumn. Smith indicated that, in his opinion, he had not received a fair trial because he never had any intention to kill Autumn. Smith stated that he was offered a plea deal that would have resulted in a sentence of 25 years to life. He rejected the deal because he had no recollection of killing Autumn.

Smith noted that, upon advice of his attorneys, he did not testify at his trial. When asked who testified on his behalf during the trial's mitigation phase, Smith indicated that he could not recall who spoke on his behalf. He indicated that it might have been his family or his friends who had testified on his behalf.

Smith spoke briefly to his criminal history, acknowledging several convictions for driving under the influence and an incident of domestic violence with a former girlfriend. When asked whether he had a history of behaving violently during blackouts, Smith responded in the negative.

Smith denied ever sexually offending against any child prior to Autumn. When asked whether he might have offended against another child during one of the several blackout experiences he claims to have experienced during his lifetime, Smith responded in the negative. Smith stated that he has no idea why, during his blackout experience on September 28, 1998, he would sexually assault a child.

Smith told the Board that he has been spending his time in prison reading and doing some community service. Smith stated that programs have not been available during his incarceration. When Parole Board member Marc Houk, a former warden of the Ohio State

Penitentiary (OSP), pointed out that programs would have been available to Smith at OSP, Smith maintained that those programs were not made available to *him*. When asked why he did not avail himself of the opportunity to live on death row's extended privilege unit, Smith responded that he has never viewed himself as special and that, in any case, he did not know anyone in that unit.

Smith reported that he has fairly regular contact with his family and that his family supports him. Smith stated that he has regular contact with his mother, brother, two sisters, niece, nephew, and daughter. Smith reported that his family has visited him regularly in prison during his incarceration.

Smith noted that he has only one biological daughter and that he has been in regular contact with her over the years. Smith's daughter is currently 21 years old. Smith indicated that he does not speak about his crime with his daughter because she does not ask about it. Were his daughter to ask him about the crime, he said he would admit his guilt to her.

Smith spoke in detail about his history of alcohol abuse. Smith reported that his alcohol consumption began at age 15 and that he abused alcohol throughout his teen years and into adulthood, regularly consuming as many as 12 beers each day. Smith stated that every criminal offense that he committed during his lifetime was committed during an alcohol-induced blackout. Smith noted that his alcohol abuse cost him several good jobs.

During the interview, Smith stated that he was once ordered by a court to address his alcohol addiction through Alcoholics Anonymous. However, according to Smith, he was unable to overcome his alcohol addiction before he took Autumn's life, because he never came to recognize his alcohol addiction. Having never accepted his own addiction, attempts to address his alcohol addiction in the years leading up to Autumn's death were futile, Smith suggested.

As the interview concluded, Smith acknowledged that he is responsible for Autumn's death. Smith reiterated that he did not intend to kill Autumn. Smith insisted that he only intended to sexually assault her. He stated that the crime "just happened." He laments the way in which the crime happened and the shame it has put upon him. Smith again stated that he is remorseful, but that he did not intend to kill Autumn. Smith indicated that he should spend the rest of his life in prison. However, at the same time, Smith also indicated that his lack of intent to kill may mean that he should someday be considered for release. Meanwhile, were his sentence to be commuted to life, Smith would spend the remainder of his life making things for people and pursuing programs, he claimed.

As the interview concluded, Chair Mausser again explained the clemency process to Smith. After Smith indicated that he had no questions, Chair Mausser concluded the interview.

#### **ARGUMENTS IN SUPPORT OF CLEMENCY:**

At the hearing held on April 2, 2013, arguments in support of clemency supplementing the written application previously received were presented to the Board by Smith's counsel, Tyson Fleming and Joseph Wilhelm.

Smith's counsel presented several bases for their clemency request. First, Smith did not intend to kill Autumn. Second, Autumn's death was caused by sexual assault, not by shaken baby syndrome (SBS), as alleged at trial. Third, the jury was not able to fully consider the question of Smith's intent because Smith was charged only with aggravated murder and the trial court refused to instruct the jury on the lesser included offense of involuntary manslaughter. Fourth, Smith had a reputation for being good with children and had no history of violence toward them. Fifth, Smith was an alcoholic. Sixth, Smith had a "shattered childhood" that negatively affected him into adulthood. Seventh, Smith has adjusted well in prison, has accepted responsibility, and is very remorseful.

### **Argument 1: Smith did not intend to kill Autumn**

Wilhelm began his presentation by acknowledging the sad and shocking facts of the case. According to Wilhelm, Smith's crime is as bad as it gets. At the same time, Smith's crime was not, from the standpoint of capital crime, among the worst of the worst. Smith's crime was the accidental consequence of a sexual assault, Wilhelm contended. Wilhelm asked that the Board look beyond the anger and disgust that the crime and its young victim engender and objectively evaluate whether the evidence demonstrates an intention to kill. The death penalty is reserved only for crimes in which death is intended, Wilhelm noted.

Wilhelm stressed that, regardless of how shocking the facts of the case may be, Smith could not be guilty of a capital crime unless he acted with the intention to kill. Smith did not act with that intention, Wilhelm argued. Smith was too intoxicated to appreciate that his actions were resulting in Autumn's death.

Wilhelm noted that, on the night of the crime, Smith was so intoxicated that Frye would not allow him to drive them home from the home of Smith's friend, Brett Samples, where Smith had started drinking. On the way home from Samples' house, Smith and Frye stopped to purchase Busch Ice, which has an alcohol content one and one-half times that of other beers. Accordingly, Smith's consumption of 12 cans of Busch Ice on the night of the crime was the equivalent of Smith drinking 18 regular beers.

Eight hours after Smith killed Autumn, he still had a blood alcohol level of 0.123, well over the legal limit. This means that, around the time he took Autumn's life, Smith would have had a blood alcohol level of between 0.36 and 0.60, five times the legal limit or more. Wilhelm noted that Smith's neighbors as well as the police officer who arrested Smith at the crime scene attested to Smith being very intoxicated. Someone at 0.4 is very significantly impaired, and Smith was very likely well above even this blood alcohol level at the time of the crime, Wilhelm argued.

Wilhelm described how Smith had a history of creating accidental, unintended consequences when intoxicated. Smith once attempted to paint a pool cue over a stove while intoxicated, which resulted in paint getting onto the stove. Similarly, Smith would sometimes burn food he was attempting to cook while intoxicated. On occasion, Smith would black out while drinking, resulting in spending the night in his car without any memory of how he got there. In short, when drunk, Smith lacked the foresight and rationality to see the unintended consequences that could result from his actions.

According to Wilhelm, Smith's killing of Autumn was no different than his painting and cooking mishaps. Smith was attempting to sexually assault Autumn but accidentally caused the infant's death. Wilhelm stressed that, with respect to aggravated murder and the death penalty, it is not enough that Autumn's death was foreseeable. There had to be a specific purpose to cause Autumn's death.

Wilhelm acknowledged that, before police arrived on the scene, Smith was observed throwing away beer cans and the remnants of Autumn's diaper. Wilhelm insisted that Smith's disposal of those items does not demonstrate an intention to kill. Those actions, Wilhelm argued, are akin to a drunk driver who runs someone over and then flees the scene. It was a panic reaction.

Wilhelm claimed that Smith had no motive to kill Autumn. He had a good relationship with the child and was routinely involved in her care. Smith's family and neighbors claim that Smith took good care of Autumn. Wilhelm insisted that Smith had not, as alleged by the prosecution at trial, killed Autumn as revenge for Frye earlier kicking Smith out of her home.

Wilhelm further noted that Smith made no effort to conceal Autumn's body after she died. Instead, Smith took Autumn's body upstairs to the bedroom he shared with Frye. Smith denied that he killed Autumn when Frye first accused him of killing the child. When Frye first accused Smith of killing the baby, Smith cradled the child to his chest and insisted that she was not dead. These are the actions of a man who accidentally took a life, Wilhelm argued.

### **Argument 2: Autumn's death was caused by sexual assault, not SBS**

According to Wilhelm, the nature of Autumn's injuries was consistent with an accidental death. The injuries were caused by the rape, Wilhelm argued. There was no wound on Autumn demonstrating Smith's purpose to kill. Wilhelm noted that in most capital cases there is some wound or injury that is corroborative of an intention to kill such as strangulation marks, a crushed skull, or a gunshot wound. The wounds on Autumn were instead corroborative of only a sexual assault.

Wilhelm noted the trial testimony of Dr. Marvin Platt, the coroner who autopsied Autumn's body, who testified that the injuries to Autumn's head were up and down and rotational. He further testified as to injuries to Autumn's buttocks, which were indicative of force being applied to that region of Autumn's body. According to Wilhelm, those injuries are clearly indicative of a sexual assault but are not indicative of an intention to kill. Autumn died while pinned under Smith's body, Wilhelm insisted.

Wilhelm argued that there were three causes posited at trial for Autumn's death: compression asphyxia (suffocation from the weight of Smith's body), blunt head trauma, and SBS. Wilhelm noted that the first, compression asphyxia, is not disputed as a cause of death. However, Wilhelm challenged the validity of the other alleged causes of death, blunt head trauma and SBS.

Wilhelm noted that blunt head trauma and SBS were identified as causes of death at trial because of the existence of retinal hemorrhage, optic nerve damage, and subdural bleeding.

Wilhelm contended that those conditions were caused not by head trauma and SBS, but rather by being pinned under the weight of Smith's body.

In support of his contention that Autumn died only from compression asphyxia and that SBS was not a cause of death, Wilhelm offered the videotaped statement of Robert Rothfeder, a Utah-based doctor board-certified in emergency medicine. Wilhelm stated that Rothfeder formed his opinions from a review of the trial testimony.

During his videotaped statement, Rothfeder opined that SBS was an unproven hypothesis commonly used to explain retinal hemorrhage around the time of Smith's trial. According to Rothfeder, the presence of retinal hemorrhage used to be overly linked to SBS but that link has since been discredited in the medical community. There can be other causes of retinal hemorrhaging, according to Rothfeder. Rothfeder's opinion is that Autumn's retinal hemorrhaging was secondary to the compression asphyxia from which she died, rather than SBS.

Rothfeder contended that there have been studies on SBS showing that the shaking of a baby cannot produce enough force to produce intracranial bleeding of the type found during Autumn's autopsy. The retinal hemorrhaging does not itself establish that Autumn was shaken. In the absence of any other evidence that Smith violently shook Autumn, there is no medical basis for concluding that she was the victim of SBS.

Rothfeder also disputed Platt's trial testimony that Smith's attack on Autumn lasted from 10 to 30 minutes. Rothfeder stated that if Smith was lying on top of Autumn, who was face down on the couch, the child's head would have been at about the level of Smith's abdomen or lower chest. According to Rothfeder, while this is not a position that lends itself to shaking, it is capable of resulting in compression asphyxia in three to five minutes. The precise duration of Smith's assault, Rothfeder opined, is impossible to determine.

Rothfeder stated that, in his opinion, the medical findings presented at Smith's trial do not demonstrate any intention on Smith's part to kill Autumn. According to Rothfeder, inferring Smith's intention to kill from the medical evidence presented at trial would be akin to inferring intention to kill from the presence of a bullet wound or inferring intention to kill from the fact that a person's head was crushed with a baseball bat. In neither case does the presence of the wound itself give any indication as to whether it was inflicted intentionally or accidentally.

Lastly, Rothfeder spoke to Smith's blood alcohol level at the time of the offense. Rothfeder noted that, in his opinion, someone with Smith's blood alcohol level at the time of the offense could not function normally. Rothfeder has never seen a patient with a blood alcohol level of 0.4 or higher, including chronic alcoholics, who were not very significantly impaired.

Wilhelm argued that opinions such as those offered by Rothfeder were important information that the jury did not have. The information would have been very helpful to rebut the notion that Smith acted with the intention to kill Autumn and could have been used to rebut the coroner's finding of SBS as well as his estimation that Autumn was assaulted for 10 to 30 minutes. Wilhelm noted that the prosecutor repeatedly argued at trial that Smith physically beat Autumn for an extended period of time. Those statements inflamed the jury, Wilhelm

argued. The information that Rothfeder would have provided, Wilhelm urged, could have been used to rebut the prosecutor's assertion that the abuse occurred over an extended period of time.

**Argument 3: The jury was not given any viable option if it found no intent to kill**

Wilhelm noted that Smith's prosecution was "all or nothing" in the sense that the prosecution charged Smith only with aggravated murder and the aggravating circumstances. More specifically, Wilhelm took issue with the fact that Smith was not also charged with rape and that the jury was never given an instruction on the lesser included offense of involuntary manslaughter. Wilhelm observed that he has never seen a case with a felony murder death penalty specification where the felony was not separately charged. Wilhelm observed that Smith was never offered any kind of plea agreement.

The upshot of Smith's all-or-nothing prosecution was that the jury essentially had no choice but to return a guilty verdict on aggravated murder even if it found that Smith had no intention to kill. According to Wilhelm, the jury was unlikely to acquit Smith when he was plainly guilty of sexually assaulting Autumn. In support of this claim, Wilhelm pointed to a United States Supreme Court decision from 1980, *Beck v. Alabama*, in which the Court observed that a jury's tendency is to resolve its doubts in favor of conviction under such circumstances.

As evidence that Smith's jury had doubts about Smith's intent to kill, Wilhelm pointed to the fact that, during the trial's penalty phase, the jury inquired as to whether its belief that Smith "was not in his right mind" would be reason enough to spare his life. By this point in the trial, however, the jury could not properly revisit the question of Smith's intent, Wilhelm argued.

Wilhelm acknowledged that the arguments he was making regarding the jury and its decision-making process was not based on any actual discussions that he or co-counsel had with the jurors themselves. Counsel made attempts to contact jurors, but those attempts were unsuccessful. That being the case, Wilhelm could not say definitively how any one of Smith's jurors would have actually voted if presented with the alternatives of rape or manslaughter. Wilhelm insisted, however, that the jury should have been presented with those options and he argued, in effect, that the failure to provide those options calls into question the credibility of Smith's conviction.

Wilhelm further acknowledged that his argument regarding the involuntary manslaughter instruction has been rejected by each of the various courts that have considered that argument. He attributed the failure of those legal appeals to the deferential standard of review applied by courts reviewing trial court decisions. Wilhelm insisted that he was not using the clemency hearing as an opportunity to rehash rejected legal claims. At the same time, he urged the Board to independently consider whether, in light of how the case was prosecuted, the jury was able to give fair consideration to the issue of intent. Fleming added that it goes without saying that the courts have already rejected Smith's legal claims. Fleming pointed out that Smith's case would not be before the Board unless his legal avenues had been exhausted.

**Argument 4: Smith had a good reputation with children**

Fleming argued that Smith's assault on Autumn was out of character because Smith always interacted very positively with children. Fleming described relationships that Smith had with two women who had children, both of whom attested to Smith's good treatment of the children. Smith routinely babysat his sister's children and interacted well with them. He routinely organized sporting events involving children in the neighborhood and always treated the children well and made an effort to make each child feel included in those events. In short, no one ever saw any signs that Smith harbored ill will toward children or had the potential to abuse a child.

Fleming stated that Smith had a good relationship with Autumn and treated her as his own child. Neighbors never witnessed Smith abusing Autumn or her sister, Ashley. Neither child ever showed any signs of physical abuse. After Smith was arrested, Frye was interviewed by the police on multiple occasions and never raised any allegation that Smith was abusive toward either of her children.

Fleming noted that everyone who knew Smith was surprised by his crime, including Smith's former employer. Fleming stated that many of those people remain in denial about Smith's crime.

**Argument 5: Smith was an alcoholic**

Fleming described how Smith began drinking alcohol at a young age. Smith would routinely drink in a shack in the woods with friends, and it was not uncommon for him to be so hung over that he would miss school the following day. Smith would typically drink to the point of intoxication and experienced several blackout episodes in his lifetime. Smith would sometimes pass out and wake up with no memory of how he arrived where he was.

Fleming noted the deleterious effect that drinking has had upon Smith. Smith's alcoholism had cost him several relationships with women. It also cost him jobs, as his alcoholism caused him to have attendance problems. Smith himself believes that his alcohol abuse cost Autumn her life. He is convinced that had he not been drunk, he would not have assaulted Autumn the way that he did.

Yet in the months and years preceding Autumn's death, Smith never recognized his own problem with alcohol. Wilhelm noted that Smith was twice ordered by courts into alcohol counseling, but he never followed through with that mandated treatment because he did not believe that he had an alcohol problem.

**Argument 6: Smith had a "shattered childhood"**

Fleming described Smith's childhood as a chaotic upbringing that negatively affected his development and had long-term negative consequences. Fleming noted that Smith grew up surrounded by alcohol and alcoholism. Most of the adult male figures in his life were alcoholic, including the men that his mother brought into the home.

For much of Smith's life, his mother was a source of instability. She would leave her children, including Smith, unattended for long periods of time and would sometimes leave Smith and his siblings with individuals who were friends to her, but strangers to the children. At least one of those individuals attempted to sexually assault Smith's sister, Karen. One of those "caretakers" once sexually humiliated Smith by having him put catsup and mustard on his penis, saying that it would help his penis grow. According to Fleming, this sexual deviancy may provide some explanation for Smith's later sexual attack on Autumn.

Smith's biological father was never in his life. Smith's father was married to another woman with whom he had a family. In sum, Smith grew up largely without any positive adult role models and turned to alcohol at a young age as a coping mechanism. Smith did not choose this life for himself.

### **Argument 7: Smith has adjusted well to prison**

Fleming remarked that Smith has redeeming qualities, which he has exhibited during his incarceration. Fleming noted that Smith is a well-behaved inmate who has not engaged in vexatious litigation against the Department, for example. Though Smith has not completed institutional programs, he has assisted another inmate with community service projects that involved Smith making origami projects for the benefit of churches, schools, and women's shelters.

Fleming noted that Smith now takes full responsibility for what he did to Autumn. According to Fleming, Smith is appropriately remorseful. Since coming to prison, Smith has come to the difficult realization that he is the only one who could have killed Autumn. At one time, Smith denied killing Autumn as a coping mechanism, but no longer. Still, the crime weighs heavily on Smith's conscience. Smith does not understand why he did what he did. Smith's counsel insisted that, while Smith should be punished for what he did, he should not be executed.

### **Videotaped Presentations**

Smith's counsel offered videotaped presentations from Smith's mother, sister, niece, and daughter.

In her videotaped presentation, Smith's mother, Jane Mosier, stated that she could not attend the clemency hearing for medical reasons. Mosier stated that she wants to see her son taken off death row because she does not believe that he committed the crime for which he has been convicted. Mosier reiterated that Smith was always good around children. She noted that Smith had a serious drinking problem that had gone untreated. Mosier described how she and Smith communicate with one another over the telephone and by writing to one another. Mosier sends Smith money every month. Smith sends her his origami. Mosier has kept everything that Smith has ever sent her. Mosier noted that Smith is a talented artist. She further noted that, if Smith's sentence is commuted, she will be able to maintain a relationship with him. Mosier stated that she loves her son.

In her videotaped presentation, Smith's sister, Karen Smith, stated that she could not attend the clemency hearing due to her work. Even though she could not attend the hearing in person, she wanted to show her support for Smith. Karen Smith indicated that Smith was a very good brother growing up. They had a great relationship and had fun together. Karen Smith noted that all of her brother's legal problems related to his drinking. She described how Smith began drinking heavily when he was a teenager and how he continued to drink to excess into adulthood. Karen Smith noted that her brother would lose control of himself while under the influence of alcohol. Karen Smith indicated that Smith was good with children. He would routinely babysit his sister's children, playing basketball with them and cooking them hot dogs. Her brother was never mean to a child, according to Karen Smith. She stated she would trust Smith with her own five year old. Karen Smith further stated that her brother could not have done the things that he is convicted of doing because he loved Autumn. Smith tells her that he cannot remember the crime. If Smith's sentence were commuted, Karen Smith would continue to write to her brother and would go to see him. She would like her brother to be able to come home.

In her videotaped presentation, Melissa Aguirre, who is Smith's niece (Karen Smith's daughter), stated that Smith was her favorite uncle. He would give her money. They played sports together. Aguirre noted how Smith would never let a child sit out of a game he was organizing. Kids were always comfortable around Smith. Aguirre described how Smith would often babysit her and her younger brother. Aguirre never saw Smith drink when he was babysitting her. Aguirre stated that she would not hesitate to allow Smith to be around her children. She never saw any indication that Smith was hurting Autumn. If commuted to life, Aguirre would maintain contact with Smith and would go visit him. Aguirre, who was physically present at the clemency hearing, made an oral statement in addition to her videotaped statement. During her oral statement, Aguirre reiterated what she said in her videotaped statement and additionally noted that she does not think that Smith harmed Autumn at all. In her opinion, Smith is only now confessing to raping Autumn because he has lost all of his court appeals and has given up hope.

In her videotaped presentation, Brittney Smith, Smith's daughter, described him as a fun-loving father who took her to the park and took her fishing. Smith and his daughter would color together, and he taught her how to draw. Brittney Smith described how she did not come to understand that Smith was in prison until several years after his incarceration, when she was around 12 years old. Her father's conviction does not change the way that she feels about him. She misses seeing her father and talking to him in person. Brittney Smith writes her father often, though she has not seen him. She indicated that she loves her father very much. Like Aguirre, Brittney Smith supplemented her videotaped remarks with an oral statement at the clemency hearing. During her oral statement, Brittney Smith echoed Aguirre's opinion that Smith did not rape and kill Autumn. She too believes that Smith is only admitting to raping Autumn because he has given up all hope.

Wilhelm and Fleming concluded their presentation by asking the Board to recommend a commutation of Smith's sentence to life in prison. Wilhelm noted that it would be his personal preference that Smith's sentence be commuted to a sentence with parole eligibility given that Smith never intended to kill Autumn. However, Smith would accept a sentence of life without the possibility of parole, Wilhelm stated.

### **ARGUMENTS IN OPPOSITION TO CLEMENCY:**

Arguments in opposition to clemency were presented by James Mayer, the Richland County Prosecutor; Bambi Couch Page, a criminal division attorney in the Richland County Prosecutor's Office; and Jill Cochran, an appellate attorney in the Richland County Prosecutor's Office.

Mayer stated that he chose to present to the Board at the clemency hearing for two reasons. First, Smith's case is an important one and as prosecutor, it is important that he represent the county in this matter. Second, Mayer is particularly familiar with Smith's case and the issues Smith's counsel have raised because Mayer was one of the several attorneys who prosecuted Smith's case in 1999.

Mayer opined that Smith received a solid defense during his trial. Smith's attorneys, who were appointed by the trial court, were very skilled and experienced trial lawyers.

Mayer stated that Autumn's death was anything but a tragic accident, as Smith's attorneys contended. It is hard to imagine a crime more horrible than that which Smith committed, Mayer stated, noting that at the time of the crime, Smith weighed at least 165 pounds to Autumn's 16.5 pounds. Smith was 31 years old, while Autumn was one day shy of six months.

Mayer described the night of the crime beginning with Frye retiring to bed. Mayer described how Smith went upstairs and removed Autumn from her crib and brought her downstairs. Smith raised the volume on the television. Smith next stripped himself and Autumn. Smith then commenced a sexual assault upon the child. Mayer noted that Smith did all of this intentionally. Smith shook Autumn violently. He smashed Autumn's face into the couch with such force that a fabric pattern was left imprinted on the baby's face. He banged Autumn's head around with his hands.

Mayer described the numerous bruises and abrasions about Autumn's body. Mayer described how Smith penetrated Autumn both vaginally and anally. He noted that Autumn's vagina was stretched to approximately ten times its normal size. Mayer described the bruising that was found around Autumn's anus. Abrasions on Autumn's face show that she was trying desperately to obtain air while being assaulted. Mayer noted that the coroner estimated the duration of the assault to be between 10 to 30 minutes. The injuries themselves demonstrate Smith's intention to kill, according to Mayer.

Mayer described how Frye immediately recognized that Autumn was dead. He described how Frye ran to a neighbor's home to call 911. Before the police arrived, Smith was observed by a neighbor throwing away 11 beer cans and Autumn's diaper, which had all of its fibrous absorption material ripped out of it. Particles of that material were found scattered about Smith's living room along with clumps of Autumn's hair. Mayer noted that Autumn's blood was found both on the couch and on her pink baby sleeper. When police arrived on the scene, officers immediately observed that there were no signs of forced entry and that the television had been turned up very loud. Mayer noted that the jury relied upon all of this compelling evidence to find Smith guilty of aggravated murder.

Mayer discussed the mitigation evidence offered by Smith's attorney during the penalty phase of the trial. Mayer dismissed what he referred to as the "upbringing" factor as unpersuasive. Mayer argued that Smith did in fact have the opportunity to learn right from wrong while growing up. His mother's neglect and his biological father's indifference were largely offset by the fact that Smith had a caring grandmother who lived right next door to Smith and who would assist with Smith's care. There was also a cousin who assisted with Smith's care. Mayer further noted that when Smith was 11 or 12 years old, his mother married a man who became a very positive influence in Smith's life. Smith's step-father imposed discipline in the household, and Smith cared for the man so much that he came to refer to him as "Dad." Smith never lacked for the necessities of life.

Mayer next addressed Smith's impaired intelligence, which was presented as mitigation at trial. Mayer notes that Smith was identified as having below average intelligence and IQ. Mayer noted that, while they may have been below average, Smith was as intelligent as roughly 25% of the United States population. Mayer noted that Smith was an average student in high school and that his low intelligence never prevented him from obtaining employment, which he performed capably. Smith lived a normal life and graduated high school, despite his low intelligence.

Mayer noted that Smith's criminal history suggests that Smith was never a model citizen. Mayer insisted that Smith's criminal history aggravates, rather than mitigates, his present offense. Smith had 18 encounters with law enforcement, which were, for the most part, alcohol-related. Those encounters should have served as a wake-up call to Smith to address his alcohol addiction, Mayer argued. Yet he ignored court-ordered mandates to address his alcoholism.

Mayer argued that Smith's alcohol addiction did not mitigate his crime. According to Mayer, Smith chose a life of heavy drinking. It was a lifestyle that he wanted. Smith chose to surround himself with heavy drinkers and persisted with this lifestyle despite the toll it was taking on his life. Alcoholism costs Smith relationships with several women and also cost him employment. Yet Smith continued to drink, developing a tolerance to its effects.

Mayer noted that depression was raised as a mitigation factor at trial, and a psychologist reported to the trial court that Smith suffered from a depressive disorder. According to Mayer, Smith's feelings of depression were to be expected given Smith's life circumstances at that time. Mayer noted that when examined by the psychologist, Smith was awaiting trial for aggravated murder, he had lost his job, he had lost his relationship with Frye, and his beloved step-father had recently died.

With respect to the claim advanced by Smith's attorneys that Smith was good with children and had never previously harmed a child, Mayer described how he had wanted to introduce testimony from Frye at trial regarding a photo that Frye had taken of Autumn approximately a month before her death showing a fabric pattern on Autumn's face. The fabric pattern was similar to that found on Autumn's face following Smith's fatal attack upon her. Mayer had wanted to introduce evidence of the preexisting fabric pattern to demonstrate that the night Smith killed Autumn was not the first night that he assaulted the child. However, the trial court refused to allow the introduction of this evidence on the ground that it was potentially too prejudicial to Smith.

Mayer also refuted the statement made by Smith during his interview with the Parole Board that he was offered a plea agreement that would have resulted in a sentence of 25 years to life. Mayer insisted that Smith was never offered any plea arrangement of any kind, and no deal was ever offered to Smith because his case was the worst of the worst. Because the evidence and the law supported the death penalty, there was never any reason for the prosecution to approach Smith with a plea agreement, Mayer insisted.

Mayer addressed the argument that Smith's prosecution was "all or nothing" and that he also should have been charged with rape. Mayer agreed that rape should have been charged and stated that its omission from the indictment was an oversight. However, Mayer insisted that there was no sinister motivation underlying its omission. It was simply an oversight. Mayer stated that had Smith's trial counsel approached him prior to the trial and complained about the rape charge's omission, Mayer would have gladly sought an amendment to the indictment. In any case, Mayer does not believe that inclusion of the rape charge would have resulted in a different verdict.

Mayer added that, for several reasons, when it comes to including a rape charge in cases like Smith's, prosecutors face a "damned if you do, damned if you don't" situation. If the prosecutor does include the rape charge he or she is accused of overcharging, or piling on. If the prosecutor omits the charge, he or she is accused of unfairly pursuing an all-or-nothing prosecution. Mayer noted, further, that adding the rape charge can create potential double jeopardy problems if a defendant decides to plead guilty to the rape.

Mayer stated that Smith made a conscious decision to intentionally murder Autumn. Mayer noted that all of the courts that have reviewed Smith's conviction have upheld his death sentence. For that reason, Mayer asked that the Board make an unfavorable recommendation on Smith's clemency application.

Bambi Couch Page, who handles most of Richland County's severe abuse and sexual assault cases, addressed the issues raised by Smith's counsel regarding SBS. She noted that Dr. Platt was chosen by the prosecution to testify at trial based upon his experience and specialization in the field of pediatric pathology. Couch Page insisted that Platt was considerably more credentialed in the area of pediatric pathology than Smith's present expert, Dr. Rothfeder.

Couch Page argued that Rothfeder has no relevant background in child abuse pediatrics but instead he specializes in medical malpractice and vehicle-related injury. Couch Page noted that it is not clear that Rothfeder could have even qualified to give expert testimony at trial on the subject about which he is now offering his opinions. Couch Page noted, further, that Rothfeder has never testified in an Ohio court. She pointed out that, following his testimony in a Michigan case on issues similar to those presented in Smith's case, the Michigan Supreme Court deemed Rothfeder unqualified to testify in the area of child abuse pediatrics.

Couch Page questioned why, if Rothfeder could not attend the clemency hearing in person, Smith's counsel could not have had at least made Rothfeder available to the Board via videoconference or Skype so that the Board would have had the opportunity to question him on the opinions he was offering. Couch Page further noted that if SBS has been as widely

discredited as Rothfeder suggests, Smith's counsel should have been able to locate an expert here in Ohio who could have attested to that fact.

Couch Page challenged Rothfeder's opinion that SBS has largely been disproven since 1999. She noted that the condition is still recognized by the American Academy of Pediatrics. The only thing that has changed, Couch Page noted, is the name given to the diagnosis. It is now referred to as abusive head trauma, rather than SBS. The name change reflects recognition within the medical community that the injury is not always the result of shaking, but can result from any form of abuse that inflicts trauma to the head. The argument that SBS does not exist has been raised in trials and rejected by juries, Couch Page stated.

Couch Page noted that SBS emerged onto the medical scene in the 1940s, rather than the 1970s as stated by Rothfeder. At the time of Smith's trial, SBS was thus considerably more entrenched in the medical community than Rothfeder's videotaped statement suggests.

Couch Page addressed Rothfeder's observation that SBSs effects have never been replicated in scientific studies. Couch Page observed that the effects of SBS cannot be replicated in a scientific study because that would require violently shaking an actual child. Couch Page noted that SBS has been found in autopsies of children who have been shaken, however.

According to Couch Page, indicators of compression asphyxia and SBS are not the same. Autumn's body exhibited indicators of both. For instance, Autumn's autopsy revealed more than just retinal hemorrhaging. Her optic nerve was also damaged. Moreover, had the sole cause of Autumn's death been compression asphyxia, one would expect to see more chest trauma than Autumn's body exhibited. What Autumn's body did exhibit, Couch Page argued, were finger marks on the baby's trunk area, which are strongly indicative of the child being shaken. Couch Page stated that the evidence in the case attests to the violence of the crime, and there was considerably more involved in Autumn's death than compression.

Couch Page noted that it is impossible to know precisely how long it took for Smith to kill Autumn. However, it was significantly longer than five minutes, as the coroner had testified at trial that the child's death resulted from a series of events that took place over a significant period of time.

Jill Cochran then noted that Smith's death penalty conviction has been thoroughly reviewed in the courts. She observed that, rather than accept responsibility for his crime and plead for mercy, Smith continues to advance legal arguments. Cochran noted that the members of Smith's family who presented at the clemency hearing all continue to believe in Smith's innocence. Cochran asked, rhetorically: What has Smith been telling his family?

Cochran observed that had Smith not killed Autumn, she would be 15 years old. She would be an aunt. However, she is not alive today and the reason she is not alive today is because Smith took her life.

Cochran stressed that Smith's case was never a case of involuntary manslaughter. There was no evidence presented at trial that Autumn's death was the accidental result of a sexual assault. Smith did not pass out on top of Autumn, crushing her, for example. Autumn's injuries were to her buttocks and her head. Cochran contended that the Supreme Court of

Ohio properly concluded that Smith committed a purposeful killing while attempting to rape a child.

Cochran acknowledged that, during the mitigation phase of the trial, the jury raised a question as to whether it could spare Smith's life on the basis of Smith not being in his "right mind" at the time of the murder. Cochran noted that the court's response to this left the jury with considerable discretion to spare Smith's life on that basis, yet the jury chose not to do so.

Cochran challenged the notion that Smith's alcoholism is in any way suggestive of a lower culpable mental state or in any way mitigates Smith's crime. Cochran observed that the Ohio General Assembly enacted legislation in 2000 that makes voluntary intoxication irrelevant to criminal mental state. In other words, voluntary intoxication is not a defense to a charge that someone acted purposefully. Therefore, Smith could be in a state of blackout and still act with purpose. Cochran noted that motive is equally irrelevant to intent. The fact that Smith had no motive to kill Autumn has no bearing on his legal guilt. Motive is not a criminal element that needs to be proven by the prosecutor, Cochran pointed out.

According to Cochran, a person's intent can be gleaned from the circumstances of the crime. Everything that Smith did on the night of the crime—drinking, bringing Autumn downstairs, turning up the television volume, raping the child—was done purposefully. Cochran argued that if Smith did all of these things purposefully, it stands to reason that Smith also acted purposefully in killing Autumn. Anyone would know that putting the weight of an adult upon an infant is going to result in the child's death, Cochran argued.

Cochran stated that everything Smith did on the night of the crime demonstrates that Smith was concerned only with himself. From the moment he took Autumn's life, Smith was attempting to create the illusion that he had done nothing wrong. Smith denied the crime to Frye, his neighbor, and the authorities. He told different stories about how Autumn died. Smith attempted to destroy evidence at the crime scene.

The state concluded its presentation by again asking that the Board recommend that clemency in Smith's case be denied.

### **VICTIM'S REPRESENTATIVES:**

Kaylee Bashline, Autumn's aunt, described how the police showed up at her home to report that Autumn had been killed and that the family needed to get to the hospital. Bashline remembers her mother collapsing in grief at the news of Autumn's death. Bashline recounted that Smith would sometimes exhibit inappropriate sexual behavior in front of her. When Bashline was only six years old, Smith would stand in front of her holding a hot dog at his crotch and shaking it provocatively. Bashline reported that her mother and her grandmother were unable to attend the clemency hearing. Bashline wanted the Board to know that her mother and grandmother remain deeply affected by Autumn's death. Bashline lamented that, for 14 years, Smith's family has been able to have contact with Smith. Bashline's family, however, has lost all of that time with Autumn. Bashline observed that Smith has lived 14 years longer than Autumn. Bashline described how, when she spends time with her two nieces, she often thinks of how she should have three nieces and that they should all be

together doing things. Bashline noted that she remains significantly impacted by Autumn's death. She believes that Smith does not deserve to live and should be executed.

Kesha Frye, Autumn's mother, described how difficult it has been dealing with Autumn's death. Frye described how, in the period immediately following Autumn's death, she needed her mother to sleep in her bed with her for comfort. Frye reported that both she and her daughter have been receiving counseling in an attempt to cope with the effects of Autumn's death. Frye indicated that she would like to see the state move forward with Smith's execution.

### **PAROLE BOARD'S POSITION AND CONCLUSION:**

The Ohio Parole Board conducted an exhaustive review of documentary submissions and carefully considered the information presented at the clemency hearing. The Board reached a unanimous decision to provide an unfavorable recommendation regarding clemency based on the following:

- The Board rejects the argument advanced by Smith and his attorneys that Smith was too drunk to appreciate his actions on the night he killed Autumn. Smith's actions on that night suggest that Smith was very much in control of his actions and very much aware of the consequences of those actions. Immediately before assaulting Autumn, Smith raised the volume on his television in an apparent attempt to mask Autumn's cries. After Kesha Frye became aware of the baby's death and began accusing Smith of killing the child, Smith gathered up the torn diaper and beer cans strewn about the crime scene and attempted to dispose of them. When asked during his interview with the Board why he chose that moment to dispose of those items, Smith responded, weakly, that people do strange things sometimes. Smith understood that Frye was accusing him of killing Autumn, and he was sufficiently conscious of the situation to deny those allegations to Frye, his neighbor, and the police after they arrived on the scene. Smith also attempted to blame Frye for Autumn's death. Smith's actions on the night of the murder belie the contention that he was unable to perceive the situation clearly or think rationally. His actions were certainly not indicative of someone operating in some kind of automatic blackout state.
- Even if Smith did murder Autumn while in a state of alcohol-induced blackout, as Smith and his attorneys contend, it does little to mitigate Smith's horrific crime. According to Smith, he had previously engaged in criminal behavior during alcohol-induced blackouts. Smith's attorneys note that Smith "has a history of creating unintended, secondary consequences when he gets drunk." Smith had ample opportunity to address this problem in the years preceding Autumn's death. He had previously been ordered to address his alcohol problem by at least two courts, but he was unwilling to recognize his alcohol addiction and address the problem. Instead, Smith continued to routinely drink to gross excess, with little regard for whom he might hurt during one of his alleged blackouts. That he would continually risk the safety and security of others, including the girlfriend and children with whom he shared a home, speaks poorly to Smith's character. Smith's "track record of creating

unintended consequences,” as Smith’s counsel characterized it, in many ways aggravates more than it mitigates his crime.

- The Board finds counsel’s suggestion that the rape and murder of Autumn was simply another in a long line of Smith’s alcohol-related unintended consequences absurd. Smith’s brutal attack of this infant is in no way analogous to burning one’s dinner, spilling paint on a stove, or any of the other silly mishaps described by Smith’s counsel.
- The Board rejects the argument that Smith never formed an intention to kill Autumn. The Board finds evidence of purpose and intent to kill in the facts and circumstances of the offense, including Smith raising the volume on the television, his attempts to dispose of evidence, and his repeated denials of any culpability on the night of the crime and thereafter. Moreover, the ferociousness with which Smith assaulted Autumn, a six-month-old baby, is proof of Smith’s intention to kill the child. Smith raped Autumn while the baby lay face down on the sofa, placing the weight of his adult male body upon her 24-inch, 16-pound frame. He then proceeded to penetrate the baby’s anus and vagina while holding her down. Evidence presented at Smith’s trial suggested that the attack lasted from 10 to 30 minutes. Smith pulled clumps of the child’s hair from her head. He inflicted severe head trauma upon her. Smith claimed to have meant only to sexually assault Autumn. However, it stretches credulity to think that Smith had no intention to kill Autumn when he assaulted her in a manner that made death a virtual certainty.<sup>1</sup> Proof of Smith’s intent can be found in the directed and persistent brutality he exhibited during the attack.
- The Board rejects the argument that “newly obtained evidence” calls into question the validity of the coroner’s shaken baby diagnosis and suggests that Autumn died by suffocating to death, possibly within only three to five minutes after Smith laying on top of her. This “newly obtained evidence” amounted to nothing more than the opinions offered by Dr. Rothfeder, whom the Board was never offered the opportunity to question, and who based his opinions solely on a retrospective analysis of transcribed trial testimony from 14 years ago. Even after putting aside the obvious credibility gap that exists between Rothfeder’s documentary review and the observations of the actual coroner who autopsied Autumn’s body, the Board still finds Rothfeder’s opinions unpersuasive. First, the Board is not persuaded that the SBS evidence that was presented to the jury was seriously flawed, as Rothfeder contended. In its rebuttal of Rothfeder’s statements, the state made a persuasive argument for the continued validity of SBS and its validity as a cause of death in this case. Second, as Smith’s attorneys themselves acknowledged, the fact that Autumn *could have* died after only three to five minutes does not mean that she *did* in fact die that quickly. The extensive injuries sustained by the child suggest that the attack went on for much longer than three to five minutes. More importantly, from the standpoint of intent and purpose to kill, whether Smith killed Autumn by beating her to death for 30 minutes or by suffocating her to death under the weight of his body for only five minutes is a

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<sup>1</sup> If Smith had in fact spent as much time around children as his counsel and family suggested, then he would have been acutely aware of Autumn’s fragility.

distinction without a difference. Either mode of death reflects Smith's intention to kill Autumn, and both are equally vile.

- The Board rejects the argument that the jury never had a full and fair chance to consider the issue of Smith's intent because Smith was indicted only for aggravated murder. Smith's counsel argued that, without a lesser offense on which to find Smith guilty, the jury likely felt compelled to return the guilty verdict because the facts of the case were so offensive that the jury would not have wanted to acquit Smith. This argument is premised on the assumption that, if given the option of the lesser offense of rape, the jury likely would have returned that verdict rather than aggravated murder. The argument is unpersuasive for several reasons. First, as noted, the record is replete with evidence suggesting that Smith acted with the intention to kill. Accordingly, there is no reason to think that the jury was looking for a viable option to convicting Smith on the aggravated murder charge or outright acquittal. Moreover, had the jury felt compelled to return a guilty verdict despite finding no intent to kill, as counsel suggests, the jury could have recommended during the penalty phase that Smith's life be spared.
- The Board rejects the argument that Smith should be granted clemency because the trial court did not instruct the jury that it could return a verdict on the lesser included offense of involuntary manslaughter. Here again, Smith's counsel is asking the Board to speculate about what the jury might have done if presented with an option to aggravated murder. As noted, there was substantial evidence presented at trial from which the jury could reasonably have inferred Smith's intent to kill. That the jury chose not to spare Smith's life during the penalty phase suggests that the jury felt no discomfort with its verdict and would not have handed down an involuntary manslaughter conviction even if available to it. Finally, Smith raised this specific legal argument during his direct appeals and habeas proceedings and it was thoroughly vetted during those legal proceedings, but it was rejected by all of the courts that considered it.<sup>2</sup>
- Smith's uniformly positive interactions with children, which Smith's family and attorneys described in detail, is commendable if true. However, those positive interactions tell the Board little about Smith's culpable mental state at the time of the offense. Ultimately, it has little bearing on the clemency decision. Presumably, the Board is supposed to conclude from Smith's positive interactions with children that he would never intentionally hurt a child. Clearly, though, Smith was quite capable of seriously harming a child, as evidenced by his vicious sexual assault upon Autumn, which Smith himself admits to intending. It is no stretch to presume that someone who would unleash such a despicable sexual attack on an infant would not hesitate to also intentionally take her life. Moreover, the photograph that the state produced of Autumn taken one month before her death, which shows an impression on her face

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<sup>2</sup> The Supreme Court of Ohio held that the trial court did not err in denying Smith's request for an involuntary manslaughter instruction because, in the Supreme Court's view, the evidence at trial revealed that Smith did purposely kill Autumn while raping or attempting to rape her. The Supreme Court thus rejected Smith's suggestion that evidence of purpose was lacking.

similar to the pattern of Frye's sofa, suggests that Smith may have previously assaulted Autumn.

- Smith's turbulent childhood mitigates his crime, but only minimally. Smith's childhood, while by no means idyllic, was far less chaotic and violent than that of many of the death row inmates who have sought and been denied Executive clemency. Moreover, Smith's childhood was not completely devoid of stable and reliable adult role models. Smith had family, including a grandmother and step-father, who treated Smith well, offering him love and support.
- The dearth of mitigation in Smith's case contrasts sharply with the appalling facts and circumstances of his crime. Smith took the life of an innocent six-month-old infant while using the baby to sexually gratify himself. It is hard to fathom a crime more repulsive or reprehensible in character. It is clearly among the worst of the worst.
- The Board recognizes that Smith has adjusted well during his incarceration, refraining from serious institutional misconduct. His positive institutional adjustment is commendable. However, every inmate is expected to conform his or her conduct to institutional rules and regulations. Even though some inmates are unable or unwilling to behave themselves in prison, a positive institutional adjustment is a minimum expectation of all inmates. It cannot by itself form the basis for Executive clemency in the absence of other factors supporting a favorable recommendation. Furthermore, while Smith's institutional conduct has been good and he has done some community service, Smith has not attempted to improve himself by taking institutional programs available to him during his incarceration.

**RECOMMENDATION:**

The Ohio Parole Board with ten (10) members participating, by a vote of ten (10) to zero (0) recommends to the Honorable John R. Kasich, Governor of the State of Ohio, that Executive clemency be denied in the case of Steven T. Smith A369-054.

Steven T. Smith, A369-054  
Death Penalty Clemency Report

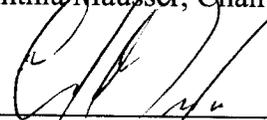
Adult Parole Authority

Ohio Parole Board Members  
Voting **Favorable**

Ohio Parole Board Members  
Voting **Unfavorable**



Cynthia Mausser, Chair



Andre Imbrogno, Vice Chair



Kathleen Kovach



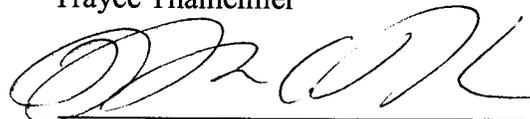
Ellen Venters



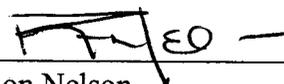
R.F. Rauschenberg



Trayce Thalheimer



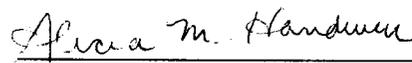
Marc Houk



Ron Nelson



Michael H. Jackson



Alicia Handwerk