

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

18th Circuit Court
Case No. 79-653-CFB

vs.

CASE NO. SC-_____

GREGORY MILLS,

Appellee.

_____ /

EMERGENCY MOTION TO VACATE STAY OF EXECUTION

Appellant, the State of Florida, by and through the undersigned Assistant Attorneys General, hereby respectfully requests that this Honorable Court enter an Order vacating the Stay of Execution granted by the Honorable O. H. Eaton on May 1, 2001, in this case. As grounds therefor, the State says:

Appellee Gregory Mills was scheduled to be executed on May 2, 2001.¹ Following an evidentiary hearing before the Honorable O. H. Eaton on April 30, 2001, Judge Eaton entered an Order Setting Aside Death Sentence, Staying Execution, and Ordering Additional Hearings (a copy of that order is attached). The State of Florida is filing, contemporaneously with this motion, an Emergency Notice of Appeal and a Motion for Expedited

¹ The warrant period runs from 12:00 P.M. April 30th through 12:00 P.M. May 7, 2001.

Briefing with regard to the circuit court's order.

Judge Eaton granted the stay below as part of his ruling that Mills was entitled to relief on two grounds: Newly discovered evidence regarding testimony of a State witness at Mills' 1979 trial, and the initial order summarily denying postconviction relief had been drafted by the State after an improper *ex parte* communication between the postconviction judge and the State Attorney's Office. Neither of these claims provide a reasonable basis for the granting of a stay of execution on a successive postconviction motion.

In *State v. Salmon*, 636 So. 2d 16 (Fla. 1994), this Court vacated a stay of execution and quashed an order granting an evidentiary hearing entered by the Honorable Michael H. Salmon, based on a successive postconviction motion which alleged that the defendant, Roy Allen Stewart, under an active death warrant, had received ineffective assistance of trial counsel. This Court held that the claim of counsel's deficiency was not likely to have affected the outcome of the case, and therefore, the stay should not have been entered. 636 So. 2d at 17. In addition, this Court noted that Stewart's allegations had, or could have, been made previously, and therefore, offered no reasonable basis for a stay of execution. *Id.*

Like Stewart, Mills has had multiple opportunities to demonstrate the wrongfulness of his conviction or sentence.

Such claims could not have affected the validity of Mills' conviction or sentence, and therefore, the stay should not have been granted.

Florida law is well-settled that "[t]he execution of a death sentence may be stayed only by the Governor or incident to an appeal." § 922.06(1), Fla. Stat. (2000); *State ex rel. Russell v. Schaeffer*, 467 So. 2d 698 (Fla. 1985); *Goode v. Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984)("When the death warrant is issued by the governor, the execution of the death sentence can be stayed only by the governor or 'incident to an appeal.'"); *Spalding v. Dugger*, 526 So. 2d 71, 73 (Fla. 1988)("In order for [the Florida Supreme Court] to grant a stay of execution, there must be an appeal or habeas corpus pending before this Court"); *Bundy v. State*, 490 So. 2d 1257 (Fla. 1986); *Sullivan v. State*, 372 So. 2d 938 (Fla. 1979).

Mills has not presented a colorable basis for granting relief, as required to justify the stay entered herein. See, *Booker v. Wainwright*, 675 F.2d 1150 (11th Cir. 1982)(proper to grant a stay only if the petitioner has presented colorable, non-frivolous issues); *Barefoot v. Estelle*, 463 U.S. 880 (1983)(stay only justified when the petitioner presents claims which are debatable among jurists of reason).

Under settled United States Supreme Court precedent, "a stay of execution pending disposition of a second or successive

federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted.'" *DeLo v. Stokes*, 495 U.S. 320, 321 (1990)(per curiam)(quoting *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983)). As the United States Supreme Court has emphasized "[e]ntry of a stay on a second or third [habeas] petition is a drastic measure, and we have held that it is 'particularly egregious'" to enter a stay absent substantial grounds for relief. *Bowersox v. Williams*, 517 U.S. 345 (1996)(quoting *DeLo v. Stokes*, 495 U.S. 320 (1990)).

Although the lower court has determined that the sentence should be vacated, this determination rests on the assumption that *this* Court's prior rulings on Mills' post conviction claims was erroneous. No stay of execution is justified in this case. See *DeLo v. Stokes*, 495 U.S. 320 (1990); *Antone v. Dugger*, 465 U.S. 200 (1984).

Based on the foregoing arguments, the stay of execution should be vacated. See *Darden v. State*, 521 So. 2d 1103 (Fla. 1988)(court not required to issue a stay on a successive motion for post-conviction relief even if the same issue is pending in the United States Supreme Court in another case).

WHEREFORE, the State respectfully requests that this Honorable Court VACATE the Stay of Execution entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile/U.S. Regular Mail to Todd G. Scher, Litigation Director, Office of the Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this _____ day of May, 2001.

CO-COUNSEL FOR STATE OF FLORIDA