

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-879

STATE OF FLORIDA,

Appellant,

v.

GREGORY MILLS,

Appellee.

_____ /

**RESPONSE TO STATE'S EMERGENCY MOTION
TO VACATE STAY OF EXECUTION**

COMES NOW THE APPELLEE, GREGORY MILLS, by and through his undersigned counsel, and herein files this response to the State's Emergency Motion to Vacate Stay of Execution.¹

1. On May 1, 2001, the Honorable O.H. Eaton entered an order vacating Mr. Mills' sentence of death and ordering a resentencing based on a claim of newly discovered evidence. Judge Eaton also ordered that Mr. Mills was entitled to a new Rule 3.850 proceeding due to newly discovered evidence of an improper *ex parte* communication between the State and Judge William Woodson, the judge who had presided over Mr. Mills' first Rule 3.850 proceedings. Judge Eaton also granted a stay of execution in light of the relief that he granted to Mr. Mills.

2. The State now moves on an "emergency" basis for this Court to vacate the stay entered by the lower court because "[n]either of these claims provide a reasonable basis for the granting of a

¹The State's motion was received by Mr. Mills' counsel at approximately 5:37 PM on May 2, 2001.

stay of execution on a successive postconviction motion" (Motion at 2). In addressing such a motion, this Court is *not* reviewing the merits of the claims upon which Judge Eaton granted relief, but rather only whether Judge Eaton abused his discretion in granting a stay. See State v. Crews, 477 So. 2d 984 (Fla. 1985).² In light of the narrow focus of the State's motion, the State's argument is troubling. Mr. Mills' was afforded relief and his death sentence was vacated. Does the State of Florida wish Mr. Mills to be executed despite the fact that there is no death sentence in effect?

3. The State, other than expressing bald displeasure at the lower court's rulings, has provided no reason demonstrating that Judge Eaton abused his discretion in staying Mr. Mills' execution, given that Judge Eaton also vacated Mr. Mills' sentence of death. The sole legal support advanced by the State is State v. Salmon, 636 So. 2d 16 (Fla. 1994). Salmon addressed a motion to vacate a stay and an appeal from a court's granting of an evidentiary hearing on a claim (raised in a fourth Rule 3.850 motion) on ineffective assistance of counsel for failure to object to a jury instruction. Id. at 16. In Mr. Mills' case, the State is not appealing the granting of an evidentiary hearing; the evidentiary hearing already took place and relief was afforded in a 13-page order. If the State chooses to appeal Judge Eaton's ruling,³ it is within its rights to do. Again, however, in addressing a motion to

²The State cites to a number of cases involving stays in federal courts, which are not exactly relevant herein. Nevertheless, the federal standards also support the principle that absent a gross abuse of discretion, a stay of execution should not be vacated. See, e.g. Singletary v. Porter, 514 U.S. 1048 (1995); Wainwright v. Ford, 104 S. Ct. 3498 (1984)(Powell, J., concurring); Kemp v. Smith, 463 U.S. 1344 (1983)(Powell, J., Circuit Justice); Kemp v. Smith, 463 U.S. 1321 (1983)(Powell, J., Circuit Justice); Holtzman v. Schlesinger, 414 U.S. 1304, 1309-10 (1973)(Marshall, J., Circuit Justice); Aberdeen and Rockfish R. Co. v. SCRAP, 409 U.S. 1207, 1218 (1972)(Burger, C. J., Circuit Justice).

³Mr. Mills counsel notes that the State apparently has filed a notice of appeal, as it is referred to in its motion (Motion at 1-2). As of the writing of this response, however, Mr. Mills' counsel has not been

vacate a stay, this Court is not reviewing the merits of the appeal; rather, it is only determining whether Judge Eaton abused his discretion in granting a stay. Given that Judge Eaton granted Mr. Mills a resentencing, the State's burden of demonstrating abuse of discretion as to the granting of the stay cannot logically be met.

4. The fact that relief was granted to Mr. Mills in a successive motion for postconviction relief⁴ is irrelevant to the singular issue before the Court at this time: whether Judge Eaton abused his discretion in granting a stay after he vacated Mr. Mills' sentence of death. That the State disagrees with *the merits* of Judge Eaton's conclusions does not bear on whether he abused his discretion in granting a stay. The merits are to be determined in the State's appeal, not on a motion to vacate a stay of execution.

5. The State contends that the claims presented by Mr. Mills "could not have affected the validity of Mills' conviction or sentence," and that he "has not presented a colorable basis for granting relief" (Motion at 3). Obviously Judge Eaton disagreed. Again, these arguments go to the merits of Judge Eaton's decision, which the State apparently disagrees with, not to the issue of whether Judge Eaton abused his discretion in granting a stay following the vacation of Mr. Mills' sentence of death. It is difficult to imagine more "colorable" grounds warranting a stay of execution than the setting aside of a death sentence. To the State's apparent chagrin, Florida inmates are not permitted to be executed if they do not have a death sentence imposed on them.

served with any notice of appeal from the State.

⁴Moreover, Judge Eaton found as a matter of fact that the claims raised by Mr. Mills were newly discovered and could not have been previously ascertained by the exercise of due diligence.

WHEREFORE, the Appellee, Gregory Mills, submits that the State's Emergency Motion to Vacate Stay of Execution should be denied.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by fax transmission to all counsel of record on May 3, 2001.

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