

SUPREME COURT OF FLORIDA

BENNIE DEMPS,

CASE NO.: SC54249

Appellant,

Lower Tribunal No.: 77-0116-CFA

vs.

STATE OF FLORDIA,

Appellee.

**EMERGENCY¹ APPLICATION FOR STAY
OF EXECUTION AND ALTERNATIVE MOTION TO
WITHDRAW BY COURT-APPOINTED APPELLATE COUNSEL**

The appellant/defendant, Bennie Demps, through his newly appointed appellate counsel, George F. Schaefer, moves this court for an order staying the defendant's execution now scheduled for May 31, 2000. This court has jurisdiction to enter a stay of execution. State v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985); see also State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986). If this application for a stay pending review is denied, the undersigned court-appointed counsel moves this court for an order authorizing the undersigned counsel to immediately withdraw. The undersigned counsel cannot render effective assistance of counsel on behalf of Mr. Demps in his appeal to this court unless the scheduled execution of May 31, 2000 is stayed. The following grounds support this motion:

¹in accordance with Rule 9.300 of the Fla. R. App. P., a copy of this emergency application has been faxed to opposing counsel.

1. On May 22, 2000 the trial court rendered an order denying the defendant's fourth motion to vacate the defendant's first degree murder conviction and death sentence.

2. On May 23, 2000 the trial court denied the defendant's motion for rehearing of this fourth 3.850 motion.

3. The defendant has been represented in the trial court by William Salmon in the latest collateral proceedings.

4. The defendant, who is indigent, filed a *pro se* request with this court to have counsel appointed for him which was denied on May 23, 2000. This court denied Mr. Demps' request to have counsel appointed based on the fact that Mr. Demps is represented by Mr. Salmon. On May 24, 2000 Attorney Salmon faxed a letter to the clerk of this court, a copy of which is attached to this application.

5. On May 24, 2000 Assistant Attorney General Curtis M. French, on behalf of the State of Florida, requested that this court, or the trial court, clarify whether Mr. Salmon represents Mr. Demps on appeal. The State's request for clarification cited ethical considerations. In the request for clarification, the State notes:

Mr. Salmon is presently the attorney most knowledgeable about Mr. Demps' case. As such, and considering the circumstances of this case, including especially that Mr. Demps is currently under a death warrant with execution scheduled for May 31, 2000, Mr. Salmon has an [sic] strong, if not overwhelming, ethical obligation to continue his representation of Mr. Demps in any further litigation in this matter. See, e.g., Rule 4-1.16 of the Florida rules of Professional Conduct.

6. Also on May 24, 2000 the undersigned counsel received a telephone call that commenced at 2:39 p.m. from the trial court judge soliciting the undersigned counsel

to represent Mr. Demps on appeal. The undersigned counsel agreed to accept this appointment.

7. Shortly thereafter the undersigned counsel was informed that the trial court had appointed the undersigned counsel as cocounsel to Mr. Salmon in this case. At 4:40 p.m. on May 24, 2000 the undersigned counsel received a faxed copy of the trial court's order of appointment which states in pertinent part, "In order to protect defendant BENNIE E. DEMPS's right to counsel under Florida Statute 925.035, which ensures post-conviction representation for capital defendants, this Court hereby appoints co-counsel for appellate purposes in this case."

8. The undersigned counsel's law office is located in Gainesville, Florida. At the time of learning of the court's appointment, the undersigned counsel was informed by a court official that the defendant's original court files were recently returned to the Clerk of Court in Bradford County, Florida. Consequently, the undersigned counsel has not even had an opportunity to review the entire record in this case. The record is reportedly voluminous and in a disorganized state.

9. The defendant remains on "death watch" at the Florida State Prison. The undersigned counsel has not even had an opportunity to meet with Mr. Demps.

10. Mr. Demps has a statutory right to the effective assistance of postconviction counsel. See Spaziano v. State, 660 So.2d 1363, 1370 (Fla. 1995) and Spalding v. Dugger, 526 So.2d 71, 72 (Fla. 1988). In Spalding this court discussed the statutory right to effective capital collateral counsel:

We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings. This statutory right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings. Although the United States Supreme Court, in Pennsylvania v. Finley, ___ U.S. ___, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), held there is no absolute constitutional right to counsel in collateral relief proceedings, it did recognize that the circumstances of a particular case might require appointment of counsel. Id. Accord Graham v. State, 372 So.2d 1363 (Fla. 1979). The legislature established this statutory right, not only in recognition of the appropriateness for all death-sentenced prisoners to have counsel in collateral relief proceedings, but also to avoid the attendant problems of determining the need to appoint counsel and the utilization of volunteer counsel, including the resulting delays in that process.

11. Furthermore, the Florida Constitution requires the appointment of counsel in capital postconviction cases where "a colorable or justifiable issue or meritorious grievance" appears in the defendant's petition. Graham v. State, 372 So.2d 1363, 1366 (Fla. 1979).

12. Collateral counsel must have a reasonable time for preparation of the defendant's case between the time of assignment of counsel by the court and the date of the postconviction relief hearing. Smith v. State, 545 So.2d 423, 424 (Fla. 4th DCA 1989). Likewise, collateral counsel must have a reasonable time for preparation of the defendant's appeal of the denial of postconviction relief. Rules 9.140(b)(6)(E) and 9.140(f) of the Fla. R. App. P. require service of the defendant's initial brief within thirty (30) days of service of the record or designation of appointed counsel, whichever is later, in death penalty cases. A stay of the defendant's execution scheduled for May 31, 2000 is necessary so that the undersigned counsel will have sufficient time to review the entire record in this case, confer with Mr. Demps, and prepare the appellant's initial brief.

13. Furthermore, the Supreme Court of the United States recently held in Roe v. Flores-Ortega, 13 Fla. L. Weekly Fed. S122, 120 S.Ct. 1029 (February 23, 2000) that competent counsel has an obligation to confer with a defendant about an appeal and that failure to confer may satisfy the Strickland prejudice test for ineffective assistance of counsel. The Roe decision requires that the undersigned counsel be given a meaningful opportunity to confer with Mr. Demps about the appeal of the denial of postconviction relief. Less than three business days to confer in a death penalty case is per se inadequate.

14. This court has emphasized that a capital defendant must receive effective postconviction representation and that counsel be able to meet his responsibilities under the Rules of Professional Conduct. Peede v. State, 748 So. 2d 253, 256 n. 5 (Fla. 1999). Denial of the requested stay would deprive Mr. Demps of his statutory and constitutional rights to effective assistance of collateral counsel because the undersigned cannot competently represent the defendant in his appeal with less than three business days before the scheduled execution.

15. Under similar circumstances, i.e., a successive death warrant and a successive motion for postconviction relief, this court stayed the execution of Joseph Spaziano so that new counsel could prepare for further proceedings. Spaziano, 660 So. 2d at 1370. This court held that because CCR had not been familiar with the prior proceedings in Spaziano's case and did not have access to the dozens of boxes of materials on the case, the court had "no choice but to grant a stay of execution to provide CCR additional time" Id. This court should grant a stay so that Mr. Demps is not

arbitrarily denied the same rights to counsel and due process that Spaziano and numerous other similarly situated persons have received.

16. The denial of a stay under these circumstances would also result in a denial of Mr. Demps' constitutional rights under Article 1, Section 2, Article 1, Section 9, and Article 1, Section 16 of the Florida Constitution and Equal Protection rights under the Fourteenth Amendment to the United States Constitution. Denial of a stay under these circumstances would render the imposition of the death penalty arbitrary and capricious in this case in violation of the Eighth Amendment to the United States Constitution.

17. The state will suffer no prejudice if a stay is entered. By statute, the Governor's death warrant will remain in effect. § 922.052, Fla. Stat. (1999).

18. If this court denies a stay, then the undersigned counsel should be permitted to immediately withdraw. The Florida Rules of Professional Conduct at Rule 4-1.1 require a Florida lawyer to provide competent representation to a client. This rule provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The commentary to this rule further provides in pertinent part:

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

19. The undersigned counsel is board certified in appellate law, criminal appeals, and criminal law. The undersigned counsel, based on his experience in criminal law and appeals, represents to this court that he cannot competently represent Mr. Demps in prosecuting the appeal of Mr. Demps to the Supreme Court of Florida before the

scheduled execution of May 31, 2000. If a stay is denied, the undersigned counsel must be allowed to withdraw rather than be forced to incompetently represent Mr. Demps on appeal.²

20. For all of the above reasons, the undersigned counsel applied on an emergency basis for a stay of execution before the lower tribunal on May 25, 2000. The trial court denied the application for stay with prejudice and concluded that the issue of a stay should be addressed by this court. A copy of the trial court's order is also attached. The trial court directed the official court reporter to prepare a final transcript of the hearing on the emergency application for a stay which is in the process of being faxed to this court.

DATED this 25th day of May, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was furnished by facsimile and U.S. mail on this 25th day of May, 2000 to:

Roger R. Maas, Executive Director
Commission on Administration of Justice
in Capital Cases

154 Holland Building
600 South Calhoun Street, Room 154
Tallahassee, Florida 32399-1400

²The Florida Rules of Professional Conduct expressly provide that counsel “**shall withdraw** from the representation if . . . the representation will result in a violation of the Rules of Professional Conduct or law” R. Regulating Fla. Bar 4-1.16. (Emphasis added).

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