

IN THE SUPREME COURT OF FLORIDA

BENNIE DEMPS,

Appellant,

vs.

CASE NO. : SC 00-1118

STATE OF FLORIDA,

Appellee.

_____ /

RESPONSE IN OPPOSITION TO ANY MOTION
FOR STAY OR FOR WITHDRAWAL OF COUNSEL

THE STATE OF FLORIDA, by and through undersigned counsel, hereby files this response in opposition to motion for stay of execution or withdrawal of counsel filed by Mr. George Schaeffer or that might be filed by Mr. William Salmon in this case. The State shows as follows:

1. On July 2, 1999, Demps filed his fourth 3.850 motion, the summary denial of which is the subject of this appeal.

2. On August 10, 1999, William Salmon filed in circuit court his notice of appearance as retained counsel in this case. Bennie Demps was at that time represented by registry counsel Baya Harrison. At a hearing to seek clarification of the representation issue, Demps, after consultation with his retained attorney, advised the court that he wished Mr. Salmon to represent him and that he did not wish Mr. Harrison to do so. The court therefore relieved Mr. Harrison of any further

responsibility to represent Demps. Mr. Salmon was advised at that hearing that he should not look to the State of Florida for payment of his fees in this case. See Order of November 30, 1999 (copy attached).

3. Not only has William Salmon represented Bennie Demps continuously since August 10, 1998, but he has represented Demps previously. Mr. Salmon was appointed in February of 1997 to represent Demps on appeal from the summary denial of his third 3.850 motion, see petitions for payment of fees and costs for services rendered between 2/10/97 and 11/26/97 (copies attached), and Mr. Salmon briefed and argued the case on appeal, as reflected in this Court's opinion in Demps v. State, 714 So.2d 365 (Fla. 1998). Thereafter, Mr. Salmon represented Demps in 1998, during his bid for clemency. See Affidavit of Bill Salmon, dated April 13, 2000 (copy attached).

4. On April 24, 2000, while Demps' fourth 3.850 motion was pending in the circuit court, Governor Bush issued a death warrant for Mr. Demps.

5. On April 26, 2000, this Court ordered that any further proceedings in this case be expedited.

6. On May 3, 2000, the circuit court held a status hearing, following which it scheduled a hearing for May 12, 2000, to determine whether an evidentiary hearing would be required.

7. On May 12, 2000, such hearing took place in the circuit court. Following additional submissions by both parties, the circuit court summarily denied the 3.850 motion, by written order dated May 22, 2000. Mr. Salmon filed on behalf of Mr. Demps a motion for rehearing, which the circuit court denied by written order dated May 23, 2000.

8. At no time during his representation of Mr. Demps to this point had Mr. Salmon informed the circuit court, this Court, or the State of any limitations in his representation of Mr. Demps. The State, the circuit court and this Court have all expected that Mr. Salmon would continue his representation of Mr. Demps until he either obtained relief for Mr. Demps or exhausted all avenues of appeal.

9. However, by letter to this Court dated May 24, 2000 - almost two years after Mr. Salmon was retained to represent Mr. Demps in this case and a year and a half after registry counsel representing Mr. Demps had been relieved of his duties in this case at Demps' behest - Mr. Salmon stated *for the first time* that he had been "retained on behalf of Mr. Demps only here in Bradford County Circuit Court on his pending motion for post conviction relief," and that he had "not been retained and [did] not represent Mr. Demps on any proceedings in the Florida Supreme Court or other judicial bodies." Letter of May 24, 2000

(copy attached). Mr. Salmon has provided no reason why he cannot represent Mr. Demps except for money.

10. To date, Mr. Salmon has never filed a request to withdraw in this or any court. However, in light of the above letter, the State anticipates that he might file such request. The State would strongly urge that any such request be denied.

11. Mr. Salmon's knowledge of Mr. Demps's case extends at least to February of 1997, when he was appointed to represent Demps on his previous appeal. Moreover, he has continuously represented Mr. Demps in this case since August 10, 1999. He clearly is knowledgeable about all aspects of Mr. Demps case and is fully qualified to represent Mr. Demps on appeal. As such, and considering the circumstances of this case, including especially that (a) Mr. Demps is currently under a death warrant with execution scheduled for May 31, 2000, and (b) Mr. Salmon has not timely moved to withdraw from representation in this case, Mr. Salmon has a strong, if not overwhelming, ethical obligation to continue his representation of Mr. Demps in any further litigation in this matter. See e.g., R. Regulating Fla. Bar 4-1.16; Fla. R. of App. P. 9.140(b)(5); Fla. R. of Jud. Adm. 2.060(j).

12. Although Mr. Salmon cites lack of funds to undertake

representation on appeal, nothing has ever prevented Mr. Salmon from timely alerting the parties and the courts to any claimed limitations of his retained representation so that substitution of counsel could be timely planned for, and nothing yet prevents Mr. Salmon from seeking appointment to represent Mr. Demps on appeal. He has done neither of these things, however, and he should not be allowed just suddenly to withdraw from representation of Mr. Demps in the middle of death warrant litigation, particularly in the absence of any suggestion that Mr. Demps wishes Mr. Salmon to withdraw from this case. Cf. Stafford v. Mesnik, 63 F.3d 1445 (7th Cir 1995)(attorney seeking to withdraw must establish that his client consents or that "valid and compelling reason" exists for court to grant motion over defendant's objection). Mr. Salmon's withdrawal at the present juncture either would fail to protect Mr. Demps' legitimate interest in being represented by counsel familiar with his case, or would allow his departure to become a vehicle for achieving the delay of further proceedings in this case and for subverting the orderly administration of justice. Either way, this Court should refuse to countenance such action. See, e.g., Evans v. State, 741 So.2d 1190 (Fla. 4th DCA 1999)(substitution of counsel may be limited in favor of considerations of judicial administration or if made in bad

faith for the sake of arbitrary delay or otherwise to subvert judicial proceedings).

13. This Court should deny any attempt by Mr. Salmon to withdraw from representing Bennie Demps. See, e.g., Billings, et al v. Isom, 701 So.2d 1271 (Fla. 5th DCA 1997) (counsel's motion to withdraw properly denied, considering length of time counsel had represented client and client's inability to secure other counsel); Hollis v. F.B. Myers, 482 So.2d 568 (Fla. 4th DCA 1986) (counsel's motion to withdraw on the ground that his fee arrangement was inadequate was properly denied in view of age of case, the many continuances that had been already been granted, and the probability that requiring new counsel would exacerbate the delay); Madrid v. Gomez, 150 F.3d 1030, 1038-39 (9th Cir. 1998) ("In California, as elsewhere, attorneys may not withdraw from ongoing litigation if so doing would materially and adversely affect the interests of the client;" withdrawal appropriately denied where securing replacement counsel would be difficult at best, and any replacement counsel "would lack current counsel's unique familiarity with the facts and circumstances" of the case); Ryan v. Butera, 193 F.3d 210 (fn. 4) (3rd Cir. 1999) (under Pennsylvania law, an attorney "may withdraw from representation only for reasonable cause and upon reasonable notice").

14. On the afternoon of May 24, 2000, circuit court judge Stanley Morris appointed Mr. George Schaefer as *co-counsel* for appellate purposes in this case. At approximately 5 p.m. on May 25, 2000, Mr. Schaefer filed in this Court a motion for stay or in the alternative to withdraw from representation, which is very similar to the one he filed in circuit court and which was denied by Judge Morris. In essence he contends that he is not familiar enough with this case to represent Mr. Demps unless he is given additional time to familiarize and prepare by means of a stay of execution; lacking such additional time, he seeks withdrawal from representation. However, this motion fails to acknowledge that Mr. Schaefer is neither sole counsel nor lead counsel. The State will not address the issue of whether a stay would be appropriate or necessary if Mr. Schaefer were the only attorney representing Mr. Demps, because so long as Mr. Salmon remains in this case, Mr. Schaeffer's role is limited to assisting Mr. Salmon. Because Mr. Salmon is demonstrably capable of representing Mr. Demps by himself, and Mr. Schaefer's role is limited, any motion for stay should be denied. Mr. Salmon is amply familiar with this case and there is no reason why he cannot litigate this appeal in a timely manner, especially since qualified co-counsel has been appointed to assist him.

WHEREFORE, the State respectfully asks this Court to deny any motion to withdraw or for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail and by facsimile transmission to William Braley Salmon, P.O. Box 1095, Gainesville, FL 32602-1095, to George F. Schaefer, 1005 S.W. 2nd Ave, Gainesville, FL 32601-6116, and to Bennie Demps, Florida State Prison, this 24th

day of May, 2000.

CURTIS M. FRENCH
Assistant Attorney General