IN THE FLORIDA SUPREME COURT

Case No. 76,315

FILED
JUL 16 1990
SUPREME COURT
Deputy Clerk
DEC

JAMES HAMBLEN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

EMERGENCY:
DEATH WARRANT SIGNED.
EXECUTION SCHEDULED
FOR 7:00 A.M.,
TUESDAY, JULY 17,
1990.

APPLICATION FOR STAY OF EXECUTION AND CONSOLIDATED REQUESTS FOR A REASONABLE TIME PERIOD FOR APPELLANT TO PREPARE AND FILE A BRIEF DISCUSSING THE IMPORTANT FACTS INVOLVED IN THIS CASE WHICH ARE ONLY NOW COMING TO LIGHT, FOR ORAL ARGUMENT, AND FOR AN ORDER DIRECTING THAT AN EVIDENTIARY HEARING BE SCHEDULED IN THE CIRCUIT COURT

Appellant, JAMES HAMBLEN, through counsel, respectfully urges that this Honorable Court enter a stay of execution, schedule oral argument, and allow him the opportunity to provide for the Court's consideration a brief presenting the many facts which have now come to light (some, only this past Friday, July 13, 1990) demonstrating that an evidentiary hearing is warranted on the basis of Appellant's claim (facts which neither this Court nor any capital petitioner's counsel were aware of at the time of the litigation of the Buenoano and Squires cases, because the DOC

had not then disclosed them).[1]

With regard to his claim that the execution of his sentence of death shall constitute an unnecessarily cruel and unusual punishment because of the Florida Department of Corrections (DOC) lack of professional competence and willful and negligent refusals to make repairs of the known defects in its execution machinery, Mr. Hamblen does respectfully note the following in an attempt to provide this Honorable Court with some of what has been recently learned.

As discussed in the Rule **3.850** motion, numerous oral and written requests to the DOC for disclosure of information pursuant to the Florida Public Records Act, Fla. Stat. section 119, were made by CCR counsel commencing shortly after the execution of Jesse Tafero, in May of 1990. Copies of some of the written requests are appended hereto. As noted in the **3.850** motion, the requests were all denied or ignored, until the State's response to the **3.850** motion in this case on July 12,

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[1]The circumstances faced by the CCR office during this three-week period (two executions were set for last Tuesday, two for tomorrow, one for next Tuesday, while CCR counsel are also conducting an evidentiary hearing in a non-warrant capital case this week, and conducted an evidentiary hearing in an under-warrant capital case last week) and the fact that Public Records Act (Fla. Stat. section 119) information requests were denied and ignored by the DOC until this past Friday (July 13, 1990) when some bits and pieces of information were finally disclosed, have made it impossible for counsel to brief and present the facts properly, although many of the facts are facts which the Court should but has yet to hear.

1990, included as an attachment a letter from the DOC reflecting that, finally, there might be some disclosure. The copies of the requests appended hereto were obtained on Friday, July 13, 1990, from the DOC's own files, and the handwritten notations are from DOC personnel. The DOC received the requests, but refused to comply until the end of last week.

As noted, on Thursday, July 12, 1990, the State filed a response to Mr. Hamblen's then-pending Fla. R. Crim. P. 3.850 motion in the trial court, and that response stated that information was available for disclosure by the DOC. This was the first time collateral counsel in any Florida case was informed that the DOC had changed its mind, and was willing to provide information. Regarding this development, Mr. Hamblen immediately submitted to the circuit court as follows:

SUPPLEMENTAL APPLICATION
FOR STAY OF EXECUTION, ETC.

> JAMES HAMBLEN, Defendant in the instant action, through counsel, hereby supplements his previously filed requests for relief with the following:
>
> 1. The Respondent delivered a response to Mr. Hamblen's counsel on July 12, 1990. The Respondent's pleading states that on July 11, 1990, Florida State Prison Superintendent T. L. Barton forwarded to the Office of the Capital Collateral Representative a letter (by mail) apparently agreeing, finally, to disclose some materials pursuant to Fla. Stat. section 119. Ironically, the letter is dated July 11, 1990, the same day that Mr. Hamblen's Rule 3.850 motion was filed. Today is the 12th of July. The DOC letter was

> delivered by immediate facsimile transmission to the Attorney General's office, but not to Mr. Hamblen's counsel. The State's response does not explain how Mr. Hamblen could obtain access to 119 materials which no one would disclose until the day he filed his motion, and one day after it was sent out for filing. In the past, the State did not ever offer to disclose the materials, and in fact refused to abide by any of the many telephonic and written Chapter 119 requests that the CCR office had made.
>
> Given the recent development which has been presented in the State's response -- the Barton letter which was first seen by Mr. Hamblen's counsel in the State's July 12th response -- Mr. Hamblen's counsel is sending an investigator to the Florida State Prison, who shall be there tomorrow, on July 13th, and who shall inspect and copy the materials. (Again, Mr. Hamblen's counsel saw the letter for the first time on July 12th.) Why the DOC refused to even suggest that it would comply until today is still an open question. We hope that the DOC will comply <u>fully</u>. We shall inform the Court of what transpires tomorrow.
>
> Under these circumstances, a stay of execution in order to allow Mr. Hamblen's counsel to present whatever it may be that the DOC discloses is appropriate and is requested hereby.

(July 12, 1990). The Rule 3.850 motion was denied by the circuit court before it ruled on this submission. Immediately thereafter, on July 13, 1990, Mr. Hamblen moved the circuit court for rehearing, again discussing this development.

<u>MOTION FOR REHEARING</u>

> JAMES HAMBLEN, Defendant in the instant action, through counsel, hereby moves for rehearing. This Court denied relief on July

12, 1990, apparently immediately after the State's response was filed, without affording Mr. Hamblen an opportunity to respond. Mr. Hamblen had prepared a supplemental application for stay, which he delivered to the Court by facsimile transmission immediately after the State's response was reviewed, on July 12th. Relief was apparently denied before the supplement was even reviewed. Indeed, the order denying relief was sent to the Attorney General's office by facsimile transmission, although it has not yet been seen (since apparently it has not been forwarded to Mr. Hamblen's counsel either by the Court or by opposing counsel). Mr. Hamblen's counsel learned that relief was denied because a federal court clerk received a copy of the order from the Attorney General's office, and informed undersigned counsel's office of this. Mr. Hamblen's counsel have not yet seen the order.

The Respondent delivered a response to Mr. Hamblen's counsel on July 12, 1990. The Respondent's pleading states that on July 11, 1990, Florida State Prison Superintendent T. L. Barton forwarded to the Office of the Capital Collateral Representative a letter (by mail) apparently agreeing, finally, to disclose some materials pursuant to Fla. Stat. section 119. Ironically, the letter is dated July 11, 1990, the same day that Mr. Hamblen's Rule 3.850 motion was filed. Today is the 12th of July. The DOC letter was delivered by immediate facsimile transmission to the Attorney General's office, but not to Mr. Hamblen's counsel. The State's response does not explain how Mr. Hamblen could obtain access to 119 materials which no one would disclose until the day he filed his motion, and one day after it was sent out for filing. In the past, the State did not ever offer to disclose the materials, and in fact refused to abide by any of the many telephonic and written Chapter 119 requests that the CCR office had made.

> Given the recent development which has been presented in the State's response -- the Barton letter which was first seen by Mr. Hamblen's counsel in the State's July 12th response -- Mr. Hamblen's counsel is sending an investigator to the Florida State Prison, who shall be there tomorrow, on July 13th, and who shall inspect and copy the materials. (Again, Mr. Hamblen's counsel saw the letter for the first time on July 12th.) Why the DOC refused to even suggest that it would comply until today is still an open question. We hope that the DOC will comply fully. We shall inform the Court of what transpires tomorrow.
>
> Under these circumstances, rehearing and a stay of execution in order to allow Mr. Hamblen's counsel to present whatever it may be that the DOC discloses is appropriate and is requested hereby.

(July 13, 1990). Rehearing was denied by the 3.850 court on July 13th (Friday).

On that date, however, as the above-quoted submissions noted, Petitioner's counsel sent an investigator to the Florida State Prison to obtain what the Florida Department of Corrections may have been willing to disclose.

Some information was disclosed, although a great deal of other requested information was not. (An investigator was also sent to the Florida State Prison today, July 16, 1990, in order to try to convince the Superintendent to disclose the myriad documents that were not provided on Friday.) Indeed, the copies obtained themselves indicate that a number of documents were removed before any disclosure was provided. For example, the

requested logs of the death chamber reflect that page 114 of the log was provided, while page 115 (involving May 5 and 6, 1990, the days immediately after Mr. Tafero's execution) is excerpted, as are pages 117 and 118, although page 119 is included. A copy of this document, as provided by the DOC, is appended hereto for the Court's review. Numerous other requested documents were also withheld. When the investigator inquired about this, she was told that she had to await Mr. Barton's (the superintendent's) decision, but that Mr. Barton was away from the Florida State Prison. The investigator was also told that a number of other documents which she was allowed to view would not be copied. There still has been no true compliance with the Public Records Act, and proper discovery by this Court should be ordered.

The DOC did, however, disclose certain documents that are quite remarkable, particularly in light of what transpired before the Federal District Court at the hearing in the Buenoano case. In Squires v. State, So. 2d (Fla. July 5, 1990), this Honorable Court cited the federal hearing in the Buenoano case, along with the Court's own previous opinion in the Buenoano case, and denied relief. At the Buenoano hearing, the Respondent called an electrician (Mr. Brandies) who was purported to be

impartial and independent of the DOC.[2] Although the many significant questions which he did not resolve were discussed in Mr. Hamblen's Rule 3.850 motion, it was his testimony upon which the District Court relied to ultimately deny the claim.[3] The electrician presented himself as an absolutely unbiased, independent, impartial, uninterested witness. He testified that he and his firm had done some general contract work at the Union facility, but that he had no knowledge of the Florida State Prison or its death chamber and had never been there before. He testified that he had nothing to gain from his testimony. He testified that he had no connection to the Florida State Prison or its authorities.

What the now disclosed records reflect -- something that the District Court Judge was not allowed to hear in the Buenoano case, because the facts were not then disclosed, although it should have been heard -- is that this witness was far from the

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[2]The district court's order stated that the electrician's account was reliable because he was "not in the employ of DOC." Buenoano Order at 80-81. We now know that nothing could be further from the truth. But the true facts were not disclosed by the DOC or the electrician to the District Court in the Buenoano case.

[3]This electrician had also violated the sequestration rule, by talking to another witness -- Mr. McNeil of the DOC -- about his testimony (Buenoano hearing transcript, p. 734). We now know that Mr. McNeil's interactions with Mr. Brandies have been much more extensive than that (See infra).

unbiased, uninterested, independent witness he purported himself to be. The records now disclosed reflect that commencing in late May, 1990, and up until and through the time period of the Buenoano hearing on June 21-22, 1990, this electrician's company (Cogburn Bros. Electric, Inc.) entered into an $88,862.09 contract with the Florida State Prison to make general repairs in the prison's execution machinery (although not the electrode used during executions). The "Purchase Request" from the Florida State Prison to this same supposedly unbiased electrician's firm (dated June 11, 1990 -- ten days prior to the Buenoano hearing) has a handwritten notation that the purchase request was an "emergency" involving "cables", "fuses [and] switches serving the electric chair switch gear." Indeed, the documents reflect that on Wednesday, May 30, 1990, this same electrician (Tom Brandies) who supposedly (according to his Buenoano hearing testimony) had never been to the Florida State Prison before and was independent of the prison's authorities was involved in an "F.S.P.-Trip" in the death chamber area, from "9:30 p.m. to 12:30 p.m." as one of the representatives of "Cogburn Bros. Electric." The meeting was undertaken in contemplation of the $88,862.09 contract. Present at the meeting were Mr. McNeil (see n.1, supra) and Mr. Thornton of the Florida State Prison. The Florida State Prison's May 31, 1990, field report concerning the May 30th meeting itself states that the "[m]eeting was called by Mr. Townsend for purposes of

initiating work on an emergency P.O. to replace all 5 KV cable, fuses and switches serving the chair switchgear." Other documents disclose the frantic pace at which the Florida State Prison's authorities were contracting with this electrician's firm for the $88,862.90 contract. The general repairs referred to in those documents have not been completed. None of the documents reflect that anything has been done about the electrode. These recently disclosed documents are appended hereto for the Court's review. They show that what the Federal District Court Judge was asked to rely on during the Buenoano hearing -- that the electrician was "not in the employ of the DOC" -- could not be more belied by the truth. They also show that every court (including this Court) that has been asked to rely on the DOC's representations has been seriously misled.[4]

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[4] In light of all this the representations in the DOC's "investigation" report, representations upon which this Court relied in the Buenoano and Squires cases, that there are no major problems in its execution machinery (and that the problem was the "sponge") are belied by the facts as reflected in the DOC's own records. $88,862.09 worth of repairs is not a minor problem involving the "sponge". The electrode remains in ill repair. The general repairs have yet to be completed. The $88,862.09 contract also demonstrates that the purportedly "independent" electrician had substantial connections to the DOC, and quite a great deal to gain from his connections to the DOC. What is clear is that the DOC does not stand before the Court with clean hands. This Court in Buenoano relied on the fact that the Department's investigation "reported that the equipment was in proper working order." 15 F.L.W. 355, 356 (Fla. June 20, 1990). The Court cited the conclusions of the report referring to the

(footnote continued on following page)

It would have been quite significant for the District Court Judge in the Buenoano case to have learned that the documentation from the files of the same DOC officials who testified at the hearing that the execution machinery was in acceptable working order reflected that those same officials were contracting to make repairs in the same machinery on an **"emergency"** basis to the tune of **$88,862.09** literally during the days immediately prior to and as the Buenoano hearing was being conducted. It would have been quite significant for the District Court Judge in the Buenoano case to have learned that the purportedly unbiased, "independent" electrician who had supposedly never been to the

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"sponge" and held, **"We** do not find that the record as proffered justifies judicial interference with the executive function to require an evidentiary hearing **. . ."** Id. The record as proffered in Mr. Hamblen's case demonstrates that even those few of its records which the DOC has now disclosed belie the representations of its investigation report "that the equipment was [and is] in proper working order." This record now demonstrates that **$88,862.90** worth of repairs were contracted for on an emergency basis, that those general repairs have not yet been completed, that no independent, competent expert has ever tested the electrode, that the evidence presented by the DOC at the Buenoano hearing cannot be relied upon, and that an evidentiary hearing in the circuit court is plainly warranted in order for the facts to be properly, finally resolved.

Florida State Prison was in fact intimately involved in that very contract, had been to the prison before, had had extensive contact with the same DOC officials (Mr. Thornton, Mr. McNeil) who testified at the Buenoano hearing, and was intricately involved in the contract for the expensive repairs which the DOC believed (although the belief was not disclosed) to be necessary. It would have been quite important for the District Court Judge in the Buenoano case to have learned that this purportedly unbiased and independent electrician's firm was beholden to the DOC for the $88,862.09 contract. And it would have been quite important for the District Court Judge in the Buenoano case to learn that this same electrician, one on whose account the District Judge was asked to rely and on whose account she did rely, misrepresented and failed to disclose these facts while testifying at the Buenoano hearing.

Mr. Hamblen should not be dispatched to his execution when it is becoming so clear, literally on a daily basis, that the DOC's representations -- to the Federal District Court in the Buenoano case, and to this Court in the Buenoano and Squires cases -- leave so very much to be desired. A full and fair

evidentiary hearing, and proper discovery,[5] are appropriate. At a minimum, a stay of execution is appropriate in order for counsel to brief and present these facts and others for the Court's review. Mr. Hamblen should not be sent to his execution, one which will likely involve a cruel and unusual punishment, before these issues (indeed, before these developing factual

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[5]The District Court in the Buenoano case allowed no discovery. Then, although no discovery whatsoever had been afforded, the District Court found that Ms. Buenoano's claim (and Mr. Leuchter's testimony) were based on **"speculation".** This ruling is obviously unfair, and the unfairness of such a procedure needs no elaborate explanation.

Much ado, however, has been made by the Respondent concerning Mr. Leuchter's reference to Dr. Kilgo's affidavit, an affidavit included in the DOC's **"investigation"** report. This matter therefore should be touched upon here. What the discussion in Dr. Kilgo's affidavit (App. **9)** concerning the shifting skull cap in fact demonstrates is that a broken electrode was the real problem: the skull cap is strapped on, and it cannot move; what actually moved was the broken head electrode in the skull cap. In the affidavit Dr. Kilgo said that there was "partial dislocation of the electrical entry plate" during Mr. Tafero's execution. The "electrical entry plate" is the head electrode. Since the electrode is rigidly fastened to the helmet and the helmet is rigidly fastened to the head (and given the complete lack of any evidence that the helmet itself ever came loose and moved during Mr. Tafero's execution), the evidence -- based even on Dr. Kilgo's affidavit alone -- shows that it was the malfunctioning electrode that separated during Mr. Tafero's execution. Dr. Kilgo's account was never heard at the Buenoano hearing -- he did not testify. Mr. Leuchter's analysis of Dr. Kilgo's affidavit account, however, makes perfect sense, the Respondent's protestations to the contrary notwithstanding.

questions) are resolved. Oral argument, briefing, and an evidentiary hearing to properly resolve the facts should be allowed.

Fundamental fairness demands no less.

Respectfully submitted,

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By: _____
Attorney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 16th day of July, 1990.

Billy N Nash

Attorney