

# SUPREME COURT OF FLORIDA

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No. 67,929

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Joseph Robert Spaziano, Appellant,

vs.

State of Florida, Appellee.

[September 12, 1995]

On September 8, 1995, we issued an opinion directing that the trial court hold an evidentiary hearing in this cause by September 15, 1995, to examine the recantation of specific trial testimony. In that opinion, we directed that the Capital Collateral Representative (CCR) was to retain primary responsibility for Joseph Robert Spaziano's representation in this case. After our opinion issued, a total of seven motions were filed by Michael A. Mello and CCR. Mello filed: (1) Motion for Rehearing and Reconsideration and Stay of Execution;<sup>1</sup> (2) Application for Stay of Execution; and (3) Motion to Hold Evidentiary Hearing in Abeyance. CCR filed: (4) Petition for Extraordinary Relief; (5) Petition for a Stay of Execution; (6) Petition for a Continuance of Evidentiary Hearing Ordered in *Spaziano v. State*, No. 67,929 (Fla. Sept. 8, 1995); and (7) Petition for an Evidentiary Hearing Regarding Spaziano's Representation. Most of these motions stem from continuing confusion concerning the representation of Spaziano.

We address three primary issues. First, we revisit the question of primary responsibility for Spaziano's postconviction relief proceedings. Second, we confront whether an indefinite stay of execution is warranted by the lack of cooperation between CCR and Mello. Third, we again define the scope of the evidentiary hearing.

### *Representation of Spaziano*

In our September 8, 1995, opinion, we specifically stated that CCR has primary responsibility for Spaziano's postconviction relief proceedings. Furthermore, we declined to appoint Mello, nunc pro tunc, as Spaziano's counsel. In rendering that decision, this Court unanimously rejected

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<sup>1</sup> Mello subsequently attempted to withdraw this motion.

Mello's assertions that a conflict existed in CCR's representation of Spaziano. Additionally, when we issued that opinion, we envisioned a spirit of cooperation between CCR and Mello that would guarantee the best representation for Spaziano. Unfortunately, the events of this past weekend make it clear that such cooperation does not exist. Indeed, Mello has not accepted our findings or conclusions. He states:

The court should be aware that counsel shall not follow the court's unreasonable commands . . . .

. . . .

. . . . Nor will I accept as "co-counsel" a law firm with interests adverse to my client's--a law firm my client has rejected for very good reasons.

Specifically, the court should know that (1) I will participate in no evidentiary hearing under warrant; (2) neither Mr. Spaziano nor I will accept CCR as co-counsel in this case, since CCR refused to serve as co-counsel when I asked them to do so in June; (3) counsel lacks the funds to return to Florida for purposes of any further court proceedings, as counsel's few remaining personal funds were spent to attend this court's 30 minute oral argument.

Mello also states:

CCR has none of the 25 bankers' boxes of files in this case. Nor will CCR ever have those files, as CCR will never have the cooperation or acquiescence of Mr. Spaziano.

Finally, Mello provides this court with his correspondence with CCR, which reads in part: I told you that CCR is *not* Mr. Spaziano's lawyer, and that CCR will *never* be Joe's counsel. I explained why neither Joe nor his family trust CCR to represent his interests.

I trust that CCR will *not* (1) hold itself out as Joe's attorney, against the express wishes of him and his family, or (2) attempt to interfere with my attorney/client relationship with Mr. Spaziano by communicating in any manner with my client or with his family.

Finally, I trust that CCR will resist all efforts to "represent" him at the evidentiary hearing.

In summary, during the course of the last four weeks, Mello has (1) sought appointment as Spaziano's counsel nunc pro tunc to attempt to have this Court direct payment of attorney's fees and expenses; (2) suggested that he should withdraw because of a lack of resources; (3) stated

that he is an appellate lawyer and not competent to represent Spaziano at an evidentiary hearing; (4) advised CCR, as noted, that Spaziano is his client and directed CCR not to interfere with his attorney-client relationship; and (5) stated that he will not appear at the evidentiary hearing ordered by this Court.

The fair administration of justice in Florida cannot proceed with such flagrant disregard of this Court's procedures and directions. In view of Mello's actions, including his refusal to abide by this Court's directions, his statement that he is not competent to handle an evidentiary hearing at the trial level, and his express refusal to appear at the evidentiary hearing ordered by this Court, we find that he has effectively withdrawn from representing Spaziano. Because Mello concededly has neither the resources nor the necessary trial experience, we find that he is not competent to continue this representation. To avoid any more unnecessary delays, we expressly direct that the files in his custody be immediately delivered to CCR. In the event that other volunteer counsel is obtained, we envision no problems in having CCR turn over those files to the new attorney.

In making this ruling, we are fully aware that Spaziano's family has expressed a desire that Mello remain as Spaziano's counsel. We also note that Spaziano has personally expressed that he does not want CCR's representation:

As my attorney told you, CCR is not my lawyer. I do not want CCR to represent me in any hearing. As my attorney Michael Mello has told you, do not try to see me or write to me again. I only want to speak through my attorney Michael Mello, who has been my lawyer for a long time. It can't be fair to go to court with a lawyer who doesn't know my case.

While cognizant of these wishes, we refuse to endorse or allow Mello's representation to continue when that representation would, admittedly, be less than adequate.

The United States Supreme Court has stated that no constitutional right requires states to appoint counsel for indigent death row inmates seeking state postconviction relief. *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989). Nevertheless, the State of Florida has provided for a Capital Collateral Representative under section 27.702, Florida Statutes (1993), to ensure that death row inmates have representation in post conviction relief proceedings. Section 27.702(1) provides:

The capital collateral representative shall represent, without additional compensation, any person convicted and sentenced to death in this state who is without counsel and who is unable to secure counsel due to his indigency or determined by a state court of competent jurisdiction to be indigent for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

CCR has represented Spaziano since his initial appeal became final and, in fact, Mello was one of the assistant CCR attorneys who represented Spaziano initially. Clearly, no constitutional right

exists for a defendant to choose a particular court-appointed counsel. *Jones v. State*, 612 So. 2d 1370 (Fla. 1992), *cert. denied*, 114 S. Ct. 112, 126 L. Ed. 2d 78 (1993); *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988), *cert. denied*, 488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988). We once again state that, on this record, no legal or ethical conflict exists which would prohibit CCR from representing Spaziano in this matter.

Spaziano is an indigent inmate. Spaziano has previously requested that this court address the issue of investigation costs and legal fees for his postconviction relief proceedings. We attempted to provide for both Spaziano's wishes and rights in our September 8, 1995, opinion. CCR and Mello were to work together to ensure adequate counsel and resources. That solution was intended to satisfy both Spaziano's wishes and his need for effective counsel. This past weekend's events have made it clear that a choice must now be made. Under the present circumstances, we direct that CCR shall act as Spaziano's counsel without Mello's assistance or interference.

Spaziano is faced with a choice. He may be represented at the evidentiary hearing by CCR or by competent volunteer counsel who will comply with rules and directions of this Court at no expense to the State, or he may choose to have no counsel at the evidentiary hearing. It is his decision. *See, e.g., Hardwick*, 521 So. 2d at 1074 (one who attempts to dismiss court-appointed counsel is presumed to be exercising the right to self-representation). Any further proceeding relating to Spaziano's representation is remanded to the trial court, including any issue concerning Spaziano's right to represent himself.

This cause will proceed as indicated by this Court and by the trial judge assigned to this matter. The processes governing this case will not be, in any way, controlled by counsel for the State or Spaziano.

#### *Motion of the Capital Collateral Representative*

CCR has filed a motion that states its willingness to proceed in this cause but, because of Mello's refusal to cooperate, it is presently unprepared to represent Spaziano on such short notice. We find that, under the circumstances, we have no choice but to grant a stay of execution to provide CCR additional time for the evidentiary hearing. Accordingly, we modify our September 8, 1995, opinion by directing that an evidentiary hearing be commenced on or before November 15, 1995.

#### *Scope of Evidentiary Hearing*

Finally, CCR asks that we broaden the scope of the evidentiary hearing. In our September 8 opinion, we limited the scope of the evidentiary hearing to "newly discovered evidence of the recantation of the testimony of a significant witness." *Spaziano v. State*, 1995 Fla. LEXIS 1428, No. 67,929, slip op. at 5 (Fla. Sept. 8, 1995). We refuse to alter our ruling on this issue.

#### *Conclusion*

In summary, we reaffirm that CCR is Spaziano's legal counsel; we find that Mello has effectively

withdrawn as counsel and we direct him to turn over all Spaziano files to CCR; we extend, until November 15, 1995, the time in which to hold an evidentiary hearing; and finally, we enter an indefinite stay of execution pending the outcome of the evidentiary hearing. Our opinion of September 8, 1995, is modified to be consistent with this opinion. All other requested relief is denied.

It is so ordered.

GRIMES, C.J., and OVERTON, HARDING and WELLS, JJ., concur.

SHAW, J., concurs in part and dissents in part with an opinion, in which KOGAN and ANSTEAD, JJ., concur.

NO MOTION FOR REHEARING WILL BE ALLOWED.

CONCUR BY: SHAW (In Part)

DISSENT BY: SHAW (In Part)

DISSENT: SHAW, concurring in part, dissenting in part.

I fully agree with the majority's conclusion that in light of attorney Mello's inability or refusal to comply with this Court's decision of September 8, 1995, the office of the Capital Collateral Representative shall represent Spaziano in all post-conviction matters relating to this case.

I disagree with the November 15, 1995, deadline the majority opinion places on the trial court for conducting an evidentiary hearing on Spaziano's claim of recantation. As pointed out by Justice Kogan in his opinion concurring in part, dissenting in part with this Court's decision of September 8, 1995, this is a highly unusual case:

Today we are presented with a grossly disturbing scenario: a man facing imminent execution (a) even though his jury's vote for life imprisonment would be legally binding today, (b) with his conviction resting almost entirely on testimony tainted by a hypnotic procedure this Court has condemned, (c) with the source of that tainted testimony now swearing on penalty of perjury that his testimony was false, and (d) without a careful consideration of this newly discovered evidence under the only legal method available . . . .

*Spaziano v. State*, No. 67,929, slip op. at 9 (Fla. Sept. 8, 1995) (Kogan, J., concurring in part, dissenting in part) (citations omitted). The problems presented by this case are further exacerbated by recent events as outlined in the majority opinion.

In light of the unusual procedural history of this case, the critical nature of the evidentiary issue before the trial court, and recent events, I would leave the time frame for conducting an evidentiary hearing to the trial court's discretion. The trial court is far better suited than we are to determine the logistical requirements of such a hearing.

I concur in the remainder of the majority opinion.

KOGAN and ANSTEAD, JJ., concur.

COUNSEL:

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