

ORIGINAL

IN THE SUPREME COURT OF OHIO

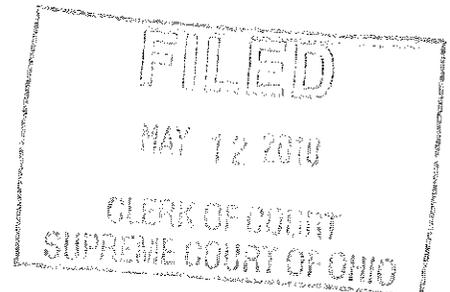
STATE OF OHIO, : Case No. 1996-2301
Appellee, :
v. :
DONALD L. PALMER, JR., : THIS IS A DEATH PENALTY CASE
Appellant. :

MEMORANDUM IN OPPOSITION TO
MOTION TO SET EXECUTION DATE

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On May 3, 2010, the state moved this Court to set an execution date asserting that Palmer has exhausted all of his state and federal court reviews and that he has not sought a stay in this Court.

Palmer is indigent and has been represented by appointed counsel throughout the prosecution and appeals of his conviction and sentence of death. Most recently, Palmer was represented in the Federal Courts by appointed counsel Keith A. Yeazel and Michael J O'Hara.

On May 29, 2009 the Sixth Circuit Court of Appeals affirmed the District Court's denial of Palmer's Petition for Habeas Corpus. *Palmer v. Bagley*, 330 Fed.Appx. 92, 2009 WL 1528503 (6th Cir., 2009) Palmer subsequently filed a petition for writ of *certiorari* in the United States Supreme Court which was denied on March 17, 2010. *Palmer v. Bagley*, ___ U.S. ___, 2010 WL 757725 , 78 USLW 3521.

Following the denial of *certiorari*, Palmer requested that new counsel be appointed to take over his representation for any further legal proceedings because he did not wish to pursue any

additional proceedings with his present appointed counsel. Counsel Yeazel and O'Hara authorized counsel from the Office of the Federal Public Defender Capital Habeas Unit, to interview Palmer to determine his intentions regarding clemency and the appointment of new counsel.

On April 22, 2010, Palmer was interviewed by Carol Wright from the Federal Public Defenders Office, Capital Habeas Unit. Palmer requested that counsel Yeazel and O'Hara withdraw from the case and that counsel from the Capital Habeas Unit be appointed to represent him in any future proceedings. (*Id.*)

Ms. Wright subsequently contacted Yeazel and O'Hara. Both Yeazel and O'Hara agreed to withdraw from any further representation of Palmer and requested that counsel from the Capital Habeas Unit be appointed to provide representation in any further proceedings. Pursuant to that request, undersigned counsel moved the District Court for appointment of undersigned counsel for any further legal proceedings. The District Court granted Palmer's Motion for Appointment of New Counsel on May 3, 2010, the same day that the state moved this Court to set an execution date.

New counsel from the Capital Habeas Unit of the Federal Public Defenders Office have had no prior contact with and therefore no familiarity with Palmer's case. Counsel filed their motion to be appointed as counsel only after Palmer indicated that he wanted new counsel and after all of his prior counsel indicated their desire to withdraw from his case and their desire to not be involved in any further legal proceedings. Counsel has no familiarity with his case, his history or his current circumstances.

Based on this very recent appointment, counsel requests this Court refrain from setting any execution date for a minimum of six months or until such time as counsel can at the very least, obtain and familiarize himself with the record and investigate and develop the information necessary

to properly represent Palmer before this Court and in any additional legal proceedings in federal court and elsewhere. As counsel for a death-sentenced inmate, current counsel has an obligation to fully investigate the facts of Palmer's conviction and his life history to determine if any further legal proceedings are available or appropriate - including seeking clemency from the Governor of Ohio.

In *Harbison v. Bell*, 129 S. Ct. 1481 (2009), the United States Supreme Court recognized the need for competent counsel's assistance in the investigation and preparation for clemency proceedings and additional litigation after the denial of *certiorari* in habeas. *Id.* at 1491 ("In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system.") (citation omitted). The Court in *Harbison* noted that federally appointed counsel who had represented the client in federal habeas corpus proceedings and who had fully investigated and developed information necessary for the effective representation of the client would be in a much better position to properly represent death sentenced individuals in these late-stage proceedings than counsel totally unfamiliar with the case and client. *Id.* In fact, the Court specifically recognized that Congress, in authorizing federally funded counsel to represent death sentenced individuals in some state proceedings, indicated its intent that "condemned men and women [would not] be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells." *Id.* (citation omitted).

Donald Palmer has been abandoned by counsel familiar with his case. It is only with time and resources that present counsel will be able to properly fulfill their obligation to Palmer in his post-certiorari proceedings. For this reason, Donald Palmer respectfully requests this Court to deny the state's Motion to set an execution date so that newly appointed counsel can become familiar with

his case and properly investigate his case to determine what additional litigation is available and appropriate at this stage in his capital proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by regular U.S. Mail to Christopher Berhalter, Belmont County Prosecutor, 147-A West Main Street, St. Clairsville, OH 43950, this 12th day of May 2010.



DAVID C. STEBBINS

COUNSEL FOR DONALD L. PALMER, JR.