

Opinion in Chambers

KEMP, SUPERINTENDENT, COLUMBIA DIAGNOSTIC AND CLASSIFICATION CENTER v. SMITH

ON APPLICATION TO VACATE STAY

No. A-133. Decided August 24, 1983

An application to vacate the Court of Appeals' stay of respondent's execution is denied. The papers presented do not show that the Court of Appeals abused its discretion in granting a stay pending a hearing on the merits in respondent's habeas corpus proceedings.

JUSTICE POWELL, Circuit Justice.

Respondent Smith, a convicted murderer, is scheduled to be executed by the State of Georgia at 8 a. m. tomorrow, Thursday, August 25.

At about 4:25 p. m. on August 23, the Court of Appeals for the Eleventh Circuit—reversing the District Court—granted a stay of execution. Its brief opinion stated that substantial issues were raised in this habeas corpus proceeding that justified review of their merits. Judge Hill dissented. At about 10 a. m. today, the Attorney General of Georgia filed an application with me as Circuit Justice requesting that I dissolve and vacate this stay. A response to this application was received this afternoon in my chambers at about 3 o'clock.

This is the fourth time that this capital case has required action by this Court: once on direct appeal, once on state habeas corpus, once on federal habeas corpus, and now in Smith's second federal habeas proceeding. Apart from rehearings, this case has been reviewed 16 times by state and federal courts since Smith's conviction in 1975. In these circumstances, and for the reasons stated by Judge Hill in his dissenting opinion below, it is not clear to me that the Court of Appeals is correct in thinking that substantial issues may remain for further consideration.

But in the present posture of the case, the question before me as Circuit Justice is whether the Court of Appeals has

abused its discretion in granting a temporary stay pending a hearing on the merits. I am not able so to conclude. It is apparent from the papers presented that the Court of Appeals heard arguments at some length yesterday afternoon. Moreover, and quite properly, that court has provided for an expeditious hearing on the merits.

Accordingly, the application to vacate the stay ordered by the Court of Appeals is denied.