

IN THE SUPREME COURT OF FLORIDA

NO.SC 01-2371

MARC JAMES ASAY,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

COMES NOW, the Petitioner, **Marc James Asay**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Asay's Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue, however expressly does not abandon the issues and claims not specifically replied to herein.

PRELIMINARY STATEMENT

At the outset, Petitioner takes issue with Respondent's characterization that Mr. Asay's Petition for Writ of Habeas Corpus "has been initiated merely for the purpose of delay—designed not to obtain relief, but further toll the time for commencing his federal habeas proceedings." (Response at 2). Counsel for Mr. Asay has an obligation to ensure that all claims have been exhausted in state court prior to presenting them in a federal petition for habeas corpus. Mr. Asay's petition is the proper method to ensure that ineffective assistance of appellate counsel is brought before this court. Rutherford v. Moore, 744 So. 2d 637, 643 (Fla. 2000); Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). Additionally, Petitioner asserts

that Respondent's citation to Mann v. Moore, 26 Fla. L. Weekly S490 (Fla. July 12, 2001) is completely irrelevant and this Court should not be swayed by Respondent's argument made therein. Mr. Asay has followed the rules applicable to his case - a fact that should not be considered against him. Any suggestion otherwise is wholly improper.

ORAL ARGUMENT¹

Respondent relies upon its speculative allegation that timing of Mr. Asay's petition was designed for "merely for delay" in order to suggest to this Court that oral argument is unnecessary. This argument is improper. Mr. Asay has followed the rules applicable to his case. Given the assertions made by Respondent and the consequences of the outcome of this case, oral argument is necessary. This Court has not hesitated to grant oral arguments in similar situations.

CLAIM I

MR. ASAY WAS ABSENT DURING CRITICAL STAGES OF THE PROCEEDING, CONSEQUENTLY HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND RIGHT TO DUE PROCESS WERE VIOLATED. MR. ASAY'S TRIAL ATTORNEY UNLAWFULLY WAIVED HIS PRESENCE. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL AND MR. ASAY'S ABSENCE CONSTITUTED

¹ Petitioner has responded by separate pleading to the State's request to deny oral argument. This pleading is filed simultaneously with this Reply.

**FUNDAMENTAL ERROR. CONSEQUENTLY, CONFIDENCE IN THE
CORRECTNESS AND FAIRNESS OF THE RESULT HAS BEEN
UNDERMINED.**

Respondent misunderstands Petitioner's argument.

Petitioner has asserted a constitutional violation due to his absence, i.e., failure to be included in the peremptory strikes exercised, rather than solely the procedural rule addressed in Coney.²

Accordingly, Respondent's assertion that "Asay's appellate counsel cannot be deemed constitutionally ineffective for failing to anticipate Coney" (Response at 16) is irrelevant. Thus, according to this Court's ruling in Francis v. State, 413 So. 2d 1175 (Fla. 1982) (receded from on other grounds), Mr. Asay's claim is properly before this Court. This Court has recognized that "the exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant". Francis at 1178 citing to Pointer v. United States, 151 U.S. 396 , 14 S. Ct. 410 (1894) and Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136 (1892). This Court recognized the same principle in Muhammad:

In *Francis* [citation omitted], we recognized that the process of exercising challenges to members of

² Coney v. State, 653 So.2d 1009 (Fla. 1995).

the jury constitutes a critical stage of the proceedings where a defendant has a right to be present. We found reversible error in *Francis* because the defendant did not have an opportunity to consult with his counsel while peremptory challenges were being exercised and the defendant did not subsequently waive the right to be present.

Muhammad v. State, 782 So. 2d 343, at 351 (Fla. 2001) citing Francis. Ultimately Muhammad was denied relief because the questioning of jurors took place in open court **and** he ratified the procedure employed and "[m]ost importantly, after the selections were made, Muhammad gave an affirmative answer to the trial court's question whether [he] had 'enough time to discuss these choices with [his] lawyer'." Muhammad at 352.

Here, Respondent concedes that Mr. Asay was absent for at least some of the peremptory challenges: "it is not so clear that Asay consulted with counsel *during* the next conference" (Response at 17).

Respondent's assertion that "Asay[nor]his trial counsel 'expressed any interest" in Asay being present at the bench during jury selection" [citation omitted] (Response at 20) is without merit because silence is not a waiver of this issue and the state has not otherwise established a valid waiver. See Francis at 1178.

Finally, fundamental error occurred as this was a critical stage from which Mr. Asay was excluded from participating in

and the facts supporting this claim were in the record at the time of direct appeal and the case law supporting it was in existence. See e.g. Rose v. Dugger, 508 So. 2d 321 (Fla. 1987). Respondent again mischaracterizes the argument in footnote 3 page 20 of the Response wherein Respondent attempts to defeat Mr. Asay's claim with an argument based solely on matters of procedural rules rather than the issue presented to this Court.

This claim is properly before this Court and Mr. Asay is entitled to a new trial.

CLAIM II

MR. ASAY'S DEATH SENTENCES ARE UNCONSTITUTIONAL BECAUSE MR. ASAY WAS IMPERMISSIBLY LIMITED FROM PRESENTING MITIGATION AND THE TRIAL COURT FAILED TO CONSIDER AND WEIGH MITIGATION PRESENT IN THE RECORD AND THE PROSECUTOR'S ARGUMENT IMPROPERLY LIMITED MITIGATION AND OVER BROADLY ARGUED AGGRAVATING FACTORS AND IMPERMISSIBLY ARGUED NON STATUTORY AGGRAVATING FACTORS.

Respondent asserts that this issue was raised on direct appeal. Appellate counsel however, raised the fact that the lower court impermissibly denied Mr. Asay a continuance. Thus, the analysis employed by this Court on direct appeal was governed by the standard by which to review a trial judge's decision whether or not to grant a continuance - i.e., abuse of discretion. Here however, Mr. Asay has raised the constitutional issue that he was precluded from presenting

mitigating evidence in several respects. This issue is not subject to the abuse of discretion standard. Thus, the trial court reversibly erred and violated the principles set forth by the United States Supreme Court. This Court has defined mitigating factors to "include all matters relevant to the defendant's character or record or to the circumstances of the offense proffered as a basis for a sentence less than death" Spencer v. State, 691 So. 2d 1062, 1064 (Fla. 1997). Mr. Asay was denied the opportunity to present this evidence. The trial court's denial and thus refusal to consider these matters violated the Eighth and Fourteenth Amendment requirements as articulated in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954 (1978) that trial courts must consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 98 S. Ct. at 2965. In so doing, Mr. Asay was denied the constitutionally required individual sentencing determination to which he is entitled and the resulting sentence is arbitrary. Hitchcock v. Dugger, 481 U.S. 393 (1987); Proffitt v. Florida, 428 U.S. 242 (1976). The trial courts treatment of Mr. Asay's proposed mitigation violates Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869 (1982). Mr.

Asay's trial judge failed to follow the applicable law when sentencing Mr. Asay to death. This error should be considered cummulatively with the other sentencing errors that occurred in Mr. Asay's case, e.g., items B,C,and D³ of Claim II (Petition at 20-40) and Claims III, IV and V. Confidence in the result is undermined and Mr. Asay is entitled to a new penalty phase.

CLAIM III

MR. ASAY'S JURY WEIGHED THE UNCONSTITUTIONALLY VAGUE AGGRAVATOR OF 'COLD, CALCULATED AND PREMEDITATED'. THIS WAS IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Respondent relies upon the trial courts 3.850 ruling wherein the 3.850 court denied Mr. Asay's claim of ineffective assistance of trial counsel regarding the CCP aggravating factor and instruction to the jury in order to attack Mr. Asay's claim. However it too, must fail for faulty reasoning. Mr. Asay's claim is ineffective assistance of appellate counsel which is properly raised in this Court in Mr. Asay's Petition. As Respondent concedes, no complaint about the CCP instruction was raised on appeal" (Response at 35).

³ (A typographical error exists in the Petition here and a duplicate subsection C, should actual be considered as subsection "D").

Accordingly, this Court in reviewing Mr. Asay's habeas claim must assess the performance of appellate counsel under Strickland v. Wahsington, 466 U.S. 668 (1984). This is a distinct claim from ineffective assistance of **trial counsel**.

Here, as respondent recognizes, trial counsel did propose an alternative to the standard instruction (a variation on the defense requested instruction was given) and the issue was not raised on appeal. (Response at 35). Thus, Mr. Asay asserts appellate counsel's performance was deficient. Appellate counsel was deficient because this Court had articulated the definition of the CCP aggravating factor by the time of Mr. Asay's appeal in Rogers v. State, 511 So 2d. 526, 533 (Fla. 1987) and the jury was not properly guided by the instructions given.

Mr. Asay was prejudiced as a result, especially after a cumulative analysis is performed of all of the sentencing errors which occurred in Mr. Asay's case. Confidence in the result is undermined and Mr. Asay is entitled to a new penalty phase.

CONCLUSION AND RELIEF SOUGHT

For all the discussed herein, Mr. Asay respectfully urges this Court to grant habeas corpus relief in the form of a new trial and/or penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing
Petition has been furnished by United States Mail, first-class
postage prepaid to Curtis French, Assistant Attorney General,
The Capitol - PL-01, Tallahassee, FL 32399, on December 20,
2001.

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CERTIFICATE OF TYPE SIZE AND STYLE

This Petition is presented in 12 point Courier New, a
font that is not proportionately spaced.

HEIDI E. BREWER