IN THE SUPREME COURT OF FLORIDA

NO._____

MARK JAMES ASAY,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR WRIT OF HABEAS CORPUS, AND APPLICATION FOR STAY OF EXECUTION

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INTRODUCTION[1]

On January 8, 2016, Governor Rick Scott signed a death warrant scheduling Mr. Asay's execution for Thursday, March 17, 2016, at 6:00 p.m. At the time his death warrant was signed, Mr. Asay was without any counsel, either state[2] or federally appointed.[3] Indeed, Mr. Asay has been without state court registry counsel since 2005 when his court-appointed registry counsel withdrew and replacement counsel was not appointed.[4]

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[1]Citations in this petition shall be explained herein.

[2]Mr. Asay has been without state court collateral counsel since May of 2005 when an attorney by the name of Dale Westling withdrew as Mr. Asay's collateral registry counsel.

[3]An attorney by the name of Thomas Fallis was the most recent attorney who had been appointed by the federal court to represent Mr. Asay in federal habeas proceedings. Undersigned counsel has been advised that Mr. Fallis no longer views himself as counsel for Mr. Asay because when he sought to withdraw in 2014, the federal court denied his motion as moot. Accordingly, Mr. Fallis destroyed the files and records in Mr. Asay's case that were in his possession because they had been horribly damaged before he had obtained them and were insect infested.

[4]Section 27.710(4), Fla. Stat., provides:

> Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Chief Financial Officer. **If the appointed attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director shall notify the trial court.** The Chief Financial Officer shall develop the form of the contract, function as contract manager, and enforce performance of the terms and conditions of the contract. By signing such contract, **the attorney certifies that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed,**

On January 13, 2016 after the death warrant had been signed, undersigned counsel was contacted by a judicial assistant for the circuit judge presiding over Mr. Asay's case. Undersigned counsel was asked if he would accept an appointment to serve as Mr. Asay's registry counsel. After consulting with his law partner and given due consideration to the time parameters allotted,[5] undersigned counsel called the judicial assistant back and agreed to serve as Mr. Asay's registry counsel. An order appointing the undersigned was entered later that day.[6]

Since his appointment, undersigned counsel has become aware of circumstances which make it all but impossible for him to

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reduced, or carried out or until released by order of the trial court.

(Emphasis added).

[5]This Court by order dated January 11, 2016, stated that all proceedings in the trial court "shall be completed and orders entered by 5:00 p.m., Wednesday, February 3, 2016." *Asay v. State*, Case No. SC73432 (Fla. January 11, 2016).

[6]Upon receipt of the order of appointment, undersigned counsel notified the Justice Administrative Commission. He was then emailed a contract to sign covering his representation of Mr. Asay. In the contract, there appeared a provision indicating that by signing the contract counsel is certifying that he "is counsel of record in not more that ten (10) capital collateral postconviction proceedings." At a case management hearing conducted on January 15, 2016, counsel advised the circuit court that he was counsel of record in more than ten capital collateral proceedings and was not in a position to certify otherwise. He asked the circuit court for leave to accept the appointment despite the ten case cap appearing in the contract and in § 27.710(1), Fla. Stat. After asking the State if there was an objection, the circuit court indicated that it would find that counsel could exceed the ten case cap.

effectively represent Mr. Asay within the present time constraints arising from the pending death warrant.[7] As will be explained herein in greater detail, it appears as though Mr. Asay's files and records collected by predecessor counsel have either been destroyed or are unavailable. Because Mr. Asay's case was originally worked up for collateral purposes before the advent of the records repository, copies of files and records were never provided to the repository and are not there to access. The archives do have hard copies of the records on appeal from proceedings in this Court. However because the records on appeal are purportedly voluminous and must be copied, it is not known when counsel will receive the records on appeal.

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[7]On January 11, 2016, this Court entered a scheduling order in Mr. Asay's case. In pertinent part, this order provided:

> The assigned judge shall immediately appoint counsel to represent Mark James Asay if it is determined he is not represented by counsel in state court proceedings. All proceedings pending in the trial court, if any, shall be completed and orders entered by 5:00 p.m., Wednesday, February 3, 2016.

In light of this scheduling order directing the circuit court proceedings to be concluded by 5:00 pm on February 3rd, the circuit court has ordered any motions for relief to be filed on behalf of Mr. Asay to be filed on or before January 25, 2016. hus, undersigned counsel, who was first appointed to represent Mr. Asay on January 13, 2016, must locate the files and records, read the files and records of an unknown size, conduct the necessary factual and legal investigation, prepare and file whatever motion to vacate he determines is warranted on or before January 25th, twelve days after counsel was appointed to represent a client that he had never represented before and for whom there are no files and records available from predecessor counsel.

As of this moment, undersigned counsel does not have access to a record on appeal from the trial or any previous collateral proceeding. Undersigned counsel does not have access to Mr. Asay's trial attorney files. There are no public records to review from the State Attorney's Office, the Department of Corrections or from any state agency involved in the prosecution of Mr. Asay.[8]

Given these circumstances, Mr. Asay submits that to proceed with his case at this juncture would constitute a violation of due process, equal protection and fundamental fairness. Providing an attorney without the client's files and records is the equivalent of providing no counsel at all.[9] Mr. Asay seeks

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[8]Both the Attorney General's Office and the State Attorney Offices agreed at the January 15th case management conference to provide counsel with their files and are attempting to copy their files for undersigned counsel and have the copies in electronic format sent to the repository by the end of day on Tuesday, January 19, 2016.

[9]Mr. Asay, for instance, likely has a valid claim to present based on the United States Supreme Court's decision in *Hurst v. Florida*, 2016 WL 112683 (January 12, 2016). Indeed, this Court entered an order *Lambrix v. State*, Case No. 16-56 (a case with a pending execution date of February 7, 2016), directing the parties to brief the applicability of *Hurst*. *See* Attachment A. *Hurst v. Florida* issued after Mr. Asay's warrant was signed and after this Court issued a scheduling order on January 11. Certainly, Mr. Asay should be permitted to litigate any claims arising on the basis of *Hurst v. Florida*, just as Mr. Lambrix has been permitted to do. However, given the lack of a trial transcript in Mr. Asay's case, his counsel is currently unable to read the record, let alone formulate a well developed *Hurst* claim at this juncture. *See Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987) ("We granted Riley's application for stay of execution and requested supplemental briefing on the issue of 'whether or not

a stay of execution with a reasonable schedule for the submission collateral motions and/or amend this petition, so as to provide counsel with time to obtain access to the records in his case and a sufficient opportunity to review such records so that he can be in a position to effectively represent Mr. Asay and present whatever Rule 3.851 or habeas claims that he finds are present.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Asay respectfully requests oral argument.

PROCEDURAL HISTORY[10]

Mark James Asay was indicted on two counts of first degree premeditated murder on August 20, 1987, in Duval County, Florida. Trial commenced September 26, 1988, and Mr. Asay was convicted as charged. The jury recommended death by votes of 9-3 on both counts, and the trial court imposed sentences of death. Mr. Asay appealed his convictions and sentences, which were affirmed. *Asay v. State*, 580 So. 2d 610 (Fla. 1991). The United States Supreme Court denied Mr. Asay's petition for writ of certiorari on October 7, 1991. *Asay v. Florida*, 502 U.S. 895 (1991).

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this Court can give retroactive application to *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), as it affects a jury's recommendation of sentence.'")

[10]In constructing this procedural history counsel is relying on this Court's opinions since he does not have access to any ROAs that were before this Court, and upon docket entries that are available online.

On March 16, 1993, Mr. Asay filed a Rule 3.850 motion in the circuit court. The motion was amended on November 24, 1993. On March 19, 1996, the circuit court entered an order denying relief on some claims and granting an evidentiary hearing on other claims.

The evidentiary hearing was conducted on March 25-27, 1996. On April 23, 1997, the circuit court issued an order denying relief. On appeal, this Court affirmed the circuit court's denial of Rule 3.850 relief. *Asay v. State*, 769 So. 2d 974 (Fla. 2000). Rehearing was denied on October 26, 2000.

On October 25, 2001, Mr. Asay filed a petition for writ of habeas corpus in this Court. Subsequent to briefing and oral argument, this Court denied Mr. Asay's petition on June 13, 2002. *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002). Rehearing was denied on October 4, 2002.

On October 17, 2002, Mr. Asay filed a successive postconviction motion in the circuit court in which he contended that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). The motion was denied on February 23, 2004. On appeal, this Court affirmed the circuit court's denial of relief. *Asay v. State*, 892 So. 2d 1011 (Fla. 2004).

On May 11, 2005, Dale Westling, Mr. Asay's state court registry counsel, was permitted to withdraw from the case. Mr.

Asay was not provided with new registry counsel.

On August 15, 2005, Mr. Asay filed a federal habeas petition in the Middle District of Florida. Mr. Asay's petition was ultimately denied on April 14, 2014. Mr. Asay subsequently moved to withdraw his notice of appeal, which the Eleventh Circuit Court of Appeals granted on July 8, 2014.

On January 8, 2016, Governor Rick Scott signed a death warrant scheduling Mr. Asay's execution for March 17, 2016.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const.

REQUEST FOR STAY OF EXECUTION

Mr. Asay requests a stay of execution. This Court has not hesitated to stay executions to ensure judicious consideration of capital cases presented by petitioners litigating during the pendency of a death warrant. *See e.g.*, *Puiatti v. Dugger*, Case No. 74,869 (Fla. Oct. 24, 1989) (stay granted to permit filing of notice appearance within 4 days and motion to amend 3.850 within 4 months); *Parker v. Dugger*, Case No. 74,978 (Fla. Nov. 8, 1989) (stay granted for four months to permit counsel to amend); *Jackson v. Dugger*, Case No. (Fla. April 26, 1990) (stay granted to permit CCR to enter an appearance and file 3.850 motion within

60 days); *Lecroy v. Dugger*, Case No. 76,144 (Fla. June 19, 1990) (stay granted to permit CCR to enter an appearance and file 3.850 with 90 days); *Hildwin v. Dugger*, Case No. 76,145 (Fla. June 21, 1990) (stay granted to permit CCR to enter an appearance and file 3.850 motion within 60 days);[11] *Walton v. Dugger*, Case No. 76,695 (Fla. Oct. 24, 1990) (stay granted and CCR was ordered to file 3.850 motion within 51 days); *Rivera v. Dugger*, Case No. 76,694 (Fla. October 24, 1990) (stay granted and CCR ordered to file 3.850 motion 51 days); *Scott v. Dugger*, Case No. 76,831 (Fla. Oct. 29, 1990) (stay granted and counsel order to file 3.850 motion within 30 days). Historically, this Court has been especially vigilant to the need for procedural fairness in capital proceedings, and has accordingly not hesitated to enter stays of execution in order to ensure that capital petitioners are treated fairly in the litigation of claims for relief during the pendency of a death warrant.

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[11]The circumstances in Mr. Hildwin's were articulated by CCR in a habeas petition filed on June 12, 1990, as follows:

> CCR has not had the opportunity to even obtain transcripts of Petitioner's trial and sentencing, nor has it been able to do any investigation or research into this case. This is not the type of representation envisioned by Rule 3.850. *Spaldinq v. Duqqer*, 526 So. 2d 71 (Fla. 1988).

GROUNDS FOR HABEAS CORPUS RELIEF

MR. ASAY'S DEATH WARRANT WAS SIGNED AND HIS EXECUTION MADE IMMINENT WHEN NO REGISTRY COUNSEL WAS IN PLACE TO REPRESENT HIM AND HAD NOT BEEN IN PLACE FOR OVER A DECADE. AND, UNBEKNOWNST TO MR. ASAY, THE FILES AND RECORDS NECESSARY TO LITIGATE HIS CASE HAVE EITHER BEEN DESTROYED OR AT LEAST ARE NOT CURRENTLY AVAILABLE. CURRENT COUNSEL CANNOT EFFECTIVELY PREPARE WITHIN THE TIME CONSTRAINTS SET BY THE GOVERNOR AND BY THIS COURT UNDER THESE CIRCUMSTANCES. MR. ASAY IS BEING DENIED DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND HIS RIGHT TO EFFECTIVE COLLATERAL REPRESENTATION UNDER *SPALDING V. DUGGER*.

A. INTRODUCTION

In *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...". *Id.* In a special concurrence, two Justices discussed the right to counsel in capital postconviction in terms of State Due Process. Counsel was characterized as an "essential requirement" in capital postconviction proceedings. *Id.* at 329.

As noted in *Arbelaez*, all capital litigation is particularly unique, complex and difficult. The basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985). The special degree of reliability in capital cases, which can only be

provided by competent and effective representation in postconviction proceedings, is necessary to ensure that capital punishment is not imposed in an arbitrary and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed. *Arbelaez v. Butterworth*, 738 So. 2d 331 at n. 12.

In *Peede v. State*, 748 So. 2d 253 (Fla. 1999), this Court made clear that ineffective representation at any level of the capital punishment process will not be tolerated. This Court felt "constrained to comment on the representation afforded Peede in these proceedings [appeal from summary denial of motion for postconviction relief]", which included criticism of the length, lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, **especially in death penalty cases**, and we urge the trial court, upon remand, to **be certain that Peede receives effective representation**". *Id.* at 256, n. 5 (emphasis added). Less than a week later, this Court entered an unpublished Order in *Fotopoulos v. State*, 741 So. 2d 1135 (Fla. 1999), which remanded the case for further proceedings in the lower court **despite having considered briefs on appeal and having heard oral argument**, because appellate counsel inappropriately attempted to raise issues and asserted arguments and positions which should have been, but were not, presented to

the lower court in the Rule 3.850 motion. This Court did not penalize Fotopoulos for his attorney's incompetence; rather, it remanded for corrective action to be taken prior to ruling on the appeal.

Subsequently, in *Happ v. State*, Case No. SC93121 (Sept. 13, 2000), this Court remanded the Appellant's case in the inherent interests of justice in response to the inadequate performance of counsel:

> Upon consideration of the briefs and oral argument presented to this Court, we conclude that counsel for appellant has set forth positions and arguments that had not previously been properly pleaded or presented with particularity to the trial court in the pleadings filed in the trial court. As we did in *Peede v. State*, 748 So. 2d 253 (Fla. 1999), we criticize and condemn this practice. However, in an attempt to properly administer justice, and recognizing the legislature's call for judicial oversight of collateral counsel, we hereby dismiss the above case without prejudice for allowing the appellant to further amend the underlying motion . . . and proceed in the trial court on certain limited claims.

This Court in *Spalding v. Dugger* explained:

> We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative **in all collateral relief proceedings**. This statutory right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings.

The right to collateral counsel extends up until the capital defendant's sentence of death is either vacated or carried out.

Sec. 27.710(4).[12]

As set forth herein, Mr. Asay is being denied due process, equal protection, and his right to the effective assistance of collateral counsel. In the interests of justice, Mr. Asay submits that a stay of execution is mandated.

B. MR. ASAY'S CASE

On January 8, 2016, Robert Friedman, Capital Collateral Counsel for the Northern Region (CCC-NR), received a phone call from a representative of the Governor's Office to inform him that the Governor had signed the death warrant for a CCC-NR client, Mark Asay. Mr. Friedman informed the Governor's representative that Mr. Asay was not represented by CCC-NR.

The Governor's Office made another phone call on January 8, 2016, to Thomas Fallis, a private attorney in Jacksonville, Florida, to inform him that the Governor had signed the death warrant for Mr. Fallis' client, Mark Asay. Mr. Fallis explained that, though he had represented Mr. Asay pursuant to the Criminal Justice Act in federal court for a few years, he no longer represented Mr. Asay.

What additional steps the Governor's Office took to notify

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[12]Indeed, this Court approved the stays of executions entered in 1985 on behalf of James Agan, *State v. Green*, 466 So. 2d 218 (Fla. 1985), and Robert Waterhouse, *State v. Beach*, 466 So. 2d 218 (Fla. 1985). The stays had been entered because Mr. Agan and Mr. Waterhouse were without collateral representation and were facing imminent execution.

Mr. Asay's state court counsel of the death warrant is unclear. What is clear, however, is that despite being given information that at a minimum, Mr. Asay's representation was unknown, Governor Scott did not pause or delay the execution date in order to ensure that Mr. Asay was or would be represented by competent postconviction counsel.

On January 13, 2016, undersigned counsel, Martin McClain, received a phone call from the judicial assistant for the Honorable Tatiana Salvador, Circuit Judge in the Fourth Judicial Circuit in and for Duval County, who inquired as to whether undersigned would be willing to represent Mr. Asay. Undersigned indicated that he would consider a possible appointment and would let Judge Salvador's office know as soon as possible. A few hours later, undersigned contacted Judge Salvador's office and agreed to accept the appointment to represent Mr. Asay.

As soon as undersigned accepted the appointment, he and his law partner, Linda McDermott, began to contact prior counsel in order to locate Mr. Asay's files and records, including the records on appeal in his case. Neither Mr. McClain, Ms. McDermott, nor John Abatecola, a veteran capital collateral attorney who also agreed to assist in the warrant litigation, had any familiarity with Mr. Asay's case. What was learned was quite disconcerting – numerous boxes, probably a majority, of Mr. Asay's files and records had been destroyed, while those records

that theoretically still exist, have yet to be located.

Between January 14th and January 15th, Ms. McDermott spoke to each attorney who represented Mr. Asay since his direct appeal became final. The result of Ms. McDermott's inquiries and interviews is as follows:

Stephen P. Kissinger and Elizabeth Wells represented Mr. Asay while employed by the Capital Collateral Representative in Tallahassee. Mr. Kissinger and Ms. Wells litigated issues related to the collection of public records and drafted Mr. Asay's initial Rule 3.850 motion.[13] Mr. Kissinger was lead counsel at Mr. Asay's evidentiary hearing in March, 1996. Both Mr. Kissinger and Ms. Wells left CCR, but neither took any files or records with them.

Heidi Brewer was assigned to represent Mr. Asay as lead counsel at the Capital Collateral Counsel for the Nothern Region Office (CCC-NR), in mid-1997. CCC-NR was the successor agency of CCR when the Florida Legislature split CCR into three regional offices. Ms. Brewer represented Mr. Asay after his Rule 3.850 motion had been denied and in his 3.850 appeal to this Court.

Following the briefing, two attorneys from Holland and

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[13]The public records were gathered and obtained before the March, 1996 evidentiary hearing. This was before the creation of the records repository in October of 1998, and thus a back up copy of the public records was not provided by the various state agencies that turned over public records to Mr. Kissinger and Ms. Wells.

Knight, Gregg Thomas and Rachel Fugate, entered appearances as *pro bono* counsel to assist CCC-NR with the oral argument before this Court. Ms. Fugate appeared before this Court for the argument. Following the argument, Holland and Knight's involvement with Mr. Asay's case concluded. The records that had been supplied to them for preparation for the oral argument were returned to CCC-NR.

Ms. Brewer continued to represent Mr. Asay and, following this Court's affirmance of the denial of relief, she filed a petition for writ of habeas corpus on his behalf. After the United States Supreme Court's decision in *Ring v, Arizona*, 536 U.S. 584 (2002), Ms. Brewer filed a successive Rule 3.851 motion on Mr. Asay's behalf. However, shortly after the successive Rule 3.851 was filed, the Florida Legislature abolished CCC-NR by refusing to provide funding for the office, effective July 1, 2003. Ms. Brewer did not take any of Mr. Asay's files and records with her when she entered private practice.

The closing of CCC-NR was overseen by Bill Jennings, then Capital Collateral Counsel for the Middle Region (CCC-MR). Mr. Jennings employed Carla Georgieff, who had been employed by CCC-NR, to assist in the transition. One of Mrs. Georgieff's responsibilities was to coordinate the transfer of files and records relating to each clients' cases to appointed counsel. Appointed counsel was required to provide Mrs. Georgieff the

order of appointment and then she coordinated the transfer of files and records. Mrs. Georgieff kept a log of who took possession of which case files and how many boxes were transferred. In Mr. Asay's case, attorney Dale Westling was appointed on July 3, 2003, as registry counsel on behalf of Mr. Asay. *See* Fla. Stat. 27.711.

James Viggiano, the current Capital Collateral Counsel for the Middle Region, is now in possession of the aforementioned log. According to Mr. Viggiano, thirty-three (33) boxes of files and records relating to Mr. Asay's case were provided to Mr. Westling.

Mr. Westling represented Mr. Asay in relation to the successive 3.851 motion and when it was denied, he appealed to this Court. During the course of the appeal, Mr. Westling designated Mary Katherine Bonner to assist him with the appeal.

In December, 2004, this Court affirmed the denial of Mr. Asay's successive Rule 3.851 motion. Thereafter, according to Mr. Asay's on-line docket from the Duval County Clerk of the Court, on May 11, 2005, Mr. Westling moved to withdraw. The circuit court granted the motion that same day.

In relation to Mr. Asay's files and records, Mr. Westling and his secretary, Vanya, have informed Ms. McDermott that they have none. Vanya indicated that according to Mr. Westling's retention policy, records are destroyed after seven (7) years.

Ultimately, Ms. Bonner was appointed as CJA Counsel to represent Mr. Asay before the federal district court as to the issue of the timeliness of his § 2254 petition. *Asay v. State of Florida*, Middle District of Florida Case No. 3:05-cv-00147-TJC-PDB, Doc. 15. However, the federal district court removed Ms. Bonner and appointed John S. Mills, a private attorney from Tallahassee, to represent Mr. Asay as to the issue of whether equitable tolling applied to Mr. Asay's § 2254 petition.

On January 13, 2016, Ms. Bonner informed Ms. McDermott that she provided files to subsequent CJA Counsel, Thomas Fallis, who was appointed as to the merits of Mr. Asay's § 2254 petition. Ms. Bonner did tell Ms. McDermott that she believed she may have some files and that they may be at her home in a room that has several boxes of files from various cases and/or at a warehouse where she stored other boxes of files. At the end of the day on January 14, 2016, Ms. Bonner informed Ms. McDermott that she had not attempted to locate the files as she had indicated she would the day before and that her husband's health prevented her from determining what if any files she had. She hoped that over the weekend she would have some help caring for her husband and she could devote some time to determining if she had any of Mr. Asay's files and if so, where they were located.

When contacted, Mr. Mills informed Ms. McDermott that due to the limited nature of his representation (it related to equitable

tolling), he did not obtain any of Mr. Asay's files or records. His working file contained some correspondence related to his representation and the pleadings and orders that were filed in the federal court.

Mr. Fallis was contacted. He indicated that his representation of Mr. Asay ended in July, 2014. He, too, was asked whether he had any files relating to his representation of Mr. Asay. Mr. Fallis stated that he had obtained boxes of files from Ms. Bonner shortly after he was appointed by the federal court in August, 2010. He drove to Ms. Bonner's home in south Florida. She kept Mr. Asay's files in an outdoor storage shed. He described the shed as hot and infested with snakes, rats and insects, including roaches. The files were in horrible condition. Nonetheless, Mr. Fallis said that he took approximately ten (10) boxes of files from Ms. Bonner. He did not recall if there were others.

After reviewing the files more carefully, Mr. Fallis believed that they were worthless due to the condition in which they were stored. He did his best to make use of what he could. Ultimately, Mr. Fallis destroyed all of the files and records he received from Ms. Bonner in addition to the file he maintained while representing Mr. Asay.

On January 13th, undersigned requested that Mr. Asay's records on appeal be provided to him by personnel from the

Department of State, Archives and Records Management Division of Library and Information Services. Undersigned has been informed that copies of the records on appeal are being prepared and undersigned will be notified when they are complete.

Mr. Asay's legal team also searched the index of public records maintained by the Department of State in the Repository, pursuant to Rule 3.852. Counsel has verified that none of Mr. Asay's records were ever delivered to the Repository due to the fact that he had already had his evidentiary hearing when Rule 3.852 was promulgated.[14]

On January 15, 2016, the circuit court conducted a case management hearing. Undersigned explained the highly unusual and nearly impossible circumstances he faced representing a capital collateral client without and files or records under the exigencies of a death warrant. Further complicating the matter, Mr. Asay has been without capital collateral representation in the state courts for over ten (10) years.[15] And, undersigned has

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[14]Unlike numerous other capital postconviction defendants, Mr. Asay does not have the "back-up" of having records in the repository to replace those that were previously disclosed should records be destroyed of lost.

[15]During the case management hearing at one point, Charmaine Millsaps, Assistant Attorney General, took issue with undersigned counsel's assertion that Mr. Asay had been without collateral counsel for over ten years. Ms. Millsaps noted that Mr. Asay had had federally appointed CJA counsel in connection with his federal habeas proceedings. However, undersigned counsel responded that federal appointed CJA counsel was not authorized by the federal courts to appear on behalf of Mr. Asay in state

been unable to obtain a single document from the thirty-three (33) boxes of files and records previously gathered in Mr. Asay's case.[16] Despite Mr. Asay's predicament, the circuit court, faced with this Court's January 11th scheduling order, adopted timelines that requires Mr. Asay's Rule 3.851 motion to be filed on or before January 25th.[17]

At the January 15th case management hearings, Assistant

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court proceedings. Mr. Asay in fact had no registry counsel in place who was familiar with his case, monitoring jurisprudential developments by this Court and/or the United State Supreme Court, conducting research or investigation as new factual issues, and prepared to timely file, i.e. within the time limits set forth in Rule 3.851, any factual or legal claims arising on Mr. Asay's behalf. Certainly had Mr. Hildwin or Mr. Swafford been left without state collateral counsel for ten years as Mr. Asay was, neither Mr. Hildwin nor Mr. Swafford would have received new trials in successive Rule 3.851 proceedings. *See Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014); *Swafford v. State*, 125 So. 2d 760 (Fla. 2013).

[16]Undersigned has obtained the opinions and some of the briefs that were filed in this Court. Undersigned is also able to access the pleadings and orders related to the federal proceedings that are accessible through PACER. Undersigned does not have access to view the documents that are referenced on the Duval County Clerk of Court's website. However, while these documents may assist counsel in having a bit of familiarity about the facts surrounding Mr. Asay's convictions and sentences of death and the issues that were previously raised, they don't scratch the surface of what was undoubtedly contained in the thirty-three (33) boxes of files and records provided to Mr. Westling in 2003. Furthermore, they are simply not the types of files and records necessary for counsel to review in order to effectively represent Mr. Asay.

[17]This pleading is being filed one week before the deadline, and at this time undersigned counsel does not even have Mr. Asay's trial transcript, the Rule 3.850 evidentiary hearing transcripts or any of the files and records gathered by prior collateral counsel.

Attorney General Millsaps represented that she had been unaware that Mr. Asay had been without state court registry counsel for the last ten (10) years.[18] Ms. Millsaps has offered to provide a copy of the records in her possession to the Repository in Tallahassee by the end of the day on Tuesday, January 19th. Likewise, Assistant State Attorney Bernie de la Rionda indicated that he would attempt to have his file copied before the end of the day on January 19th and made available. Assistant General Counsel Rana Wallace, who represents the Department of Corrections, reluctantly agreed to request that a medical release be presented to Mr. Asay for his signature so that she could provide a copy of his medical file.[19] At the hearing, undersigned counsel had the understanding that, given the circumstances,[20] Ms. Wallace, like Ms. Millsaps and Mr. de la

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[18]Section 27.710(4) makes clear that, what happened here, is not supposed to happen. Registry counsel is supposed to be in place until the sentence is vacated or carried out. There is also a provision in the statute requiring JAC to notify the circuit court if a registry attorney with a valid contract is not in place.

[19]Ms. Wallace's position was contingent upon undersigned counsel immediately placing a call to Mr. Asay to assure that he would voluntarily sign the release for his medical file before a DOC employee approached him with a form to sign. Counsel made arrangements for the necessary phone call so that the medical file can be obtained as soon as possible.

[20]Counsel explained that the inmate file had been obtained in the 1990's before the adoption of Rule 3.852, but whatever had been provided had been lost. Mr. de la Rionda confirmed that Mr. Asay's collateral counsel, Mr. Kissinger had DOC's inmate file on Mr. Asay at the time of the 1996 evidentiary hearing.

Rionda, would also attempt to have Mr. Asay's inmate file copied. However, shortly after the hearing concluded, Ms. Wallace sent undersigned counsel an e-mail indicating that, unlike Ms. Millsaps and Mr. de la Rionda, she would not produce any records, other than the medical file, without a written Rule 3.852 request: "The Department awaits a proper Rule 3.852 demand as to any other records you seek. Warrant or no warrant, the Rule requires, among other things, that you identify with specificity the records you seek and demonstrate the records you seek are relevant to a postconviction proceeding."[21]

Accordingly, undersigned counsel orally requested DOC's files in exactly the same fashion that he had requested files from the Attorney General's Office and from the State Attorney Offices.

[21]Because of Mr. Asay's situation, i.e., having none of the files relating to his case, he simply is in no position to file a Rule 3.852 request with the specificity required, and he has no way to make any showing of relevance since he has no idea what claims or issues might be presented. Further, it should be noted that under Rule 3.852, once this Court affirms a conviction and sentence of death, the Office of the Attorney General must notify specific agencies so that they can send records to the repository. The Department of Corrections is one of these agencies. *See* Fla. R. Crim P. 3.852(d)(1). Surely, if the repository destroyed or lost the records of a capital defendant, "[w]arrant or no warrant", DOC would be required to reproduce the records relating to the inmate. And here we know that DOC previously, before the advent of Rule 3.852, provided Mr. Asay's inmate file. Yet apparently, Ms. Wallace has decided to require a written Rule 3.852 request even though without any files and records Mr. Asay's counsel cannot prepare in a fashion that complies with the rule.

Undersigned counsel does intend to file a motion to compel DOC to provide Mr. Asay's inmate file. Rule 3.852(j) does afford the trial court with the authority to "compel or deny disclosure of records."

C. ANALYSIS

The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). "[Flundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). "In *Holden v. Hardy*, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L.Ed. 780, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L.Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.'" *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

In Mr. Asay's postconviction proceedings, the circuit court appointed counsel and imposed upon that counsel the obligation to

represent Petitioner "until the sentence is reversed, reduced, or carried out, or until released by order of the trial court." Section 27,710(4), Fla. Stat. The appointed counsel by statute and by virtue of a signed contract with the Florida Department of Financial Services was obligated to represent Mr. Asay in both state and federal courts while pursuing his collateral remedies.

Mr. Asay has not received that to which he was entitled, and that which other capital postconviction defendants have received. The treatment of similarly situated defendants is a violation of equal protection. *See e.g., City of Cleburne, Texas, et al.v. Cleburne Living Center, Inc., et al.*, 473 U.S. 432, 439 (1985), citing to *Plyler v. Doe*, 457 U.S. 202, 216 (1982)("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

Not only has Mr. Asay been without registry counsel for the past ten years, he also has been stripped of all the files and records that should have been maintained in his case. Presently, Mr. Asay has no records on appeal, transcripts, public records, none of trial counsel's files and no background records. Though Assistant Attorney General Millsaps and Assistant State Attorney de la Rionda have indicated that attempts will be made to provide their files, undersigned counsel has no idea what files and

records they have. Moreover, though undersigned had requested that Mr. Asay's records on appeals be copied, he has no idea when they will be completed or delivered to him. Further, these records and files will not be all that are necessary to adequately represent Mr. Asay.

This Court in the past has not hesitated to remedy such unfairness in the interests of justice. *See e.g., Scott v. Dugger*, 634 So. 2d 1062, 1064 (Fla. 1993)(stay granted where new collateral counsel was required to take the case after signing of death warrant); *Hildwin v. Dugger*, Case No. 76,145 (Fla. June 21, 1990) (stay granted to permit CCR to enter an appearance and file 3.850 motion within 60 days).[22]

Undersigned and co-counsel have never found themselves in such dire and disturbing circumstances when representing a capital postconviction defendant with an active death warrant. Undersigned counsel submits that a stay of execution is warranted. Certainly, this Court can enter a stay of execution a set a time table for counsel to obtain and review copies of Mr. Asay's files and file any claims discovered on which Mr. Asay has

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[22]The circumstances in Mr. Hildwin's were articulated by CCR in a habeas petition filed on June 12, 1990, as follows:

> CCR has not had the opportunity to even obtain transcripts of Petitioner's trial and sentencing, nor has it been able to do any investigation or research into this case. This is not the type of representation envisioned by Rule 3.850. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988).

a basis for seeking relief. *See Hildwin v. Dugger*, Case No. 76, 145 (Fla. June 21, 1990).

CONCLUSION

For all the reasons discussed herein, Mr. Asay respectfully urges this Court to grant a stay of execution or such other relief warranted in these circumstances that affords Mr. Asay's counsel adequate time to obtain the necessary files and records to ascertain what Rule 3.851 and/or habeas claims exist and then present them in the appropriate pleadings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 18th day of January, 2016.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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