

In The Supreme Court of Florida

CASE NO. 16-102

MARK JAMES ASAY, *Petitioner*

v.

JULIE L. JONES,
Secretary, Florida Department of Corrections, Respondent.

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF

On January 18, 2016, counsel for Asay, Marty McClain, filed a petition for extraordinary relief, for writ of habeas corpus and application for stay of execution. Many of the concerns raised by recently appointed counsel in the petition have already been addressed by the trial court. Furthermore, while opposing counsel was recently appointed, the defense team includes an attorney that has been counsel of record in federal court since 2010. This Court should deny the petition as well as the motion for stay.

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FACTS AND PROCEDURAL HISTORY

The facts of the crime are recited in the Florida Supreme Court's direct appeal opinion:

Asay, Asay's brother, Robbie, and Robbie's friend, "Bubba" McQuinn, on July 17, 1987, the three met at a local bar where they drank beer and shot pool. They left the bar around 12:00 a.m. and went to a second bar where they stayed until closing at 2:00 a.m. Although Asay drank a number of beers, both Bubba and Robbie testified that Asay did not appear drunk or otherwise impaired.

After the bar closed, Robbie said he wanted to try to "pick up a girl" he had seen at the bar, so Bubba and Asay drove around the corner in Asay's truck. They returned to discover that Robbie had been unsuccessful with the girl he had seen, so Bubba suggested that they go downtown to find some prostitutes and he would pay for oral sex for them all. Asay and Bubba left in Asay's truck and Robbie left in his. Once downtown, Asay and Bubba soon spotted Robbie who was inside his truck talking to a black man, Robert Lee Booker. Robbie was telling Booker who was standing at the driver's side window of Robbie's truck that he and his friends were looking for prostitutes.

After spotting Booker standing by Robbie's truck, Asay told Bubba to pull up next to the truck. Asay immediately got out of his truck, proceeded to Robbie's truck, and told Robbie "You know you ain't got to take no s-t from these f---ing niggers." Although Robbie told Asay that "everything is cool," Asay began to point his finger in Booker's face and verbally attack him. When Booker told him "Don't put your finger in my face," Asay responded by saying "F-k you, nigger" and pulling his gun from his back pocket, shooting Booker once in the abdomen. Booker grabbed his side and ran. According to the medical examiner, the bullet perforated the intestines and an artery causing internal hemorrhaging. Booker's body was later found under the edge of a nearby house.

Robbie drove away immediately after the shooting. Asay jumped into the back of his truck, as Bubba drove off. When Asay got into the cab of the truck, Bubba asked him why he shot Booker. Asay responded, "Because you got to show a nigger who is boss." When asked if he thought he killed Booker, Asay replied, "No, I just scared the s-t out of him."

Bubba testified that after the shooting, Asay and

Bubba continued to look for prostitutes. According to Bubba, he saw "Renee" who he knew would give them oral sex. It appears that at the time neither Bubba nor Asay was aware that "Renee" was actually Robert McDowell, a black man dressed as a woman. According to Bubba, he negotiated a deal for oral sex for them both. Bubba drove the truck into a nearby alley. McDowell followed. Bubba testified that McDowell refused to get into the truck with them both, so Asay left the truck and walked away to act as a lookout while Bubba and McDowell had sex. As McDowell started to get into the truck with Bubba, Asay returned, grabbed McDowell's arm, pulled him from the truck and began shooting him. McDowell was shot six times while he was backing up and attempting to get away. Asay jumped back in his truck and told Bubba to drive away. When asked why he shot McDowell, Asay told Bubba that he did it because "the bitch had beat him out of ten dollars" on a "blow job." McDowell's body was found on the ground in the alley soon after the shots were heard. According to the medical examiner, any of three wounds to the chest cavity would have been fatal.

Asay later told Charlie Moore in the presence of Moore's cousin, Danny, that he shot McDowell because McDowell had cheated him out of ten dollars on a drug deal and that he had told McDowell, "if he ever got him that he would get even." Asay told Moore that he was out looking for "whores," when he came across McDowell. According to Moore's cousin, Danny, Asay also told Moore that his plan was to have Bubba get McDowell in the truck and they "would take her off and screw her and kill her." Moore testified that Asay told him that when Bubba "didn't have [McDowell] in the truck so they could go beat him up," Asay "grabbed [McDowell] by the arm and stuck the gun in his chest and shot him four times, and that when he hit the ground, he finished him off." As a result of tips received from Moore and his cousin after McDowell's murder was featured on a television Crime Watch segment, Asay was arrested and charged by indictment with two counts of first-degree murder.

The state also presented testimony of Thomas Gross, who was Asay's cellmate while he was awaiting trial. Gross testified that when the black prisoners, who were also housed in their cell, were out in the recreation area, Asay told him he was awaiting trial for a couple of murders. According to Gross, Asay then showed him some newspaper articles and told him, "I shot them niggers." While they were discussing the murders, Asay showed Gross his tattoos, which included a swastika, the words "White Pride," and the initials "SWP" which Gross said stand for

supreme white power.

Asay v. State, 580 So.2d 610, 610-612 (Fla.1991).

Asay was found guilty of both murders. In accordance with the jury's recommendations, the trial court imposed a sentence of death for each conviction. The following two aggravating factors were found in connection with both murders: 1) the murder was committed by a person under sentence of imprisonment because Asay was on parole; and 2) Asay had been previously convicted of a capital felony based on the contemporaneous murder conviction. § 921.141(5)(a), (b), Fla.Stat. (1987). In connection with the McDowell murder, the court found a third aggravating factor, that the murder was committed in a cold, calculated, and premeditated manner, without any pretense of any moral or legal justification. § 921.141(5)(i), Fla.Stat. (1987). Asay's age of twenty-three at the time of the offenses was found in mitigation as to both murders. § 921.141(6)(g), Fla.Stat. (1987).

Asay, 580 So.2d at 612.

The jury recommended a death sentence of 9 to 3 for both victims.

On direct appeal to the Florida Supreme Court, Asay raised seven issues: 1) the trial court erred by allowing racial prejudice to be injected into the trial; 2) the trial court erred in failing to advise Asay of his right to represent himself and to conduct an inquiry when Asay asked to discharge court-appointed counsel; 3) the trial court erred in denying Asay's pro se motion for a continuance of the penalty phase of the trial to enable him to secure additional mitigation witnesses; 4) the prosecution improperly diminished the jury's role in sentencing; 5) the trial judge erred by failing to grant his motion for judgment of acquittal on count I of the indictment charging him with the

first-degree premeditated murder of Robert Lee Booker; 6) the trial court erred in finding the McDowell murder was committed in a cold, calculated, and premeditated manner; and 7) death is not proportionate for these murders because they were "spontaneous, impulsive killings during stressful circumstances." *Asay v. State*, 580 So.2d 610, 612, n.1 (Fla. 1991) (listing four of the seven issues raised in the direct appeal). The Florida Supreme Court found that issues 1-4 did not merit discussion. *Asay*, 580 So.2d at 612 (stating only three of the seven issues raised merit discussion). The Florida Supreme Court affirmed the two convictions for first-degree murder and the death sentences.

Asay filed a petition for writ of certiorari in the United States Supreme Court which was denied on October 7, 1991. *Asay v. Florida*, 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991).

On March 16, 1993, Asay filed an initial 3.850 postconviction motion in state court raising twenty claims. *Asay v. State*, 769 So.2d 974, 978, n.5 (Fla. 2000) (listing the twenty claims in the amended initial postconviction motion). In March 25-27, 1996, an evidentiary hearing on various claims of ineffectiveness. On April 23, 1997, the trial court denied the post-conviction motion.

Asay appealed to the Florida Supreme Court. Asay raised the following claims in his state posconviction appeal: 1) judicial bias during the trial and postconviction proceedings resulted in a denial of "a fair and impartial tribunal throughout his proceedings in violation of his due process rights;" 2) the trial court

improperly limited the scope of the evidentiary hearing by (a) limiting the testimony of some of Asay's siblings concerning mitigating evidence not presented during the sentencing phase; (b) limiting the scope of Asay's examination of his trial counsel regarding his knowledge of prior inconsistent statements of key witnesses; and (c) refusing to hear the testimony of Thomas Gross recanting his trial testimony; 3) ineffectiveness of counsel during the guilt phase for (a) failing to adequately impeach the State's key witnesses, (b) for failing to present a voluntary intoxication defense, and (c) for failing to rebut the State's arguments that he committed the crime due to his racial animus; 4) ineffectiveness of counsel during the penalty phase for (a) failing to investigate and present statutory mitigating evidence that he was acting under extreme emotional distress and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and (b) failing to present nonstatutory mitigating evidence of physical and emotional abuse and poverty during his childhood, alcohol abuse and his history of "huffing" inhalants; 5) the trial court improperly summarily denied several claims; and 6) cumulative error. *Asay v. Moore*, 828 So.2d 985, 989, n.7 (Fla. 2002) (listing the issues raised in the postconviction appeal in a footnote). Following an oral argument, the Florida Supreme Court affirmed the trial court's denial of the postconviction motion. *Asay v. State*, 769 So.2d 974 (Fla. 2000).

On October 25, 2001, Asay filed a state habeas petition in the Florida Supreme Court. The Florida Supreme Court concluded that: 1) attorney's failure to confer with petitioner before the final acceptance of the jury panel did not violate due process right to be present during critical stages; 2) trial court's misstatement during voir dire concerning mitigating factors was not fundamental error; 3) appellate counsel did not render ineffective assistance; 4) trial court did not commit fundamental error by failing to refer to additional mitigating evidence; and 5) the instruction on the aggravating factor of a cold, calculated, and premeditated (CCP) murder was correct. The Florida Supreme Court denied the petition. *Asay v. Moore*, 828 So.2d 985 (Fla. 2002).

On October 17, 2002, Asay filed a successive 3.851 postconviction motion in state trial court raising a *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) claim. On December 20, 2004, the Florida Supreme Court rejected the *Ring* claim in an unpublished opinion, which states in its entirety:

"Mark James Asay appeals the circuit court's order summarily denying his successive motion to vacate judgment and sentence wherein he challenges the validity of his death sentences under *Ring v. Arizona*, 536 U.S. 584 (2002). The circuit court's order is hereby affirmed." *Asay v. State*, 892 So.2d 1011 (Fla. 2004).

Asay then filed a petition for writ of certiorari in the United States Supreme Court, which the Court denied on November 2, 2009. *McNeil v. Asay*, 558 U.S. 1007 (2009).

On August 15, 2005, original federal habeas counsels, Dale

Westling and Mary Catherine Bonner, filed a federal habeas petition. (Doc. #8). The original habeas petition was untimely.

The federal district court ordered several rounds of briefing and conducted two oral arguments on the issue of the timeliness of the petition. The district also conducted an evidentiary hearing on the issue of equitable tolling. Following the evidentiary hearing on equitable tolling, Respondents, in light of *Holland v. Florida*, - U.S. -, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010), without waiving the timeliness argument, agreed to proceed to the merits of the habeas petition.

On March 11, 2011, newly appointed habeas counsel, Thomas Fallis, filed a motion to adopt the original habeas petition. (Doc. #135). The original habeas petition raised eleven grounds for habeas relief: 1) the trial court's failure to provide substitute trial counsel under *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973) or advise Petitioner that he had the right to proceed *pro se*; 2) ineffective assistance of his trial counsel, Raymond A. David, for delegating the investigation to an investigator; 3) ineffective for failing to meet with him in jail and for failing to cross-examine the State's witnesses, "Bubba" O'Quinn, Danny Moore, Charlie Moore and Floro, regarding inconsistencies in their testimony; 4) ineffectiveness for not more vigorously pursuing the reasonable doubt trial strategy such as failing to object to admission of evidence which tied Petitioner to the type of gun used in the murders and failing to present a voluntary intoxication

defense; 5) failing to present his abusive childhood and mental mitigation during penalty phase; 6) denial of a fair trial due to the prosecution introducing evidence that the murders were racially motivated and that counsel was ineffective for failing to keep race out of the trial; 7) Thomas Gross's trial testimony was a violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); 8) ineffective assistance of counsel for advising him not to testify in his own behalf; 9) ineffectiveness during guilt phase closing argument for acknowledging that Asay shot someone in the dark; 10) a claim that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and 11) ineffectiveness for failing to convey a plea offer from the trial court. (Doc. # 152 at 1-3) (listing issues raised but noting "the caption of the ground often does not encompass or even pertain to many of the actual issues raised" Doc. # 152 at n.2).

On August 15, 2011, Respondents filed an answer on the merits to the habeas petition. (Doc. #143). Asay filed a reply abandoning grounds one, seven, nine, and eleven. (Doc.# 147; Doc. #152 at 3). So, only grounds two, three, four, five, six, eight, and ten remained. Thus, there ultimately were seven grounds raised in the federal habeas litigation.

On April 14, 2014, the federal district court denied the federal habeas petition on the merits but granted a certificate of

appealability (COA) on the issue of whether "Petitioner received ineffective assistance of counsel at the penalty phase of trial because counsel failed to investigate, obtain and present additional mitigating evidence." (Doc. # 152 at 51).

Asay, again represented by Tom Fallis, filed a notice of appeal to the Eleventh Circuit. On June 13, 2014, federal habeas counsel Fallis filed a motion to withdrawal the appeal stating that Asay directed him to dismiss the appeal. The Eleventh Circuit voluntarily dismissed the appeal with prejudice.

On January 8, 2016, Governor Rick Scott signed a death warrant setting the execution for Thursday, March 17, 2016, at 6:00 p.m.

Ground I

THERE IS NO DENIAL OF DUE PROCESS OR EQUAL PROTECTION FROM THE CURRENT BRIEFING SCHEDULE OR EXECUTION.

Petitioner Asay asserts that because the case files have been destroyed by previous counsel, the briefing schedule and execution violate due process. Many of the documents in this case have already been recreated and provided to opposing counsel. Regardless, the loss of the case files is not a due process violation or a reason to stay the execution.

Counsel writes that as of the filing of the petition he does not have the trial transcripts or the 3.851 evidentiary hearing transcripts. Pet at 20 n.17. The State made a copy of the entire state proceedings on CD, including the trial, direct appeal, and all the collateral proceedings. Undersigned counsel personally hand-delivered the CD to the repository on Tuesday, January 20, 2016 at 12:10 p.m.¹ A copy of the CD was mailed to opposing counsel. According to the UPS tracking system, that CD was delivered to opposing counsel at 10:19 a.m. on Wednesday, January 20, 2016. Thus, opposing counsel currently has the state and federal court proceedings in this case.

This is a pre-repository case. So, the old public records production that were part of the initial postconviction proceedings

¹ The state included the federal district court's docket sheet for the federal habeas case in the CD but not the underlying pleadings because those documents are available to counsel via the federal CM-ECF system. There was no Eleventh Circuit appeal because Asay voluntarily dismissed his appeal.

were not archived. But the State Attorney's Office provided opposing counsel with its case file. On January 20, 2016, at 8:00 a.m., the trial prosecutor scanned and emailed opposing counsel its files and then sent a CD of the material to opposing counsel as well.

Additionally, the Department of Corrections has provided counsel with Asay's entire medical records. Opposing counsel also sought the inmate's entire file. Opposing counsel has not filed a 3.852(i)(2) written demand on DOC as is required by the rule.²

² Florida Rule of Criminal Procedure 3.852(i)(2), which limits postconviction requests for additional records, requires production of public records upon a finding of the following:

- (A) collateral counsel has made a timely and diligent search of the records repository;
- (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
- (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
- (D) the additional records request is not overly broad or unduly burdensome.

The circuit court has the discretion to deny public records requests that are overly broad, of questionable relevance, and unlikely to lead to discoverable evidence. *Valle v. State*, 70 So. 3d 530, 548-49 (Fla. 2011) (citing *Moore v. State*, 820 So.2d 199, 204 (Fla. 2002)). As the Florida Supreme Court has emphasized, rule 3.852 is not intended to be a fishing expedition for records unrelated to a colorable claim for postconviction relief. *Valle*, 70 So. 3d at 549. While this case is a pre-repository case and therefore, the additional aspect of the rule does not apply, opposing counsel should still file a written demand identifying with particularity what parts of the inmate records are necessary and are not overly broad or unduly burdensome. Just because this is a pre-repository case, that does not authorize opposing counsel to go on a fishing expedition.

Instead, he filed a motion to compel the Department to provide him Asay's entire inmate record. Inmate records, as opposed to inmate medical records, contain notations regarding what the prisoner ate and whether he went into the yard that day. There are hundreds of pages of them which must be reviewed and redacted. Opposing counsel did not identify any particular parts of the inmates record that he wanted, such as any disciplinary reports (DRs), and did not file a written demand as is proper.

Opposing counsel asserts that he needs Asay's inmate records to raise a *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), competency-to-be-executed claim but the critical documents for such a claim are the inmate's medical records and he was already provided those records. Opposing counsel admitted at the hearing that he had not even read the inmate's medical records provided to him yet he still insisted he needed the inmate's entire file to raise a *Ford* claim. The State considers the oral request for the entire inmate's record to be an improper fishing expedition. *Bryan v. State*, 748 So.2d 1003, 1006 (Fla. 1999) (affirming the denial of public records requests, during warrant litigation, which the trial court had found "to be at best a 'fishing expedition' and at worst a dilatory tactic.").

Moreover, on January 21, 2016, the trial court held a status conference to address matters such as the motion to compel the Department of Corrections to provide inmate records and the JAC contract. The trial court resolved the contract dispute by

entering an order allowing opposing counsel to exceed the 10 case statutory cap. Mr. McClain will be paid. The trial court also ordered DOC to produce Asay's entire inmate records once a written demand was filed. Additionally, the trial court provided opposing counsel two additional days to file the successive 3.851(h) motion. The trial court had previously scheduled the successive 3.851(h) motion to be file by Monday, January 25, 2016 but rescheduled the due date to Wednesday, January 27, 2016, to give opposing counsel additional time to review the numerous documents he has already received. The trial court also scheduled a third status hearing to verify the progress on the public records production.

Counsel ignores that he would be in much the same position if none of the files had been lost. In either case, he would be faced with reading thousands of pages of records regardless of the source. Counsel knew that he personally had no familiarity with the case when he accepted the appointment. He was aware of that fact when he took the appointment as counsel of record.

More importantly, counsel also ignores that he is part of a larger defense team. In the petition, counsel refers to his defense team as including three highly-experienced capital litigators - Marty McClain, Linda McDermott, and John Abatecola. And that team also includes federal habeas counsel Fallis who handled merits briefing in the federal district court and is familiar with this case. Fallis was appointed as counsel by the federal court in August of 2010. Fallis has been Asay's lawyer for

years. Asay's defense team includes an attorney who is familiar with both him and this case.

Due Process/Equal Protection

Opposing counsel asserts the loss of some of the records in this case is a due process violation. Prior federal habeas counsel Mary Katherine Bonner gave some of case files to current habeas counsel Fallis who destroyed the files due to their condition which rendered them useless. While Ms. Bonner may have some of the remaining case files, she seems unable to locate them and they are likely to be in the same useless condition as those given to Mr. Fallis.

No doubt many of the 33 boxes referred to in the petition were boxes containing record on appeal documents from state and federal courts and prior public record requests that have now been provided to opposing counsel. And while some of the material in the 33 boxes may be permanently lost, this Court had held the loss or destruction of files does not amount to a due process violation. *Jones v. State*, 928 So. 2d 1178, 1192 (Fla. 2006) (rejecting a due process challenge to the capital collateral proceedings where trial counsel's files were destroyed in a fire). Moreover, counsel does not identify any particular argument he is being prevented from raising by the loss of those case files. There is no due process violation.

As to equal protection, with the trial court's ordering the

production of the entire inmate record despite there being no relevancy establishes, counsel, by ignoring the rules and the limitations on public records requests to relevant materials, will have received more public records in this case than other death row inmates normally have received. There is no equal protection violation.

The petition is the proverbial case of squealing before you are stuck.³

Stay of execution

A "stay of execution is an equitable remedy" that is "not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Equity "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584; see also *Gomez v. United States Dist. Court*, 503 U.S. 653, 654, 112 S. Ct. 1652, 1653 (1992) (observing that "[e]quity must take into

³ Asay lacked state postconviction counsel when the warrant was signed but Asay was represented in federal court by CJA counsel Thomas Fallis. Prior state postconviction counsel, Dale Westling, filed a motion to withdraw when the case moved from state court into federal court with Mary Katherine Bonner representing Asay at that point in federal court. The state trial court granted that motion to withdraw in May of 2005. Undersigned counsel was unaware that Asay was not represented in state court because the trial court allowed state registry counsel Dale Westling to withdraw in violation of the statute and registry contract without notification of the order to the Office of the Attorney General. Undersigned counsel thought Dale Westling was still state postconviction counsel of record at the time the warrant was signed.

consideration the State's strong interest in proceeding with its judgment. . ."); *Hill v. McDonough*, 464 F.3d 1256, 1259 (11th Cir. 2006) (refusing to grant a stay and discussing strong equitable principles against a stay). A Court "must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

Asay has not identified any harm from the loss of some of the case files. Asay provides no real reason for this Court to grant a stay. The problems regarding the records in this case are being handled in the trial court. Basically, the trial court has already provided opposing counsel with the majority of relief he is seeking in his petition to this Court. Furthermore, Asay's request for a stay based on the loss of some of the records amounts to a request for an indefinite stay. This Court should deny any stay of execution.

Accordingly, the petition should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF has been furnished via the e-portal to MARTIN J. MCCLAIN, McClain & McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334 this 21st day of January, 2016.

/s/ Charmaine Millsaps
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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New
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