IN THE SUPREME COURT OF FLORIDA

NO. 16-102

MARK JAMES ASAY,

Petitioner,

v.

JULIE L. JONES,

Secretary, Florida Department of Corrections,

Respondent.

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

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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

Respondent raises two points of contention in opposition to Mr. Asay's request for relief. One point focuses on the theory that Mr. Asay is being ably represented by counsel long familiar with and involved in his case, thus belying any notion of prejudice to him. The other point alleges that the trial court has already addressed many of Mr. Asay's concerns, thereby negating any need for a stay.

As will be demonstrated herein, Respondent's assertions have little basis in fact and should be rejected. As the Eleventh Circuit Court of Appeals recently observed, "the State cannot dictate reality by fiat." *Hardwick v. Sec'y, Fla. Dep't of Corrs*, 803 F.3d 541, 555 (11th Cir. 2015).

B. PRIOR COUNSEL

Respondent does acknowledge the fact that attorney Dale Westling was permitted to withdraw as Mr. Asay's counsel in

violation of the statute and the registry contract (Response at 16, fn 3). Moreover, Respondent concedes that Mr. Asay lacked state postconviction counsel when his warrant was signed (Response at 16, fn 3). Respondent, however, is of the opinion that all is just because Mr. Asay has had his federal habeas counsel, Tom Fallis, at his side, "for years" (Response at 15).[1] Indeed, Respondent goes so far as to say that Mr. Asay's current defense team "includes federal habeas counsel Fallis who handled merits briefing in the federal district court and is familiar with this case." (Response at 15).

The accuracy of Respondent's observations extends only to the fact that Mr. Fallis did represent Mr. Asay as his federal habeas counsel at a point in time. The reality is, however, that Mr. Fallis has not represented Mr. Asay since 2014, nor is he part of Mr. Asay's current defense team. A recent news article regarding an interview with Mr. Fallis emphasizes this point:

> But Fallis said he withdrew from the case in 2014 and would have had nothing to do with Asay's defense in state court, anyway. **Fallis was appointed to represent Asay only in federal appeals**, he told the News Service of Florida on Thursday.
>
> "I'm out. I've been out since 2014. And I have no input into this," Fallis said. "There's nothing in federal court for me to represent him on. And if you already withdrew, how do you become a lawyer again? Are you a lawyer for life?"

[1]According to Respondent, Fallis was appointed as counsel by the federal court in August of 2010 (Response at 15).

Dara Kam, *State says March execution should move forward,* News Service Florida (January 21, 2016) (Att. A) (emphasis added).

C. THE THIRTY-THREE MISSING BOXES

Respondent takes the position that because some records have been produced since the time Mr. Asay filed his habeas petition, the loss of the case files is not a due process violation or a reason to stay the execution (Response at 11). Further, Respondent seems to be of the opinion that Mr. Asay has no right to complain as he has been generously afforded an extra two days in which to file a postconviction motion.[2]

Respondent's argument ignores the reality that while Mr.

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[2]According to Respondent, "The trial court had previously scheduled the successive 3.851(h) motion to be file[d] 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." (Response at 14).

Ignored by Respondent is the fact that the extension was limited to two days because of the pendency of an active death warrant and because of this Court's scheduling order requiring the completion of all circuit court proceedings by February 3, 2016. The time allotted to undersigned counsel, even with a two day extension, is simply not adequate. Moreover, Respondent ignores the fact that undersigned counsel still does not have all of the necessary files he requires. For example, he does not have trial counsel's files, nor does he currently have predecessor collateral counsel's files despite a provision in the registry contract and in § 27.711(8) that requires "An attorney who withdraws or is removed from representation shall deliver all files, notes, documents, and research to the successor attorney within 15 days after notice from the successor attorney."

Asay has been provided with approximately four to five boxes of files and records at this juncture, he originally had thirty-three boxes.[3] Moreover, Respondent ignores the fact that as records continue to trickle in, Mr. Asay's counsel needs adequate time to review them in order to provide effective representation.[4] Contrary to Respondent's assertion, Mr. Asay is not "in much the same position if none of the files had been lost." (See Response at 14).[5] Crucial time is being expended

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[3]Mr. Asay's counsel was notified yesterday afternoon that former federal CJA counsel Mary Katherine Bonner had finally located three boxes of materials relating to Mr. Asay. Arrangements had been made to have those three boxes delivered to undersigned counsel today. However, Ms. Bonner has now advised that due to the fact that it is raining, the delivery of the boxes today is uncertain. Still not having possession of the three boxes, Mr. Asay's counsel does not know of the condition of the documents contained therein and the extent to which they will aid in Mr. Asay's defense.

[4]In order to attempt to continue to reconstruct Mr. Asay's litigation files and public records, Mr. Asay filed three demands for additional public records today. A demand to the Office of the State Attorney (SAO), for additional public records concerning three prosecution witnesses; a demand to the Florida Department of Law Enforcement (FDLE), for public records concerning FDLE's investigation of Mr. Booker and Mr. McDowell's homicides; and a demand to the Jacksonville Sheriff's Office (JSO), concerning JSO's investigation of Mr. Booker and Mr. McDowell's homicides. The demands were prepared after reviewing the records received from the Office of the State Attorney and determining what other agencies and records are necessary to obtain on behalf of Mr. Asay. The demands also indicate what records the agencies produced and were included in the records received from the SAO. Mr. Asay is not requesting the agencies to duplicate any of the records already received.

[5]Respondent ignores the fact that Mr. Asay has not had registry counsel in place for over ten years. Had counsel been in place for the past ten years he would already have been

just to place counsel in the position of being able to know the basic facts of Mr. Asay's case in order to determine what legal and factual investigation is warranted that was not conducted during the past ten years because in violation of Florida law Mr. Asay did not have court-appointed registry counsel. At the very least, the unfairness to Mr. Asay should be remedied 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).

Respondent further claims that because Mr. Asay is being provided with his entire DOC file, there can be no equal protection violation (Response at 16). According to Respondent, "[W]ith the trial court's ordering the production of the entire inmate record despite there being no relevancy established, counsel, by ignoring the rules and the limitations on public

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familiar with those records and would not be starting from scratch. He would already have been evaluating legal developments in the past ten years in order to analyze potential claims arising from those legal developments. He would have been in a position to be on the look out for factual developments in Mr. Asay's case that may have given rise to a basis for a motion to vacate or petition for writ of habeas corpus. Indeed, registry counsel during the past ten years would have been obligated to exercise diligence on behalf of Mr. Asay as to both legal and factual developments that may have warranted collateral litigation.

records requests to relevant materials, will have received more public records in this case than other death row inmates normally have received." (Response at 16).

Respondent's argument here makes no sense whatsoever.[6] The records of other DOC inmates would include their entire DOC file.[7] Mr. Asay himself presumably had his DOC file before it was destroyed. Respondent fails to explain how Mr. Asay being provided with a file that all other death row inmates possess negates the fact that he is missing so many other files that similarly situated inmates possess.[8]

D. STAY OF EXECUTION

Respondent submits that no stay of execution is necessary on the basis that Mr. Asay has not identified any harm from the loss

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[6]Respondent appears to be taking issue with the fact that, despite not having any records, and despite there being no records at the Repository, Mr. Asay did not abide by Rule 3.852(i)(2) in his request for his entire file from the DOC (Response at 12). And, ignoring the difficult position that Mr. Asay's counsel faces in having to obtain and review thousand of documents, Respondent laments that there are "hundreds of pages" in Mr. Asay's inmate records "which must be reviewed and redacted." (Response at 13).

[7]For some unknown reason, Respondent characterizes Mr. Asay's request for his own file, which every other death row inmate likely possesses, as a "fishing expedition." (Response at 12, fn 2, 13).

[8]Indeed, Respondent's argument ignores the fact that the DOC files are not all of the files and records that are missing. Obtaining the DOC records, as well as records from the State Attorney and the Attorney General is merely the first step in trying to reconstruct the record that Mr. Asay was entitled to have preserved under § 27.711(8).

of the case files (Response at 17).[9] Further, according to Respondent, Mr. Asay's request for a stay based on the loss of some of the records amounts to a request for an indefinite stay (Response at 17).

Respondent's argument here is disingenuous at best. The harm to Mr. Asay is evident: He is being forced to proceed without sufficient time to obtain and review the records and files to which he is entitled. In short, Mr. Asay is being denied representation. *See Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988).

Moreover, as Respondent is aware, Mr. Asay is asserting that a stay of execution has to be for an indefinite period. As Mr. Asay submitted in his petition, this Court can enter a stay of execution and set a time table for counsel to obtain and review copies of Mr. Asay's files and to file any claims discovered on which Mr. Asay has a basis for seeking relief. *See Hildwin v. Dugger*, Case No. 76, 145 (Fla. June 21, 1990).

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[9]As indicated in the petition, this Court in the past has granted stays of execution because an inmate was without collateral representation (James Agan in 1985) or because collateral counsel did not have the files and records (Paul Hildwin in 1990). Neither Mr. Agan nor Mr. Hildwin was required to show the harm arising from the deprivation of counsel or from the absence of the files and records in order to demonstrate a stay was warranted. Of course without counsel or without the files and records, prejudice could not anticipatorily be shown. However, after their executions were stayed and Mr. Agan received counsel and Mr. Hildwin received the files and records, both were ultimately granted new trials.

Respondent also notes that in determining whether to grant 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." (Response at 17).[10] In that vein, Mr. Asay submits that a stay of execution is also warranted in light of the United State's Supreme Court's recent decision in *Hurst v. Florida*, 577 U.S. ____ (2016). In *Hurst*, the Supreme Court by a vote of 8-1 concluded that Florida's capital sentencing statute was unconstitutional: "We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 2016 WL 112683 at *3.

Mr. Asay submits that the decision in *Hurst* was a tectonic shift in the law which will likely result in him obtaining relief.[11] The declaration that Florida's capital sentencing statute is unconstitutional can only be described as a development of fundamental significance or a jurisprudential upheaval. *See Hughes v. State*, 901 So. 2d 837, 848 (Fla. 2005)

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[10]Of course when Mr. Agan received his stay in 1985 and when Mr. Hildwin received his stay in 1990, prejudice was presumed from the denial of the tools necessary to demonstrate prejudice.

[11]Certainly, Mr. Asay is proceeding in a diligent manner, as the decision in *Hurst* was just rendered on January 12, 2016.

(Lewis, J., concurring in result only) ("Based on language in both *Apprendi* and *Ring*, these decisions initially appeared to implicate constitutional interests of the highest order and seemed to go to the very heart of the Sixth Amendment.").

Mr. Asay needs adequate time to assess the implications of *Hurst*, investigate the impact on how it affects a capital penalty phase proceeding, review the record in his case in light of the decision, and to determine what nonrecord evidence exists as to how the decision would have changed trial counsel's strategic approach to his capital trial.

When *Hitchcock v. Dugger*, 481 U.S. 393 (1987), issued, this Court ultimately determined consideration of nonrecord evidence as to *Hitchcock* claims was necessary in evaluating the impact of *Hitchcock* on specific penalty phase proceedings. *Hall v. State*, 541 So. 2d 1125, 1126 (Fla. 1989) (Florida's pre-*Hitchcock* law "precluded Hall's counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstance"); *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991) ("according to the affidavits filed with this motion, Meeks' counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction"). Accordingly, this Court concluded that *Hitchcock* claims were required to be presented in Rule 3.850 motions. *Hall v. State*, 540 So. 2d at 1128 ("We hold, therefore, that *Hitchcock* claims

should be presented to the trial court in a rule 3.850 motion for postconviction relief and that, after the filing of this opinion, such claims will not be cognizable in habeas corpus proceedings."); *Meeks v. Dugger*, 576 So. 2d at 716 ("*Hitchcock* claims should now be raised by motion for postconviction relief. However, Meeks' petition for habeas corpus was filed before our decision in *Hall*. Therefore, we remand this case to the trial court for an evidentiary hearing directed to the *Hitchcock* allegations of this petition as if they had been filed pursuant to Florida Rule of Criminal Procedure 3.850.").

Hurst, like *Hitchcock*, has enormous implications for how trial counsel would approach a capital trial, and in particular the penalty phase proceeding. By changing who decides the facts necessary for death eligibility and by treating those facts as elements of the offense of capital murder, the decision in *Hurst* also changes the strategies that trial counsel in Florida would employ in a capital trial. Counsel must investigate by speaking with trial attorneys regarding how *Hurst* would change how the penalty phase was conducted. This kind of investigation requires time as it did in the post *Hitchcock* cases. It also requires evidentiary development. For example, on its face *Hurst* holds that a jury's decision as to the facts necessary under Florida statutes for rendering death eligibility must be conclusive, not advisory. Certainly, this would cause trial counsel to object to

any instructions informing a jury that its penalty phase decision is advisory. Trial counsel would undoubtedly go further in this regard and emphasize to the jury its responsibility for a death sentence. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Moreover, the *Hurst* decision observes that Florida's statute sets forth the facts necessary for death eligibility in a much different fashion that did Arizona law. *Hurst*, 2016 WL 112683 at 6, specifically set forth the additional statutorily defined facts required to be found to render the defendant death eligible are:

> **"...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3).

This is unlike Arizona law that provided that the finding of one aggravating factor rendered the defendant death eligible. *See Ring v. State*, 25 P.3d 1139, 1151 (Ariz. 2001)[12] This issue not only needs to be pled, but also investigated. Nonrecord evidence needs to be developed and presented regarding how this aspect of *Hurst* would have impacted Mr. Asay's penalty phase proceeding.

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[12]Unlike the Arizona law at issue in *Ring*, Florida law only permits the imposition of a death sentence upon a factual determination **"...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."** § 921.141(3).

Given these circumstances, Mr. Asay submits that a stay of execution is warranted.

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 and review 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 REPLY has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 22nd 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.

/s/ Martin J. McClain
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EXECUTION DELAY SOUGHT AMID MISSING RECORDS
(Subscribers: Updating with response from governor's office.)

By DARA KAM
THE NEWS SERVICE OF FLORIDA

THE CAPITAL, TALLAHASSEE, January 19, 2016……Attorneys for a convicted murderer scheduled to be put to death on St. Patrick's Day are asking the Florida Supreme Court for a stay, arguing that records --- including some stored in an insect-infested shed --- were destroyed.

Mark James Asay's case is even more troubling because the Death Row inmate hasn't had a lawyer to represent him in state court for nearly a decade and had no legal representation when Gov. Rick Scott signed the warrant ordering Asay's execution, Asay's new attorney wrote in a motion filed Tuesday.

A Jacksonville judge appointed Marty McClain to represent Asay last Wednesday, five days after Scott signed the warrant scheduling Asay's execution for March 17. A circuit judge gave McClain until Jan. 25 --- 12 days after he was appointed to represent Asay --- to file any motions for relief.

That's not enough time, McClain argued in Tuesday's 27-page filing. Proceeding with the case "would be a violation of due process, equal protection and fundamental fairness," he wrote.

"Providing an attorney without the client's files and records is the equivalent of providing no counsel at all," McClain wrote.

Hours after McClain filed his request for a stay, the Supreme Court gave Department of Corrections Secretary Julie Jones until 5 p.m. Thursday to respond.

Scott may not have been aware that Asay did not have a lawyer, as required by state law for inmates on Death Row, when the governor signed the death warrant.

"Given that the statute requires that collateral counsel be in place at all times, I would think it would be wise for the governor's office to make sure that the statute has been complied with before a warrant is signed," McClain said in a telephone interview Tuesday.

In the court filing, McClain wrote that Scott's staff contacted the state agency that represents Death Row inmates after the warrant was signed on Jan. 8. Capital Collateral Counsel for the Northern Region Robert Friedman told the governor's representative that his agency did not represent Asay.

Scott's staff then contacted Thomas Fallis, a private attorney who had represented Asay in federal

court, according to Tuesday's filing. Fallis told the governor's aide that he no longer represented Asay.

"What additional steps the governor's office took to notify Mr. Asay's state court counsel of the death warrant is unclear," McClain wrote. "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 post-conviction counsel."

A spokesman for Scott said that the governor's office contacted Fallis before the warrant was signed.

"As is standard procedure in our office, we spoke to his counsel of record," spokesman John Tupps said in an email.

Fallis withdrew from Asay's case in mid-2014, according to McClain.

Asay was convicted in 1988 of the murders of Robert Lee Booker and Robert McDowell in downtown Jacksonville. Asay allegedly shot Booker, who was black, after calling him a racial epithet. He then killed McDowell, who was dressed as a woman, after agreeing to pay him for oral sex. According to court documents, Asay later told a friend that McDowell had previously cheated him out of money in a drug deal.

McClain said he and his partner, Linda McDermott, started trying to locate Asay's files after they were assigned to the case last week.

"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," McClain wrote, adding that 33 boxes of records pertaining to Asay's file are missing or were destroyed.

Asay was once represented by the predecessor of the Capital Collateral Counsel for the Northern Region, but the Legislature shut down the agency in 2004. At least some of Asay's records were transferred to Mary Katherine Bonner, a lawyer who once worked on his case, according to McClain's brief filed Tuesday.

Fallis, who represented Asay in federal court from 2010 through 2014, obtained about 10 boxes of documents from a shed that was "infested with snakes, rats and insects" where Bonner stored them, McClain wrote.

Fallis decided the files were "worthless due to the condition in which they were stored" and ultimately destroyed them, McClain wrote.

McClain, who has worked on death penalty cases for nearly three decades and represented more than 250 clients, and his partner "have never found themselves in such dire and disturbing circumstances when representing a capital post-conviction defendant with an active death warrant," the lawyers wrote.

During a case-management hearing Friday, lawyers with Attorney General Pam Bondi's office and the state attorney who prosecuted Asay told McClain they would provide copies of their records regarding Asay's case by the end of the day on Tuesday. Bondi's office was unaware that Asay had gone so long without a lawyer, McClain wrote.

McClain is also trying to get copies of other case files from the Department of State's archives, but he is unsure when the documents will be provided, he wrote. As of Tuesday, he still did not have copies of the trial court transcripts.

"Historically, this (Supreme) 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," McClain wrote.

The Florida Supreme Court has granted stays in at least two other cases when new lawyers for inmates scheduled for execution needed more time. In 1990, the court delayed the execution of Paul Christopher Hildwin to give his lawyers extra time to review his files. In 2014, the court threw out Hildwin's death sentence based on new DNA evidence.

--END--
1/19/2016