In the Supreme Court of Florida

CASE NO. SC17-1536

MARK JAMES ASAY, *Petitioner*,

v.

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

ANSWER TO SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

On August 18, 2017at 11:53 p.m., Asay, represented by registry counsel Martin J. McClain, filed a petition for writ of habeas corpus in this Court raising a claim that this Court's error in classifying the race of the second victim as black violates due process relying on *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). Asay asserts that based on this "false fact" this Court must reopen three of its prior decisions. The habeas petition amounts to motion for rehearing of the direct appeal. Asay murdered two people in separate incidents. There is no dispute regarding the race of the first victim as being black or Asay's racial motivation in the first murder. And, regardless of the race of the second victim, the CCP aggravator remains and Asay' death sentence for the murder of two victims remains proportionate. The race of the second victim does not matter to the

convictions or death sentence. All the aggravators remain the same regardless of whether the second victim was white, black, or mixed race. This Court should not deny the habeas petition.

Facts and procedural history

There was a dispute regarding the race of the second victim. *Compare Asay v. State*, _ So. 3d _, 2017 WL 3472836 (Fla. August 14, 2017) ("We have previously described the victim born Robert McDowell as 'a black man dressed as a woman.' McDowell was known to friends and neighbors as Renee Torres. Torres was identified at trial by everyone who testified as white and Hispanic. Renee Torres née Robert McDowell may have been either white or mixed-race, Hispanic but was not a black man"); *with Asay v. State*, 210 So.3d 1, 6 (Fla. 2016) (noting both victims were black).

The testimony at trial regarding the race of the second victim was contradictory. Deputy Chief Medical Examiner, Dr. Bonifacio Floro, testified that Robert McDowell was black. (Vol. II 431). Furthermore, an autopsy photograph of Robert McDowell's face was introduced as State's exhibit #3 for purposes of identification during the medical examiner's testimony and was published to the jury. (T. Vol. II 429-430).[1] Detective Roger Housend, the lead detective, testified

[1] The medical examiner's investigative report, which was not introduced at trial, also listed McDowell as black.

he went to both murder scenes and that there "were two dead black males." (Vol. II 463).

On the other hand, Charles Curtis Moore, Jr., known as "Danny" Moore, who lived near Robert McDowell when he was growing up and had known him for several years, testified that he was a "white boy." (T. Vol. II 414; Vol. III 646; 655; 670-71). It was defense counsel that brought that testimony out during his recross. (Vol. III 670-71). Charles Lee Moore, known as "Charlie" Moore, testified that he had seen Renee Torres née Robert McDowell's around and McDowell's street name was Scooby and Scooby was known as a white person. (Vol. III 679; 696). And again, it was defense counsel that brought that testimony out during his cross-examination. (Vol. III 696). On redirect, the prosecutor asked Moore about his prior deposition testimony and Moore testified that McDowell was "a little dark-skinned." (Vol. III 713-714).

In the initial brief of the direct appeal in this Court, appellate defense counsel wrote several times that "Mark Asay is white and the victims are black." *Asay v. State*, No. 73,432 (IB at 14, 18). The issue raised in the direct appeal was not a claim of factual error regarding the race of the second victim. Rather, the issue raised was that there was insufficient evidence of a racial motive for both murders other than Asay's use of the word "nigger." *Asay v. State*, No. 73,432 IB at 18-24.

Standard of review

The standard of review is *de novo*. Whether a factual error violates due process is a pure legal question and purely legal issues are reviewed *de novo*. *Puglisi v. State*, 112 So.3d 1196, 1204 (Fla. 2013) ("Pure questions of law are subject to *de novo* review" quoting *Sanders v. State*, 35 So.3d 864, 868 (Fla. 2010)). Not only is due process a purely legal issue but a habeas petition is an original proceeding meaning that there is no ruling from the lower court for an appellate court to defer to. The standard of review necessarily is *de novo*.

Procedural and time bar

The issue is procedurally barred. It is simply too late to raise a factual dispute about the race of the second victim. The testimony regarding the race of the second victim has been contradictory since the trial in 1988. Furthermore, this Court's direct appeal opinion containing the statements that both victims were black was issued in 1991. *Asay v. State*, 580 So.2d 610, 611 (Fla. 1991) (describing Robert McDowell as "a black man dressed as a woman"); *Asay v. State*, 580 So.2d at 613 (stating that the second murder "occurred twenty minutes after Asay shot another black."). If Asay wanted to dispute this Court's characterization of second victim as black he needed to do so in his rehearing of the direct appeal that he filed in May of 1991. This issue should have been raised in 1991, not in 2017. The entire habeas petition is actually a 26-year late motion

for rehearing of the direct appeal.

Merits

First, regardless of the race of either of the two victims or the motive for either of these two murders, Asay murdered two victims in separate incidents that night. On Friday, July 17, 1987, in downtown Jacksonville, Asay shot the first victim, Robert Lee Booker, who then ran away. Approximately 20 minutes later that same night, and in a slightly different location of downtown Jacksonville, Asay shot the second victim, Robert McDowell, six times. According to the medical examiner, Dr. Floro, the second victim, Robert McDowell, had six gunshot wounds to his body including three fatal shots to his chest. (T. Vol. II 431, 432-434, 436). Given the fact that Asay had shot another person earlier that night, as well as the sheer number of shots Asay fired at the second victim and the location of many of those shots into the second victim's chest, there is no valid dispute regarding the premeditated nature of the second murder of Robert McDowell. Regardless of either victim's race, Asay murdered two people.

Second, regardless of the race of the second victim or the motive for the second murder of Robert McDowell, there is no dispute about the race of the first victim or Asay's racially charged motive for the first murder of Robert Booker. Opposing counsel does not dispute that the first victim was black nor does he dispute the first murder was motivated at least in part by racial animus. Asay

called the first victim, Robert Booker, a nigger immediately before murdering him and immediately after the murder, told his friend that he killed the victim to show the "nigger who is boss." Asay's friend, James Laton O'Quinn, Jr., known as "Bubba" O'Quinn, who had been drinking with Asay the night of the murders and was an eyewitness to the murders, testified at trial that Asay said: "Fuck you, nigger and shot him" referring to the first victim. (T. Vol. II 488; 499). Bubba testified that the first victim was a black male repeatedly. (T. Vol. II 499-500). The first victim ran away and Bubba and Asay drove off in Mark Asay's truck. (T. Vol. II 500-501). Bubba pulled over after two blocks and asked Asay why he shot the first victim. Bubba testified that Asay replied "because you got to show a nigger who is boss." (T. Vol. II 501). Asay's own brother, Robert C. Asay, known as Robbie Asay, who was also an eyewitness to the first murder, testified at trial that Asay said: "You know you ain't got to take no shit from these fucking niggers" just before shooting the first victim. (T. Vol. II 550; 559). There was also testimony from a fellow inmate that Asay had racist tattoos, included a swastika tattoo, "White Pride" tattoos and the initials "SWP" tattoos which stands for supreme white power. (T. Vol. III 744; 752).[2] As this Court previously observed, in rejecting

[2] Asay waived the *Giglio* claim related to Gross by refusing to proffer Gross's testimony at the state evidentiary hearing and refusing to allow the prosecution to cross-examine Gross, even though Gross was actually present at the evidentiary hearing in what this Court described as an "evasive maneuver." *Asay*, 769 So.2d at 982-83. Opposing counsel's assertion that the state postconviction court "refused to allow Mr. Asay to call Mr. Gross as a witness and present his testimony" is incorrect. Pet at 12. And the entire Gross claim was really designed

an attack on Gross's testimony that Asay has racist tattoos, Asay made no assertion that he does not in fact have the tattoos. *Asay v. State*, 769 So. 2d 974, 983 (Fla. 2000). So, regardless of the second victim's race or the motive for murder for the second murder, the first victim was black and the first murder was racially motivated.

Third, the jury and the sentencing judge were aware of the dispute regarding the second victim's race and the motive for the second murder. The jury and judge heard the contradictory testimony regarding the second victim's race and saw a photograph of the second victim's face. The jury heard Charles Curtis Moore, Jr. known as "Danny" Moore's testimony. He testified that he lived near Robert McDowell when he was growing up and had known him for several years, and testified that he was a "white boy." (T. Vol. II 414; Vol. III 646; 655; 670-71). It was defense counsel that brought the testimony regarding the second victim's race during his recross of Danny Moore. (Vol. III 670-71). The jury also heard Charles Lee Moore's testimony. Charlie Moore testified that he had seen Renee Torres née Robert McDowell's around and McDowell's street name was Scooby and Scooby was known as a white person. (Vol. III 679; 696). And again, it was defense counsel that brought that testimony out during his cross-examination of

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as a means of disqualifying the prosecutor anyway. Once the state postconviction court refused to disqualify the prosecutor during the state postconviction proceedings, state postconviction defense counsel Kissinger refused to present Gross.

Charlie Moore. (Vol. III 696). On redirect, the prosecutor asked Charlie Moore about his prior deposition testimony and Charlie Moore testified that McDowell was "a little dark-skinned." (Vol. III 713-714). The jury and the sentencing judge were also well aware that there was a dispute as to Asay's motive for the second murder. Asay may well have murdered the second victim, Robert McDowell, known as Renee, for being a transvestite. Charles Curtis Moore, Jr. known as "Danny" Moore, testified that he heard Asay telling Charlie what happened that night. (T. Vol. II 414; Vol. III 646; 650). Asay said he kissed the second victim and realized that she was a male. (T. Vol. II 414; Vol. III 646; 651). Asay then immediately grabbed her by her left arm, while she was begging "Please, don't hurt me," and shot her four times and "finished off" the second victim with the last two shots. (T. Vol. III 651). Alternatively, Asay may have shot the second victim due to a prior bad deal regarding oral sex. "Bubba" O'Quinn testified at trial that Asay told him he killed the second victim because "the bitch had beat him out of ten dollars" on a "blow job." (T. Vol. II 512). And the jury also heard that there was yet another possible motive regarding a prior bad drug deal. Charlie Moore testified that Asay told him say that he had shot McDowell because McDowell had previously "cheated him on a drug deal" for $10 dollars and "if he ever got him that he would get even." (Vol. III 679; 689). Danny Moore testified that he heard Asay telling Moore that his plan was to get McDowell in the truck and they "would take her off and screw her and kill her." (T. Vol. III 650-651). All these witnesses

were the State's witnesses. Asay did not present a defense case at trial. (T. Vol. IV 806). So, the jury was aware that even the State witnesses did not agree on the motive for the second murder. The jury and sentencing judge knew there was a dispute about the race of the second victim and about the motive for the second murder being racial or not. Provided the jury knows there is a dispute regarding the evidence, due process requires no more. Indeed, that is why we have juries - to resolve such disputes. There was no due process violation.

Asay asserts that the "evidence that Mr. Asay was a racist melts away and needs to be revisited." Pet. at 9, n.5. No, it does not. The evidence that the first victim was black and that the first murder was racially motivated remains uncontradicted. Furthermore, it does not matter objectively what race the second victim actually was, it matters what race Asay thought the second victim was. The autopsy photograph of Robert McDowell's face, which was published to the jury, must have shown a person that looked sufficiently black for the prosecutor's theory regarding the race of second victim to be viable to the jury. (T. Vol. II 429-430). A perpetrator can engage in, and be guilty of, a racially motivated murder even if that perpetrator is mistaken regarding the victim's true DNA profile. If the perpetrator thinks the intended victim is a particular race but the victim is not in fact that particular race, that crime remains a hate crime. *People v. Lawson*, 155 Cal. Rptr. 3d 236, 241 (Ct. App. 2013) (explaining that a mistake of fact defense requires, at a minimum, an actual belief in the existence of circumstances, which,

if true, would make the act with which the person is charged an innocent act).

Asay argues that evidence "of racial animus towards blacks is not relevant in a case in which a white man is charged with killing another white man" which is not true if the perpetrator thinks the second victim is black. And it certainly is not true of a case where there is no dispute that the first victim was black. There is simply no dispute that Asay showed racial animus towards his first victim.

Opposing counsel insists that Asay's racial animus towards blacks is irrelevant and inadmissible in a prosecution of Asay for killing a white man. Petition at 37. Asay's racial animus, however, is relevant and admissible in a prosecution of Asay for killing a black man and a white man, much less a black man and mixed race man.

And, even if the second victim was indisputably and clearly a light-skinned white, the State would still be entitled to try both murder counts together based on the sheer number of factual connections between these two murders including the time of the murders, the place of the murders, and the fact that the bullets recovered from both victims were from the same murder weapon. § 90.404(2)(a), Fla. Stat. (1988) (providing that similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .); *Barnett v. State*, 151 So. 3d 61, 62 (Fla. 4th DCA 2014) (concluding that evidence related to a second shooting was

admissible in a murder prosecution as *Williams v. State*, 110 So.2d 654 (Fla.1959), rule evidence because both crimes involved the same firearm). And the State would still be entitled to pursue its theory that the first murder was racially motivated at that single trial of both murder counts even if there was no doubt about the race of the second victim. Opposing counsel insists that the State cannot have different theories of prosecution regarding the motives for the two murders. But the State can have two different motives. A defendant can be both a white supremacists and a bigot toward transvestites or a white supremacists and just plain homicidal. One does not preclude the other. The State can have a racial motive for the first murder and a nonracial motive for the second murder at the same trial.

Opposing counsel focuses the sentencing judge's statement in the sentencing order supporting the cold, calculated, and premeditated aggravator (CCP) that the murder was CCP because "the Defendant committed one premeditated murder, then rode around the downtown area of Jacksonville for a period of time, during which there was a substantial period in which he could reflect on the fact that he had just taken the life of another human being. Subsequently, without the slightest remorse or hesitancy, he selected a second person of the same race and social circumstances as the first victim, and proceeded coldly and calculatedly to execute him, shooting him repeatedly to ensure his death." (R. 161; T. 1106). Regardless of the race of the second victim,

the majority of this statement is correct. The sentencing judge's main point was that Asay killed two people in two separate incidents. There is no dispute that Asay murdered two different people during two separate incidents that night. It is also undisputed that Asay shot the second victim repeatedly. Asay shot the second victim six times including repeatedly in his chest. Nor is there any dispute about the victims' social circumstances. The CCP aggravator is supported by the facts of the murders regardless of the second victim's race.

And the other aggravators remain valid regardless of the victims' race as well. One of the aggravators the trial court found applied to both murders was the under-sentence-of-imprisonment aggravator. *Asay*, 580 So.2d at 612. That aggravator applied because Asay was on parole. But that aggravator concerns Asay's recidivist status, not the victims' race. That aggravator still applies regardless of either victim's race. The other aggravator was the previously-convicted-of-a-capital-felony aggravator based on the contemporaneous murder conviction *Id.* That aggravators applies any time there are multiple victims regardless of their race. Both of these aggravators apply and remain valid regardless of the race of either victim.

Opposing counsel's reliance on *Johnson v. Mississippi*, 486 U.S. 578 (1988), is misplaced. *Johnson* involved a prior conviction that was used as the basis for an aggravating circumstance to impose a death sentence that was later vacated. There is no real analogy between a vacated conviction and contradictory evidence

about the race of the second victim and the motive for the second murder. The only way *Johnson* could possible apply to a case such as this is if there was a hate crime aggravator and that aggravator that was found as to the second victim. But there is no such aggravator in Florida's list of statutory aggravators. *Johnson* does not apply.

Opposing counsel's reliance on *Freeman v. State*, 761 So. 2d 1055, 1068 (Fla. 2000), and *Freeman v. State*, 858 So. 2d 319 (Fla. 2003), is equally misplaced. Pet. at 28, n.21. This Court, in *Freeman v. State*, 858 So. 2d 319, 322-24 (Fla. 2003), ultimately affirmed the trial court's finding, following an evidentiary hearing, that State did not prosecute Freeman based on his race of being white. Moreover, *Freeman* involved a different prosecutor. *Freeman*, 858 So.2d at 322 (noting the prosecutor in the case was John Bradford Stetson, Jr.).

Accordingly, the motion for stay should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS has been furnished by e-portal to has been furnished via the e-portal to Martin J. McClain, McClain & McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334; phone: (305) 984-8344; email: martymcclain@earthlink.net this 21st day of August, 2017.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.

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