

IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC08-1213

Polk Case No. CF81-0112 A1XX

Alachua Case No. 88-448 CF-A

DEATH WARRANT SIGNED

RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

COMES NOW the Appellee, State of Florida, by and through the undersigned counsel, and files this response in opposition to Appellant/Petitioner's application for stay of execution. Appellee/Respondent respectfully submits that a stay be denied and as grounds therefore, states¹:

1. On October 7, 2009, Governor Crist signed a death warrant against this triple-murderer, Paul Beasley Johnson.

2. Today, October 27, 2009, Johnson seeks a stay of execution because this case is scheduled for oral argument tomorrow, October 28, 2009.

3. The three issues pending in this successive post-conviction appeal are: (1) lethal injection, (2) a claim based on the ABA report, and (3) a renewed *Brady* claim - based on

¹ This Court is well aware of the lengthy procedural history and the undersigned also notes that a procedural history is set forth in the State's Answer Brief in this case.

handwritten notes which the defense admittedly had in their possession for ten years and re-asserted under the guise of *Banks v. Dretke*, 124 S. Ct. 1256 (2004). None of these claims provide any basis for a stay of execution. First, Johnson's identical lethal injection claim (based on the execution of Angel Diaz) has been repeatedly rejected by this Court. See, *Finney v. State*, 2009 WL 2856929 (Fla. 2009) (collecting cases). Likewise, this Court has repeatedly held that the ABA Report does not constitute newly discovered evidence and does not provide any basis for post-conviction relief. See, *Finney v. State*, 2009 WL 2856929 (Fla. 2009), citing *Tompkins*, 994 So.2d at 1082-83; *Power v. State*, 992 So. 2d at 222-23; *Rolling v. State*, 944 So. 2d 176, 181 (Fla.), cert. denied, 549 U.S. 990 (2006); *Rutherford v. State*, 940 So.2d 1112, 1117-18 (Fla.), cert. denied, 549 U.S. 989 (2006). Finally, Johnson cannot remotely establish any *Brady* violation, ostensibly renewed under *Banks*, based on documents which were admittedly in his possession for ten years. See, *Jennings v. McDonough*, 490 F.3d 1230, 1239 (11th Cir. 2007); *Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1315, n. 4 (11th Cir. 2005) (rejecting defendant's reliance on *Banks* and finding *Brady* claim barred where the defendant had "equal access" to the evidence.)

4. Johnson also seeks a stay of execution to litigate his third successive motion for post-conviction relief. Johnson's

third successive motion asserts three claims: (1) a warrant-signing claim, (2) a denial-of-executive clemency claim, and (3) a stay-on-death-row claim. Johnson's warrant/clemency claims mirror the virtually identical claims rejected by this Court in *Marek v. State*, 14 So. 3d 985 (Fla. 2009) and *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009). Likewise, Johnson's claim about the length of time he has spent on death row has been consistently rejected by this Court. See, *Marek v. State*, 8 So. 3d 1123, 1131 (Fla. 2009), citing *Tompkins*, 994 So.2d at 1085.

5. Furthermore, Johnson's filing of an untimely petition for writ of habeas corpus in the federal district court is irrelevant to his application for stay.

6. This eleventh-hour application is clearly without merit and simply represents an attempt to delay execution by raising claims with no possibility of success. See, *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998), citing *Bowersox v. Williams*, 517 U.S. 345, 116 S. Ct. 1312 (1996) (recognizing that a stay of execution on second or third petition for post-conviction relief is warranted only where there are substantial grounds upon which relief might be granted); *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383 (1983) (same)."²

² Under settled United States Supreme Court precedent, "a stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted'". *DeLo*

In determining whether to grant a stay, this Court can and should consider the eleventh-hour nature of Johnson's filing. See, *Lonchar v. Thomas*, 517 U.S. 314, 337 (1996) (Rehnquist, C.J., concurring) (footnotes omitted); *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) ("Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation."); see also, *Sawyer v. Whitley*, *supra*. In an earlier case, Justice Rehnquist also noted:

There may be very good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a "hydraulic pressure" which is brought to bear upon any judge or group of judges and inclines them to grant last-minute stays in matters of this sort just because no mortal can be totally satisfied that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them. To use the technique of a last-minute filing as a sort of insurance to get at least a temporary stay when an adequate application might have been presented earlier, is, in my opinion, a tactic unworthy of our profession.

Evans v. Bennett, 440 U.S. 1301, 1307 (1979).

v. Stokes, 495 U.S. 320 at 321, 110 S. Ct. 1880, 109 L. Ed. 2d 325 (1990) (per curiam) quoting *Barefoot v. Estelle*, 463 U.S. 880 at 895, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). As the United States Supreme Court has emphasized "[e]ntry of a stay on a second or third [habeas] petition is a drastic measure, and we have held that it is 'particularly egregious'" to enter a stay absent substantial grounds for relief. *Bowersox v. Williams*, 517 U. S. 345, 116 S. Ct. 1312, 134 L. Ed. 2d 494 (1996), quoting *Delo v. Stokes*, 495 U.S. 320 (1990). No stay of execution is justified in this case.

WHEREFORE, the State respectfully requests that this Honorable Court DENY the requested stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic transmission to The Honorable Neil A. Roddenbery, Circuit Judge, Polk County Government Center, 255 No. Broadway Avenue, Bartow, Florida 33830, c/o lschrader@jud10.flcourts.org; Terri Backhus, Esquire, Backhus & Izakowitz, P.A., 13014 N. Dale Mabry Highway, #746, Tampa, Florida 33618-2808, bakowitz1@verizon.net; Martin J. McClain, Esq., 141 N.E. 30th St., Wilton Manors, Florida 33334, martymcclain@earthlink.net and William P. Cervone, State Attorney, Alachua County State Attorney's Office, 120 W. University Avenue, Gainesville, Florida 33830, cervonew@sao8.org this 27th day of October, 2009.

s//Candance M. Sabella
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