

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS FOR THE
STATE OF OKLAHOMA**

JULIUS DARIUS JONES,)

Petitioner,)

NOT FOR PUBLICATION

-vs-

FILED

No. PCD-2017-1313

IN COURT OF CRIMINAL APPEALS

STATE OF OKLAHOMA, STATE OF OKLAHOMA

JUL 24 2018

Respondent)

**JOHN D. HADDEN
CLERK**

**ORDER RECALLING THE MANDATE, WITHDRAWING PREVIOUS
ORDER, DIRECTING CLERK OF THIS COURT TO FILE
PETITIONER'S EXHIBITS AND STRIKING AS MOOT
PETITIONER'S MOTION TO FILE PETITION FOR REHEARING**

On December 29, 2017, Petitioner Julius Darius Jones filed his third application for post-conviction relief and related motions for discovery and an evidentiary hearing. Within this application, Jones claimed that newly discovered evidence establishes that a juror harbored racial animus toward him. In support of this claim, Jones specifically referred this Court to "Ex. A." 3rd PC App. at 20. On June 11, 2018, this Court denied Jones's Application along with the related motions for discovery and an evidentiary hearing. See *Jones v. State*, Case No. PCD-2017-1313 (unpublished). Mandate issued the same day. Therein, the Court found, *inter alia*, that

Jones's failure to attach such exhibit barred review of his claim. *Id.* at 3. Additionally, assuming as fact Jones's characterization of his purported Exhibit A as set out in his Application, the Court further addressed alternatively the merits of Jones's claim.

On June 25, 2018, Jones tendered for filing a Motion for Leave to File Petition for Rehearing in this matter. Jones asserts therein that the unaccounted-for exhibit was in fact contemporaneously submitted in a separate sealed envelope with his third application for post-conviction relief. Jones thus argues that the Court's rejection of his Application was "predicated on material factual errors." Pet'r Motion at 2, 5. As Jones is aware, this Court does not allow petitions for rehearing in post-conviction appeals.¹ We therefore treat Jones's motion as a request for this Court to reassume jurisdiction and recall the mandate. *See Denton v. Hunt*, 1944 OK CR 72, 152 P.2d 698, 700-01 (this Court has the superintending

¹ Under Rule 3.14(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017), a Petition for Rehearing may be filed only in regular appeals as defined by Rule 1.2. Post-conviction appeals do not fall within the regular appeals identified in Rule 1.2. Furthermore, Rule 5.5 provides:

Once this Court has rendered its decision on a post-conviction appeal, that decision shall constitute a final order and the petitioner's state remedies will be deemed exhausted on all issues raised in the petition in error, brief and any prior appeals. A petition for rehearing is not allowed and these issues may not be raised in any subsequent proceeding in a court of this State. The Clerk of this Court shall return to the movant any petitions for rehearing tendered for filing.

power to recall a mandate after its issuance where there has been fraud, accident, inadvertence, or mistake in connection with the issuance of the mandate).

In support of his motion, Jones attaches the following items:

1. Attachment A—Affidavit of Amanda C. Bass;
2. Attachment B—Affidavit of Kim Marks; and
3. Attachment C—a photocopied picture of Exhibit A’s cover page.

Attachment A is the most telling of these documents. As set forth in her affidavit, Amanda Bass is an Assistant Federal Public Defender with the Office of the Federal Public Defender for the District of Arizona (Attachment A at ¶ 1). Bass avers in her affidavit that she is co-counsel with the attorney of record in this case, Mark Barrett² (*Id.* at ¶ 4). Bass’s affidavit outlines a timeline of events relating to the filing of Jones’s third post-conviction application. In doing so, Bass references four (4) emails. Copies of these emails are attached to her affidavit as Exhibits 1—4 and are referred to herein as “Bass Exhibit ___”. All the emails were sent by Bass to others involved in Jones’s case. Notably, each of the emails has been

² Notably, Ms. Bass has not requested permission to *pro hac vice* enter an appearance in this case. See Rule 1.6, *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).

redacted by counsel. The remaining part of the emails relates to telephone conversations Bass had with John Hadden, the Clerk of the Oklahoma Court of Criminal Appeals (OCCA), wherein she sought guidance from him regarding this Court's rules. Specifically, how to file exhibits containing protected juror information pursuant to Rule 2.6(E), *Rules of the Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017).

Kim Marks is an investigator employed by Mr. Barrett to assist in Jones's case. Her affidavit—Attachment B—outlines her visit to the OCCA Clerk's office on June 15, 2018, which led to the unearthing of Jones's Exhibit A, along with Exhibits B and C, in the Clerk's office.

We glean the following pertinent information from Attachments A-C and the formal record in this case. From the outset we note that Bass played a key role in the preparation and filing of Jones's third application for post-conviction relief (Attachment A). Bass was concerned that two supporting exhibits for Jones's third post-conviction application—Exhibits A and B—contained juror identifying information (Bass Exhibit 1-3). On December 27, 2017, Bass sought guidance from the Clerk of this

Court regarding Rule 2.6(E) and how to file exhibits containing juror identifying information. *Id.* Bass sent three separate emails that day in which she summarized what she garnered from her conversations with the Clerk (Bass Exhibits 1–3). According to these emails, the Clerk advised Bass, *inter alia*, that: (1) exhibits containing juror identifying information should be placed in a “sealed envelope” (Bass Exhibits 1-3); (2) the envelope should be clearly labeled “PROTECTED MATERIAL, JUROR INFORMATION or something to that effect” (Bass Exhibit 3); (3) these types of documents are generally filed “separately” (Bass Exhibit 1); and (4) documents of this nature are not made public and thus are not scanned into the Court’s docketing system (Bass Exhibit 1).

On December 28, 2017, Jones’s Application with attachments, along with the related motions for discovery and evidentiary hearing were placed in a single box and shipped from Arizona to the Clerk of this Court (Attachment A at ¶¶ 12-14). These materials included Exhibits A-C (*Id.* at ¶ 13). Exhibits A-C were contained in a separate sealed envelope, designated “Protected Information (Exhibits A, B & C).”

On December 29, 2017, the OCCA Clerk's office docketed the following items as being received and filed in this case: Third Application for Post-Conviction Relief Death Penalty; Petitioner's Motion for Discovery; and Petitioner's Motion for Evidentiary Hearing.³ According to an email Bass sent to Mr. Barrett (and others) that same day, Bass contacted the Clerk's office by phone that day to confirm the OCCA Clerk's office had "received our filings" (Bass Exhibit 4). In her email, Bass advises that the Clerk had instructed her that—

[W]e need to *put together a motion* asking the court to make a determination of whether or not the exhibits A and B (which contains the name of a juror) need to be sealed. Once the court makes that determination, he'll know whether those exhibits can be scanned and made part of the public record, or whether those should be omitted from public view.

He also said that he will scan what can be made public, and will, for now, *hold off on scanning the exhibits* which we've indicated may contain protected information."

(Bass Exhibit 4) (emphasis added).

The record shows that a motion to file the exhibits under seal was never filed in this matter. On February 1, 2018, the State of Oklahoma filed its response to Jones's third post-conviction

³ Each of these documents is signed by Mark Barrett, the sole attorney of record for Jones.

application.⁴ Jones filed a reply to the State's response on February 14, 2018. Thereafter, this Court began its review of Jones's Application. During this review, the Court observed that the record did not contain the purported exhibits nor had the exhibits been entered on the Court's docketing system. When this Court made an inquiry to staff in the Clerk's office, the exhibits were not located and the Court's review proceeded accordingly. The Court's order denying Jones's Application being issued on June 11, 2018.

On June 15, 2018, the Exhibits A-C were discovered, having been set aside by the Clerk's office presumably in anticipation that a motion to seal would be forthcoming. However, as no such motion was ever filed, the exhibits were apparently overlooked by the Clerk's office as time lapsed. The exhibits were thus never entered on the Court's docket as being tendered for filing or returned to counsel—actions the Clerk's office should have taken when the sealed envelope was received without an accompanying requisite motion. Complicating matters further, the elusive sealed envelope went unnoticed by the OCCA Clerk's office when this

⁴ Notably, when quoting the alleged racial epithet made by a juror, the State's response cites to Jones's Application—"3rd PC App. at 14" and "3rd PC App. at 20"—rather than directly to

Court made inquiry during its review of Jones's third post-conviction application. This Court did not learn that the exhibits had been located until June 25, 2018, when Jones's motion seeking leave to file a petition for rehearing, together with the attached email exhibits, was tendered for filing.

Without a doubt, Jones's legal team bears the brunt of the responsibility for the mishandling of the elusive exhibits. It is now clear that Ms. Bass, working from Arizona, orchestrated Jones's third post-conviction application. Because she is both unlicensed to practice law in the State of Oklahoma and unfamiliar with this Court's rules, the risk of a mistake or error occurring in this matter was amplified. And, as fate would have it, Jones's exhibits were erroneously submitted in a sealed envelope without a motion to file under seal as prescribed by Rule 2.7(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). Moreover, despite the Clerk's charitable willingness to make an accommodation for counsel, counsel failed to heed the Clerk's clear instruction to tender such a motion to seal after-the-fact (Bass Exhibit 4).

Exhibit A. Resp. at 6, 7. This should have signaled Jones's counsel when preparing its Reply brief that the State did not have a copy of Exhibit A.

Yet, this Court cannot ignore the fact that the OCCA Clerk's mismanagement of the exhibits upon their receipt further complicated this matter. Thus, given the circumstances, this Court now finds the mandate in this matter should be recalled and the Court's June 11, 2018 Order withdrawn. To be clear, it is the rare instance in which this Court recalls its mandate. The Court's actions in this case are precipitated by the exceptional and extraordinary circumstances presented.

Furthermore, having now had the opportunity to review Jones's Exhibits A-C, we find the contents of these documents do not contain protected juror material as defined in Rule 2.6(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). Consequently, pursuant to Rule 2.7(E) of this Court, no grounds exist upon which to withhold these documents from the public record. We thus find that Jones's Exhibits A-C should be filed by the Clerk of this Court and a copy provided to the Attorney General of Oklahoma. Finally, given this Court's actions taken herein, we find Petitioner's Motion for Leave to File Petition for Rehearing has been rendered moot. Thus, Jones's motion should be stricken.

This Court will henceforth review this matter anew with Jones's exhibits properly filed. As the contents of the exhibits are as Jones represented in his Application, we find further briefing by the parties would be superfluous and is thus unwarranted under the circumstances. A new order will issue at a later date.

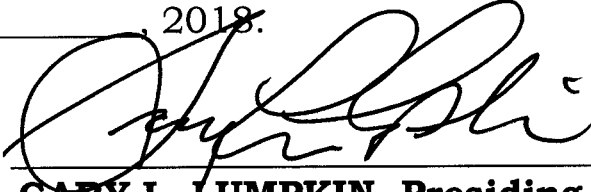
IT IS THEREFORE THE ORDER OF THIS COURT that the mandate issued on June 11, 2018, in this matter is **RECALLED** and our Order is **WITHDRAWN**. Additionally, we find that Jones's Motion for Leave to File Petition for Rehearing having been rendered moot and is **STRICKEN**. The Clerk of this Court is directed to return the Motion to Jones and to retain a copy for our records.

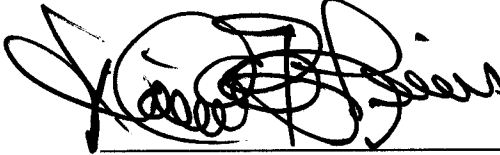
IT IS FURTHER ORDERED that the Clerk of this Court file Jones's Exhibits A-C. The Clerk is further directed to transmit a copy of this Order along with a copy of Jones's exhibits to Jennifer L. Crabb, Assistant Attorney General of Oklahoma.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this

24th day of July, 2018.

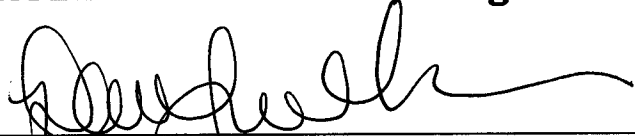

GARY L. LUMPKIN, Presiding Judge *Cover in Place with writing*

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writing attached

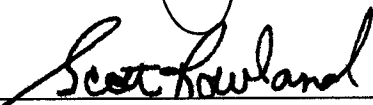
DAVID B. LEWIS, Vice Presiding Judge



ROBERT L. HUDSON, Judge

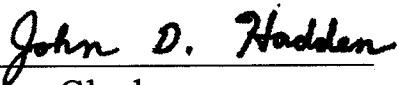


DANA KUEHN, Judge



SCOTT ROWLAND, Judge

ATTEST:


Clerk

LUMPKIN, PRESIDING JUDGE: Concur in Result

I concur in the Court's order in this matter. However, I would go further and await the response, which was directed to be filed, from Petitioner's attorney of record, Mark Barrett, as to why this application was filed by a third party who is not the attorney of record in this case. This Court has a responsibility to ensure that all matters filed in this Court are filed by the attorney of record and not someone who may be engaging in the unauthorized practice of law in Oklahoma. This is a matter the Court must at some point address and I believe it should be resolved prior to authorizing any additional filings in this case.

LEWIS, VICE PRESIDING JUDGE, concurring in result:

I cannot join in some of the Court's language resolving Petitioner's motion, but the result is correct. The Court goes somewhat far afield in a disapproving and self-serving attempt to fix blame on the acts of an out-of-state attorney for a regrettable and essentially administrative failure of this Court's Clerk to accurately document the submission of certain sealed exhibits accompanying Petitioner's third post-conviction application.

Despite the omission of Petitioner's post-conviction counsel of record to follow through with a motion asking whether these supporting documents should be public or remain sealed, if the Clerk had simply noted on the docket that the supporting exhibits referenced in the application *had been tendered to, and retained by,* the Clerk in a separate sealed envelope, it seems very unlikely that our previous order would have so readily concluded in error that counsel's failure to attach these materials had procedurally defaulted Petitioner's claims.