

Serial: 203822

IN THE SUPREME COURT OF MISSISSIPPI

No. 2015-IA-00975-SCT

***CALEB CORROTHERS a/k/a CALEB
CARROTHERS a/k/a CALBE
CAROTHER a/k/a CALEB L.
CARROTHERS a/k/a CALEB
COROTHERS a/k/a CALAB
CARROTHERS***

v.

STATE OF MISSISSIPPI

EN BANC ORDER

The order entered in this case on September 18, 2015, is vacated, and the following order is issued in its place.

This matter is before the Court, *en banc*, on Caleb Corrothers's "Petition for Permission to Appeal [the] Circuit Court's Order Requiring Disclosure of Youth Court and DHS Records to the State," Motion Number 2015-2838, filed June 24, 2015. This petition was filed pursuant to Rule 5(a) of the Mississippi Rules of Appellate Procedure.

On May 19, 2011, Corrothers was convicted in the Circuit Court of Lafayette County of two counts of capital murder with the underlying felony of robbery and was sentenced to death. In the same trial, Corrothers was convicted of aggravated assault as an habitual criminal and was sentenced to life imprisonment on that charge. This Court affirmed Corrothers's convictions and sentences in *Corrothers v. State*, 148 So. 3d 278 (Miss. 2014),

and denied Corrothers's Motion for Rehearing on October 23, 2014. This Court's mandate issued on October 30, 2014. The Mississippi Office of Post-Conviction Counsel was appointed to assist Corrothers in preparing and filing his petition for post-conviction relief, which was required to be filed in this Court on or before October 30, 2015.

Mississippi Rule of Appellate Procedure 22 (c)(4), which governs the time between the appointment of counsel and the filing of a petition for postconviction relief, allows the petitioner's lawyers access to "discovery and compulsory process" to gather information to support the petition for post-conviction relief. Mississippi Rule of Appellate Procedure 22 (c)(4)(ii). Under this rule, on March 23, 2015, Corrothers's counsel filed a Motion for Discovery in the Circuit Court of Lafayette County, in which Corrothers sought leave to seek an order from the Youth Court of Lafayette County for the purpose of "obtaining Department of Human Services and Youth Court records, which may prove to be pertinent to Petitioner's case." Corrothers also sought subpoenas from local news stations for video footage related to his case. In response, the State filed a motion for "reciprocal discovery" whereby the State sought access to the videotapes Corrothers might receive from local news stations and records which Corrothers might receive from the Youth Court of Lafayette County. On June 3, 2015, the Circuit Court of Lafayette County granted both Corrothers's motion for discovery and the State's motion for reciprocal discovery. That court held that:

[The] Petitioner shall, upon receipt, provide counsel for Respondent within forty-eight (48) hours, true and complete copies of any and all video footage, photographs, and online news articles pertinent to Petitioner's arrest, the investigation of the crimes for which Petitioner was convicted, and Petitioner's trial obtained by or on Petitioner's behalf . . . [,] true and complete copies of any and all records that is/are obtained by or on behalf of Petitioner from the

Mississippi Department of Human Services and/or any other individual agency which is/are obtained pursuant to an order entered by the Youth Court of Lafayette County and/or any other Mississippi youth court(s) . . . [and] true and complete copies of any and all juvenile court and/or juvenile probation/court service records pertaining to Petitioner and his siblings

Corrothers petitioned for leave to file an interlocutory appeal in this Court, arguing that the State is not entitled to reciprocal discovery under Mississippi Rule of Appellate Procedure 22.

This Court reviews discovery matters for abuse of discretion. *Ford Motor Co. v. Tennin*, 960 So. 2d 379, 390 (Miss. 2007). However, we review questions of law *de novo*. *Moore v. State*, 986 So. 2d 928, 932 (Miss. 2008).

Corrothers’s Motion for Rehearing was denied by this Court on October 23, 2014. His petition for post-conviction relief was due in the Court on or before October 30, 2015. He therefore is engaged in discovery “preliminary to proceedings in the Supreme Court” for the purposes of Rule 22. Mississippi Rule of Appellate Procedure 22, in pertinent part, provides:

Discovery and compulsory process may be allowed the petitioner from and after the appointment of post-conviction counsel . . . , but only upon motion indicating the purpose of such discovery and that such discovery is not frivolous and is likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question and proper for post-conviction relief, and order entered in the sound discretion of the court

M.R.A.P. 22(c)(4)(ii) (emphasis added). Rule 22 clearly provides that “[d]iscovery and compulsory process may be allowed *the petitioner*.” *Id.* (emphasis added). It is equally apparent that the rule lacks a similar provision allowing the State to compel discovery or

receive reciprocal discovery from the petitioner.

This Court has held that petitioners “must be able to obtain and to compel production of the evidence prior to the filing of the post-conviction application and motion in order to include them in compliance with the statute.” *Russell v. State*, 819 So. 2d 1177 (Miss. 2001). We adopted Rule 22 to enable petitioners to comply with the Mississippi Uniform Post Conviction Collateral Relief Act’s (UPCCRA) substantial burden of production. *Id.* at 1179; *accord Brown v. State*, 88 So. 3d 726, 730 (Miss. 2012) (“Rule 22 is intended to allow a petitioner to gather information to support an application to the Supreme Court for leave to file a motion for post-conviction relief in the trial court.”).

Before Corrothers files his petition for post-conviction relief in this Court, there is no case pending in any Mississippi court concerning Corrothers’s criminal convictions. Corrothers merely is preparing to bring a case into existence in Mississippi courts. To the extent that the information obtained pursuant to Rule 22’s discovery mechanism is relevant to the petitioner’s petition for post-conviction relief, it must be attached to the petition, at which time the State will have access to it. Miss. Code Ann. § 99-39-9(1)(e) (Rev. 2015). Moreover, if the petitioner is able to demonstrate “a substantial showing of the denial of a state or federal right” and is allowed to proceed to the trial court, pursuant to Mississippi Code Section 99-39-27(5), the State then is allowed access to the full spectrum of civil discovery which it may employ to prepare and to defend its case. Miss. Code Ann. § 99-39-15(1) (Rev. 2015); *accord Brown*, 88 So. 3d at 730. Inasmuch as Rule 22 was enacted for the purpose of aiding petitioners for post-conviction relief in meeting UPCCRA’s burden of

production and because the State has no burden prior to the filing of a petition for post-conviction relief in this Court, the Court's exclusion of the State as a beneficiary of discovery under Rule 22 was not a negligent omission but instead was consistent with this Court's intent in drafting Rule 22.

Significantly, the State's request for reciprocal discovery is a matter of first impression that previously has not been decided by this Court. For example, in *Russell*, the State refused to comply with Russell's Rule 22 discovery requests, averring that "that under the post-conviction statutes, discovery is to be had, if at all, after this Court has granted leave to proceed on the motion for post-conviction relief." *Russell*, 819 So. 2d at 1178. We rejected the State's argument that it did not have to allow petitioners discovery prior to filing a petition for post-conviction relief and held: "To the extent that discovery is allowed, the inmate is entitled to the compulsory process of the court. It would be of no avail to declare that [the petitioner] is entitled to discovery, but not entitled to the process of the court to compel responsiveness." *Id.* at 1180.

Russell addresses a petitioner's right to request permissive discovery "in camera without notice to the State or an opportunity for the State to be heard." *Russell*, 819 So. 2d at 1179. In response to this specific concern, this Court held:

The State is justified in its complaint regarding excessive use of *ex parte* proceedings on discovery. The rule recognizes the burden placed on the inmate to file fully developed post-conviction pleadings. At the same time, the State is entitled to resist unwarranted discovery as well as unnecessary awards of investigative expenses, which will, at least implicitly, condone the areas of inquiry to be pursued in the investigation. *Ex parte* presentation should be available in proceedings for expenses and discovery, but only after a determination that disclosure to the State is incompatible with a meaningful

opportunity to prepare the defendant's case. This necessarily entails service on the Attorney General of pleadings and notice of hearings.

Id. at 1179-80. *Russell* holds that petitioners should not seek in-camera discovery under Rule 22, except under exceptional circumstances. *Id.* at 1179. Thus, *Russell* requires counsel for the petitioner to serve the State "pleadings and notice of hearings." *Id.* at 1180. But, in so holding, this Court did not find that the State was entitled to its own discovery under Rule 22, nor did we hold that the State was entitled to receive reciprocal discovery. To find otherwise would require this Court to remove all context from *Russell* and to eschew the case's plain language.

IT IS THEREFORE ORDERED that Corrothers's "Petition for Permission to Appeal [the] Circuit Court's Order Requiring Disclosure of Youth Court and DHS Records to the State" is granted. We grant interlocutory appeal of the Lafayette County Circuit Court's order of June 3, 2015, permitting the State reciprocal discovery under Rule 22 of Mississippi Rules of Appellate Procedure. On interlocutory appeal, the Circuit Court of Lafayette County's order of June 3, 2015, to the extent that it provides reciprocal discovery to the State of videotapes from local news stations, Corrothers's and Corrothers's siblings' youth court records, and Corrothers's and Corrothers's family's Department of Human Services records, is vacated and rendered. The notice of appeal having been deemed filed, the filing fee is due and payable to the Clerk of this Court.

IT IS FURTHER ORDERED that the State is taxed with all costs of this appeal.

SO ORDERED, this the 26th day of April, 2016.

/s/ James W. Kitchens

JAMES W. KITCHENS, JUSTICE

**RANDOLPH, P.J., DOES NOT JOIN AND WOULD AFFIRM THE TRIAL COURT.
BEAM, J., NOT PARTICIPATING.**