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IN THE SUPREME COURT OF FLORIDA

Case No. SC22-1286

Lower court Case No. 2011-CF-11A

JOHNNY MACK SKETO CALHOUN,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND
FOR HOLMES COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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RESPONSE TO STATE'S OPPOSITION TO ORAL ARGUMENT

In the State's Answer they suggested that oral argument was not necessary and would only serve to delay justice for the victims further. The State's sudden interest in efficiency is disingenuous. The newly discovered evidence claim upon which the successive 3.851 motion is based was discovered in 2017, merely a month after the close of Mr. Calhoun's original 3.851 evidentiary hearing. At that point Counsel for the Defendant asked that the circuit re-open the evidentiary hearing so that the newly discovered evidence could be addressed then. The State made no arguments about the delay that would (and did) ensue if the Court did not re-open the evidentiary hearing and address the newly discovered evidence back in 2017.

Additionally, while the claim itself is straightforward enough, the cumulative review of all the available evidence is difficult as this is a fact intensive case. This will be the first cumulative review of all the evidence developed in post-conviction that has been done by this Court and it would facilitate this Court's review to hear oral argument.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the various records on reposit with this Court:

"RDA" - record on direct appeal to this Court;

"T" - trial transcript on direct appeal to this Court;

"PCRI" - initial post conviction record on appeal to this Court;

"EHI" - transcript on appeal to this Court from initial PCR proceedings;

"PCRII" - successive post conviction record on appeal to this Court.

Additional citations will be self-explanatory.

ARGUMENT IN REPLY

I. DOUG MIXON'S CONFESSION TO KEITH ELLIS WOULD BE ADMISSIBLE AT A RETRIAL UNDER A *CHAMBERS* ANALYSIS AND UNDER THIS COURT'S PRECEDENT IN *AGUIRRE-JARQUIN*[1]

The lower court erred in its legal finding that Doug Mixon's confession to Keith Ellis would be inadmissible on a retrial. Under this court's precedent in *Aguirre-Jarquin* the confession should be admitted. The State argues that a *Chambers* analysis would lead the confession to being excluded (based on factors 1 and 3 of *Chambers*) and that the facts of *Aguirre-Jarquin* are distinct from the current case.[2] The State seems to concede that Doug Mixon's

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[1] (1) The confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the confession or statement is corroborated by some other evidence in the case; (3) the confession or statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of-court confession or statement, the declarant must be available for cross examination.*Bearden v. State*, 161 So. 3d 1257, 1265 (Fla. 2015)(citing Chambers, 410 U.S. at 300-01).

[2] Before going through the *Chambers* analysis the State argues more generally that the main thrust of *Chambers* is finding indicia of reliability for the hearsay confession. The State then makes the unsupported claim that this Court has never deemed a "jailhouse confession" to be admissible. (Answer at pg. 39). This argument is not credible as jailhouse confessions are regularly introduced at the trial level and used against the defendant. Merely classifying it as a

confession meets factors 2 and 4 of the *Chambers* analysis, so for this reason our response will focus on factors 1 and 3 as well as *Aguirre-Jarquin.*

The procedural posture in *Aguirre-Jarquin* is almost exactly similar to this case. Mr. Aguirre-Jarquin filed a newly discovered evidence claim based on multiple confessions that the victim's daughter made, which were discovered after Mr. Aguirre-Jarquin's initial evidentiary hearing. The lower court ruled that the confessions would be inadmissible under the factors articulated in *Chambers* and this court reversed, making some modifications to the first factor in *Chambers*. While acknowledging that the confessions did not occur in close proximity to the time when the crimes were committed, they "were made in close proximity to the postconviction DNA testing, which Samantha [the victim's daughter] knew was being conducted." *Aguirre-Jarquin v. State*, 202 So. 3d 785, 793 (Fla. 2016). Additionally, this court acknowledged that the confessions were spontaneous, as in not coerced, and that they were made to people Samantha knew.

"jailhouse confession" does not automatically make it unreliable or inadmissible.

Similarly, Doug Mixon's confession to Keith Ellis, while not occurring shortly after the crime, was still spontaneous and occurred during the time that Mr. Calhoun had a 3.851 motion pending which identified Doug Mixon as an alternate suspect. Mr. Mixon even met with a CCRC investigator and attorney in August of 2017 while at Graceville Correctional, where he was incarcerated with Mr. Keith Ellis. He referenced this visit in his testimony at Mr. Calhoun's evidentiary hearing (EHI 309, 313). He also acknowledged in that testimony that he was aware that there were rumors he was involved in this crime. (EHI 310). Even Doug Mixon and Keith Ellis's conversations, as described by Keith Ellis, seem to reference the post-conviction investigation that was leading to Doug Mixon. The affidavit executed by Keith Ellis reports that "Doug said he had court and people were telling on him for what he had done. He even told me people from Alabama were telling on him." (PCRII 99). Admittedly, this particular statement seems to have been made after Doug had returned from the evidentiary hearing, but it does demonstrate that Doug Mixon was aware of the post-conviction proceedings and aware that he was being looked at as an alternate suspect. It was not, as the State wants to portray it,

unrelated post-conviction litigation that had no bearing on Doug Mixon.

The State also argues that Doug Mixon's confession was not against interest given the setting of being in prison and being afraid of other inmates. While he may have been in fear of *other* inmates, he did testify that he was not afraid of Keith Ellis. (PCRII 478). As such, there would be no reason for Doug Mixon to be bragging to Keith Ellis about crimes he had not committed. Additionally, Doug Mixon was aware at the time that there were rumors he was involved in this crime. (EHI 310). Knowing that he was a suspect, any confession he makes is still going to be against interest even if it may benefit him in the short term. Lastly, a false confession, purely for the sake of bragging, is inconsistent with Doug Mixon's previous testimony at the first evidentiary hearing. He stated "I would never confess to something, but if I did or didn't do, more or less, in all honesty. But I sure as sin wouldn't confess to something I didn't do." (EHI 320). While somewhat disjointed, the sentiment seems to be that if Doug Mixon were to confess it would be to a crime he had actually committed.

II. Newly discovered evidence of Doug Mixon's confession to Keith Ellis is credible and, in combination with all other evidence that could be introduced at a retrial, would give rise to reasonable doubt as to Calhoun's culpability

The State seems to be under the misapprehension that previous post-conviction claims cannot be reassessed in light of the newly discovered evidence. (Answer at 65). In fact, previous post-conviction claims must be re-assessed in light of newly discovered evidence.

> In determining the impact of the newly discovered evidence, the Court must conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case." *Lightbourne v. State,* 742 So.2d 238, 247 (Fla.1999) (quoting *Armstrong v. State,* 642 So.2d 730, 735 (Fla.1994)). As this Court held in *Lightbourne,* a trial court must even consider testimony that was previously excluded as procedurally barred or presented in another proceeding in determining if there is a probability of an acquittal.

Swafford v. State, 125 So. 3d 760, 776 (Fla. 2013)

The circuit court's assessment of the previous confessions Doug Mixon has made, must be reassessed in light of the new confession as it corroborates the others and strengthens their credibility.

The State argues that in spite of the multiple confessions, the facts this Court found on direct appeal are not altered by Mr. Calhoun's newly discovered evidence. (Answer at 66). The circuit court also relied on these facts and ignored admissible evidence that would refute some of those facts. While most of the admissible evidence was inventoried in our initial motion in the form of a proposed opening statement, some of it is worth revisiting pursuant to the State's response. Firstly, in light of Doug Mixon's confession that he not only killed the victim but framed Mr. Calhoun for this crime, all of the physical evidence (blanket, duct tape, etc.) should be viewed with some suspicion.

Secondly, the "eyewitness" who testified to seeing Mr. Calhoun at her gas station the morning after the victim's disappearance would be impeached at a retrial. In the first evidentiary hearing, it was brought out that her initial statement was not consistent with her testimony. Specifically, in her statement she admitted that she had read about the crime in the paper and was concerned she might supplant what she read for what she actually saw. (PCRI 2174). When trial counsel was confronted with this impeachment that she had neglected to use, she admitted she probably should have

impeached the clerk on this issue. (EHI 105). The clerk's testimony becomes more important as Doug Mixon's latest confession impugns much of the physical evidence that could have been planted or manipulated by him or his daughter. For this reason, it is imperative that courts revisit all the prior issues that were raised and assess them anew.

Thirdly, the State's facts reference Mr.Calhoun having "evaded law enforcement." (Answer at 66). This comes from a partial statement from Mr. Calhoun that when divorced from the entirety of the statement was tantamount to a confession. In an interview with Det. Raley Mr. Calhoun admitted to hiding from law enforcement in the woods in Florida after he had been kidnapped. (PCRI 2091). However, when the state referenced the interview, the state implied that Mr. Calhoun was hiding from law enforcement in the woods in Alabama, near to where the victim's car was discovered. (T.995). The lower did not find it to be a *Giglio* violation, but recognized that the State "implied it incorrectly." (PCRI 2595). The court found this to not be material in its initial post-conviction assessment. However, when assessed now, with the growing body of evidence against Doug Mixon, the importance or materiality of previous errors changes.

In assessing the credibility of Mr. Ellis, the court and the State also overemphasize the inconsistencies in Keith Ellis's testimony. Almost five years have passed between when Keith Ellis wrote his affidavit and when he testified. Inconsistencies are to be expected. While the court labeled these as embellishments, it is equally possible that with the passage of time Keith Ellis is less guarded on the subject and more willing to give specific details. The court took particular issue with Mr. Ellis referring to the receptacles that Doug Mixon used for the accelerant as "gas cans." Light Petroleum Distillates (including camping fuel) are frequently sold in a metal jug that one might colloquially refer to as a gas can.[3] Additionally, the court takes issue with the discrepancy between how Doug Mixon referred to the defendant in court (either as Johnny Mack or as "my future ex-son in law") and the way he referred to him ("the kid") when confiding in Keith Ellis. These are not competent, substantial issues that should be used to determine credibility. Looking to the jury instructions,

[3] While the discussion has centered around camping fuel (because it was found in Mr. Calhoun's trailer) there are other light petroleum distillates (paint thinner, pesticides, etc.) that could have been found in Doug Mixon's home had he been appropriately investigated at the time.

what is more important is whether their testimony fits with other evidence and whether the person has a bias. Keith Ellis has no horse in this race and the same cannot be said for Doug Mixon.

III. The circuit court's denial of Calhoun's demand for additional records under 3.852(i) was unreasonable and prejudicial to the investigation of his case

It is counsel's duty to investigate thoroughly from appointment until the ultimate resolution. Counsel has a duty to "continue an aggressive investigation of all aspects of the case." *American Bar Association, American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1080 (2003). This duty to investigate continues even after the filing of an initial 3.851. Pursuant to Fla. Stat. 27.711(8), "accepting court appointment under s. 27. 710 to represent a capital defendant, the attorney agrees to continue such representation under the terms and conditions set for in this section until the capital defendant's sentence is reversed, reduced, or carried out." While this statute applies to registry counsel, the continuing duty is presumably the same for CCRC attorneys.

While the State takes issue with the timing of Mr. Calhoun's (i) demand, it should be viewed as a re-initiation of the investigation, consistent with counsel's continuing duty to investigate.[4] The language used in the (i) demand was forward looking in that it stated that the records would "lead to admissible evidence." (PCRII 724). Given that the incident report related not to Mr. Calhoun, but two other inmates and a nurse at Graceville, some explanation of the relevance was necessary. The State somehow misinterprets the relevance explanation to mean that the demanded records can only relate to the previously denied claim. (Answer at 71). The report itself may be fairly limited as to what it contains, however as asserted in the demand it will "lead to admissible evidence."

Mr. Calhoun is already strictly curtailed from what records he can pursue in violation of his rights under the Florida Constitution.

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[4] When Mr. Calhoun's successive 3.851 was filed back in 2018, undersigned counsel diligently attempted to locate records that were relevant to Doug Mixon's confession to Keith Ellis while at Graceville. Mr. Calhoun filed a demand for records under 3.851(i) asking for "Classification records for Keith Ellis (098905) and Charles Mixon (Q31073)." (PCRII 106). In counsel's experience (both as post-conviction counsel and as an employee of the Department of Corrections) incident reports are contained within inmates' classification files.

He does not have access to public records that the rest of the population could request through a 119 request, but instead is bound by the strict and exacting procedures specified in Fla. R. Crim. Pro. 3.852. The lower court's arbitrary denial of his public records demand only further serves to prejudice and limit Mr. Calhoun's investigation.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing and the record before this Court, Calhoun respectfully urges this Court to reverse the circuit court, grant a new trial, and grant such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been electronically filed with the Clerk of the Florida Supreme Court, and electronically served upon all counsel of record on the 27th day of December, 2022.

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I hereby certify that the foregoing Initial Brief was generated in Bookman Old Style 14 point font, pursuant to Fla. R. App. P. 9.045 and 9.210.

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