

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC23-163
L.T. No. 162010CF008424AXXXMA**

DAVID KELSEY SPARRE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE CLAIMS RAISED IN APPELLANT’S SUCCESSIVE RULE 3.851 MOTION ARE NOT PROCEDURALLY BARRED

In the answer brief, Appellee has taken the kitchen sink approach in arguing that the claims raised in the successive Rule 3.851 motion are procedurally barred under every doctrine imaginable—the claims are untimely, barred under the law-of-the-case, and were all actually waived by Appellant’s waiver of the presentation of mitigation evidence during the penalty phase. But unlike an actual kitchen sink, none of Appellee’s arguments hold water.¹

a. The motion was filed within one year of the factual basis for the claims becoming discoverable

The circuit court correctly assumed that the successive Rule 3.851 motion was timely filed. (PCR-2. 118). As Appellant noted in his initial brief, the newly discovered evidence—including the fact that the PSI contained false information, the probation officer failed to conduct a comprehensive investigation into Appellant’s personal

¹ The Answer Brief is broken into three sections, one for each claim. Because each section raises overlapping, essentially identical arguments regarding procedural bars, Appellant will provide one general reply to the issues raised throughout Appellee’s brief.

and mental health history, and the pattern and practice of DOC to generate PSI's in capital cases that do not comply with *Muhammad*—was not known at the time of trial. Initial Brief, at 30-31.² It was not until Carney came forward and disclosed this information during his June 2021 interview that it became discoverable.

Despite this, Appellee argues that the information revealed in Carney's 2021 statement was not diligently discovered because the PSI was known at the time of trial. *See, e.g.*, Answer Brief, at 16, 26 (“Furthermore, the claim of newly discovered evidence regarding the completeness of the PSI is untimely. The PSI has been available since 2012.”). Appellee's argument is nothing more than a bait and switch. The newly discovered evidence is, quite obviously, not the PSI itself; rather, the newly discovered evidence includes Carney's admissions of the DOC's pattern and practice of generating inadequate PSI's in capital cases, Carney's fundamental misunderstanding of the purpose of preparing a PSI under *Muhammad*, and that the PSI in this case contained false information.

² *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001).

Tellingly, Appellee makes no attempt to dispute or distinguish the applicability of *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012) to this case. In *Waterhouse*, this Court has held that both trial counsel and collateral counsel can presume the accuracy of state-generated investigative reports until a witness comes forward calling the veracity of the report into question. *Id.* at 103. Appellant may have disputed the *comprehensiveness* of the PSI on its face on direct appeal and during initial postconviction proceedings, Initial Brief, at 22-23, but Appellant had no reason to believe the report contained the affirmative misrepresentations, falsities, and suppressed information that only came to light in 2021.³

Officer Carney made the relevant statements calling into question the veracity of the PSI in this case for the first time in June 2021 when he informed an investigator working on Appellant's federal habeas case of the information that formed the basis of the

³ As Appellee concedes, in upholding the circuit court's decision not to order mitigation evidence be presented based on the PSI, this Court previously relied upon the fact that neither party at trial objected or raised any issues regarding the PSI under *Muhammad*. Answer Brief, at 28, 33-34. In light of the newly discovered evidence, the prosecution had a duty to do so, and, if the information had been known, reasonable defense counsel would have objected.

three claims. Within one year, Appellant filed the successive 3.851 motion below. Therefore, these claims were timely raised within one year of the date from which they became discoverable.

b. The law-of-the-case doctrine does not apply

Appellee defends the circuit court's finding below that the claims raised in the successive 3.851 motion are barred by the law-of-the-case doctrine on the basis that "this Court found the PSI to be sufficient to satisfy *Muhammad* in the direct appeal and in the state habeas petition as well." Answer Brief, at 16. Appellee argues that the claims raised in the successive Rule 3.851 motion are simply "variations" of the PSI claims raised on direct appeal and in Appellant's state habeas petition. Answer Brief, at 29-30.

As Appellant noted in his Initial Brief, the claims raised below are not barred by the law-of-the-case doctrine. When a party "develops different facts and different issues, the 'law of the case' doctrine will not preclude a conclusion at variance with the initially adjudicated result." *Steele v. Pendarvis Chevrolet, Inc.*, 220 So. 2d 372, 376 (Fla. 1969); *see also State v. Sigler*, 967 So. 2d 835, 840 (Fla. 2007) (acknowledging that "issues which have previously been addressed by the court may be reconsidered where there have

developed material changes in the evidence or where reliance on the prior decision would result in manifest injustice”). It should go without saying that a defendant can raise distinct legal claims related to the same aspect of trial during subsequent legal proceedings when the claims raised later in time are based on facts outside the trial record and/or new evidence.

On direct appeal and in his state habeas petition, Appellant raised two claims challenging the PSI in this case on the face of the trial court record. Initial Brief, at 22-23. But each of the claims raised below in Appellant’s successive Rule 3.851 motion was based on the operative newly discovered evidence disclosed in Carney’s 2021 interview. This Court has never decided any legal issues in this case regarding the newly alleged facts, which include: the DOC officer’s candid admissions that his PSI was cursory pursuant to a pattern and practice of DOC in capital cases, that he did not follow the *Muhammad* comprehensiveness requirement (or even know about it) in crafting the PSI and believed that the judge and jury had already considered all relevant information, and that he did not actually believe that Appellant’s mental health to be “satisfactory” or that Appellant was “not remarkably different from most young men I have

interviewed and supervised.” (PCR-2. 6-8). Therefore, the factual basis underlying the claims raised in the successive 3.851 is distinct from the factual basis underlying claims that this Court has previously decided.

Relatedly, Appellee argues that Appellant’s federal constitutional claims should have been raised on direct appeal. Answer Brief, at 44-45, 54-55. But this argument fails for the same reason: the newly discovered evidence raised below had to become discoverable for Appellant to be able to raise it in the first place. Because Carney did not disclose the information calling into question the PSI until 2021, the claims necessarily could not have been raised on direct appeal. As this Court noted in denying Appellant’s state habeas claim, Appellant had not been previously able to allege any information calling the preparation of the PSI into question. *Sparre v. State*, 289 So. 3d 839, 855 (Fla. 2019).

Appellee also argues that the law-of-the-case doctrine bars the claims raised below because there has not been a new hearing or trial in this case, “only a new statement.” Answer Brief, at 30-31. This argument is spurious. In analyzing newly discovered evidence, this Court must assume the factual allegations are true and Appellant

has requested an evidentiary hearing at which the evidence would be presented so that a court can determine what impact the new evidence would have at a new trial. To accept Appellee's argument would be to hold that all newly discovered evidence is inherently barred by the law of the case because it must be raised in a postconviction motion before it can be presented in court.

In any event, Appellee failed to address Appellant's argument that, even if the law-of-the-case doctrine did apply, it would be manifestly unjust and/or clearly erroneous to bar Appellant's claims from being heard. Otherwise, Appellant would face execution despite being sentenced to death—without a sentencer having reviewed the substantial mitigation in this case—on the basis of a materially inaccurate sentencing procedure that was tainted by the suppression of evidence and the circuit court's reliance on materially inaccurate information. Additionally, this Court's prior findings regarding the sufficiency and thoroughness of the PSI in this case are now clearly erroneous in light of Carney's admissions. As Appellant noted in his Initial Brief, to hold otherwise would violate his federal constitutional rights. Initial Brief, at 27-28.

c. This Court should reject Appellee’s novel argument that a waiver of mitigation is a waiver of all constitutional protections and postconviction remedies

Appellee makes the novel argument that the claims raised below were “affirmatively waived when Sparre voluntarily waived the presentation of mitigation at the penalty phase.” Answer Brief, at 21. So, as Appellee’s argument goes, because “*Muhammad* and the contents of the PSI only becomes an issue due to his waiver,” any claims related to the generation and presentation of the PSI to the trial court have thus been waived. This argument is frivolous; a defendant’s waiver of a trial right does not constitute a waiver of all other constitutional protections and postconviction remedies. *Cf. Long v. State*, 183 So. 3d 342, 346 (Fla. 2016) (applying newly discovered evidence standards to claim that defendant would not have pleaded guilty in light of newly discovered evidence).

Appellee argues that because a capital PSI is generated “for the benefit of the court” as a safeguard in capital cases, rather than for “the benefit of the defendant” himself, Appellant has waived—or ostensibly lacks standing—to now challenge the PSI. Answer Brief, at 21. Even if this argument had merit, a criminal defendant has long had the ability to challenge his conviction or sentence of the basis of

issues that, while only indirectly affecting him, “cast[] doubt on the integrity of the judicial process.” *Powers v. Ohio*, 499 U.S. 400, 412-13 (1991); *see also Campbell v. Louisiana*, 523 U.S. 392 (1998). Undoubtedly Appellant was harmed when he was sentenced to death based on the materially inaccurate and suppressed information raised in the successive Rule 3.851 motion below.

Appellee’s argument on this point overlooks that, in *Gardner v. Florida*, 430 U.S. 349, 361–62 (1977), the United States Supreme Court rejected Florida’s argument that any federal constitutional claim regarding the unconstitutional PSI process had been waived by trial counsel’s failure to object to the PSI because, among other reasons, there was no reason to presume that either the defendant waived or trial counsel strategically withheld an objection to the information in the PSI because it was confidential and thus unknown. Likewise, Appellant could not have waived any challenge to information he did not know existed.

It is also worth noting this Court’s recent opinion in *Figueroa-Sanabria v. State*, No. SC21-1070, 2023 WL 4246244 (Fla. June 29, 2023). There, the defendant wished to waive the presentation of mitigation evidence, but in doing so, was incorrectly advised by the

trial court that they must dismiss counsel and proceed *pro se* to do so. Slip Op., at 36. The trial court erred, and this Court ordered a new penalty-phase trial. In doing so, this Court recognized that the waiver of the presentation of mitigation evidence does not constitute a waiver of any and all other trial rights. *Id.* at 36-48. Here, like *Figueroa-Sanabria*, Appellant may have wished to waive the presentation of mitigation, but Appellant did not waive anything else—he allowed trial counsel to argue for a life sentence, to cross-examine the State’s witnesses, and to make a closing argument. Therefore, although Appellant may have waived the presentation of mitigation, he did not waive the suppression and presentation of materially inaccurate and false information.

d. Conclusion

In his June 2021 interview with an investigator working on Appellant’s federal case, the PSI author in this case disclosed, for the first time, substantial materially inaccurate and suppressed information regarding the PSI report prepared in this case. Appellant timely raised the three claims below based on this disclosure. Therefore, there is no procedural bar impeding the claims.

II. THIS COURT SHOULD REMAND THE CASE FOR AN EVIDENTIARY HEARING

The claims raised below establish significant constitutional violations and newly discovered evidence that resulted in Appellant being sentenced to death. Because there are no procedural issues barring these claims and they are meritorious, this Court should remand the case for an evidentiary hearing.

a. The circuit court failed to address Claims Two and Three

As an initial matter, and as Appellee implicitly concedes, the circuit court completely failed to address two of the three claims Appellant raised below. Answer Brief, at 41-42, 52. The circuit court's failure in this regard deprives this Court of the ability to conduct "meaningful appellate review." *Mendoza v. State*, 964 So. 2d 121, 129 n.6 (Fla. 2007); *see also Tanzi v. State*, 94 So. 3d 482, 489 (Fla. 2012) (noting that a circuit court is required to make findings of fact and conclusions of law with respect to each claim raised). The circuit court below neither set out the relevant standards of review for Claims Two and Three, nor did it address the claims and the facts that Appellant alleged, and the State does not defend the circuit court's actions. Therefore, this Court should vacate the order below

because it did not “provide sufficient findings of facts and conclusions of law to provide meaningful appellate review.” *Tanzi*, 94 So. 3d at 489.

As noted in the Initial Brief, in Claim Two Appellant has raised a claim under *Giglio* and related cases regarding the State’s suppression of the information revealed by Carney in his 2021 statement. Initial Brief, at 39-45.⁴ And, in Claim Three, Appellant has raised the claim that he was unconstitutionally sentenced to death based on materially inaccurate information under *Townsend v. Burke*, 334 U.S. 736 (1948) and *United States v. Tucker*, 404 U.S. 443 (1972). Initial Brief, at 45-48. These claims state substantial constitutional violations and the circuit court erred in failing to even address them.

b. The claims are meritorious

In addition to failing to address two of the claims raised below, the circuit court erred in failing to hold an evidentiary hearing on the claims. In defending the circuit court’s failure on the merits, Appellee makes several unavailing arguments that are worth addressing here.

⁴ *Giglio v. United States*, 405 U.S. 150 (1972).

Because the arguments were raised repeatedly across the three different sections in the Answer Brief, Appellant will provide one succinct reply in support of the merits. This should not be understood as Appellant waiving any argument with respect to any specific claim raised in the successive Rule 3.851 motion.

As an initial matter, Appellee appears to fundamentally misunderstand the factual nature of the claims. Appellee characterizes the claims as arguing that “[t]his is really a claim that due process requires full information regarding all possible mitigation in a waiver-of-mitigation case” and that “the actual complaint is the Probation Officer Carney was not a mitigation specialist.” Answer Brief, at 38, 58. These are straw-man arguments. Appellant has not argued that the PSI should have contained absolutely all mitigation or that the probation officer tasked with generating a PSI should scour the world for every scrap of mitigation.⁵

⁵ Notably, in *Gardner*, 430 U.S. at 359-60, n.10, the United States Supreme Court presumed that PSI “reports prepared by professional probation officers, as the Florida procedure requires, are generally reliable,” but noted that the “presumption that the reports are normally reliable is, of course, not inconsistent with our concern about the possibility that critical unverified information may be inaccurate and determinative in a particular case.” This is such a case.

Rather, the claims are based on the affirmative misrepresentations and suppressed information specifically related to the PSI in this case and the resulting failure by the PSI officer to fulfill the requirements laid out by this Court in *Muhammad* and its progeny. For example, Carney has now admitted that, in his capacity as a probation officer tasked with generating these reports for a living, he believed that Appellant had severe mental health issues that should have been flagged but were not.

Similar to the argument that the claims are procedurally barred based on Appellant's waiver of the presentation of mitigation evidence, Appellee argues that the claims should be denied on the merits for the same reason. The argument can likewise be disregarded—a defendant's waiver of one constitutional trial right does not insulate the proceeding from any and all other federal constitutional protections and postconviction remedies. Appellant may have waived the presentation of mitigation, but he did not waive his due process rights to not be sentenced to death based on suppressed and/or materially inaccurate information.

Appellee also makes a new speculative and unsupported argument that Appellant "waived" any PSI claims because he "may"

have waived the PSI process by giving Carney short answers during the PSI interview. Additionally, Appellee speculates that Carney did not seek medical and DOC records because it is possible Appellant could have refused to provide a release if asked. Appellee's speculations are meritless. It was those short answers that, in Carney's experience and opinion as a long-time probation officer, formed the basis of his concerns regarding Appellant's mental health.

And, as to the records, Carney stated in the 2021 interview that he never even sought records beyond the initial records he was provided based on his fundamental misunderstandings of the capital PSI process and DOC's pattern and practice of generating inadequate PSI's. (PCR-2. 6-8). To the extent that Appellant may, if asked, have declined to release those records, it suffices to note that Appellant cooperated fully during the entire pretrial and mitigation investigation portions of the case and trial counsel had no trouble obtaining medical and DOC records on his behalf. *See* Initial Brief, at 3-10 (noting that Appellant met and cooperated with mental health experts and that trial counsel had no difficulties obtaining records

relevant to mental health mitigation).⁶

Regarding the newly discovered evidence raised under Claim One, Appellee's argument misunderstands the role of the PSI under *Muhammad*. Appellee argues that there was no prejudice because an accurate PSI would not "have changed the jury's view, the trial court's view, or this Court's view of mitigation to the point it would result in a life sentence instead of a death sentence." Answer Brief, at 37. But that is not the role of a capital PSI. Rather, had the PSI not been tainted by falsities and suppressed information, it would have been an abuse of discretion for the sentencing court not to order the presentation of mitigation evidence, which, as Appellee repeatedly acknowledges, would have been "extensive," *e.g.*, Answer Brief, at 22, and would have resulted in a life sentence.

As to the constitutional claims, Appellee also argues that because the PSI is a creature of state law, Appellant was not entitled to any federal constitutional or due process protections in the preparation and reliance upon the PSI in his being sentenced to

⁶ Notably, Carney neither asked the circuit court for an order providing him with relevant records, nor did he ask trial counsel or the prosecution team to simply provide him with records beyond what he initially received.

death. Answer Brief, at 48-50. As a general matter, this is wrong—sentencing procedures must comply with federal constitutional standards. *Gardner*, 430 U.S. at 358 (“[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding[.] . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.”) (internal citations omitted); *Cf. Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016) (when states enact procedures that are themselves not constitutionally required, they may not “disregard a controlling, constitutional command in their own courts” in the course of that procedure).

And, as Appellee concedes, the United States Supreme Court has long held that the preparation and content of a PSI report is subject to federal constitutional standards under *Gardner v. Florida*, 430 U.S. 349 (1977). Just as much as it is a federal issue for a Florida judge to rely on “secret information” in a capital PSI, *see id.* at 360,

it is plainly a federal issue when Florida prosecutors, and other state agents, load up their capital PSIs with false evidence or for a defendant to be sentenced to death based on materially inaccurate information.

Appellee makes related arguments that the federal constitutional claims should be denied because they are based on “omissions” in the PSI report, rather than “falsities.” Answer Brief, at 45-48, 56-58. This argument fails on its own terms—as Appellant alleged below, the PSI did contain falsities, including Carney’s false representations regarding Appellant’s mental health and childhood. (PCR-2. 6-8). But this argument is also meritless for the reason that it has long been rejected by the United States Supreme Court. *See, e.g., Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (creating a “false impression” violates due process); *Berger v. United States*, 295 U.S. 78, 85 (1935) (condemning “improper insinuations and assertions calculated to mislead”).

Ultimately, the claims raised below should be allowed to proceed forward to an evidentiary hearing because the sentencing court unduly relied on the PSI in declining to order the presentation of the substantial mitigation in this case. Appellee does not dispute

the reliance placed upon the PSI by the sentencing court with respect to both declining to order the presentation of mitigation and in sentencing Appellant to death. Rather, Appellee argues that the sentencing court was “aware” of other information. Answer Brief, at 39. As Appellant laid out thoroughly in the Initial Brief, consistent with this Court’s instructions in *Muhammad* and related cases, the sentencing court treated the PSI as the sole authoritative source in determining whether to order the presentation of mitigation evidence. Initial Brief, at 32-36.

And in this case the circuit court went even further and relied almost exclusively on the PSI in determining what mitigation to consider in sentencing and what import to give it. The sentencing court treated anything contained in the PSI as true, regardless of whether it was hearsay or unexplained, and disregarded anything outside the PSI as a mere proffer to be ignored, including undisputed mitigation evidence that multiple witnesses had already testified to in depositions or sworn statements. The circuit court never discredited, or failed to find, any mitigator that was averred to in the PSI. If the PSI had been accurate, the sentencing court would have followed it and ordered the presentation of mitigation evidence.

If the sentencing court had ordered the presentation of mitigation evidence, it would have been substantial and resulted in a lesser sentence. Initial Brief, at 48-55. Appellant has thoroughly documented severe mental health issues and suffered profound abuse and privation throughout his childhood. Additionally, despite Appellee’s arguments to the contrary, the “extensive” mitigation that Appellant could present at a new trial would also ameliorate the aggravation, tipping the scale in favor of a life sentence at a new trial under the relevant prejudice standards. Initial Brief, at 54; *cf. Porter v. McCollum*, 558 U.S. 30, 42 (2009) (“Had the judge and jury been able to place Porter’s life history on the mitigating side of the scale, and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the jury—and sentencing judge—would have struck a different balance[.]”) (internal quotation omitted). Therefore, this Court should remand the case for an evidentiary hearing on the claims raised below in Appellant’s successive Rule 3.851 motion.

CONCLUSION

This Court should reverse the lower court and remand the cause for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 14th day of July, 2023.

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CERTIFICATION OF TYPE SIZE AND STYLE

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