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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC2024-0273

LOWER TRIBUNAL CASE NUMBER: 541988CF001357

RICHARD BARRY RANDOLPH,
APPELLANT,

v.

STATE OF FLORIDA,
APPELLEE.

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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Reply Argument

The State makes essentially three arguments to support the postconviction court's denial of Mr. Randolph's motion without an evidentiary hearing. The State argues that Mr. Randolph's "motion is procedurally barred because the allegations in the motion do not qualify as newly discovered evidence." (Answer Brief, p. 12) The State asserts that the evidence is not newly discovered because it is a "repackaging" of previous testimony and, alternatively, that the evidence is inadmissible. (Answer Brief, p. 13). The State lastly argues that the evidence is "not likely to produce an acquittal on retrial." (Answer Brief, p. 13). Each argument must fail as the State's arguments conflict with well-settled law and the facts as presented in Mr. Randolph's motion, which this Court must accept as true. *Nordelo v. State*, 93 So. 3d 178, 185 (Fla. 2012); Fla. R. Crim. P. 3.851(f)(5)(B). And, notably, the State makes no effort to squarely address the caselaw relied upon by Mr. Randolph in his Initial Brief or squarely address Mr. Randolph's arguments, including that the postconviction court made its determinations as to the weight of the evidence without conducting an evidentiary hearing.

I. Mr. Randolph alleged in his motion that he timely filed his motion within one year of the discovery of the previously unavailable evidence.

The State asserts in the heading to Section A of its argument that Mr. Randolph "failed to comply with the Rule 3.851 requirement that postconviction motions be filed within one year after a judgment and sentence become final." (Answer Brief, p. 14). The State then summarizes the law regarding the filing of successive motions based on newly discovered evidence but fails to articulate how Mr. Randolph's motion was untimely. The State also cites cases in support of a summary denial which are distinguishable. Each argument will be addressed in turn.

a. Mr. Randolph's Motion was Timely

Mr. Randolph pled in his Third Successive Motion to Vacate Judgments of Conviction and Sentence that he filed his motion within one year of the discovery of the new evidence, as required under Fla. R. Crim. Pro. 3.851(d)(2)(A). Mr. Randolph further asserted that his efforts were diligent and timely. There is nothing in the record to refute this claim. The questioning of timeliness by the postconviction court in its order, ("Other than citing to application and reapplication, they fail to detail the steps they took

in over two years from the 2019 change in law to the receipt of the birth certificate in October 2022. The Court is, therefore genuinely concerned that procedurally, this application is not timely." (PCR3 86-87)), appears premised on the State's unfounded argument at the *Huff* [1] hearing.

At the *Huff* hearing, Mr. Randolph argued to the court that the delay in receiving the documents was due in part to a backlog in the New York state agency tasked with producing the documents because of COVID. (PCR3 176-177) The court did not inquire further as to the timing of the motion. In addressing a timeliness issue, this Court "has repeatedly held that 'where no evidentiary hearing is held below [the appellate court] must accept the defendant's factual allegations to the extent they are not refuted by the record.'" *Nordelo*, 93 So. 3d at 185 (quoting *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999)).

b. The State's Cases Supporting Summary Denial are Distinguishable

The State's reliance on cases in support of a summary denial of Mr. Randolph's claim are distinguishable. By way of example, in

[1] *Huff v. State,* 622 So. 2d 982 (Fla. 1993).

Brown v. State, 304 So 2d. 243 (Fla. 2020) the Court applied the *Jones*[2] standard to newly discovered evidence, *after* an evidentiary hearing which provided full development of the evidence in question. In the other cases which involve a summary denial, it was clear from the record that the newly discovered evidence was information trial counsel had, or could have obtained through due diligence, at the time of trial. In *Jimenez v. State*, 997 So. 2d 1056,1064 (Fla. 2008) this Court upheld the lower court's summarily denial of a newly discovered evidence claim when the newly discovered evidence was information that had been known to trial counsel at the time of trial and had been known to post conviction counsel for three years prior to filing the motion in question. Similarly, in *Tompkins v. State* 872 So 2d. 230, 239 (Fla. 2003), this Court affirmed the denial of a hearing where trial counsel had an illegible copy of a police report, failed to request a legible copy, but then postconviction counsel tried to argue the legible copy of the police report was newly discovered. This Court appropriately rejected that argument.

[2] *Jones v. State,* 678 So. 2d 309, 315 (Fla.1996)

c. The identity of Mr. Randolph's birth parents is newly discovered

In Section A(1) of the State's Answer Brief, the State appears to abandon the argument that the actual filing date of the motion is at issue. The State then makes the argument that the "'New Information' is not Newly Discovered [,]" (Answer Brief, p. 17), because Mr. Randolph had previously presented some information about his childhood and had mentioned he was adopted to the sentencing judge and jury. (Answer Brief, p. 18). The State then quotes the postconviction court's order, arguing that Mr. Randolph's presentation of the evidence is an attempt "'to circumvent the rules by repackaging the prior history of his abusive upbringing predicated on the discovery of the identity of his birth parents and the expert interpretation.' PCR3 pg. 91." (Answer Brief, p. 18). However, in so doing, the State and the postconviction court misapprehend both the *Jones* [3] standard and fail to set out how Mr. Randolph is circumventing any rules.

The State's argument, and the postconviction court's determination that the defense is simply attempting to repackage

[3] *Jones* 678 So. 2d at 315.

prior testimony fails in several regards. First, when Dr. Krop testified as the only defense witness at the one-day sentencing trial, his entire testimony, including direct, voir dire, cross, re-direct and re-cross, amounted to a total of 55 pages in the transcript. (R. 1706-1761) When asked about Mr. Randolph's history his response was "[w]e don't know anything about his birth, so I can't comment on that." He then repeated the incorrect version of the biological parents' story, or at least the story Mr. Randolph had been told growing up. (R.1732) The postconviction court's determination Mr. Randolph was not entitled to a hearing because the newly discovered evidence was a mere "repackaging" of evidence presented at trial is not supported by the trial record. Dr. Brodzinsky's detailed report, which must be accepted as true at this stage of the proceedings, set out facts and analyses the jury never heard and which a reasonable juror could find to be a basis for a sentence less than death.

II. The new evidence would likely result in sentence less than death

In Section A(2) of the State's Answer Brief, the State argues (i) the evidence is inadmissible, and (ii) even if admissible, the

evidence would not result in a life sentence. Both arguments must fail because they are wrong on the law and amount to a merits determination without a hearing.

a. The evidence is admissible and meets the constitutional relevancy standard

The State argues that the proffered evidence is inadmissible because mitigation evidence "must be 'relevant to the defendant's character, his prior record, and the circumstances of the offense in issue[,]'" quoting *Eaglin v. State*, 19 So. 3d 935, 944 (Fla. 2009). (Answer Brief, p. 21). However, the State's narrow reading of the analysis of the admissibility of mitigation evidence does not reference the full paragraph in *Eaglin* where this Court stated: "We recognize the requirement of the United States Supreme Court to *liberally permit any conceivable mitigation*[,]" that meets a threshold of relevance. *Eaglin*, 19 So. 3d at 944 (emphasis added).

The analysis that the State urged the postconviction court to take mirrors that of the Texas Court of Criminal Appeals' (hereinafter CCA) approach condemned by the Supreme Court of the United States in *Smith v. Texas,* 543 U.S. 37, 44 (2004) and *Tennard v. Dretke,* 542 U.S. 274 (2004).

The Court addressed the CCA's exclusion of evidence of a defendant's low IQ, where the CCA had found the evidence irrelevant because the defense failed to show the defendant's mental infirmities were severe or had a nexus to the offense. In rejecting this analysis, the Court held that the CCA's relevance test was "inconsistent with the standard we have adopted for relevance in the capital sentencing context." *Tennard,* 524 U.S. at 287. The Court explained that while, "[w]e have never denied that gravity has a place in the relevance analysis, insofar as evidence of a *trivial feature* of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability[,]" the proper test "is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death." *Id.* at 286-87 (internal quotation marks omitted)(emphasis added).

"'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background… may be less culpable'"). *Porter v. McCollum*, 558 U.S. 30, 41 (2009), *citing Williams v. Taylor* 529 U.S.

362, 398 (2000). In denying Mr. Randolph an evidentiary hearing, the postconviction court "unreasonably discounted the mitigation evidence[.]" *Porter*, 558 U.S. at 43. "Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating." *Id.* "[T]he Constitution requires that "'the sentencer in capital cases *must be permitted to consider any relevant mitigating factor.*'" *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)) (emphasis added).

Mr. Randolph's theory, as paraphrased by the postconviction court at the *Huff* hearing was that Dr. Brodzinsky would "[m]ore saliently [ ] testify that the additional information about the circumstances of the Defendant's birth would give a jury a deeper understanding of the psychopathology [Mr. Randolph suffered] both as a young child and leading up to the murder." (PCR3. 86) This information is of such a character that a reasonable juror could conclude the evidence serves as a basis for a sentence less than death. That is the relevancy test that must be applied here and which Mr. Randolph has met for purposes of being granted evidentiary development.

If given the opportunity, Dr. Brodzinsky would testify, as set out in his report filed with the postconviction court, that the newly discovered evidence would demonstrate that Mr. Randolph does not have a genetic predisposition for criminality, substance abuse, or significant mental health disorder. "Therefore, the most likely explanation for what led [Mr. Randolph] to commit this terrible crime is the unrelenting adverse experiences he encountered in his adoptative family." (PCR3 53) "The new information regarding the birth parents' health and psychosocial history provides a more nuanced and previously unreported context for understanding the devastating impact of [Mr. Randolph's] adoptive family life on his development and behavior." (PCR3 53). "It is unreasonable to discount to irrelevance the evidence of [Mr. Randolph's] abusive childhood [and adoption circumstances], especially when that kind of history may have particular salience for a jury evaluating [Mr. Randolph's] behavior." *Porter,* 558 U.S. at 43.

The newly discovered evidence is more than just the discovery of the birth parent's identity, but the facts surrounding Mr. Randolph's birth, adoption, the nature of the birth parents' lives and how that informs a deeper understanding of Mr. Randolph's

mental health and psychopathology, and how this evidence considered with all other evidence presented, at trial and the previous postconviction hearing, lessens Mr. Randolph's culpability and may serve as a basis for a juror to render a verdict less than death.

The circumstances of Mr. Randolph's birth parents, and the proffered testimony of Dr. Brodzinsky met this minimal standard of relevance. And while the postconviction court, after having heard the evidence, may have determined it was insufficient to produce a life sentence, that was not what happened here. The postconviction court denied Mr. Randolph the ability to present his evidence, incorrectly deeming it irrelevant and erroneously denied Mr. Randolph a hearing.

b. The evidence would likely produce a sentence less than death

In support of their argument, the State relies on a block quote from the postconviction court's order, stating that the court reasonably determined that "the second prong of *Jones* had not been met," by relying on *Randolph v. State*, 853 So. 2d 1051 (Fla. 2003) (Answer Brief, p. 24). However, the post-conviction court's analysis of the weight of the evidence and whether it would produce

a sentence less than death is erroneous for three primary reasons. First, the postconviction court unreasonably discounted the mitigating evidence as overruled in *Porter*, supra. Second, the postconviction court failed to weigh the evidence presented in the initial postconviction hearing with that proffered in the instant motion in the aggregate, but instead, weighed the initial postconviction motion evidence against Mr. Randolph as if it had been presented at trial. In so doing, the court failed to weigh the totality of the evidence as required under *Jones*. And, third, the court's weighing and rejection of the proffered testimony as "speculative" without conducting a hearing amounts to a merits ruling without evidentiary development.

c. The postconviction court unreasonably discounted the newly discovered mitigation evidence

The postconviction court unreasonably discounted the mitigation evidence of Mr. Randolph's adoption and his birth parents' successful lives and lack of criminality as argued supra. The postconviction court appeared to apply a "nexus" requirement as that rejected in *Tennard*, when the court stated "The connection of this alleged newly discovered evidence to actual crime committed

and the sentence is tenuous at best." (PCR3, p. 94). This analysis was an erroneous and unreasonable application of the law as set out *supra*.

d. The postconviction court failed to consider the totality of the evidence

Second, the postconviction court failed to fully consider the totality of the evidence at trial and in postconviction as it was required to do. A proper analysis requires considering the proffered evidence of Dr. Brodzinsky, Mrs. Kelly and Mr. Streeter *and* the testimony of Dr. Eisenstein, Dr. Burglass, Timothy Randolph, Pearl Randolph, Shirley Randolph, Verna Betts presented at the initial postconviction evidentiary hearing *and* Dr. Harry Krop's testimony at trial.

> An assessment of the second prong of *Jones* includes consideration of "whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence," "whether the evidence is cumulative to other evidence in the case," and "the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence." *Jones*, 709 So. 2d at 521. When evaluating these factors to determine whether the newly discovered evidence would probably result in an acquittal or a lesser sentence on retrial, *see id.*; *Swafford*, 125 So. 3d. at 767, this Court considers it in conjunction with not only the evidence already presented at trial but also any new evidence the movant has developed in postconviction proceedings that could be introduced at a new trial,

> including evidence that has not been considered on its own because it was the subject of a procedurally barred claim. *See Hildwin v. State*, 141 S.3d 1178, 1181, 1184 (Fla. 2014). In other words, this Court examines the newly discovered evidence at issue in light of a "total picture" of the case that could be presented at a new trial. *See id.* at 1184.

Brown v. State, 304 So. 3d 243, 274 (Fla. 2020).

The postconviction court erred in determining that because the initial post-conviction court heard mitigation evidence in 1997 and failed to find trial counsel ineffective, that *Jones* warranted a reliance on previous rulings to support a determination that the new information was a mere "repackaging" of what was presented at the penalty phase. The court was required to look at the new evidence proffered here – that of the identity of Mr. Randolph's adoptive parents and their lives – in aggregate with the evidence presented in the initial postconviction proceeding.

The State cited to no case law in support of their argument below that "[a]nd even assuming that you would have this hearing, and we would admit this evidence, there is no probability that this will produce an acquittal." (PCR3 189) Additionally, the postconviction court was required not to just weigh the newly discovered evidence against the aggravating factors, as suggested by

the State, "when you weigh those aggravating factors against what they are attempting to introduce, there's no way that he would receive a life sentence" (PCR3 189) but also to consider the mitigating evidence from the July 1997 evidentiary hearing and the mitigating evidence presented at trial in determining whether there was a likelihood of a lesser sentence. The error in the postconviction court's ruling is illuminated when the court stated: "Finally, balancing the potential new information with the (4) aggravating factors would not, in all probability, alter the sentence. Simply put, the second prong of *Jones* has not been met." (PCR3, p. 94). The postconviction court makes no mention of the mitigation found at trial, the additional mitigation found at the initial postconviction hearing or the fact that the jury recommendation in this case was a mere eight to four vote. Mr. Randolph need only establish that it is likely he could convince one more juror to vote for a life sentence based upon ALL the evidence from the penalty phase, the postconviction hearing and the newly discovered evidence under the *Jones* totality analysis.

e. The postconviction court's weighing of the proffered expert testimony as speculative amounts to a merits ruling without a hearing

The State, in arguing that the postconviction court properly denied Mr. Randolph's claim, blockquotes, as noted supra, the postconviction court's order. (Answer Brief, p. 24). In its order, the postconviction court states that the "'impact' evidence proposed to be presented by the expert[,] is highly speculative." (PCR3, p. 93). The postconviction court then makes several assumptions about what it perceives as the hypothetical nature of the testimony and the concludes the defense theory relies on the notion that the "jury must have clearly misapprehended the evidence they received about the Defendant's childhood and life experiences." (PCR3 p. 93).

This analysis is clearly erroneous, and while the postconviction court may conclude *after hearing from the expert witness* that his testimony is not likely to persuade a reasonable juror, the postconviction court never allowed Mr. Randolph to present his expert. At this stage of the pleading, this Court and the lower court must accept Mr. Randolph's assertions as true, including that of his expert, absent contradiction in the record. *Nordelo*, 93 So. 3d at 185 ; Fla. R. Crim. P. 3.851(f)(5)(B). Mr.

Randolph was not given the opportunity to establish, through direct examination, subject to cross-examination or presentation of an opposing expert, that Dr. Brodzinsky, a highly regarded expert with a specialty or focus on adoption, based his opinion on articulable facts and peer reviewed scientific theories – not rank speculation. The postconviction court's rejection of Mr. Randolph's proffered evidence was an improper merits ruling without evidentiary development. The State's arguments lack merit.

CONCLUSION AND RELIEF SOUGHT

This Court should reverse and remand for an evidentiary hearing so that Mr. Randolph can present the newly discovered evidence identified in his motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify I filed this document on July 15, 2024 using the Florida Courts' Efiling Portal which contemporaneously served Assistant Attorney General Doris Meacham.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable word count and font requirements contained Florida Rule of Appellate Procedure Rule 9.045. The brief contains 3,244 words and uses Bookman Old Style 14-point font.

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