IN THE SUPREME COURT OF FLORIDA

No. SC04-1610

ANTHONY FARINA,
Appellant

versus,

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PRELIMINARY STATEMENT

Any claims not argued are not waived and Appellant relies on the merits of his initial brief.

STATEMENT OF THE CASE AND FACTS

In his statement of the case, Appellee completely leaves out the fact that the trial court granted Farina leave to amend his Motion to Vacate in its September 30, 2003 scheduling Order (SUPP ROA , Vol I, 17-18). Pursuant to this Order, Farina filed his amended claims III and V on November 3, 2003 (ROA Vol. II, 423-427). The State filed its Response to Amendment on November 24, 2003 (ROA Vol. II, 441-443).

SUMMARY OF ARGUMENT

The Appellee in his Summary of Argument, much as he does through out his Reply Brief, distorts and mischaracterizes Farina=s newly discovered evidence of his brother=s life sentence claim, calling it a proportionality claim. (Response at 16). Appellee appears to be re-labeling Farina=s claim purposefully in order to claim a procedural bar. This argument is facetious and misleading.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING PART OF CLAIM III REGARDING NEWLY DISCOVERED EVIDENCE OF JEFFREY=S LIFE SENTENCE AND ERRED IN DENYING ANTHONY FARINA=S CLAIM THAT THE NEWLY DISCOVERED EVIDENCE WARRANTS A NEW PENALTY PHASE. THESE RULINGS VIOLATE ANTHONY FARINA=S RIGHTS UNDER FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. The lower court erred in holding that Anthony Farina=s claim of newly discovered evidence of his brother=s life sentence was procedurally barred.

Just as he did at the trial level, Appellee distorts and mischaracterizes Farina=s claim. By way of example, Appellee retitles this argument AThe Collateral Proceeding Trial Court Correctly Decided the Proportionality/New Evidence Claim.@ (Response at 17) and then disparages Farina=s argument by calling it Anothing more than his continuing disagreement with this Court=s denial of his proportionality claim on direct appeal.@ (Response at 18). Appellee further argues that because this Court addressed Farina=s Aproportionality claim,@ the trial court=s finding that the portion of Farina=s claim dealing with his brother=s life sentence is procedurally barred is correct. Appellee=s argument is erroneous.

Anthony=s claim is that evidence of his brother=s life sentence, in light of the undisputed fact that his brother was the actual killer, coupled with the newly discovered testimony of his brother about details of the crime including Anthony=s hesitation to go forward with the robbery and Jeffery=s admission that no one could

have stopped him from killing the victim at that time, and other witness testimony of Jeffery=s substantial domination of Anthony, constitutes newly discovered evidence which Awould probably produce a [life sentence] on retrial.@ *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991). This Court has recognized that evidence of an equally culpable co-defendant=s life sentence imposed after the death sentence of a co-defendant constitutes A newly discovered evidence@ for the purposes of postconviction relief. *Scott v. Dugger*, 604 So.2d 465, 469 (Fla. 1992) Further, all newly discovered evidence claims should be brought under Florida Rule of Criminal Procedure 3.850 (or its equivalent in capital cases, 3.851). *Richardson v. State*, 546 So.2d 1037 (Fla. 1989). It is error for a trial court to find a co-defendant=s life sentence procedurally barred in a postconviction claim when the claimant alleges new facts in addition to the life sentence: AWe agree with Kight that it is contradictory for the trial court to conclude that O=Kelley=s testimony constituted newly discovered evidence but the claim of disparate sentencing was procedurally barred.@ *Kight v. State*, 784 So.2d 396, 399-400 (Fla. 2001) (distinguishing *Steinhorst v. Singletary*, 638 So.2d 33 (Fla. 1994)

Farina=s claim is not a proportionality claim. As Farina recognized in his Initial Brief, proportionality review is a distinct function of this Court on appeal. Farina recognizes that a proportionality claim is not a cognizable claim in a 3.851 motion and has never raised a proportionality claim, regardless of what name Appellee chooses to distort Farina=s claim. Farina=s claim is a newly discovered evidence claim which

requires the trial court to consider the evidence presented at trial and all the newly discovered evidence, including Jeffery=s life sentence and testimony, in determining whether there is a reasonable probability that the evidence would result in an acquittal of the death penalty. *See Jones v. State*, 709 So.2d 512, 522 (Fla. 1998) (When an Aappeal involves a second evidentiary hearing in which claims of newly discovered evidence were presented and evaluated by a trial judge, we must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial.@); *accord Lightbourne v. State*, 742 So.2d 238, 247-48 (Fla. 1999).

Appellee made the same proportionality/procedural bar argument at the trial court level and led the court down the rosy path to error. The trial court summarized the relevant portion of Farina=s claim as follows: AThe defendant contends that it is probable that this new evidence, i.e., the life sentence imposed upon the brother and the brother=s testimony regarding his domination over the defendant, plus all the other mitigation introduced, a life sentence would be imposed.@ (ROA Vol. III, 481) The trial court summarized Appellee=s argument: AThe state argues that the brother=s life sentence is not newly discovered evidence as it was discussed in the defendant=s direct appeal, and that the supreme court=s (sic) rejection of the argument shows that the claim has no factual basis. The state also contends that as this issue was raised on

direct appeal, it is procedurally barred.@ Id.

The trial court then ruled that it Apartially agrees with the state@ in that the Aproportionality of the death sentence in light of the co-defendant=s life sentence . . [was] raised and rejected on appeal . . . Therefore, this portion of the claim is procedurally barred. . . . In this context then, Jeffery=s less severe sentence is irrelevant to Anthony=s proportionality review because the aggravation and mitigation in their cases are per se incomparable@ Id. In sum, the trial court disregarded and rejected any consideration of Jeffery=s life sentence as procedurally barred.

Appellee misleadingly suggests that the Court then proceeded to analyze all the evidence, including Jeffery=s life sentence, under the *Jones* newly discovered evidence standard. (Response at 26) While it is true the trial court did apply the *Jones* standard, the court only engaged in that analysis as it applied to the witness testimony as to Jeffery=s domination of Anthony presented at the postconviction hearing, not Jeffery=s life sentence. The trial court described the claim it analyzed under the *Jones* standard as: ASecond is the claim of new evidence showing the brother=s substantial domination over the defendant.@ (ROA, Vol. III, 481)

In Appellant=s Motion for Rehearing to the trial court, Appellant argued to the trial court:

> The Florida Supreme Court, in rejecting Anthony=s proportionality claim as to Jeffery=s life sentence on appeal, did not hold that the newly discovered evidence of Jeffery=s life sentence was procedurally barred in

a postconviction proceeding. . . . The Florida Supreme Court analysis is entirely separate from and does not impact the analysis that this Court is required to conduct in assessing the newly discovered evidence claim. *See State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973)(AReview by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case . . . If a defendant is sentenced to die, this Court can review that case in light of other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia*, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgement rather than an exercise in discretion at all.@); *Lightbourne v. State*, 841 So.2d 431, 436 (Fla. 1999) (explaining the circuit court=s function in postconviction claims of newly discovered evidence). Anthony=s newly discovered evidence claim of Jeffery=s life sentence is a fact which a new sentencing jury should be able to consider in making a new sentencing determination. Indeed, it is a fact that this Court must consider in making its analysis regarding whether the cumulative effect of all the post-penalty phase evidence could induce in a reasonable juror a reasonable doubt that a death recommendation is appropriate. *Lightbourne v. State*, 841 So.2d 431, 436 (Fla. 1999) . . . . In the postconviction setting, however, Anthony=s newly discovered evidence claim of Jeffery=s life sentence is a fact which a new sentencing jury should be able to consider in making an individualized sentencing determination. As Justice Anstead wrote in arguing for reversal of Anthony=s death sentence on direct appeal, Awe should acknowledge that Anthony=s sentencing jury did not know that Jeffery would receive a life sentence and, in fact, assumed the opposite, and now provide for a sentencing jury that will be properly informed as to what actually happened to Jeffery. As we emphatically declared in *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992), the codefendant=s life sentence is obviously a critically important factor to be considered by those charged with determining another=s fate. The relevancy and materiality of such information is only heightened when the actual killer is sentenced to life.@ Id. at 57-58 (Anstead, J. dissenting). Justice Anstead further noted that while the court Aacted to reduce Scott=s sentence to life, we held that a defendant is entitled to raise a codefendant=s subsequent life sentence as a ground for collateral review under rule 3.850.@ Id. At 58, n. 3.

In light of the emphasis that both the United States Supreme Court and the Florida Supreme Court have placed on jury determination of

> punishment (*See Espinosa v. Florida*, 505 U.S. 1079 (1992) and *Tedder v. State*, 322 So.2d 908 (Fla. 1975), it is difficult to imagine a scenario more compelling as to the issue of ensuring jurors have all available accurate information in determining whether an individual should live or die than in the instant case. This Courts ruling misapprehends and inconsistently applies Florida and federal law and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

(ROA, VOL. III, 497-498)

The State, in its Response to Motion For Rehearing, argued that the trial court properly held that Aany claim predicated on Jeffery Farina=s sentence was procedurally barred because that claim had been raised and litigated on direct appeal.@ ROA Vol. III, 502. Appellee now appears to want to shy away from this argument and obfuscate the circuit court=s ruling, claiming the circuit court analyzed all the evidence under the *Jones* standard. Appellee=s argument is not accurate.

The trial court, in its Order Denying Motion for Rehearing, clearly reaffirmed its position that **any** consideration of Jeffery=s life sentence was procedurally barred:

> Whether a proportionality review is undertaken or new evidence is considered, the result is the same. Both require consideration of the weight of aggravating and mitigating circumstances. Again, as the Florida Supreme Court held: Awhen a defendant is sixteen years of age, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating factors as a matter of law. In this context then, Jeffery=s less severe sentence is irrelevant to Anthony=s proportionality review because the aggravation and mitigation are per se incomparable.@ Id. At 56. As the sentences are per se incomparable, **Jeffery=s sentence would be irrelevant as a matter of law in any re-sentencing for Anthony**.

ROA, Vol. III, 506 (emphasis added).

Should this Court uphold the trial court=s ruling and flawed analysis as Appellee urges this Court to do, it would create a uniquely unfair situation where in Anthony is denied the opportunity to have a court, or a sentencing jury, consider Jeffery=s sentence in evaluating Anthony=s newly discovered evidence claim. This Chinese Wall the Appellee has urged the trial court to build around perhaps the most compelling piece of evidence in mitigation in Anthony=s case, that the actual killer got life, is inconsistent with Florida and federal law, requiring an individualized sentencing determination, due process and protection against cruel and unusual punishment. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (The Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor any aspect of the defendant=s character or record and any of the circumstances of the offenses that the defendant proffers as a basis for a sentence less than death). This Court should reject Appellee=s argument and find that the trial court erred in refusing to consider Jeffery=s life sentence as part of Anthony=s newly discovered evidence claim and remand Anthony=s case for a new sentencing proceeding where a jury can hear the testimony of the witnesses about Jeffery=s domination of Anthony and that Jeffery, the actual killer, received a life sentence.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING ANTHONY FARINA=S

AMENDED CLAIMS ON NEWLY DISCOVERED EVIDENCE AND INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN FAILING TO PRESENT TESTIMONY ABOUT JEFFERY=S VIOLENT TEMPER FINDING THAT THE CLAIMS WERE WAIVED

The Appellee=s entire argument as to this claim is essentially a lengthy quote of the Circuit Court Order and a one sentence argument, ADisposition of these claims is correct and should not be disturbed.@ Such a scanty argument is not sufficient to sustain a position and cannot be rebutted since it says essentially nothing. Appellant stands on the merits of his initial brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of November, 2005.

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I hereby certify that a true copy of the foregoing Reply Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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