IN THE SUPREME COURT OF FLORIDA

JOHNNY MACK SKETO CALHOUN,
Appellant,

CASE NO.: SC18-340
Lower Tribunal No(s).:
2011CF11A

v.

STATE OF FLORIDA,
Appellee.

and

JOHNNY MACK SKETO CALHOUN,
Petitioner

CASE NO.: SC18-1174
Lower Tribunal No(s).:
2011CF11A

v.

MARK S. INCH, etc.
Respondent.
_____/

APPELLANT'S MOTION FOR REHEARING

Appellant, Johnny Mack Sketo Calhoun, pursuant to Fla. R. App. P. 9.330, respectfully moves this Court to reconsider its opinion denying Mr. Calhoun's appeal and petition for writ of habeas corpus. Rehearing is appropriate because this Court has overlooked or misapprehended points of fact from the record. All other claims for relief previously presented to this Court are specifically argued again and no claim previously raised is hereby abandoned.

I. In determining that the newly discovered evidence of Doug Mixon's apology to Robert Vermillion would be inadmissible hearsay, this Court overlooked *State v. Gad,* which holds that an apology is an admission and therefore not inadmissible hearsay.

This Court agreed with the circuit court's finding that Doug Mixon's request for forgiveness from Robert Vermillion, a relative of the victim's husband, posed "both admissibility and credibility problems." *Calhoun v. State*, No. SC18-1174, 2019 WL 6204937, at *3 (Fla. Nov. 21, 2019). This Court determined that Mr. Vermillion's testimony is hearsay and not admissible as substantive evidence.

However, this Court ignored *State v. Gad*, 27 So. 3d 768, 770 (Fla. 2d DCA 2010). In *Gad*, the district court overruled the trial court's exclusion of Mr. Gad's apologies. The district court reasoned that the apologies could be understood to be admissions and were therefore relevant admissible evidence.

Also, this Court should reconsider its ruling that the circuit court's finding that Mr. Vermillion's testimony was "false" was based on competent, substantial evidence. This Court ignored the contradictions in the circuit court's credibility findings. The circuit court's determination that Mr. Vermillion's testimony is false relied on a finding that Mr. Mixon was credible. (PCR. 2608). However, in order to deny the claim regarding the newly discovered evidence of Natasha Simmons, the circuit court found Sheriff Greg Ward credible (PCR. 2606), and Sheriff Ward testified that he does not find Doug Mixon credible, saying he knew Doug Mixon for years and "wouldn't believe anything [Doug Mixon] told you. (EH. 399-400).

The circuit court cherry picked from Sheriff Ward's testimony and only credited the testimony that supported the court's findings, ignoring the testimony that contradicted the court's desired result. These contradictions cast doubt on whether the circuit court's findings are based on competent, substantial evidence.

II. The Court's analysis of the newly discovered evidence "cumulatively with all of the evidence that would be admissible on retrial" fails to take into account the impeachment evidence omitted from the original trial that would be admissible at a new trial.

In addressing the cumulative view of newly discovered evidence in addition to all other evidence in Mr. Calhoun's case, this Court only assessed evidence that was admitted in Mr. Calhoun's original trial that supported the State's theory. In its opinion, this Court noted that both Mr. Calhoun and the victim's DNA was found on a blanket and a roll of duct tape removed from Mr. Calhoun's trailer.

This Court failed to analyze evidence that was available at the time of Mr. Calhoun's trial, but overlooked by defense counsel. Doug Mixon was included as a possible contributor to DNA found on a shirt in Mr. Calhoun's trailer that also contained hair from the victim. (EH. 176). There was also a possible third contributor to the DNA mixture found on the roll of duct tape. (T. 872).

But for trial counsel's deficient performance, Mr. Calhoun's jury would have heard Mr. Contreras' testimony that Mr. Mixon's girlfriend lived with him and that Mr. Mixon and his girlfriend were not at Mr. Contreras' house on the night of the murder. This testimony would be presented to the jury at a new trial. Also, the

victim's husband should have been cross-examined about his sincerity and concern for his missing wife in order to cast doubt about whether this was a happily married couple.[1] This would support trial counsel's argument that Brittany Mixon was suspicious and jealous of the interactions between Mr. Calhoun (her boyfriend) and the victim. (T. 1189).

This Court should also consider that at a new trial, Sherry Bradley would be confronted with the fact that she had read about Mr. Calhoun and the vehicle prior to speaking with the police, even though she testified at trial that she had no prior knowledge of the incident from the media. Also, at a new trial, Mr. Batchelor would be confronted with the fact that there was a 12-year age difference between him and Mr. Calhoun and that he could not have known Mr. Calhoun from school. A new jury would hear testimony from Harvey Glenn Bush that the store where the victim worked was closed by 7:00 p.m. on the night she went missing, and this would cast doubt on Jerry Gammons' testimony that the victim stopped by his trailer around 8:40 p.m. This evidence would chip away at the State's timeline, create reasonable doubt, and would probably produce an acquittal at a new trial.

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[1] In its opinion, this Court found the impeachment of Brandon Brown immaterial because there was no evidence to suggest that Brandon Brown committed this crime. However, there was evidence that implicated both Brittany Mixon and Doug Mixon.

III. The Court should reconsider its finding that Mr. Calhoun's habeas claim regarding the jury instruction on jurisdiction was procedurally barred.

In denying Mr. Calhoun's habeas claim regarding the trial court's erroneous jury instruction on jurisdiction, this Court cited to *Knight* for the proposition that a claim raised in postconviction cannot be re-litigated in a habeas petition. Mr. Calhoun's case is distinguishable because the claim raised in his petition for writ of habeas corpus was summarily denied by the trial court. The issue has not been litigated on the merits, and therefore, he is not "re-litigating the substance of these claims" now. *Knight* cites to *Baker* and *Parker* for further explanation of why a claim should not be raised in a habeas petition that could/should have been brought in a Rule 3.850 motion for postconviction relief. This Court does not want petitioners bringing matters before the Court when a lower court could have or already evaluated the claim. Since this Court is the court of appeal for capital cases, Mr. Calhoun's claim is appropriately before this Court.

IV. This Court should reconsider its finding that the jury instruction conformed with *Lane*, because the record clearly shows that the instruction was an amalgamation of *Lane*, *Conrad*, and some instructions concocted by the State.

A proper jury instruction on jurisdiction in Mr. Calhoun's case would have allowed the jury to find jurisdiction based on either the intent to murder being formulated in the State of Florida, or if the underlying felony [in Mr. Calhoun's case kidnapping] occurred in Florida. The elements of kidnapping include a specific

intent, meaning that in order to find jurisdiction based on kidnapping, the jury must find that the victim was taken with the already formed intent to commit a felony. In Mr. Calhoun's case, the State charged him with kidnapping with the intent to commit murder. (R1. 39)

The instruction proposed by Mr. Calhoun's trial counsel adequately addressed both of these scenarios and specifically explained that if the jury were to find jurisdiction based on the kidnapping occurring in Florida, they would still have to find that the kidnapping and murder was "one continuous course of action". (R5. 941). The trial court and the State claimed trial counsel's proposed instruction was confusing, and said that they were written in "Tallahassee English." (T. 1118) The instruction given to Mr. Calhoun's jury allowed the jury to find jurisdiction in Florida based solely on the victim being taken from Florida, with no requirement that the jury find that the specific intent to commit a felony was already formulated.

Mr. Calhoun does not dispute that a jury *could* find jurisdiction based on the kidnapping and determine that there was evidence to support a finding that she was taken with the intent to commit murder already formulated. The jury however was alleviated of making that determination as they were only instructed that they had to find that she was "taken against her will from Florida." (R5. 940).

V. This Court should reconsider its reliance on *Pietri* to deny Mr. Calhoun's claim that his right to due process was violated when the circuit court adopted significant portions of the State's written closing.

In *Pietri*, this Court adopted the reasoning from *Glock v. Moore*, 776 So.2d 243 (Fla.2001), that since the defendant had notice of the State's proposed order and the opportunity to submit his own proposed order, there was no due process violation. However, as noted in Mr. Calhoun's initial brief, *Glock* deals with a court adopting a *proposed order*. In Mr. Calhoun's case, the circuit court adopted the State's written *closing argument* to compose the court's order denying postconviction relief. This Court held that Mr. Calhoun did not suffer a due process violation because he had an opportunity to object to the State's closing. However, this Court overlooked Fla. R. Crim. P. 3.851(f)(5)(E), which specifically states that "no answer or reply arguments shall be allowed." Mr. Calhoun was not afforded the opportunity to address the errors in the State's closing argument because Rule 3.851 specifically forbids it. Unfortunately, the circuit court essentially cut and pasted from the State's closing argument, including an improper standard of review for ineffective assistance of counsel claims. (PCR. 2568). Mr. Calhoun raised these issues as soon as was permissible in the initial brief to this court because Rule 3.851 does not allow him the opportunity to challenge the State's false statements of the law before the circuit court can adopt them into an order denying relief.

WHEREFORE, Mr. Calhoun respectfully requests this Court grant rehearing and reconsider the opinion of November 21, 2019, denying Mr. Calhoun's appeal of the denial of his Rule 3.851 motion for postconviction relief and petition for writ of habeas corpus.

Respectfully submitted, this 5th day of December, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this day, December 5, 2019, via electronic service to Lisa Hopkins, Assistant Attorney General, at lisa.hopkins@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Stacy R. Biggart
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