

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

TONY GARCIA

Respondent.

Case No. SC19-1870

L.T. Nos. 4D17-3751

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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ARGUMENT

The State generally relies on its initial brief to refute Respondent's arguments but offers the following in response to Respondent's answer brief.¹

I. Erroneous Factual Assertions.

Respondent states “the fact that the trial court . . . explicitly said it was considering it demonstrates that the trial court did think evidence of Garcia’s subsequent misconduct was relevant and admissible at sentencing.” (AB 15; PDF 26). Respondent misstates the facts.

This portrayal is directly contrary to the record and the 4th DCA’s opinion. See (R1 593-655); Garcia v. State, 279 So. 3d 148, 150-51 (Fla. 4th DCA 2019) (“the trial court **made no comment indicating that it had considered** [Respondent’s] subsequent misconduct in imposing sentence;” and “**nothing in the court’s statement indicated that the court did not consider** the evidence of [Respondent’s] post-arrest misconduct.”).

Further, Respondent asserts “the trial court did not listen to the [call recording] CDs.” See (AB 6, 26; PDF 17, 37). This is inaccurate as the record suggests the trial court **did** listen to the call recordings, based on the State’s offer to play the recordings **again**. (R1 625) (“all those phone calls were submitted to the

¹ The State also incorporates its preliminary statement from its initial brief and relies on these additional symbols: IB = Initial Brief; AB = Answer Brief. Again, emboldened emphasis is added unless otherwise stated.

Court and to the defense and the state is ready to play them for the Court **if the Court wants to listen to them again.”**).

II. Erroneous Legal Conclusions to the Facts of this Case.

Respondent asserts that: (1) “nothing suggests that the trial court knew the misconduct relied upon by the state was improper;” (2) the defense objected to the bond hearing evidence as admitted “without Garcia’s presence,” and the trial court overruled that objection; and (3) “the trial court did not listen to the CDs.” See (AB 6, 15, 26; PDF 17, 26, 37). Respondent uses these assertions to argue: (A) the trial court cannot be presumed to have disregarded the subsequent misconduct; (B) this Court must apply Petion to the subsequent misconduct allegedly considered in this case; and (C) the subsequent misconduct was not substantiated. (AB 14-15, 26; PDF 25-26, 37).

A. Appellate Courts Must Show Trial Courts Deference.

This argument is based on a fundamental misreading of this Court’s opinions in Harvard and Alford. This Court specifically stated that the **argument** in Harvard was “because the original trial judge considered confidential material in imposing the first death sentence, he **could have** been influenced at resentencing by this improper information and by his prior ruling.” Harvard v. State, 414 So. 2d 1032, 1034 (Fla. 1982). This Court explicitly rejected this “could have” argument, in favor of the contrary presumption because **the legal system is dependent upon**

confidence in trial judges to adhere to the requirements of law. See id. (citing Alford v. State, 355 So. 2d 108 (Fla. 1977)). This Court again relied on Alford to explain this rule--and its limitations--in Petion. Petion v. State, 48 So. 3d 726, 732 (Fla. 2010) (citing Alford, “this Court identified and **gave deference** to a trial court’s ability to filter the evidence considered for a decision.”).

The 1st DCA recently utilized Harvard to reject a Norvil² claim. See Johnson v. State, 45 Fla. L. Weekly D1666 (Fla. 1st DCA July 13, 2020). The 1st DCA stated:

[T]his Court has held that the simple fact that a sentencing court is presented with impermissible information is alone insufficient to merit reversal of a sentence. [T]here must be some **affirmative indication that a trial court actually based the sentence on an impermissible factor** before an otherwise legal sentence will be reversed.

Id. (citing Harvard, Serrano v. State, 279 So. 3d 296 (Fla. 1st DCA 2019), and Barlow v. State, 238 So. 3d 416 (Fla. 1st DCA 2018)).

Thus, Respondent’s inverted constraint on the Harvard presumption, (AB 14-15; PDF 25-26), is a patently inaccurate depiction of the rule. See Harvard, 414 So. 2d at 1034; Johnson, 45 Fla. L. Weekly D1666.

B. Petion is Inapplicable to This Case.

This argument is an overly broad reading of Petion and the facts of this case.

² Norvil v. State, 191 So. 3d 406 (Fla. 2016).

First, Respondent's objection **only** applied to the evidence elicited at the bond hearing and **not** to the jail call recordings. (R1 623). This argument is thus **not** dispositive of all consideration of subsequent misconduct in this case.

Second, the Petion rule rests upon a trial court's **specific** ruling on admissibility. See Petion, 48 So. 3d 735-38. Florida allows for limited admissibility of evidence. See § 90.107, Fla. Stat. ("When evidence that is admissible . . . for one purpose, but inadmissible . . . for another purpose, is admitted, the court, upon request, shall restrict such evidence to its proper scope"). Additionally, a defendant's failure to raise a **specific** objection to the trial court precludes review of that issue on appeal; absent fundamental error. Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

In Petion, the defense specifically objected during a bench trial that the "testimony from a police officer concerning generalized common practices among drug dealers [was] inadmissible as substantive proof of a particular defendant's guilt." Petion, 48 So. 3d at 729. The trial court in that case overruled the objection and allowed the officer to testify on this subject. Id. at 728.

It would make scant sense under Petion to hold a trial court considered

evidence for an improper purpose when the essence of such impropriety was not **specifically** raised in the trial court. Cf. § 90.107, Fla. Stat.; Tillman, 471 So. 2d at 35. Here, Respondent **never** asserted in the trial court that subsequent misconduct was an impermissible consideration at sentencing. The trial court’s ruling on Respondent’s purported objection only pertained to **the stated purpose of the objection**; the admissibility of the bond hearing evidence despite Respondent’s absence.³ See § 90.107, Fla. Stat.; Tillman, 471 So. 2d at 35. Thus, Respondent’s reliance on Petion is unavailing.

C. All the Evidence was Either Considered or it Was Not.

This argument is extremely puzzling. Initially, the State reiterates that this argument is based on the erroneous factual and legal assertions that the trial court did not listen to the jail call recording CDs and that Petion applies to this case. See section I., and II.B. section I & II.B. supra pp 1, 3-5. Regardless, Respondent wants this Court to presume the trial court **considered** allegedly improper factors but also presume it **ignored** evidence substantiating the same factors.

Essentially, Respondent wants the presumption to apply only in ways that benefit him. Respondent cannot ‘have it both ways’ because his entire argument rests on the trial court’s statement that it considered “**all** the evidence.” See Garcia, 279 So. 3d at 151.

³ The propriety of this specific ruling has never been challenged on appeal.

Assuming this Court disagrees with the State’s interpretation of Harvard and Alford, this Court still **cannot** apply the rule in the way Respondent asserts. Either the trial court considered: (a) “**all** the evidence” **including** the substantiating evidence of the allegedly improper factors, see Garcia, 279 So. 3d at 151; or (b) “**all** the evidence” **excluding** the evidence of allegedly improper factors. See Harvard, 414 So. 2d at 1034; Alford, 355 So. 2d at 108-09. Respondent’s argument is therefore flawed.

III. Erroneous Norvil Analysis and Reliance Interest Determinations.

Respondent conveys a completely overbroad version of Norvil’s ‘bright line’ rule. Respondent holds Norvil as a hallowed bastion of due process and admonishes its abolition as heralding a “standardless sentencing scheme,” to “permit trial courts to sentence individuals based on any factors that it so chooses, even those unrelated to the primary offense, without any guiding standards, without constitutional protections, and in violation of the [Criminal Punishment Code] CPC.” (AB 35; PDF 46).

These exaggerations are entirely erroneous. Norvil expressed its ‘bright line’ rule as: “a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense.” Norvil, 191 So. 3d at 410. A bar on considering subsequent “arrest[s]” is **not** a bar on all subsequent “misconduct.” Respondent--and the Garcia court--ignore the rudimentary meaning of a ‘bright

line’ rule to impermissibly expand this Court’s phrase, “a subsequent arrest without conviction,” to any and all conduct occurring subsequent to the primary offense regardless of proof or substantiation of the misconduct.

If this Court intended Norvil to act as a complete bar to consideration of subsequent misconduct, it would **not** have explicitly limited its ‘bright line’ rule to subsequent arrests **without conviction**. See id. The critical due process concern in Norvil was use of the ‘mere existence’ of a subsequent arrest during the sentencing process. See id. A conviction--on its face--signifies a defendant has been provided sufficient due process for lawful consideration of that conduct. See id. This is why Norvil only prohibits considering “subsequent arrest[s] **without conviction**.”

This argument was addressed in Jansson, as depicted in the State’s initial brief, which determined that § 921.231, Fla. Stat. permitted consideration of prior “mere” arrests, see (IB 32-35) (analysis of 4th DCA’s Jansson v. State, 399 So. 2d 1061 (Fla. 4th DCA 1981) and consideration of mere arrests), but not subsequent “mere” arrests. See (IB 32) (analysis of Seays v. State, 789 So. 2d 1209 (Fla. 4th DCA 2001)). Norvil’s ‘bright line’ rule is far narrower than Respondent suggests.

Respondent further misapprehends Poole. *Stare decisis* does not serve to “prop up” incorrect decisions that are clearly erroneous. State v. Poole, 297 So. 3d 487, 507 (Fla. 2020), reh’g denied, clarification granted, SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020). “[W]hen governing decisions are unworkable or are

badly reasoned, ‘this Court has never felt constrained to follow precedent.’” See Payne v. Tennessee, 501 U.S. 808, 827 (1991).

At a minimum, the wholly inconsistent application of Norvil’s ‘bright line’ rule indicates the opinion is poorly reasoned, confusing, and ‘clearly erroneous.’ Compare Paul v. State, 277 So. 3d 232, 240 (Fla. 1st DCA 2019) (substantiated subsequent misconduct is permissible consideration at sentencing), Barlow, 238 So. 3d at 417 (same), and Constantin v. State, 45 Fla. L. Weekly D1782, 2020 WL 4248497 (Fla. 5th DCA July 24, 2020) (Grosshans and Sasso, JJ.) (affirmed, citing Paul and Barlow); with Love v. State, 235 So. 3d 1037, 1040 (Fla. 2d DCA 2018) (applying Norvil’s ‘bright line’ to all subsequent incidents of misconduct), and Garcia, 279 So. 3d at 151 (same).

When a ruling is determined ‘clearly erroneous’ the question then becomes whether there is a “valid reason *why not* to recede from that precedent.” Poole, 297 So. 3d at 507. Again, as this Court noted, the critical consideration will be reliance, which will be at its lowest for procedural and evidentiary rules. Id. Justice Sotomayor’s concurring opinion in Alleyne--relied upon in Poole--determined that “[r]arely will a claim for *stare decisis* be as weak as it is here, where a constitutional rule of criminal procedure is at issue that a majority of the Court has previously recognized is incompatible with our broader jurisprudence.” See Alleyne v. United States, 570 U.S. 99, 121 (2013) (Sotomayor, J. concurring).

This is precisely what has occurred with Norvil. A procedural rule of evidence arbitrarily bars lawful consideration of sentencing factors relevant to a defendant's sentence that is largely inconsistent with Florida's existing jurisprudence in crafting criminal sentences. See Norvil, 191 So. 3d at 410-11 (Canady, C.J. dissenting).

Further, any reliance on Norvil is undeniably weak concerning the "reliance interests of private parties." See Alleyne, 570 U.S. at 119 (Sotomayor, J. concurring). A criminal defendant's subsequent misconduct cannot be said to have been committed in reliance on Norvil that, as Respondent alleges, prohibits consideration of such conduct at sentencing for a different, prior criminal offense.

Accordingly, Respondent's analysis of Norvil and Poole are erroneous.

IV. Respondent Misunderstands the CPC.

Respondent characterizes the CPC as prioritizing a defendant's prior record above all others and excluding subsequent misconduct from consideration. (AB 27-31; PDF 38-42). Respondent portrays the CPC as preempting **all** discretion to consider factors outside those listed by the Legislature. (AB 27-31; PDF 38-42).

This is patently inaccurate and incongruous with the explicit language in the CPC. The plain language of the statute indicates the Legislature intended only to limit a trial court's discretion regarding "the lowest permissible sentence [LPS] established by the code" See § 921.002(1)(f), Fla. Stat. (insertion added). For

example, the Legislature’s sentencing principles include: “(c) The penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense;” and “(d) The severity of the sentence increases with the length and nature of the offender’s prior record.” Id. at (1)(c)-(d). These principles are embodied in the CPC’s computation of a defendant’s scoresheet. See § 921.0024, Fla. Stat. (calculations for primary offense, prior record, victim injuries, community sanction violations, possession of a firearm, etc.).

The Legislature **only** limited the trial court’s discretion by mandating: any departure “**below the [LPS] established by the code** must be articulated in writing by the trial court judge and made only when circumstances . . . reasonably justify the mitigation of the sentence.” § 921.002(1)(f), Fla. Stat. (edit added).

Conversely, regarding discretion above the LPS, the Legislature clearly stated “[t]he **trial court judge may impose a sentence up to and including the statutory maximum for any offense . . .**” Id. at (1)(g).

The Legislature plainly did **not** intend to limit a trial court’s discretion **above** the LPS. See id. As such, the CPC only serves as the Legislature’s identified important factors in determining the **LPS** for a criminal defendant. The CPC does **not** foreclose consideration of any other relevant factors that may lawfully, **further** increase the sentence. See id. at (1)(g). Otherwise, subsection (1)(g) would be rendered meaningless.

If the Legislature intended to preempt all trial court discretion by narrowing its consideration to **only** the factors listed in the CPC or the presentence investigation [PSI] statute, it would have stated so.

Neither Norvil nor the PSI statute support Respondent's position. As previously argued, Norvil did **not** find that the CPC precluded consideration of all subsequent misconduct, it **only** found "a trial court may not consider a **subsequent arrest without conviction** during sentencing for the primary offense." See Norvil, 191 So. 3d at 410; section III. supra pp 6-7; (IB 25-29).

Further, the PSI statute only directs the Department of Corrections to create a report with statutorily listed factors upon request by a trial court. See § 921.231, Fla. Stat.; Norvil, 191 So. 3d at 410-11 (Canady, C.J. dissenting). The PSI statute, by its plain language, does not limit a trial court's discretion. See id. While this Court has imposed mandatory consideration of a PSI report for first-time felony offenders, see Fla. R. Crim. P. 3.710, this fact is irrelevant to whether **the Legislature** preempted the trial court's discretion in crafting a sentence. Respondent's argument that the Legislature has not amended the CPC in response to Norvil is unavailing because, as previously argued, Norvil's 'bright line' rule is very narrow. see argument III. supra pp 6-7.

Thus, the Legislature has not limited a trial court's discretion to consider other relevant factors to the sentencing process.

V. Substantiation is Due Process.

The State must comply with the demands of due process by **substantiating** any subsequent misconduct not--yet--resulting in a conviction. See Paul, 277 So. 3d at 240; Barlow, 238 So. 3d at 417; Constantin, 45 Fla. L. Weekly D1782.

Substantiation is the centerpiece of due process rights at sentencing. The State must substantiate any misconduct--not proven by the underlying conviction--**by preponderance of the evidence**. See United States v. Watts, 519 U.S. 148, 157 (1997) (acquitted conduct is a permissible consideration “so long as that conduct has been proved by a preponderance of the evidence.”); cf. also Schwingdorf v. State, 16 So. 3d 835, 836 (Fla. 2d DCA 2009) (preponderance of the evidence is the standard for revocation of probation); Norvil, 191 So. 3d at 410-11 (Canady, C.J. dissenting). A criminal defendant should also have an opportunity to challenge any evidence the State advances at sentencing. Cf. Adams v. State, 376 So. 2d 47, 50 (Fla. 1st DCA 1979) (“hearsay recitations in [a presentence investigation] report of unproved criminal activity must be corroborated, if contested, by witnesses subject to confrontation and cross-examination by the defendant.”); see also Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993) (defense right to due process in determining imposition of death penalty).

However, it flies in the face of the State’s due process rights to arbitrarily prohibit substantive evidence of conduct merely because it occurred subsequent to

the primary offense. See Spencer, 615 So. 2d at 690-91 (in determination of death sentence: “the trial judge should hold a hearing to: a) give the defendant, his counsel, **and the State**, an **opportunity to be heard**; b) afford, if appropriate, **both the State** and the defendant **an opportunity to present additional evidence**; c) allow **both sides to comment on or rebut information** in any presentence or medical report;”); cf. also State v. Gerry, 855 So. 2d 157, 161 (Fla. 5th DCA 2003) (stating that the right to due process “applies to both the state and the defendant because each is entitled to a fair trial. Hence, the courts have carefully guarded the state’s right to present relevant evidence and testimony through certiorari review of pretrial orders that attempt to exclude such evidence in trial proceedings.”); State v. Patsas, 60 So. 3d 1152 (Fla. 5th DCA 2011) (State has due process right to notice and opportunity to be heard on order of dismissal).

Accordingly, **both parties** should be permitted to present relevant evidence at sentencing when substantiated by a preponderance of the evidence.

VI. Wide Discretion in Punishing a Defendant.

Respondent wishes this Court to limit the substantiated evidence of misconduct to be “connected” to the crime. (AB 44; PDF 55).

First, Respondent’s own examples of “connected” conduct show the misconduct in this case remains admissible. Compare (AB 44; PDF 55) (“for instance, the subsequent offense was a failure to appear on the primary offense or

related to jury tampering during the trial for the primary offense.”) with (R1 368-69, 535, et seq.) (bond revocation hearing regarding Respondent’s threats to state witnesses and a police officer) and (C1 08:33-09:00); (C2 08:53-09:18); (C3 02:49-3:00) (jail call recordings regarding threats to state witnesses in this case).

Second, Respondent’s limitations are based on a fundamental misunderstanding of the purpose of sentencing. Florida sentences people, not crimes. See Williams v. People of State of N.Y., 337 U.S. 241, 247 (1949) (“a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”) (citation omitted). As this Court detailed:

A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant’s “life, health, habits, conduct, and mental and moral propensities.”

State v. Payne, 404 So. 2d 1055, 1057 (Fla. 1981) (relying on Williams).

Respondent claims that Williams is no longer good law based upon a California Law Review article claiming the same from February, 2011. (AB 35 n. 17; PDF 46) (citing Carissa Byrne Hessick & F. Andrew Hessick, Recognizing Constitutional Rights at Sentencing, 99 Calif. L. Rev. 47, 85 (2011)).

This claim is mistaken because the United States Supreme Court reaffirmed

the broad discretion of sentencing courts in crafting a sentence in March, 2011; relying heavily on Williams as the historical backdrop of this discretion. See Pepper v. United States, 562 U.S. 476, 487-491 (2011) (recognizing that sentencing courts had broad discretion to consider numerous factors at resentencing, including rehabilitation, only limited by some statutory guidelines under 18 U.S.C. § 3661, which **“does not provide ‘any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing.’”**) (insertion added) (quoting Watts).

“Permitting sentencing courts to consider the **widest possible breadth of information about a defendant ‘ensures that the punishment will suit not merely the offense but the individual defendant.’**” Id. at 488 (quoting Wasman v. United States, 468 U.S. 559, 564 (1984)).

Accordingly, the lawful result in this case remains clear. This Court should hold that the 4th DCA failed to give the trial court any deference in lawfully crafting a sentence; and/or recede from Norvil to the extent that district courts interpret its holding as prohibiting any consideration of subsequent misconduct in sentencing a criminal defendant.

CONCLUSION

Based on the foregoing arguments and authorities, the 4th DCA opinion below should be QUASHED.

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CERTIFICATE OF SERVICE

I CERTIFY that on October 6, 2020, I electronically filed the foregoing document with the Clerk of the Court using the Florida Courts e-filing Portal and it is being served on all counsel of record or *pro se* parties identified in the attached Service List either via the Florida Courts e-filing Portal or in another authorized manner for counsel or parties not authorized to receive Notices of Electronic Filing.

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