

APPELLANT'S REPLY BRIEF

CASE NO. SC19-635

**THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

MERYL McDONALD

Appellant,

v.

STATE OF FLORIDA

Appellee.

**On Appeal From:
CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIRCUIT COURT CASE NO. CRC94-02958CFANO**

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ARGUMENTS AND CITATIONS TO AUTHORITY

I. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. MCDONALD'S NEWLY DISCOVERED EVIDENCE CLAIM ARISING FROM THE FALSE TESTIMONY OF AGENT ALLEN

A. Mr. McDonald's Claim was Timely Filed

Mr. McDonald's newly discovered evidence claim was raised timely as it was filed within one-year after he received the case-specific letter from the FBI concerning Agent Allen's false testimony in the instant case. Though the Circuit Court agreed that Mr. McDonald's newly discovered evidence claim was timely, the State argued in its answer brief that the case-specific FBI letter that Mr. McDonald relied on was not "new" and that Mr. McDonald's claim was not timely pursuant to Jones v. State, 591 So. 2d 911 (Fla. 1991). This Court's precedence from recent, factually similar cases and the Circuit Court's determination completely undercut the State's contention.

In Wyatt v. State, 71 So. 3d 86 (2011), this Court addressed a procedural issue that was almost identical to the procedural issue at bar. In Wyatt, the defendant had been convicted of murder and sentenced to death in 1991. Wyatt at 93. In 2008, the defendant received a case specific letter from the FBI informing him that "an FBI agent testified regarding [comparative bullet lead analysis ("CBLA")] in a manner that exceeded the limits of the science and could not be supported by the agency." Id. at 95. In response to that letter, the defendant asserted a related post-conviction

claim several months later. Id. Evidence was later presented that the National Research Council (hereinafter referred to as “NRC”) issued a report in 2004 that have “undermined the scientific reliability of the correlation” that the FBI agent at issue drew at trial. Id. at 98. In addition, in 2005, the FBI “issued a press release announcing that the agency was discontinuing its use of CBLA.” Id. The circuit court went on to conduct an evidentiary hearing on the issue, but ultimately denied relief, finding that the claim stemming from the 2008 letter did not constitute newly discovered evidence and was time-barred. Id. at 96, 98. The circuit court reasoned that the one-year post-conviction timeclock began running when the NRC issued its report in 2004. Id. at 98. When this Court reviewed the case on appeal, the Court noted that the 2008 case-specific letter was based on the FBI’s own review of testimony that its agent gave in that specific case. Id. at 99. It thereby distinguished the 2008 letter from the 2004 report and 2005 press release, which were more general and “were only prospective in nature.” Id. The Court consequently held that “a newly discovered evidence claim predicated upon a case-specific letter from the FBI discrediting the CBLA testimony offered at trial is not procedurally barred if timely raised.” Id. The receipt of the letter was, accordingly, the event that triggers the newly discovered evidence post-conviction timeclock. See also Smith v. State, 75 So. 3d 205 (Fla. 2011) (reaching the same conclusion and holding).

As in Wyatt, the receipt of the case-specific letter was the catalyst that began the one-year timeclock running on Mr. McDonald's newly discovered evidence claim. Under the circumstances, Mr. McDonald and his predecessor counsel were not and could not have been aware of the instant issue despite the fact that they were aware of ongoing investigations by the FBI into various forensic examiners. Additionally, the State argued that Mr. McDonald should have known that "hair comparison analysis has been the subject of much critical examination over the years." (Answer Brief at 22) Yet, all forms of scientific evidence are subject to critical examination by the Criminal Defense Attorney, but this is significantly different than the type of direct criticism and undercutting of Agent Allen's testimony provided by the case-specific letter in this case from the FBI.

Consistent with the scenario at issue in Wyatt, the case-specific correspondences that Mr. McDonald received were based on the DOJ's own internal review of testimony that Agent Allen gave in this case. As with the prior CBLA report and press-release at issue in Wyatt, the prior investigations conducted by the FBI and DOJ into hair and fiber testing had not been specific to Mr. McDonald's case, rather it was a general investigation in the science and testimony surrounding the science. The State's contention that Mr. McDonald should have known of the specific newly discovered evidence issue of Agent Allen's false testimony simply because the DOJ had been investigating FBI hair and fiber testing since the 1990s is

a position that stands in direct contrast with the Wyatt holding. Contrary to the State's position, the instant newly discovered evidence claim is "predicated upon a case-specific letter from the FBI discrediting [forensic expert] testimony offered at trial." Id. at 99. As a result, the claim was timely filed because it arose within one year after the receipt of that case-specific FBI correspondence.

B. The Newly Discovered Evidence Would Result in an Acquittal at a Retrial

1. Agent Allen's Testimony was Unquestionably False in Numerous Respects

Notwithstanding the fact that the record did not conclusively refute the merits of Mr. McDonald's newly discovered evidence claim, the merits of the claim warrant a new trial because the materiality of the new evidence is so great that it would probably produce an acquittal on retrial and gives rise to a reasonable doubt as to Mr. McDonald's culpability. Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014) quoting Jones v. State, 709 So. 2d 512, 521, 526 (Fla. 1998).

In arguing against the merits of the claim, the State first alleges that the case-specific FBI investigation into Allen did not establish that Allen's testimony was "false." (Answer Brief at 16) The State's position is mistaken. The FBI clearly found that Agent Allen gave inaccurate testimony that exceeded the limits of science; thus Agent Allen's testimony was in fact false. More specifically, the FBI, itself, found:

Error Type 1: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of science.

Error Type 2: The examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association. This type of testimony exceeds the limits of science.

(R. 121) Counsel respectfully submits that the above referenced identified inaccuracies in Allen’s testimony clearly established that his testimony was in fact “false.” From there, the Innocence Project and NACDL, as initially raised in Appellant’s Initial Brief, were asked to conduct an additional independent review, they found that Allen’s report erroneously held that “[a]ccordingly, this hair is consistent with coming from RUDOLPH BOWEN, the identified source of the K7 hairs.” (R. 123) Additionally, the report found further errors in Agent Allen’s testimony at “pg 1256, ln 10-15 – Error 2; pg 1295, ln 18-25 – Error 1” which included cites to the trial transcripts of Mr. McDonald and his co-defendants. (R. 123)

To add to the falsity that was already addressed in the lower court and in the initial brief, counsel just became aware of the existence of additional correspondence that was sent to the State in September 2015 concerning Agent Allen’s testimony. The DOJ forwarded a copy of its correspondence to the State to Mr. McDonald

directly in a letter dated September 8, 2014. (R. 577) The DOJ did not send that correspondence to Mr. McDonald and his counsel directly, instead, Mr. McDonald's counsel at the time received a copy of a cover letter and a copy of the correspondence sent to the Office of the State Attorney originally on July 28, 2014. (R. 578)

Though the falsities in Allen's testimony are abundantly clear, it would appear that the State is essentially arguing that the errors uncovered by the FBI investigation do not establish that Allen's test results were inaccurate. The problem, however, is that Allen testified to the jury that his test results supported conclusions that they did not, and scientifically could not support. The State, in its answer brief, glazes over that fact and does not address the impact that Allen's false testimony must have had on the jury. Not only did Allen's false testimony improperly bolster his expert opinions, it led the jury to believe that Allen was able to conclusively identify co-defendant McDonald as the source of the hair at issue. However, the science at issue was not capable of reaching that conclusion. The trial jury, nonetheless, was left to believe that Allen's testing could and did reach that conclusion in this case. It is quite literally impossible to estimate how significant the impact of this scientific evidence was before the trial jury; thus an evidentiary hearing was required by the Circuit Court.

One cannot discount the weight that jurors surely placed on the testimony of a credentialed expert in an area of science that most laypersons have little or no

knowledge of. The fact that the expert was also a member of the FBI, a highly respected law enforcement agency, only adds to the likelihood that the jurors placed great weight on Agent Allen's expert testimony. Under the circumstances, the record does not refute Mr. McDonald's contention that Agent Allen's false testimony was material and contributed to the jury's verdict against Mr. McDonald.

2. The Newly Discovered Evidence of Allen's False Testimony is Material

The State next alleges in its answer brief that Allen's testimony regarding the purported hair matching "was a relatively insignificant portion of the its case against McDonald." (Answer Brief at 17) Mr. McDonald strongly contests that claim. The fact remains that the State's case against Mr. McDonald was entirely circumstantial and hinged on this scientific evidence to connect Mr. McDonald to the Victim in this matter. That connection was made with the very physical evidence that this newly discovered evidence claim now calls into question. Outside of the forensic evidence purportedly linking McDonald to the scene, the remaining evidence falls far short of supporting a finding of guilty beyond a reasonable doubt.

The State goes on to argue that the FBI investigation only scrutinized Agent Allen's testimony with regard to hair analysis and did not address his testimony regarding fiber testing. The State fails, however, to recognize that Allen's false testimony with regard to the hair testing would substantially diminish his credibility and, thereby, call into question the entirety of his testimony concerning all matters

with which he testified to. As it stands, Mr. McDonald had no opportunity to bring out the now-recognized falsities in Agent Allen's testimony during trial nor did he have a chance to submit the same to the Circuit Court in light of the denial of his Motion. If given the opportunity to present the newly discovered evidence of Allen's false testimony at a retrial, the result of the proceeding would be different.

II. THE CIRCUIT COURT FURTHER ERRED IN SUMMARILY DENYING MR. MCDONALD *GIGLIO V. UNITED STATES* CLAIM ARISING FROM AGENT ALLEN'S FALSE TRIAL TESTIMONY

In rebuttal to the State's argument with regard to the Giglio issue, Mr. McDonald relies largely on his initial brief and on the arguments set forth above. As with the proceeding issue, the State again alleges that the newly discovered evidence does not identify Allen's testimony as "false." Mr. McDonald addressed that argument above and establishes exactly how and why the FBI investigation did identify falsities in Allen's testimony. Likewise, the State again argues that the newly discovered evidence was not material. As with the falsity rebuttal argument, Mr. McDonald addresses the materiality issue above, especially considering how destructive it would have been of Agent Allen's credibility before the Jury.

Aside from the foregoing, the State again argues in its Answer Brief that Mr. McDonald should have known of the issues regarding Agent Allen's testimony many years prior to 2014. It then goes on to argue, however, that knowledge of the falsities in Allen's testimony cannot be imputed on the State and that the State could not have known of falsities in Allen's testimony at the time of the trial. The State's argument with regards to what Mr. McDonald and/or the State knew or should have known in years past is a double-edged sword. If, as the State argues, the discrepancies in Allen's testimony should have been known to Mr. McDonald many years earlier, perhaps even at the time of trial, should the State also not have known

of the falsities in Allen's testimony? Mr. McDonald respectfully submits that Allen, himself, knew that he was given false testimony at the time of trial, yet elected to present it. The questions remain whether Allen's knowledge of the falsity of his testimony was imputed on the State and/or whether the State had independent knowledge of the falsities in the testimony. At the very least, an evidentiary hearing is necessary to answer those questions.

CONCLUSION

Based on the foregoing, Mr. McDonald respectfully requests that this Honorable Court reverse the circuit court's order denying his successive motion for post-conviction relief and remand this case to the circuit court with instructions to order a new trial or, in the alternative, to conduct an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to the Office of the Attorney General at, on this 12th day of August, 2019.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief is formatted in compliance with Florida Rule of Appellate Procedure 9.210.

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