IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-1328

Lower Tribunal No.: 82-453-CF10A

OMAR BLANCO vs. STATE OF FLORIDA

Appellant Appellee

On appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida:

Trial Court's summary denial of any and all issues raised under Rules 3.850 and 3.851.

REPLY BRIEF OF APPELLANT

[This brief is filed on behalf of the Appellant, OMAR BLANCO]

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SUMMARY OF REPLY ARGUMENT

Appellant replies as to issue I that there is absolutely no doubt that there exists an unsolved, unidentified AFIS quality latent fingerprint that was lifted from the hall side of the bedroom door. That very spot was touched by the intruder at least three times as he entered, exited, re-entered and re-exited the bedroom of Thelia Vesos. It was also the very spot where the victim jumped the gunman and the struggle leading to the shooting occurred. Clearly, whomever the shooter was left that unidentified fingerprint. The State has refused to permit the appellant to run it through the AFIS system in order to determine if a comparison can be made 24 years after the shooting with 24 years of input fingerprints to compare. The unidentified state of the fingerprint, as raw data, is not newly discovered evidence but the AFIS comparison will give the identity of the person who left it and that will be newly discovered evidence leading to argument relating to the prejudice prong of the test at the necessary final evidentiary hearing.

Appellant replies as to issues II and III and it is noted that the State's argument is essentially identical to its argument at the *Huff* hearing and speaks to each claim individually explaining why, in its view, there should be no

relief. The trial court did not permit a final evidentiary hearing and summarily denied all claims. As such, appellant relies on its argument on issues II and III in his Main Brief.

Appellant replies as to issue IV with no further argument in addition to his Main brief.

REPLY ARGUMENT

A. REPLY TO STATE'S ANSWER BRIEF ARGUMENT AS TO ISSUE I: TRIAL COURT'S DENIAL OF MOTION TO RUN UNSOLVED LATENT PRINT THROUGH THE BSO AFIS SYSTEM.

In its answer brief, the State asserts whether or not the trial court ought to permit the defense access to the State controlled AFIS system to test the unidentified latent fingerprint (lifted from the hall side of the bedroom door at the scene of the murder) turns upon whether ENRIQUE GONZALEZ, was in fact the murderer. The State argues that appellant believes the shooter was the defendant's roommate, ENRIQUE GONZALEZ. Since the defense expert latent fingerprint examiner compared the unidentified latent lift with known fingerprints of GONZALEZ and concluded there was no match, the defense cannot be permitted access to the AFIS system, in the State's view.

Apart from the fact that such an argument would tend to unconstitutionally shift the burden of proof to the defendant who would be under no obligation to prove who the actual murder is, it also makes no logical sense in terms of evidence analysis. It is highly likely that the unidentified latent fingerprint lifted from the hall side of the bedroom door (Appendix item 10) was that of the shooter. Evidence adduced at trial proved that the shooter went in and out of that door several times (TR vol. VI, pp. 886-894) and touched the door at

least once in the view of Thelia Vesos (TR vol. VI, p. 894, l. 13-16). It was at that very location where the victim, JOHN RYAN, jumped the shooter in an attempt to disarm him (TR vol. VI, p. 888). Clearly, if the latent fingerprint is identified to a particular person other than Blanco, then the remaining evidence in the case could be reviewed and tested against that person's identity in order to determine who the real killer was. This discovery would necessarily tend to exonerate BLANCO.

It is not the latent fingerprint itself that is newly discovered evidence. If, and only if, that unsolved fingerprint was run through the AFIS system and a comparison resulted would the evidence become "newly discovered" pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Once it has been run, the appellant would be in position to determine if that newly discovered evidence would, or would not, render a probable different verdict. Since this is a death penalty case, the defendant should be given every opportunity to follow this evidentiary lead to its logical conclusion.

If the AFIS system is used as to this unsolved print and that does not indicate any comparison known to that system, the evidence would remain as it was during the initial guilt phase of the trial, raw data. In that case, it would not be newly discovered evidence because the raw data was known at trial and

on direct appeal by the defense.

The only detriment to the State in requiring an AFIS run would be the relatively low cost and brief time wasted to run the computer program [the cost of which the defense has offered to reimburse to BSO].

Since the appellant has been barred from the State controlled AFIS system and he has not been given an opportunity to present proof at an evidentiary hearing, the State has effectively precluded him from effectively arguing the prejudice prong of the newly discovered evidence test and this then becomes a *Giglio* violation pursuant to *Giglio v. United States*, 405 U.S. 150 (1972). Only when we know the identity of the person whose print was on the door would we be able to argue the prejudice prong.

The trial court denied appellant's motion, concluded that the unsolved print was not newly discovered evidence, and found that the appellant failed to prove newly discovered evidence. This was all done without affording the appellant the right to prove its claim at an evidentiary hearing.

In appellant's 1st amended motion for postconviction relief, he addressed the unidentified latent lift in Claims I and II. Claim I is directed to the issue that the State withheld material and exculpatory evidence as to three independent and

distinct factors. The first factor proffers that the two co-defendants in a separate case (who were given deals so as to obtain a conviction against BLANCO in Broward County case 82-484-CF10) were other likely suspects in the JOHN RYAN murder case. This was purely and simply appellant's opinion.

The second and unrelated factor listed in Claim I has to do with the unsolved latent print. Appellant alleged that,

> This print did not match to OMAR BLANCO, THELIA VESOS, MARGARET VESOS or JOHN RYAN. This latent print was never tested to other possible suspects **such as** (emphasis added) REY ALONSO, ENRIQUE GONZALEZ and FIDEL ROMERO, etc. All of this evidence should now be made available to the defense for testing as the presumption is that said evidence would exonerate this defendant. [ROA vol. 2, pp. 217-218].

When appellant moved the trial court for an order directing BSO to run the unidentified latent lift through the AFIS system, the trial court refused to do so because the defense expert had determined that the unidentified print was not ENRIQUE GONZALEZ. This occurred after the 1st amended motion for postconviction relief was completed and filed but before the motion for AFIS.

The identity issue as to ENRIQUE GONZALEZ was not relevant to the claims made by appellant. Appellant never said that the unidentified print had to match to ENRIQUE GONZALEZ.

If the State and trial court were willing to concede that

the latent lift was probably the shooter, then what difference would it have made if appellant believed with all his heart that the shooter was ENRIQUE GONZALEZ? Appellant's belief may be wrong, but that print on the door belonged to the shooter who was touching the door during the intrusion (TR vol. VI, p. 894, l. 13-16) and it has now been determined to be of AFIS quality.

In Claim II, appellant raised ineffective assistance of trial counsel. In paragraph 37, appellant alleges, "Trial counsel had access to or should have been able to locate several items of testimony and evidence from the scene of the crime including the following:" and then lists five separate and distinct factors, one of which was the unidentified fingerprint. Here again, appellant does not exclusively tie the unidentified fingerprint to ENRIQUE GONZALEZ such that if it is not his, then the unidentified fingerprint would be irrelevant. The relevance of the fingerprint is the location where it was found and not to whom the appellant surmised it belonged.

In ***State v. Lewis***, 656 So.2d 1248 (Fla. 1994), two cases with similar issues were consolidated for appeal, Lawrence Francis Lewis and Frank Lee Smith. Both had been convicted of first-degree murder and sentenced to death. The issue in each case arose on motion for postconviction relief where the

defendant served the trial judge with a subpoena for deposition. This raised the issues of whether pre-hearing discovery is permitted and whether the trial judge could be deposed. The Florida Supreme Court held:

> On a motion which sets forth good reason, however, the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope. On review of an order denying or limiting discovery it will be the [moving party's] burden to show that the discretion has been abused. [*Lewis* at p. 1250].

This Court further held that, "The trial judge, in deciding whether to allow this limited form of discovery, shall consider the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts." [*Lewis* at p. 1250].

In this case, the trial judge did not follow *Lewis* for the following reasons:

(1) Claims I and II were summarily denied without any hearing and appellant's motion requesting the unidentified latent lift be run through the AFIS system was also denied because the trial court believed that appellant was saying ENRIQUE GONZALEZ was the one and only prospect as shooter.

(2) The trial judge did not consider the issue presented that the location of the unidentified fingerprint made it highly relevant independent of whether it belonged to ENRIQUE GONZALEZ. For if it had compared to ENRIQUE GONZALEZ by appellant's expert latent examiner, there would be no need to run the unsolved print through the AFIS system. On the other hand, the comparison to ENRIQUE GONZALEZ having failed, it may show appellant's guess on the identity of the perpetrator was errant but the fact remains that the fingerprint is still unsolved and the issue unresolved. In addition, the trial court apparently assumed that if the unidentified fingerprint was left by ENRIQUE GONZALEZ, then the print would be newly discovered evidence whereas, if it was not GONZALEZ's print the unidentified fingerprint would not be newly discovered evidence. This is clear error on the part of the trial court and an abuse of his discretion.

(3) The trial court did not consider the elapsed time (1982) between the conviction and the post-conviction hearing (none held yet 2006). This was 24 years of accumulating fingerprints of witnesses and convicted felons whose date was put into the AFIS data bank. If the unidentified fingerprint belonged to an individual who walked away from the murder, chances are great that that person committed more crimes and has

his prints in the AFIS system over 24 years.

(4) The trial judge did not consider any burdens placed on the opposing party and witnesses. Actually running the unidentified AFIS quality fingerprint by the appropriate BSO trained employee would take no effort, a minimum of time and insignificant cost. The State wouldn't be prejudiced in any way. There wouldn't have even been any time delay had the trial court permitted the AFIS run at the time of the initial motion requesting it.

(5) The trial judge did not consider alternative means of securing the evidence as there are none. The BSO AFIS system is the only available system for accomplishing the ends sought by appellant.

(6) The trial judge did not consider any other relevant facts.

On appeal of an order denying discovery it is "the moving party's burden to show that the lower court abused its discretion." See *Spaziano v. State*, 879 So.2d 51, 55 (Fla. 2004). Appellant asserts that the trial court abused its discretion by not permitting appellant a reasonable opportunity to test the evidence and then to summarily deny appellant's claims and affirm the sentence of death.

B. REPLY TO STATE'S ANSWER BRIEF ARGUMENT AS TO ISSUES II and III: TRIAL COURT'S DENIAL OF EACH CLAIM WITHOUT AN EVIDENTIARY HEARING, SEPARATELY AND WITHOUT REGARD TO THE INTERACTIVE OR CUMULATIVE EFFECT OF THESE CLAIMS.

Appellant replies as to issues II and III and it is noted that the State's argument is essentially identical to its argument at the *Huff* hearing and speaks to each claim individually explaining why, in its view, there should be no relief. The trial court did not permit a final evidentiary hearing and summarily denied all claims. As such, appellant relies on its argument on issues II and III in his Main Brief and does not wish to enter additional reply argument to these issues.

C. REPLY TO STATE'S ANSWER BRIEF ARGUMENT AS TO ISSUE IV: TRIAL COURT'S DENIAL OF AN EVIDENTIARY HEARING ON CLERK'S MISHANDLING OF TRIAL EVIDENCE CAUSING DESTRUCTION OF EVIDENCE.

Appellant replies as to issue IV with no further argument in addition to, and relies upon the argument made in his Main Brief.

CONCLUSION

This Court does not have an adequate record for determining the remaining issues in this case because the trial court preferred to summarily denies each and every claim individually and then summarily deny all relief. There having been no final evidentiary hearing, the appellant did not have an opportunity to present proof to substantiate his claims. Therefore, this Court should return the case to the trial court and require that it enter an order requiring the running of the unidentified fingerprint through the BSO AFIS system to see if that print can be identified. If it can be, appellant requests sufficient time to present proof and argument that it is newly discovered evidence.

In addition, the appellant should be given the opportunity to make a record as to all other issues at final evidentiary hearing so that when this Court again hears argument on these issues a record will be available.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Reply Brief was served by mail upon Susan Bailey, Esq., Assistant State's Attorney, at the Broward County Courthouse, 201 SE 6th Street, Room 655, Fort Lauderdale, FL 33301, and by mail upon Leslie T. Campbell, Esq., Assistant Attorney General, at 1515 North Flagler Drive; Suite 900, West Palm Beach, FL 33401, this 22nd day of January 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) in that it is Courier New 12-point font, except that headings and subheadings are Courier New 14-point.

IRA W. STILL, III, ESQUIRE