IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG
Appellant,

v.

CASE NO. SC14-2351
L.Ct. 84CF-013346

STATE OF FLORIDA,
Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FL

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This appeal follows the trial court's denial of the Appellant, Robert Joe Long's, Successor Motion for Postconviction Relief filed pursuant to Fla. R. Crim. P. 3.851. The appellate record consists of six volumes. Volumes 1-5 are consecutively numbered. Volume 6, which contains the hearing transcripts, is numbered separately. Citations to Volumes 1-5 of the record will reference the volume number, "R", and the page number. Volume 6 will reference the volume number, "T", and the page number. The Appellant, Mr. Long, will be referred to by his proper name. The prosecuting authority, below and on appeal, the State of Florida, will be referred to as the State.

STATEMENT OF THE CASE AND FACTS

The procedural history of this case has been set forth in the prior opinions of this Court in Long v. State, 529 So.2d 286 (Fla. 1988)[*Long I*]; Long v. State, 610 So.2d 1268(Fla. 1992), *cert. denied*, 510 U.S. 832 (1993)[*Long II*], and the proceedings in the initial collateral proceedings in Long v. State, 118 So.3d 798 (Fla. 2013)[*Long III*]. A brief summary of these proceedings is as follows:

Mr. Long was indicted in the Thirteenth Judicial Circuit, Hillsborough County, Florida, in eight separate cases with one count of first-degree murder, kidnapping, and sexual battery.[1,R93] In 1984-85 Mr. Long was represented by the

Office of the Public Defender. His lawyers included Charles O'Connor [deceased], Brian Donnerly [deceased], and Craig Alldredge. Mr. Long had additional charges in Pasco County, where he was represented by undersigned counsel and Randy Grantham, who at that time were public defenders in the Sixth Judicial Circuit.

On September 23, 1985, Mr. Long entered a plea to all charges in Hillsborough County based upon the advice given to him by his Hillsborough County public defenders, including O'Connor, Donnerly, and Alldredge. Mr. Long pled guilty to eight counts of First-Degree Murder, eight counts of Kidnapping, eight counts of Sexual Battery, and admitted to a violation of probation in an unrelated case.[1,R93] The negotiated plea called for a life sentence in case numbers 84-13343-45 and 84-13347-13350.[1,R93] In case number 84-13346 the State was permitted to seek a death sentence after a penalty phase proceeding with a jury.[1,R92] The victim in case 84-13346 was Michelle Sims.

On December 11, 1985, Mr. Long appeared in court to begin penalty phase. Mr. O'Connor initially sought a continuance due to the unavailability of the primary defense mental health expert. During the proceedings, Mr. Long also sought to withdraw his plea premised on a misunderstanding regarding the waiver of a challenge to the admissibility of his confession,

and whether he would be able to appeal and what he could challenge on any appeal.

At the time of these proceedings Mr. Long had gone to trial in Pasco County, represented by undersigned counsel and Randy Grantham. Mr. Long's conviction was on appeal with this Court, with a primary issue in the case focused on the admissibility of Mr. Long's statement to police. The admission of the statement had been a source of significant litigation by undersigned counsel and Mr. Grantham in the Pasco county case. The Hillsborough lawyers representing Mr. Long were aware of the confession issues and the related litigation in Pasco County.

After considering comments by O'Connor, Mr. Long, and undersigned counsel, the trial court granted Mr. Long's request to withdraw the plea, but gave him 24 hours to consider what he wished to do.

Mr. Long was given the opportunity by the trial court to meet with the Hillsborough lawyers, undersigned counsel, and Mr. Grantham in the courthouse. Mr. Long also spoke to another attorney who did not represent him from the jail that evening by telephone.

On December 12, 1985, Mr. Long elected to maintain his plea. The trial court conducted a brief plea colloquy with Mr. Long and the plea was accepted and remained in effect. Prior to

the penalty phase Mr. Ellis Rubin [deceased] assumed representation of Mr. Long.

The penalty phase was conducted by Mr. Ellis as defense counsel in July 1986. The jury unanimously recommended a death sentence and a sentence of death was imposed.[1,R93]

Mr. Long appealed to this Court, challenging the validity of his plea. This Court affirmed the validity of the plea in *Long I*, but remanded for a new penalty phase in light of the admission of improper evidence by the State. Long v. State, 529 So.2d 286 (Fla. 1988).

Mr. Long was represented by Mr. Robert Frazier in the remand proceedings. Mr. Long moved to withdraw his plea in the trial court prior to the commencement of the penalty phase.[1,R94] The trial court denied the motion and a new penalty phase was conducted. The jury recommended death by a unanimous vote and a sentence of death was imposed.[1,R95]

Mr. Long appealed to this Court, challenging the denial of his motion to withdraw his plea. This Court affirmed in *Long II*. Long v. State, 610 So.2d 1268 (Fla. 1992), *cert. denied*, 510 U.S. 832 (1993).

The Office of Capital Collateral Representatives [“CCRC”] was appointed to represent Mr. Long. That office filed a Motion for Postconviction Relief pursuant to then Rule 3.850 on December 29, 1994.[1,R95] The Motion was denied as facially

insufficient. Mr. Long, through CCRC, then filed a second Motion for Postconviction Relief on October 4, 1995. After several years CCRC was removed as counsel from the case and attorney Byron Hileman was appointed to represent Mr. Long.

Mr. Hileman filed an Amended Rule 3.851 Motion to Vacate on March 13, 2003 and filed a Second Amended Rule 3.851 Motion to Vacate on March 31, 2003. The trial court denied those portions of the motions which raised claims of ineffective assistance of appellate counsel in the incorrect forum, granted an evidentiary hearing on Claims II and III-3, and denied the remaining claims and sub-claims.[1,R96-97] Claim II alleged trial counsel was ineffective in advising Mr. Long of the consequences of his plea, resulting in a plea that was involuntary.[1,R95] Claim III-3 alleged trial counsels were ineffective in the events surrounding the plea due to Mr. Long's brain damage, mental illness, other disorders, psychotropic medication, and impaired ability to make rational decisions about whether to enter a plea.[1,R96]

In March 2009 undersigned counsel replaced Mr. Hileman as counsel for Mr. Long.[1,R30] An evidentiary hearing was conducted on May 9-10, 2011 and on June 27, 2011.[1,R97] The trial court entered an order denying relief on November 28, 2011.[1,R97]

Mr. Long appealed the denial of his Amended Motion to Vacate to this Court. This Court affirmed in *Long III*. Long v. State, 118 So.3d 798 (Fla. 2013).

Mr. Long filed a Successor Motion to Vacate Judgment and Conviction Based on Newly Discovered Evidence on September 9, 2014.[1,R3;92-113] Mr. Long alleged in 1984-85 the Public Defenders' Office and the lawyers representing Mr. Long were provided reports generated by FBI Examiner Michael Malone from the State Attorney's Office for the Thirteenth Judicial Circuit as part of discovery.[1,R99] Examiner Malone purportedly performed forensic scientific testing in a manner generally accepted within the scientific community on evidence seized from Mr. Long's car, apartment, and the bodies/remains of the victims.[1,R100] Examiner Malone issued written reports based on his testing of fibers concluding that various hairs and fibers found on the victims were consistent with fibers of the carpet in Mr. Long's car.[1,100] Examiner Malone issued written reports based on his testing of hair and fibers that fibers found in Mr. Long's car and home matched those found on the victims.[1,R100]

Mr. Long alleged the evidence from Examiner Malone was virtually irrebuttable in 1984-85.[1,100;109] The State considered the hair and fiber evidence significant, strong circumstantial evidence, even arguing the strength of the

evidence as a basis to deny Mr. Long's motion to withdraw his plea in 1986.[1,R110] Mr. Long pointed out his prior attorney, Charlie O'Conner had previously acknowledged he received the Malone reports and was aware "that numerous fibers found in the car and on the remains of some of the victims which were microscopically indistinguishable from the fibers in the car."… and that "some of the microscopically indistinguishable hair on either Long or a victim was found in the car." and attached those portions of the State's briefs as Exhibit G. [1,108, quoting the State's Answer Brief, Case No. SC12-103, p.19-20 and Respondent's Answer to Petition for Writs of Habeas Corpus and Memorandum of Law, Case No. 8:13-cv-02069-JDW-AEP, p.36;3, R422-425] The original postconviction court also noted the strength of the hair and fiber evidence may have been sufficient to sustain a conviction even if Mr. Long's confession were found to be inadmissible.[1,R110]

Mr. Long argued Mr. O'Connor relied on Examiner Malone's reports when he assessed the strength of the State's case and how this impacted his professional judgment on the question of whether Mr. Long should go to trial or accept the plea.[1,R108] Mr. Long alleged Mr. O'Connor emphasized to him in 1985 Examiner Malone's opinion on the forensic hair and fiber evidence irrebuttabley linked the hair and fiber evidence between the victims and Mr. Long.[1,R108-9] Mr. Long alleged he decided to

take the plea conditioned on Mr. O'Connor's opinion of the strength of the State's case premised on Examiner Malone's expert opinion.[1,R109-110]

Mr. Long alleged new information released by the FBI and the U.S. Department of Justice about Examiner Malone constituted newly discovered evidence.[1,R101-105] Mr. Long alleged undersigned counsel first became aware of the problems with Examiner Malone's work in this case when he received a letter on September 27, 2013 from the Department of Justice.[1,R101,115-16] The letter noted although concerns about Examiner Malone and twelve other FBI examiners first surfaced in 1996 and the OIG issued its first report in 1997, the Department of Justice's review of Malone was ongoing, particularly in "certain historic cases which FBI laboratory reports or testimony regarding microscopic hair comparison analysis were utilized."[1,R115-16]

Attached to the letter were copies of an Independent Case Review Report of Malone's work. The Independent Case Review Report was attached to Mr. Long's motion as Exhibit B.[1,R117-173] The report was generated by Steve Robertson in 2000 when Mr. Robertson reviewed the lab reports generated in this case by Examiner Malone.[1,117-173] Mr. Robertson noted multiple deficiencies in Examiner Malone's reports, including outright lies about what he had tested.

On December 20, 2013, a second letter was sent to undersigned counsel by the U.S. Department of Justice, which provided two additional scientific reports related to Examiner Malone and his work in Mr. Long's case.[1,R174] The letter again noted the work of the Department of Justice related to Examiner Malone was ongoing and stated "If your client's case is subject to that review, the Department may contact you separately regarding that review."[1,R174]

On July 30, 2014, undersigned counsel received an email from the U.S. Department of Justice, directing undersigned counsel to a third OIG report issued July 2014 and attached to the motion as Exhibit E.[1,R103;2,R325] The OIG did not begin the review which resulted in the issuance of the 2014 report until directed to do so by Congress in the summer of 2012.[1,R198-90] The third, 2014 OIG report is attached to the Successor Motion as Exhibit D.[1,R177-200;2,R] The July 2014 Report further notes this review "was separate from a currently ongoing effort by the Department and FBI, begun in the summer of 2012, to identify and review thousands of cases where testimony about the results of microscopic hair examinations conducted by the FBI lab was included as evidence in cases that resulted in conviction."[1,R190(note 12)] The July 2014 OIG report is an assessment of the original 1996 Justice Task Force Review of the FBI Laboratory.[1,R177] The purpose of the 2014 report was to

address how the Criminal Division Task Force, who issued the 1997 OIG report, "managed the identification, review, and follow-up or cases involving the use of scientifically unsupportable analysis and overstated testimony by FBI Lab Examiners in criminal prosecutions."[1,R177] The 2014 Report found "serious deficiencies in the Department's and the FBI's design, implementation, and overall management of the case review process."[1,R177] Specifically, the 2014 report found the Department should have directed the Task Force to review "all cases involving Michael Malone, the FBI Lab examiner whose misconduct was identified by the OIG's 1997 report and who was known by the Task Force as early as 1999 to be consistently problematic."[1,R179] The 2014 report was highly critical of the FBI's decision to continue to employ Malone until June 17, 2014.[1,R179]

The 2014 Report notes that in the 1997 report Examiner Malone was not criticized for his hair and fiber analysis, he was identified only as having given false testimony about whether he conducted a tensile test on a leather strap.[1,R187(note 5); 188(note 8).[1,R187-88] The Task Force dissolved in 2005 without issuing a final report summarizing its work, its findings, or the number or nature of disclosures made to defendants.[1,R189] However, the 2014 Report concludes "We found, that, of the 13 FBI Lab examiners whose cases the Task

Force reviewed, Malone's conduct was the most egregious. He repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials."[1,R191] The 2014 report determined independent examiners found 96% of the Malone cases they reviewed to be problematic in one or more areas.[2,R232]

However, the 2014 report notes that the FBI took no disciplinary action against Malone after the 1997 OIG report.[2,R290]

The 2014 Report further questions the use of 4 of the 14 "independent" examiners who conducted case reviews such as the one done in this case in 2002.[1,R194] Four of the reviewers were actually FBI employees, thus not "independent."[1,R194(note 14);2,R208] Steve Robertson was one of the 10 examiners who actually met the criteria for "independent", but he did conduct his reviews after September 11, 2001 at a field office of the FBI.[1,R194;2,R201(note 24);218] The 2014 Report further notes the review was only a "paper review" and deemed by a Senior Task Force attorney in August 1997 to be "cursory".[2,R209,211] A second independent hair examiner who quit after only a week expressed similar concerns about the adequacy of the review.[2,R231]

The 2014 Report quotes Steve Robertson's opinion of the paper-only review, such as he conducted in this case, as "When

it comes to hair examinations… the only thing you have [are] the examiner's handwritten notes. There are no spectra, machine printouts [or other analytical data]… It's just what [the examiner] writes down…. The examiner can pretty much write down almost anything [he] want[s] and say it's a hair match… and so there's really no way, just from looking at written notes, particularly for hair exams to determine if the examiner correctly made a comparison."[2,R27] The 2014 Report further identifies problems with the independent review because the independent scientists were only permitted to review the work considering the forensic techniques available at the time of the original analysis and were not permitted to consider the forensic techniques in place at the time of the review.[2,R212] The 2014 Report found "compelling reasons to modify the review based on findings and technological advances" such as mt DNA that were not done by Mr. Robertson in this case.[2,R212]

The 2014 report found the independent review restricted only to paper review was "shortsighted."[2,R262] The 2014 report concluded "We believe, therefore, that to ensure justice was done, the FBI should have arranged for a physical re-examination of available evidence in all instances where prosecutors requested that it be done or where an independent scientist concluded that a physical re-examination was necessary

to fairly evaluate the scientific integrity and reliability of the evidence."[2,R263]

The 2014 Report states "In Florida, Malone was instrumental in helping to achieve multiple capital convictions of a serial killer, Robert [Bobby] Joe Long."[2,R229] The 2014 Report contains summaries of interviews conducted with Steve Robertson regarding his work and his opinions on Malone.[2,R232-237] These comments and compilations were not available in any of the previous OIG reports or in the Independent Case Review reports prepared by Mr. Robertson in this case. The 2014 Report found there was no definitive evidence of disclosure to Mr. Long.[2,R295]

The State's Response was filed on September 29, 2014.[3,R426-445]. The State disputed Mr. Long's claim constituted newly discovered evidence, arguing it was untimely and should be denied.[3,R436] The State argued Mr. Long had received a copy of the 1997 OIG Report in 2000 and that Byron Hileman had received copies of the Independent Review Reports in 2000, thus the current motion was untimely.[3,R437,447-451] The State further argued undersigned counsel could have discovered the problems with Malone with the exercise of due diligence.[3,R438] The State premised this argument on the release of the 1997 OIG report, news/media accounts related to Malone, and "attorney's following the release of the OIG report

in April 1997."[3,R428] The State also argued because undersigned counsel represented Mr. Long in unrelated cases in Pasco County in 1985 and due to his experience in capital cases, he should have known specifically of the problems with Malone in Mr. Long's Hillsborough county cases.[3,R439, n.2]

The State also argued Mr. Long's claim he would not have pled if he had been aware of the FBI investigation into Malone was without merit.[3,R442-443] Lastly, the State argues there were no problems with the Independent Case Review performed by Mr. Robertson, so although Malone's testing was not scientifically acceptable due to "technical reasons", no different result could be obtained.[3,R443-34]

A hearing was held by the trial court on October 27, 2014, to determine whether an evidentiary hearing would be held.[6,R1-20] In addition the trial court addressed the Attorney General's Motion to Strike the pleadings filed in the non-capital cases.[6,T3] The trial court initially struck the pleadings in the non-capital cases, then ruled undersigned counsel could appear *pro bono* in those cases and permited the pleadings to stand.[6,T3-7]

The trial court then heard argument from the parties on the need for an evidentiary hearing on the question of whether the information presented in the motion constituted newly discovered evidence.[6,T8] Mr. Long maintained there was not sufficient

evidence in the record to rebut the evidence was newly discovered evidence.[6,T8] Mr. Long pointed out the State had made allegations that attorney Hileman and Mr. Long may have received some items in 2000, but the allegation was not sufficient to demonstrate either Hileman or Mr. Long had actually received the documents attached as exhibits.[6,T8] The State agreed the documents, a copy of a letter sent to Mr. Hileman and a certified copy of a letter sent to Mr. Long were not contained in the court file, but argued the documents constituted a "file" because the items were in the State's file for the case.[6,T9]

The State argued due diligence was required in order to establish the evidence was newly discovered evidence and due diligence was not shown in this case.[6,T9] The State alleged "And the FBI—when this came out in 1997, when the OIG report came out, it was huge news, especially in the criminal defense bar, and especially in capital cases. It was very well-known."[6,T9] The State argued undersigned counsel should have been aware of the exhibits attached to the motion since "I know Mr. Norgard's practiced capital litigation for a number of years."[6,T10] The State argued press releases and case law since 1997 should have shown Malone's involvement in this case earlier if diligence was exercised.[6,T10]

The State then argued since undersigned counsel had represented Mr. Long in 1985 in the Pasco case and cross-wxamined Malone at the trial in the Pasco case, undersigned counsel should have known about Malone's involvement in the Hillsborough case and should have known about the 1997 OIG report.[6,T10]

Undersigned counsel argued a hearing was necessary to determine if Mr. Long and Mr. Hileman actually did receive anything in 2000 and if so, exactly what that was.[6,T12] Undersigned counsel pointed out he had just received information from the FBI, who did not regard the issues regarding Malone and this case closed.[6,T12]

Undersigned counsel advised the trial court since the filing of the motion he had received additional report on Mr. Long's case that had been sent to the prosecutor, then forwarded by the prosecutor to the public defender, who had then sent it to undersigned counsel.[6,T18] The Attorney General claimed to be unaware of the latest report, but stated "Part of the problem, Your Honor, is all of those reports are based on the same information that happened in 2000. … They're just regenerating. The FBI just keeps bringing it back up again…. We're at a loss as to why they're doing it because they keep sending stuff out. It's all the same information that they've had."[6,T18-19]

Undersigned counsel advised the court if the State's allegations of lack of diligence on his part were to move forward, he would have a conflict.[6,T15] The allegations directed at undersigned counsel would require him to become a substantive witness in the case and he could not serve as a witness and actually do a hearing.[6,T15] The trial court did not address the issue of conflict, but would "cross it if we need to, so….".[6,T16]

The parties then selected a tentative date for the evidentiary hearing in December 2014.[6,T17] The trial court told the clerk the case was tentatively being set for hearing.[6,T19] The trial court advised undersigned counsel "And it might be worth your while, Mr. Norgard, just to start contacting your potential witnesses."[6,T17]

The trial court entered a *Final Order Denying Successor Motion to Vacate Judgment of Conviction and Sentence Based on Newly Discovered Evidence* on November 4, 2014.[5,R930-937] The trial court found "The Court agrees with the State that the information which Defendant alleges is newly discovered evidence is information which could have been previously discovered by the exercise of due diligence."[5,R934] The trial court found the letters sent to undersigned counsel in September and December 2013 referenced only the 1997 OIG report.[5,R936] The trial court listed six appellate cases which referenced Malone

and the 1997 OIG report.[5,R935] The trial court dismissed the 2014 report, termed the third OIG report as not a new investigation, but simply a review of the 1996 Task Force.[5,R935] Lastly, the trial court found since undersigned counsel had represented Mr. Long in the Pasco case, "he would have been aware of Malone's involvement in Defendant's cases."[5,R936] The trial court found the information alleged by Mr. Long was not newly discovered evidence because it could have been previously ascertained by the exercise of due diligence.[5,R936] The trial court found the motion was time barred.[5,R936]

A timely Notice of Appeal was filed on November 26, 2014.[5,R938]

STANDARD OF REVIEW

The trial court's summary denial of a motion for postconviction relief as untimely is based on the written materials before the court, thus is subject to *de novo* review by the appellate court because the ruling in tantamount to a pure question of law. Hunter v. State, 29 So.3d 256 (Fla. 2008). The trial court must accept the defendant's allegations as true to the extent they are not refuted by the record. Ibid. A motion alleging newly discovered evidence should not be summarily denied unless the motion is legally insufficient or the allegations are refuted by the record. Ibid.

SUMMARY OF THE ARGUMENT

The trial court's summary denial of the Successor Motion to Vacate Judgment of Conviction and Sentence as time barred was erroneous. The record does not contain a sufficient basis to support the trial court's determination that undersigned counsel or prior counsel knew of the 2000 Case Review Reports or of the July 2014 Report's criticism of the manner in which the 2000 Case Review Reports were conducted. The trial court improperly relied on argument from the State, which is not evidence, to deny the motion as time barred. Remand for an evidentiary hearing is required.

ARGUMENT

ISSUE I

THE TRIAL COURT'S ORDER FINDING THE MOTION TO BE UNTIMELY IS NOT SUPPORTED BY EVIDENCE IN THE RECORD

Mr. Long filed a Successor Motion to Vacate Judgment of Conviction and Sentence [*hereafter*, Successor Motion] on September 9, 2014 after undersigned counsel was contacted by the Department of Justice in September and December 2013 and after receiving the July 2014 report by the Department of Justice on the work performed in Mr. Long's cases and other defendants. After a review of the State's response and a brief hearing, the trial court denied the Successor Motion as time barred. The

denial was error. The trial court's ruling is not supported by the record and the evidence contained in the record.

A. Summary denial due to untimeliness was error

The trial court determined the evidence of the 2000 Case Review Reports and the July 2014 Department of Justice Assessment and Review should have been identified earlier with the exercise of due diligence by undersigned counsel and previous postconviction counsel, Byron Hileman. The trial court based this finding on the issuance of the first OIG report in 1997, the issuance of the case review reports in 2000, and the existence of six appellate opinions addressing alleged improprieties by FBI examiner Michael Malone. The trial court further found that since undersigned counsel represented Mr. Long in 1985 in a case in Pasco county and cross-examined Malone in that trial, he was aware or should have been aware of the issues pertaining to Malone in the Hillsborough cases.[6,T944] The findings of the trial court are not supported by evidence, but are based on the arguments and speculation of the Attorney General. Since argument of counsel is not evidence, these allegations do not support a factual finding on the timeliness of the motion.

It is axiomatic the argument and speculation of an attorney is not evidence. Evidence, as defined by *Black's Law Dictionary,* Fifth Edition, p. 498 is:

> Any species of proof or probative matter legally presented at the trial of an issue by the act of the parties and through the, medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.

The arguments of counsel are not evidence because counsel is not a witness and is not under oath. Tyson v. State, 87 Fla. 392, 100 So. 254, 255 (Fla. 1924); Rogers v. State, 844 So.2d 728, 732 (Fla. 5th DCA 2003).

The trial court's finding that undersigned counsel was not diligent because he represented Mr. Long in the Pasco case and cross-examined Examiner Malone at trial in 1985, thus he should have known about the problems with Malone's reports in the Hillsborough County cases is not supported by evidence. While it is a matter of public record undersigned counsel represented Mr. Long in 1985 as a public defender in the Sixth Circuit and Malone was a witness in the Pasco case, there is no competent, substantial evidence, or any evidence at all, to establish undersigned counsel was aware of the problems with Malone's findings in the Hillsborough cases prior to September and December 2013, or had access to the July 2014 report or the findings in the 2014 Report prior to it being provided to him on July 30, 2014. There is no evidence the 1985 cross-examination of Malone in the Pasco case was conducted with the awareness of the investigations that began into Malone in 1996 and are still

on-going. There was no testimony, records, documents, exhibits, or concrete objects in the record to support the trial court's finding of fact undersigned counsel did not act with diligence. The only basis for the trial court's ruling was the allegation by the Attorney General that undersigned counsel was aware or should have been of the problems because problems with Malone were widely known in the defense community and undersigned counsel has been a member of the defense community for several years, has been found to be an expert, and because of media coverage in Florida counties where undersigned counsel does not reside.

Undersigned counsel pointed out to the trial court any allegation by the State that undersigned counsel was aware of the specific problems with Malone, the 2000 Case Review Reports, and the 2014 Report would have to be supported by evidence and would require testimony from him since he had alleged in his motion he was unaware of these issues until September 2013. Absent any ***evidence*** to the contrary, and there is none, the trial court was required to accept as true the facts contained in paragraphs 4,8,11,13, and 19 that Mr. Long and undersigned counsel were not aware of the problems associated with Malone in this case prior to September 2013.

The record does not support any finding by the trial court that Mr. Long or Mr. Hileman received proper notification of the

investigation into Malone as the State argued. The State argued Mr. Long was on notice because of a certified mail receipt to the prison signed by someone other than Mr. Long and a letter stating Mr. Long was being provided a copy of the 1997 OIG report was proof Mr. Long was on notice of problems with Malone.[2,R437; State's Exhibit A 447-450; State's Exhibit B 451] The receipt is proof a letter was sent to the prison by the State and signed for by Tammy Morning[sic], but does not constitute proof that Mr. Long personally received the document. Nor is it proof Mr. Long received or knew about the 2000 Case Review Reports or the 2014 Report.

The State argued Mr. Hileman was in receipt of the 2000 Case Review Reports and attached as Exhibit B a letter to Mr. Hileman dated December 19, 2000 from the State Attorney.[3,451] The letter states:

> "Please find enclosed copies of the documentation that you requested concerning Mr. Long's case."

The letter does not prove Mr. Hileman received a copy of the 1997 OIG report, the 2000 Case Review Reports, and clearly cannot show Mr. Hileman received the 2014 Report. Mr. Hileman was counsel in 2000 and may have requested certain documents, but the letter provided by the State does not establish what documents were sent to Mr. Hileman. The State has not provided sufficient proof Mr. Hileman received the 2000 Case Review

Reports, the letter only proves Mr. Hileman asked for "documentation" and was sent copies- it does not establish Mr. Hileman actually received anything and does not establish what he received. There is no testimony, records, documents, exhibits, or concrete evidence to show Mr. Hileman actually received the 1997 OIG report or the 2000 Case Review Reports and failed to act with diligence.

The State's allegations Mr. Long, Mr. Hileman, and undersigned counsel were somehow previously sent copies of the 1997 OIG report, the 2000 Case Review Reports, or the 2014 Report prior to September 2013, December 2013, and July 2014 is not contained in the record. One area of significant concern addressed by the 2014 Report was the lack of notice provided to defendants or their attorneys of the issues and findings related to Malone.[2,R223-228; 240-248] The 2014 Report reviewed each case involving Malone to attempt to determine if there was definitive evidence of disclosure of the Case Review Reports.[2,R288-302] In all of Mr. Long's cases the 2014 Report answered "**NO**" to the question of whether there was definitive proof of disclosure.[2,R295] The State's Exhibits do not provide competent substantial evidence to rebut Mr. Long's contention he did not receive information directly applicable to his case prior to 2013. It is also clear Mr. Long, Mr. Hileman,

and undersigned counsel did not have access to the 2014 July Report prior to the release date of July 30, 2014.

The trial court took no testimony from any witnesses at the case management conference and no additional records, documents, exhibits, or concrete objects were admitted into the record by the Attorney General or the State which would support the trial court's finding that Mr. Long, Mr. Hileman, or undersigned counsel failed to act with due diligence. The trial court's determination of whether the Successor Motion was timely was limited to the Successor Motion with its attached Exhibits and the State's Response with its attached Exhibits. When review is appropriately limited to the evidence, it is clear the trial court should have conducted an evidentiary hearing on the merits of the motion or conducted an evidentiary hearing to obtain additional evidence on the questions of timeliness, or conducted an evidentiary hearing on both issues. Summary denial was erroneous. Because the trial court did not choose one of those two alternatives, reversal and remand is required.

B. An evidentiary hearing on the merits was required.

Mr. Long submits his motion was timely and the trial court should have ordered a hearing on the merits of the motion. When reviewing a motion premised on newly discovered evidence, the trial court must accept the allegations contained in the motion as true unless those allegations are conclusively rebutted by

the record. A motion alleging newly discovered evidence should only be summarily denied if the motion is legally in sufficient or the claims are refuted by the record. Hunter v. State, 29 So. 3d 256 (Fla. 2008). The motion filed in this case was legally sufficient and the record does not refute Mr. Long's claim he would not have pled if he had known of the flaws, deceptions, and malfeasance committed by Examiner Malone in his case.

Claims alleging newly discovered evidence must be raised within one year of the discovery of such evidence and counsel and the defendant must act with diligence to discover the evidence. *See*, Fla. R. Crim. P. 3.851 (d)(2)(A); Jiminez v. State, 997 So.2d 1056, 1063 (Fla. 2008). Mr. Long has addressed the trial court's summary denial based on untimeliness in section A. Mr. Long alleged he first became aware of the flaws specifically directed to his case when undersigned counsel was first contacted by the Department of Justice in September 27, 2013.[1,R14] Letters such as those received by undersigned counsel have found to constitute newly discovered evidence. *See*, Wyatt v. State, 71 So. 3d, 86, 100 (Fla. 2011); Duckett v. State, 2014 WL 2882627 (Fla. June 26, 2014). Thus, the information provided to undersigned counsel in 2013 and 2014 constitutes newly discovered evidence.

The second requirement for newly discovered evidence is that it was unknown to counsel or the defendant and could not

have been discovered by the exercise of due diligence. As previously argued in Section A, the record does not support the trial court's fining there was a lack of diligence.

Mr. Long alleged he and undersigned counsel did not become aware of the existence of issues with Examiner Malone which directly impacted his case until September and December 2013, when undersigned counsel received letters from the Department of Justice containing the Case Review Reports and the July 2014 Report of the Department of Justice which contained critical information not previously released about the 1996 Task Force investigation into Malone and specifically, the problems with the 2000 Case Review Reports in this case. The trial court incorrectly found the July 2014 Report to be only an "assessment" and not investigatory. The "assessment" of the 2014 July report was based on an extensive, 2 year review of the 1996 Task Force. It was comprised of an extensive investigation of the practices and policies of the Task Force, interviews with attorneys, independent examiners, and members of the Task Force, and ultimately issued a report highly critical of the flawed manner the Task Force utilized in investigating Malone and promulgated a set of recommendations for the Department of Justice and the FBI.

The July 2014 Report called into question the manners and practices used by Mr. Steve Robertson when he evaluated Examiner

Malone's reports in this case and others due to restrictions placed on him by the FBI. For the first time the efficacy and conclusions of the 1997 OIG report and subsequent investigations into Examiner Malone were inspected and found to have been deficient.

For example, the 1997 OIG report did not investigate Examiner Malone's work in hair and fibers, which were the evidence he examined, tested, and produced reports for in this case. The 1997 OIG report criticized Malone for testifying falsely in a judicial inquiry on the issue of whether he had personally performed a tensile test on the strap of a handbag and recommended he be disciplined for his deceit. However, the 1997 OIG report did not investigate Malone further and no disciplinary action was taken against Malone.[1,R187-88;230]

According to the 2014 Report, only after the release of the 1997 Report did investigation commence directly related to Malone and twelve other examiners. As a result of this increased scrutiny, a "paper review" of Malone's reports was conducted by independent examiner Steve Robertson.[2,R210-13] Although there was disagreement within the FBI, the independent examiners, and attorneys involved internally, these concerns about the limitations imposed on the independent examiners by the FBI were not exposed until the release of the 2014 July Report.[2,R210-13] In particular, the 2014 Report contains significant

criticisms of the process and the results reached by Steve Robertson from Mr. Robertson himself.[2,R211;33-35;47-48]

In the 2014 Report it was revealed the independent reviewers, including Mr. Robertson, questioned Malone's work in 96% of the cases he worked.[2,R232] For the first time, in the 2014 Report, Mr. Robertson characterized Malone's testimony as "outlandish", his testimony about and his statistical calculations were inaccurate and improperly based only on microscopic analysis, his conclusions in reports had unclear and unsupported bases, his documentation was inadequate and often indecipherable, and his testimony often included information not contained in his bench notes, and he did not know how to use a microspectrophotometer and did not understand the limitations of that device.[2,R232-33] Mr. Robertson did not state these findings in the 2000 Case Review Reports due to restrictions imposed by the FBI.

Mr. Robertson further told the 2014 Report investigators the FBI lab was not accredited, did not follow its own standards and protocols for hair analysis and did not have any standards for fiber analysis.[2,R234] This information was not contained in the 2000 Case Review Reports. The 2014 Report further identifies problems with Mr. Robertson's reviews because he has not always provided with Malone's testimony. [2,R236-7] This problem was present in this case as Mr. Robertson checked there

was no testimony by Malone in this case, when in fact Malone gave testimony in a discovery deposition.

The State incorrectly argued to the trial court the July 2014 Report was simply the same old things, being rehashed, and this was just the FBI continually dragging up old things, and "We're at a loss as to why they're doing it..".[6,T19] The 2014 July Report was not a regurgitation of old information, it was a time-intensive, congressionally mandated investigation into the efficacy and reliability of the FBI's handling of the problems with Malone. The July 2014 Report is a scathing criticism of how the FBI managed the Task Force, failed to conduct "independent reviews", but rather permitted only terribly flawed cursory examinations of Malone's work, and detailed the failures of the FBI and the Department of Justice in notifying defendants of the problems in their cases. The State has failed to produce any documentation to establish what was revealed in the July 2014 Report only rehashed "old things".

Thus, the information released in 2014 establishes the claim of newly discovered evidence.

A motion for newly discovered evidence must identify the witnesses to support the claim. Mr. Long complied with this provision, listing witnesses he knew with information about the investigation and reports relating to Malone and specifically requested leave to amend as additional information and witnesses

were revealed.[1,R104,106] Mr. Long complied with the pleading requirements by stating those witnesses were available to testify at an evidentiary hearing.[1,R106]

Mr. Long submits his Successor Motion was a legally sufficient motion and his claims were not refuted by the record. If there was any insufficiency, Mr. Long was entitled a reasonable time to amend the motion under Spera v. State, 971 So.2d 754 (Fla. 2007).

C. An evidentiary hearing on the issue of timeliness is required

Mr. Long submits he has conclusively established he and his attorneys acted with due diligence in this case. However, should this Court determine more information is necessary, Mr. Long requests a remand be ordered for a hearing into the matter. If undersigned counsel's knowledge of the involvement of Malone prior to September 2013 in the Hillsborough cases is critical to this timeliness determination, undersigned counsel would be required to testify. Mr. Long would be entitled to new counsel, as it would be unethical for undersigned counsel to serve as both counsel and a material witness when there are no other witnesses who could testify to undersigned counsel's knowledge. *See*, Rules Regulating the Florida Bar, Rule 4-1.7(b)(4); Steinberg v. Winn-Dixie Store, 121 So.3d 622 (Fla. 4th DCA 2013).

Similarly, testimony from Mr. Hileman and/or Mr. Long may be necessary to establish what was received by them in 2000, as the State's Exhibits A and B do not conclusively establish if documents were received and what those documents contained.

CONCLSUION

The trial court's order summarily denying the Successor Motion because it was untimely is erroneous and not supported by the record. The decision should be reversed and the case remanded for further proceedings- either a hearing on the merits of the motion or for an evidentiary hearing on the issue of timeliness, or both.

Respectfully submitted,

/s/ Robert A. Norgard

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of this Initial Brief has been served by e-filing through the e-portal to ASA Stephen Akes, Office of the Attorney General, capapp@myfloridalegal.com and Stephen.ake@myfloridalegal.com this **26th** day of January, 2015.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Initial Brief is Courier New 12-point in compliance with Fla. R. App. P. 9.210.

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