IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG,

Appellant,

v. **CASE NO. SC14-2351**
L.T. No. 84-CF-013346

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the records on appeal shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "DAR V:__" followed by the appropriate page number. The record on appeal of the denial of the original Rule 3.851 motion shall be referred to as "PCR V:__" followed by the appropriate page number. The record on appeal of the denial of the instant successive Rule 3.851 motion shall be referred to as "PCR2 V:__" followed by the appropriate page number.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's summary denial of Robert Joe Long's successive motion for postconviction relief challenging his conviction and death sentence for the murder of Michelle Simms. On September 23, 1985, Long pleaded guilty to this murder, along with seven other cases, each case involving a charge of first degree murder, kidnapping, and sexual battery. Pursuant to the plea agreement, Long would receive life sentences on all the cases with the exception of the instant case, and the State would be allowed to seek the death penalty in the case involving victim Michelle Sims.

> The plea agreement provided for a full penalty phase proceeding before a jury in the Simms case and contained an express provision waiving Long's right to contest the admissibility of any statements he had given police. **In the agreement Long also expressly waived the right to contest the admissibility of a knife found near his residence and other evidence seized from his car and apartment.**
>
> > FN2. The plea agreement reads, in pertinent part:
> >
> > . . .
> >
> > The parties further stipulate and agree as follows:
> > 1. Defendant waives his right to contest the admissibility of any statements he has given law enforcement and such statements are admissible at the sentencing hearing in Case Number 84-13346-B if otherwise relevant;
> > 2. **Defendant waives his right to contest the admissibility of evidence seized from his car or**

> **at or near his apartment, and specifically waives his right to contest the admissibility of a knife found in a wooded area near his apartment in the sentencing hearing in Case Number 84-13346-B; . . .**

Long v. State, 529 So. 2d 286, 288 n.2 (Fla. 1988) (emphasis added).

In his successive postconviction motion, Long, for the fourth time, sought to withdraw his 1985 guilty plea. The first time, in 1985, Long alleged that he did not know that he would be waiving any challenge to his confession. On December 11, 1985, the presiding trial judge, Judge Griffin, offered to grant Long's request to withdraw his plea and recessed the proceedings overnight to allow Long to make a decision on whether to withdraw his plea.[1] After an overnight recess, Long rejected the court's offer. Thus, Long ratified his plea agreement, which waived any challenge to his confession or to the admissibility of the physical evidence. See Long v. State, 529 So. 2d 286, 291-92 (Fla. 1988) (finding that Long clearly made an informed choice to plead guilty with full knowledge that he was waiving his rights to appeal the admissibility of his confession and

[1] In 1985, Robert Norgard (then an Assistant Public Defender, and currently Long's collateral counsel), represented Long in his Pasco County murder case and was involved in discussions with Long and his Hillsborough County attorney, Charles O'Connor, regarding Long's guilty plea in the Hillsborough County murder cases. (DAR V12:1609-18).

physical evidence). On direct appeal, this Court affirmed the judgments of conviction on all cases, affirmed the life sentences, but vacated the death sentence and remanded for a new sentencing proceeding because the State had utilized evidence at the penalty phase of Long's murder of Virginia Johnson in Pasco County and that death sentence had subsequently been vacated. Id.

Following remand by this Court for a new penalty phase, Long sought to withdraw his plea for the second time. Long filed a *pro se* motion and defense attorney Robert Fraser was appointed to represent him. A hearing was held before the trial court on February 10, 1989. Long's former trial counsel, Charles O'Connor, and Long both testified, and the trial court denied Long's motion.

At the resentencing hearing, the State presented the following evidence:

> [T]he investigating officer in this case testified that, on May 27, 1984, Simms' nude body was found in a wooded area along Park Road just north of Interstate 4 near Plant City, Florida; that rope was tied around her front and back and around both of her wrists to restrict movement of her hands; that her throat was cut; and that clothes were scattered around the area. He additionally noted that blood was found on her head and face and that rope burns were present across her neck and chin. Evidence from the medical examiner reflected three possible causes of death: (1) strangulation, (2) head injuries, and (3) bleeding from two knife slashes in her neck.

Evidence of Long's November 16, 1984, confession, in which he gave the following account of Simms' murder, was presented to the jury. On the evening before her murder Long purchased some rope, cut it into sections, and put it in the glove compartment of his car. He put a weapon in his car and drove along Kennedy Boulevard in Tampa looking for a prostitute. When he pulled up next to the victim, she asked if he wanted a date, and when he asked how much, she said, "Fifty dollars." He agreed, she entered the car, and they drove for a distance of a half-mile to a mile. Long then pulled a knife, made the victim undress, reclined the passenger's seat into a prone position, and, at knife point, tied her up. Long further stated that he then drove fifteen to twenty miles to eastern Hillsborough County where he raped the victim. Afterwards, he talked to her, intending to take her back to where he had picked her up, and he told her he would do so. He stated that, instead, he drove to the Plant City area and tried to strangle her. After the strangulation attempt failed to render the victim unconscious, he hit her on the head with a club, and threw her out of the car. He then cut her throat and left her alongside the road. He stated that he also threw her clothes out of the car.

The State also presented, as aggravating factors, testimony regarding Long's convictions for two other crimes of violence in which the victims survived. It is important to note that both of these convictions occurred before Long entered into his September 1985 plea agreement in the Hillsborough County murders. The dialogue of the plea agreement clearly establishes that any prior convictions not the result of the plea agreement would be admissible against Long in the penalty phase proceeding. The first crime of violence occurred in Pasco County on March 6, 1984, a little more than two and one-half months before the murder in this case. The circumstances presented to the jury reflected that Long saw a house with a "For Sale" sign in front of it. He went up to the house and knocked on the door. A woman answered and Long asked the woman if he could look at the house. As soon as he gained entry, he placed his arm around the victim's neck, put

> a gun to her temple, and walked her into the bedroom. Long then tied her hands behind her back, taped her mouth shut with rope and tape from his pocket, and raped her. Subsequently, he gathered up some jewelry, which he later pawned in Tampa, and left the house. Long was convicted of kidnapping, robbery, and sexual battery for this crime on April 17, 1985. This conviction was rendered approximately five months before Long entered his guilty plea in the Hillsborough County murders.
>
> The second conviction was also for kidnapping, sexual battery, and robbery. This crime occurred on May 29, 1984, approximately two and one-half days after the murder at issue here. In this instance, the victim stated that she received a telephone call concerning her newspaper advertisement to sell furniture. The man told her that he was a salesman for IBM, and she gave him directions to her home in Palm Harbor. A short time later, Long, wearing a three-piece suit, arrived at her house. The victim led Long to the bedroom to show him the furniture. At that point, Long pushed her to the floor, sat on her, and tied her hands behind her. He then blindfolded and gagged her, cut her clothes off, and raped her. Long pleaded guilty to this offense on July 12, 1985, two months before his guilty plea in the Hillsborough County murders.

Long v. State, 610 So. 2d 1268, 1270-71 (Fla. 1992).

On appeal following his resentencing, Long raised thirteen claims, including that the trial court erred in denying Long's motion to withdraw his guilty plea. Long argued that he did not understand the plea agreement, he had not read it and his counsel did not explain it. However, Long's former trial counsel offered contrary testimony and the trial judge found Long was not credible based on the testimony before the court and the

transcripts of the prior hearing. This Court unanimously affirmed. Long v. State, 610 So. 2d 1268 (Fla. 1992). Rejecting the claim that the trial court erred in failing to grant Long's motion to withdraw his guilty pleas, this Court reasoned:

> In his first claim, Long asserts that he should be entitled to withdraw his guilty pleas. He claims he was not told that his confessions and pleas could be used against him in his Pasco County case as Williams rule evidence to convict him and as aggravation in the penalty phase of that case. He also contends that his attorney led him to believe that the other Hillsborough County homicides could not be used against him in any court.
>
> **We fully articulated why Long's plea agreement was valid in our decision in Long v. State, 529 So. 2d 286 (Fla. 1988), and we reiterate here our conclusion that Long's guilty plea was valid. The record clearly reflects Long's understanding that the convictions occurring before the time he entered into the plea agreement could be used against him in aggravation. Long is an intelligent defendant, and he entered the plea agreement with full knowledge of his prior convictions. His decision to plead was based on a reasonable defense theory to avoid the imposition of the death penalty in the other murders and to escape the death penalty in this case by establishing that he was a severely mentally ill individual.**

Id. at 1274 (emphasis added).

The third time Long sought to withdraw his plea was during his postconviction proceedings; this time on the ground that his trial counsel was allegedly ineffective. After two separate appeals, this Court concluded that Long's guilty pleas were valid. Nevertheless, in his postconviction proceedings, Long

alleged that attorney O'Connor was ineffective and failed to explain the consequences of the plea -- specifically Long's waiver of any challenge to the legality of his confession and the search of his automobile and residence. Long argued that if trial counsel had "competently explained" the waiver, Long would have withdrawn his guilty plea. After conducting an evidentiary hearing on Long's ineffective assistance of counsel claim, the lower court denied his motion.

On appeal, this Court affirmed the denial of relief and found that Long failed to establish that trial counsel performed deficiently.

> Long has failed to establish deficiency. The circuit court found that Long failed to demonstrate that trial counsel, Charles O'Connor, did not adequately review the conditions and consequences of the plea agreement. The circuit court found Long's assertions to the contrary not credible. We have stated that "[a]s long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."'" Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)); see also Cox v. State, 966 So. 2d 337, 357–58 (Fla. 2007) ("[T]he trial court is in a superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of witnesses.'") (quoting Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)).
>
> **There is competent, substantial evidence to support the circuit court's findings. During the**

colloquy for the original plea on September 23, 1985, Long testified that he had read the plea form and it was explained to him by counsel. Long also affirmed that he understood the terms of the agreement. Long did not have any questions about the plea agreement when asked by Judge Griffin. O'Connor and Long agreed that it was in Long's best interest to enter the plea.

On December 12, 1985, after being allowed twenty-four hours to consider whether he wanted to withdraw his plea, Long testified during the colloquy with the trial court that he had had time to consider the consequences of withdrawing his plea and had thoroughly discussed it with O'Connor. Long confirmed that he had confidence in the advice he had been given by counsel, O'Connor, and Long specifically confirmed that he understood that he was waiving his right to appeal the admissibility of his confession.

O'Connor was unavailable to testify during the postconviction evidentiary hearing because he had died. However, O'Connor testified before Judge Lazzara on February 10, 1989, during a hearing on Long's motion to withdraw his guilty pleas filed by then-counsel Robert Fraser before Long's second penalty phase. O'Connor testified that he reviewed the plea form with Long before Long signed it on September 23, 1985, and again when Long had the opportunity to withdraw his plea in December of 1985. O'Connor testified that he spent a substantial amount of time explaining the consequences of the plea agreement to Long and was satisfied that Long understood the agreement.

During this hearing on February 10, 1989, Long testified that he never read the agreement and that O'Connor never went over the plea agreement with him. However, on cross-examination Long acknowledged that Judge Griffin went over the plea agreement with Long during the colloquy on December 12, 1985, the hearing during which Long decided not to withdraw his plea; Long specifically acknowledged that the judge was very clear that he would be waiving his right to appeal the admissibility of his confession pursuant to the plea agreement. Long also acknowledged that he decided not

> to withdraw his plea when he was given the opportunity because he wanted to limit his potential exposure to the death penalty and he did not want to go through eight trials.
>
> Long contends that testimony at the postconviction evidentiary hearing held on May 9, 2011, provided evidence that O'Connor's previous testimony that he provided Long with the ramifications of the plea agreement was inaccurate. However, we find nothing in the record that suggests that O'Connor's prior statements to the court that Long was aware of the ramifications of the plea were misrepresentative. Despite Long's contentions, the postconviction record further supports a finding that Long was fully aware of and understood all of the ramifications of the plea agreement.
>
> Because we find that counsel was not deficient, there is no need to address prejudice. See Hill, 474 U.S. at 60, 106 S. Ct. 366 (declining to assess the deficiency prong of Strickland after finding that the petitioner's allegations were insufficient to satisfy the prejudice prong of Strickland); see also Evans v. State, 946 So. 2d 1, 12 (Fla. 2006) ("[B]ecause the Strickland standard requires establishment of both [deficient performance and prejudice] prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong.") (alteration in original) (quoting Whitfield v. State, 923 So. 2d 375, 384 (Fla. 2005)).

Long v. State, 118 So. 3d 798, 803-05 (Fla. 2013).

On September 9, 2014, Long filed a successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 claiming that "newly discovered evidence" regarding FBI hair and fiber analyst Michael Malone rendered his guilty plea invalid as he would not have entered into the plea

had he known of the issues surrounding Malone's forensic testing. (PCR2 V1-3:92-425). After reviewing the State's response and conducting a case management conference, the trial court issued an order summarily denying Long's motion as time-barred because the alleged newly discovered evidence regarding FBI Agent Michael Malone was information that could have been discovered by the exercise of due diligence. (PCR2 V5:930-37). This appeal follows.

SUMMARY OF ARGUMENT

The trial court properly summarily denied Long's successive postconviction motion as it was untimely and not based on "newly discovered evidence." Although the State submits that the record established that both Long and his counsel were specifically aware of the information concerning FBI Agent Michael Malone in 2000, this contention is not dispositive. The lower court did not make a specific finding that counsel was actually aware of this information, but rather, properly found that this information was easily ascertainable with the exercise of due diligence. Because the record conclusively established that Appellant's claim was untimely and not based on newly discovered evidence, this Court should affirm the lower court's summary denial of his successive postconviction motion.

ARGUMENT

LONG'S SUCCESSIVE POSTCONVICTION MOTION WAS TIME BARRED AND PROPERLY SUMMARILY DENIED AS THE ALLEGATIONS OF NEWLY DISCOVERED EVIDENCE WERE CLEARLY REFUTED BY THE RECORD.

On September 9, 2014, collateral counsel for Long, Robert Norgard, filed a successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 claiming that "newly discovered evidence" regarding FBI hair and fiber analyst Michael Malone rendered his guilty plea invalid as he claims Long would not have entered into the plea agreement had he known of the issues surrounding Malone's forensic testing. Long's counsel stated in his motion that he received a letter from the U.S. Department of Justice, dated September 27, 2013, informing counsel of the report issued in 1997 by the Office of Inspector General detailing improprieties in the FBI laboratory and, in particular, Michael Malone,[2] and enclosing copies of the Independent Case Reviews conducted in this case in 2000 by Steve Robertson regarding the work Malone performed in Long's cases. (PCR2 V1:92-175). Counsel also attached to his motion an OIG Report issued in July, 2014, entitled "An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory"

[2] The 2007 OIG Report was titled, "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases."

(PCR2 V1-2:176-323), and a deposition of Michael Malone in an unrelated civil case (PCR2 V2-3:324-420).

The State filed a response to Long's motion and argued that his motion was untimely under rule 3.851(d)(1) as the basis of Long's motion, an attack on the reliability of FBI analyst Malone's forensic testing, was known by Long or his counsel, or could have been known with the exercise of due diligence, prior to one year before the filing of his motion. The State attached to its pleading a certified letter sent by the prosecuting attorney on December 20, 2000, to inmate Long containing a copy of the 1997 OIG report. (PCR2 V3:426-449). The State also attached an exhibit containing a letter, and its enclosures, which was sent to Long's collateral counsel in December, 2000, Byron Hileman. The letter and enclosures sent to collateral counsel in 2000 consisted of copies of the same ten Independent Case Reviews conducted by Steve Robertson in 2000 as attached to Long's motion, as well as the underlying FBI laboratory reports for each case review.[3] (PCR2 V3:450-92).

[3] Appellant argues in his brief that the letter sent to Long's counsel "did not establish what documents were sent to Mr. Hileman." While the cover letter stated that the enclosures were "the documentation that you requested," the State also attached copies of the documents which were actually sent to Hileman with the letter, i.e., the packet of Independent Case Reviews and FBI laboratory reports.

In addition to arguing that Long and his counsel were notified of the issues surrounding FBI analyst Malone in 2000, the State asserted that, even without actual knowledge, the court should find that counsel could have discovered this information with the exercise of due diligence. The release of the 1997 OIG Report generated wide-spread national media coverage, and was especially publicized in the Tampa Bay area as Malone's testing was involved in numerous high-profile cases, including Long's multiple murder cases. See, e.g., Sydney P. Freedberg, *Report Highlight More Tainted Testimony*, St. Petersburg Times, May 3, 2001 (noting that Michael Malone had performed testing in Hillsborough County capital cases involving Michael Mordenti, Brett Bogle, and Robert Joe Long); see also Sydney P. Freedberg, *Good cop, Bad cop*, St. Petersburg Times, Mar. 4, 2001; Lyda Longa, *FBI Lab Jeopardizes Local Cases*, The Tampa Tribune, Sept. 20, 2000. Furthermore, the OIG report and the issues surrounding Malone's forensic testing were discussed in numerous reported opinions from this Court. See Buenoano v. State, 708 So. 2d 941, 945 (Fla. 1998) (stating that the Office of the Inspector General issued the report entitled "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases" in April, 1997); Hannon v. State, 941 So. 2d 1109 (Fla. 2006)

(newly discovered evidence claim based on report issued criticizing Malone for conducting incomplete tests and exaggerating testimony); Duckett v. State, 918 So. 2d 224 (Fla. 2005) (arguing that State failed to disclose 1997 OIG report regarding Malone and that Malone's testimony was not credible); Moss v. State, 860 So. 2d 1007 (Fla. 2003) (discussing Brady claim based on State's alleged failure to disclose OIG report discussing Malone's forensic work); Trepal v. State, 846 So. 2d 405 (Fla. 2003). Finally, the State pointed out that Long's current collateral counsel, Robert Norgard, represented Long in his 1985 Pasco County murder trial of Virginia Johnson and actually cross-examined Michael Malone regarding Malone's hair and fiber analysis performed in the Pasco County case.[4]

After conducting a case management conference (PCR2 V6:1-20), the lower court issued an order summarily denying Long's motion. The court found that "the information which Defendant alleges is newly discovered evidence is information which could

[4] Obviously, Long's counsel was aware that the FBI laboratory conducted forensic hair and fiber testing in *all* of Long's murder cases. (PCR2 V3:524-37). A special task force was created to investigate a series of unsolved homicides in the Tampa Bay area and after one of Long's victim's escaped, she provided law enforcement with a description of Long and his vehicle. Long v. State, 517 So. 2d 664, 665 (Fla. 1987). Long was apprehended while driving his vehicle and Malone's forensic work involved matching hair and fibers from Long's vehicle's interior to various victims, including Virginia Johnson.

have been previously discovered by the exercise of due diligence." (PCR2 V5:934). As the court correctly stated when making this determination, the 1997 OIG Report detailed the investigations and findings concerning improprieties and wrongdoing within certain sections of the FBI Laboratory and specifically identified Michael Malone and concluded that he gave false testimony and testified inaccurately and outside of his expertise. Numerous reported opinions from this Court and the court of appeals discussed the OIG report and Malone. (PCR2 V5:943-44). The court further noted that the Independent Case Reviews were complete in 2000. The court stated that the 2014 OIG report attached to Long's motion was not a new investigation, but rather an assessment of how the USDOJ Criminal Division Task Force "managed the identification, review, and follow-up of cases involving the use of unreliable analysis and overstated testimony by FBI Lab examiners in criminal cases." Id. at 944-45 (quoting United States Department of Justice Office of the Inspector General, *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory* (July 2014)). Finally, the court concluded that given Norgard's involvement in Long's Pasco County case, he would have been aware of Michael Malone's involvement in Long's Hillsborough County cases. Given these factors, the court

concluded that counsel could have obtained the information concerning Malone with the exercise of due diligence.

The State submits that the record clearly supports the lower court's finding that Long's successive motion was untimely as Long and his counsel could have learned of the alleged newly discovered evidence with the exercise of due diligence. This Court has previously held that the summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. Lukehart v. State, 103 So. 3d 134, 136 (Fla. 2012). Here, the trial court properly concluded that the motion, files, and records conclusively established that Long was not entitled to relief. Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. Id.

As the trial court correctly found, Long's successive motion did not meet the exception to the one-year time limitation set forth in Florida Rules of Criminal Procedure 3.851(d)(2)(A):

> No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, . . .

Contrary to Long's assertions in his brief, the trial court did not summarily deny his motion based on arguments by the State, but rather, based the denial on the record. The record is unrefuted that Long's current counsel has been involved with Long's murder cases since 1985 and, both Long and his counsel were obviously aware of FBI analyst Malone's forensic testing in Long's numerous Tampa Bay area murder cases as Long's current collateral counsel cross-examined Malone in July, 1985 during Long's murder trial in Pasco County.[5] Likewise, given the much-publicized release of the OIG report in 1997 dealing with improprieties at the FBI lab and specifically naming Michael Malone, collateral counsel could have discovered this information with the exercise of due diligence. Furthermore, both this Court and other Florida appellate courts have addressed the 1997 OIG report and Michael Malone's forensic testing in numerous reported decisions. Given this information, the trial court properly found that counsel could have

[5] Long's current collateral counsel was also involved with Long's Hillsborough County cases as evidenced by his testimony at the proceedings regarding his discussions with Long on his plea agreement in the instant case.

discovered the information concerning FBI analyst Malone prior to one-year before filing his successive motion. See Glock v. Moore, 776 So. 2d 243, 250-51 (Fla. 2001) (stating that defendant could not establish that racial profiling claim was based on newly discovered evidence because issue had been known for years as evidenced by reported caselaw); Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008).

Long argues that the trial court erroneously found that he could have discovered this information with the exercise of due diligence and argues that he was not aware of the *specific* problems discussed in the OIG reports until 2013. This argument is without merit. Obviously counsel could not have obtained the July, 2014 OIG Assessment Report earlier as it was not published until 2014. However, as the trial court correctly noted, this assessment "is not a new investigation but rather an assessment of how the USDOJ Criminal Division Task Force, which was created as a result of the aforementioned allegations of improprieties at the FBI lab, 'managed the identification, review, and follow-up of cases involving the use of unreliable analysis and overstated testimony by FBI Lab examiners in criminal cases.'" (PCR2 V5:944-45). Furthermore, as previously noted, the record attachments establish that the State sent a copy of the 1997 OIG report to Appellant via certified mail in December 2000, and

also sent the 2000 Independent Case Reviews to Long's collateral counsel Byron Hileman at the same time. Even assuming *arguendo* that the record does not support a finding that both Long and his counsel received this information, counsel could have discovered the problems with Malone's forensic testing with the exercise of due diligence for the reasons discussed above.

Finally, even if this Court finds that Long's claim was timely, the record refutes any entitlement to relief on the merits as Long cannot establish that the withdrawal of his guilty plea is necessary to prevent manifest injustice. Normally, a newly discovered evidence claim is controlled by the standard set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991), requiring a defendant to establish: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce an acquittal on retrial. However, as the Second District Court of Appeal has noted, "the Jones standard is virtually impossible to apply" to cases involving a guilty plea because there was no trial and no evidence introduced. Bradford v. State, 869 So. 2d 28, 29 (Fla. 2d DCA 2004). Thus, in cases involving a guilty plea, like the instant case, the appropriate standard to apply requires the

defendant to prove the withdrawal of his plea is necessary to correct a manifest injustice. Id.; see also Williams v. State, 316 So. 2d 267 (Fla. 1975) (stating that a defendant has the burden to show manifest injustice when seeking to withdraw a plea after sentencing).

Long alleged below that he would not have entered into the plea deal in this case had he known of the issues surrounding Malone's forensic testing of the hair and fiber evidence. This claim is legally insufficient and without merit as this Court has already rejected a variation of this claim when Long asserted that he was misinformed about the details of the plea agreement. This Court stated, "Long is an intelligent defendant . . . and [h]is decision to plead was based on a reasonable defense theory to avoid the imposition of the death penalty in the other murders and to escape the death penalty in this [single] case by establishing that he was a severely mentally ill individual." Long, 610 So. 2d at 1274. In addressing the validity of Long's plea, this Court noted that Long's guilty plea is "both a confession of guilt in open court and an agreement for the entry of a conviction." Long, 529 So. 2d at 291. Further, this Court stated:

> On its face, the plea agreement reflects that the number of possible offenses in Hillsborough County for which a death sentence could be imposed was reduced

from seven to one. The record clearly reflects that appellant made an informed choice with full knowledge that the admissibility of the confession was an issue to which he was waiving his appeal rights.

The guilty plea itself is a confession. Appellant is arguing that, because the confession entered into on November 16, 1984, was later invalidated, see Long v. State, 517 So. 2d 664 (Fla. 1987), the confession by guilty plea entered on December 12, 1985, should also be declared invalid. In Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970), the United States Supreme Court rejected Parker's claim that his plea was involuntary because it was made on the advice of his counsel who thought his prior confession was admissible. Parker, who was charged with burglary and rape, had confessed and later entered a guilty plea. He contended that his guilty plea was invalid because the plea was the product of a coerced confession that was obtained in clear violation of Miranda. The Supreme Court stated Parker's position as follows:

> On the assumption that Parker's confession was inadmissible, there remains the question whether his plea, even if voluntary, was unintelligently made because his counsel mistakenly thought his confession was admissible. **As we understand it, Parker's position necessarily implies that his decision to plead rested on the strength of the case against him: absent the confession, his chances of acquittal were good and he would have chosen to stand trial; but given the confession, the evidence was too strong and it was to his advantage to plead guilty and limit the possible penalty to life imprisonment. On this assumption, had Parker and his counsel thought the confession inadmissible, there would have been a plea of not guilty and a trial to a jury. But counsel apparently deemed the confession admissible and his advice to plead guilty was followed by his client. *Parker now considers his confession involuntary and inadmissible. The import of this claim is that he suffered from bad advice and that had he been correctly***

> ***counseled he would have gone to trial rather than enter a guilty plea. He suggests that he is entitled to plead again, a suggestion that we reject.***

Id. at 796 (emphasis added; footnotes omitted). Further, we note that in McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970), the Supreme Court held that a guilty plea, motivated by existence of a coerced confession, was not subject to a collateral attack if the defendant had counsel unless counsel was incompetent. **There is no question from our review of this record that appellant's decision to plead guilty, after consulting with his attorney, was a tactical decision. Under this plea agreement, if counsel could obtain a jury recommendation of life because of appellant's mental problems, a life sentence could probably be sustained and appellant would not be subject to be tried for any other offenses in Hillsborough County for which the death penalty could be imposed. We find no basis in this record to show that appellant's counsel was incompetent or ineffective. Under the facts, the plea agreement was clearly voluntary and entered with appellant's full understanding that he was expressly waiving his right to challenge the confession's admissibility. To accept appellant's argument would mean that there never could be an express waiver of prior legal challenges in pretrial matters by a guilty plea.**[FN4] As reiterated above, that is not the law. Since we have upheld the validity of the plea, appellant's other related claims are without merit.

> FN4. We are not dealing with an automatic waiver that results from a guilty plea when there is no express reservation of a right to appeal some prior trial court action. We addressed the automatic waiver rule with regard to death penalty cases in Muehleman v. State, 503 So. 2d 310 (Fla.), cert. denied, 484 U.S. 882, 108 S. Ct. 39, 98 L. Ed. 2d 170 (1987).
>
> The instant case involves an express waiver, both in the written plea agreement and in open

> court, and, consequently, our decision in Muehleman does not apply.

Long, 529 So. 2d at 292-93 (emphasis added).

Similar to the situation above, Long now argues that if he would have known that the strength of the State's case may have been weakened by the FBI's investigation into Malone's testing, he would not have pleaded guilty. As Long expressly waived the right to challenge the admissibility of the physical evidence seized in this case, his argument is without merit. Id. at 288 n.2 (noting that paragraph #2 of Long's plea agreement states: "Defendant waives his right to contest the admissibility of evidence seized from his car or at or near his apartment, and specifically waives his right to contest the admissibility of a knife found in a wooded area near his apartment in the sentencing hearing in Case Number 84-13346-B"). As there can be no manifest injustice when Long specifically waived any challenge to the admissibility of such evidence when he knowingly and voluntarily entered into his guilty plea, his claim is without merit.

Furthermore, the record clearly refutes Long's allegation that he would not have pleaded guilty had he known about the FBI's investigation into Malone. As this Court has stated on multiple occasions, Long clearly had a strategic reason for

entering into the plea agreement. Namely, Long sought to limit his exposure to a potential eight death sentences and instead chose to allow the State only one bite of the apple to obtain a death sentence (wherein the State would be precluded from using the other seven murders in aggravation at the penalty phase). Long was obviously aware at the time of his guilty plea that, in addition to his detailed confession to law enforcement officers, the State had other strong evidence against him including one of the surviving victims of his kidnapping and sexual assault, Lisa McVey, incriminating statements made by Long to a CBS national news reporter, blood evidence, and tire track impressions. (DAR V12:1671); see also CBS, Inc. v. Cobb, 536 So. 2d 1067 (Fla. 2d DCA 1988).

Finally, the State would note that, while FBI agent Malone never testified in this case, or any of Long's Hillsborough County cases, the reports attached to Long's successive postconviction motion find that Malone's testing was not scientifically acceptable due to a number of technical reasons, but the reports do not state that the results were incorrect. In fact, a number of the Independent Case Reviews concluded that Malone's forensic testing of the "instrumental fiber data [reporting an association of the victim with Robert Joe Long's vehicle] support the conclusions made [by Malone] associating

the victims with Robert Joe Long." (PCR2 V1:124, 130, 141, 151, 156, 172). Additionally, there is no indication that further testing could not be performed in a scientifically acceptable manner which would produce the exact same results and conclusions. Because the record conclusively established that Long's motion was untimely and refuted his claim that he is entitled to relief based on alleged newly discovered evidence, this Court should affirm the lower court's summary denial of Long's successive postconviction motion.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order summarily denying Long's successive motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: **Robert A. Norgard**, Esquire, P.O. Box 811, Bartow, Florida 33631, **norgardlaw@verizon.net.**

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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