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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Mr. Long submits this response to the position advanced by the State in the Answer Brief. Mr. Long will continue to rely upon the arguments and citations of authority contained in the Initial Brief as well as those contained in this Reply Brief.

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 on September 9, 2014, predicated on the continuing investigation into improprieties with the work performance of former FBI examiner Michael Malone. Mr. Long alleged, in particular, evidence contained in the July 2014 report issued by the OIG which undermined the FBI's previous investigation into Malone in the late 1990's and the 2000 Case Review Reports, constituted newly discovered evidence. Mr. Long alleged if the information contained in the July 2014 report had been available to him at the time of his plea, he would not have entered the plea. Although the 1997 OIG report and the 2000 Case Review Reports contained some information about Malone's malfeasance unrelated to the issues in this case, it was not until the issuance of the July 2014 report did Malone's malfeasance in this case and the faulty and unreliable methods

used in the 2000 Case Review Reports come to light. It was at that point in time, with the issuance of the July 2014 Report, that Mr. Long had a claim which was sufficiently ripe for review.

The State argued both in the trial court and in the Answer Brief Mr. Long and his counsel should have brought this claim when the 1997 OIG report was released or after the 2000 Case Review Reports were released and that knowledge of the investigation into Malone should be imputed from other reported decisions in which the 1997 OIG reports was mentioned. This argument is wrong.

The State first cites to Buenoano v. State, 708 So.2d 941 (Fla. 1998) in support of this argument. However, the reported opinion contains no reference to Malone or problems with Malone's work in hair and fiber analysis. Since the 1997 OIG report did not address anything related to hair and fiber from Malone and was confined to his erroneous statement he claimed to have performed a tensile test on a purse strap, this is not surprising. In fact, Malone is not mentioned in Buenoano because the agent in question was not Malone, but was FBI examiner Roger Martz, who performed the chemical analysis. The 1997 OIG report heavily focused on problems in the chemical analysis unit and Mr. Martz. Problems with Malone and his work in hair and fiber is mentioned nowhere in Buenoano.

A very similar situation exists in Trepal v. State, 846 So.2d 405 (Fla. 2003). As in Buenoano, the primary target was FBI examiner Roger Martz, along with several other examiners from the chemical analysis unit. Hair and fibers were not at issue and Malone's name is not mentioned in the opinion. Further, the 1997 OIG report specifically investigated Martz's work in Trepal, thus the defendant would have clear notice to bring claims related to problems with the lab when his own case is specifically identified as problematic. While Trepal raised concerns about Martz, it fails entirely to name Malone.

The State alleges Duckett v. State, 918 So.2d 224 (Fla. 2005), should serve as an alert to problems with Malone. However, the opinion provides just the opposite conclusion. The opinion states the trial court conducted an evidentiary hearing, at which time Malone testified he had repeatedly been tested on proficiency tests, had never failed those tests, and had been repeatedly qualified as an expert, and no court had ever rejected him as an expert. Ibid., at 234. There is no indication in this opinion that any challenge to Malone based on the 1997 OIG report would be successful. This Court rejected a *Brady* violation because the 1997 OIG report was not published at the time of the 1988 trial. Ibid., at 235. Based on Duckett, a challenge to Malone based solely on the 1997 OIG report would be fruitless. However, the July 2014 Report finds significant

issues with Malone's proficiency, his qualifications as an expert, and the need for truly independent testing and review of Malone's work. Nothing in Duckett would undermine the culture of infallibility surrounding Malone.

In Hannon v. State, 941 So.2d 1109 (Fla. 2006), this Court affirmed the denial of Hannon's claim related to Malone because in Hannon's case Malone did not make any association between Hannon and the crime. Malone testified he examined hair and fiber evidence collected from Hannon and from the murder scene, but found no matches. There was no showing Malone provided false testimony in Hannon's case. The opinion contains little to no detail about the 1997 OIG report and certainly does not contain any suggestion of the contents of the July 2014 Report. The opinion does not provide any indication Malone's efficacy in testing or his credibility has been undermined in the Court's eyes. The opinion does not indicate a challenge to Malone's analysis of hair and fiber based on the 1997 OIG report would have any degree of success.

The State's citation to Moss v. State, 860 So.2d 1007 (Fla. 5th DCA 2003), in the Answer Brief as emanating from this Court is incorrect. [State Answer Brief p.15, citation "Moss v. State, 860 So.2d 1007 (Fla. 2003)] The opinion issued from the Fifth District Court of Appeal. In Moss the trial court entered a summary denial of Moss's postconviction motion premised on newly

discovered evidence or *Brady* stemming from the 1997 OIG report where three FBI examiners, Malone among them, had testified at this trial. The appellate court reversed, finding the trial court's order was deficient because the trial court considered only the evidence favorable to the State when finding there was no prejudice and failed to consider evidence pointed out by Moss in his motion. The appellate court reversed for either an evidentiary hearing or a new order which properly evaluated the totality of the evidence, or to grant the motion. The opinion makes no findings on the credibility or efficacy of Malone.

The State argues "Numerous reported opinions from this Court and the court of appeals discussed the OIG report and Malone.[State's Answer Brief, p.16] However, other than the aforementioned cases, the State has not provided a single reported citation to any appellate opinion in Florida or any other jurisdiction finding Malone to be deficient or his testimony prejudicial based on the 1997 OIG report or the 2000 Case Reports generated in this case and the other cases where such reports were generated as identified in the July 2014 Report. It does not appear Malone's work as a hair and fiber analyst was specifically identified and subject to scathing criticism until the July 2014 Report issued.

The State has argued the trial court's statement the July 2014 Report is not a new investigation, only an assessment, and

thus fails to provide any basis for relief.[State's Answer Brief, p. 19] It is not the title of the document that determines whether relief is appropriate, it is the content of the document. The July 2014 Report finds fault with the methods and scope of the 1997 OIG investigation into Malone and faults the methodology and results of the 2000 Case Review Reports. The July 2014 Report may be referred to as an assessment, but in reality it is an investigation into how the FIB and USDOJ Criminal Task Force conducted, reviewed, and reported the malfeasance of Malone. Relief should not be denied on the failure of the trial court to review and address the contents of the July 2014 Report because it did not contain the word "Investigation". Such a denial would violate the due process provisions under the United States Constitution and Florida Constitution.

The July 2014 Report constitutes newly discovered evidence. It was unavailable to Mr. Long's trial attorneys, Mr. Hileman, and undersigned counsel until its release in July 2014. Even the State concedes "Obviously counsel could not have obtained the July, 2014 OIG Assessment Report earlier as it was not published until 2014."[State's Answer Brief, p. 19] The findings published in the July 2014 Report are the first to specifically address Malone's deficiencies and malfeasance as a forensic hair and fiber analyst and the first instance where the methodology

and conclusions of the 2000 Case Review Reports have been undermined by the very individual who conducted the reviews. The findings of the 2000 Case Review Reports are insufficient to deny relief as the basis and methodology used to produce those reports has been cast into doubt by the July 2014 Report. The State's argument the 2000 Reports are conclusive and correct fails to address the July 2014 Report findings that the case review reports were inaccurate, limited, and unreliable.[State's Answer Brief, p. 25-6]

The 2014 July Report provides sufficient basis for an evidentiary hearing. The trial court attached no records refuting the content of the report and Mr. Long's claims regarding the findings of the July 2014 Report and the impact such information would have had on his decision to enter a plea as opposed to challenging the State's evidence at trial. Thus, per Moss 860 So.2d at 1011, the trial court erred in failing to conduct an evidentiary hearing in this case.

The State argues Mr. Long should be denied relief because he alleged the elements necessary for relief on a claim of newly discovered evidence but did not allege manifest injustice and cites to Bradford v. State, 869 So.2d 28, 29 (Fla. 2d DCA 2004).[State's Answer Brief, p.20-21] While Bradford set forth this standard and has been relied upon by the Second District Court of Appeal since, this Court has not determined this to be

the standard when newly discovered evidence is alleged as the basis for withdrawing a plea in a postconviction motion. However, if Mr. Long's Motion to Vacate Judgment of Conviction and Sentence alleged an inappropriate standard, denial of relief is not the result. Mr. Long should be afforded a reasonable opportunity to amend his pleading under Spera v. State, 971 So.2d 754, 761 (Fla. 2007). *See also*, Burns v. State, 110 So.3d 96 (Fla. 2d DCA 2013).

CONCLUSION

The summary denial by the trial court was error. Mr. Long is entitled to amend his motion to cure any pleading deficiencies should this Court determine there are any pleading deficiencies. Mr. Long submits the summary denial was error and he was entitled to an evidentiary hearing on the merits of his claim. This Court should reverse the trial court's Order Denying Mr. Long's Successor Motion to Vacate Judgment of Conviction and Sentence and remand the case for an evidentiary hearing.

Respectfully submitted,

/s/ Robert A. Norgard

ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Reply Brief has been served by e-filing through the c-portal to ASA Stephen Akes, Office of the Attorney General capapp@myfloridalegal.com and Stephen.ake@myfloridalegal.com , Tampa, FL this **24th** day of February, 2015

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY a the size and style font used in the preparation of this Reply Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.201.

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