

IN THE SUPREME COURT OF FLORIDA

FILED
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BY _____

ROBERT JOE LONG,

Appellant,

v.

APPEAL NO. SC12-103

Lt. Ct. No. 84-CF-13346

STATE OF FLORIDA,

Appellee.
_____ /

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Mr. Long, will rely upon the Statement of Case and Facts contained in the Initial Brief. In addition to the arguments and citations of law and other authorities relied upon in the Initial Brief, the following Reply Brief is submitted in response to the arguments made in the Answer Brief as to both issues.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING RELIEF ON MR. LONG'S CLAIMS THAT HIS PLEA WAS INVOLUNTARY DUE TO THE DEFICIENT PERFORMANCE OF TRIAL COUNSEL AND THAT MR. LONG WOULD HAVE GONE TO TRIAL ABSENT THE DEFICIENT PERFORMANCE.

In his first state postconviction proceedings, Mr. Long argued that due to the deficient performance of trial counsel in adequately communicating to him the waiver consequences of the plea and the ramifications of those waivers on his appellate rights, Mr. Long would not have entered into the plea agreement and instead would have gone to trial.

The State's first argument raises the doctrine of law of the case and *res judicata*. [Answer Brief, p.68] Neither of these legal doctrines is applicable to this case and should be disregarded by this Court. Rejecting the same type of arguments in Parker v. State, 873 So. 2d 270, 278 (Fla. 2004), this Court

held that the doctrine of law of the case does not apply unless the issue of ineffective assistance of counsel has been raised and previously rejected. In this case the doctrine of law of the case does not apply because the issue of the efficacy of counsel has never been previously litigated, there has been no prior testimony on the issue, nor has any court been previously required to make a ruling on this issue.

The Parker Court likewise rejected the application of the doctrine of *res judicata*. The doctrine of *res judicata* bars relitigation in subsequent cases or actions of claims raised or claims that could have been raised. *Res judicata* requires that the suit be the same. While Mr. Long has had prior legal proceedings in this case as the result of successful direct appeals which required a new penalty phase, he has never litigated the issue of the effectiveness of his attorneys. Mr. Long could not have previously litigated any postconviction claims.

The plea bargain negotiation process is a critical stage of the proceedings where a defendant is entitled to the effective assistance and performance of counsel under the Sixth Amendment to the United States Constitution. These principles were emphasized during the last term of the United States Supreme Court in the cases of Missouri v. Frye, No. 10-444, 566 U.S. ___

(March 21, 2012) and Lafler v. Cooper, No. 10-209, 566 U.S. ___ (March 21, 2012). Specifically, as previously argued in the Initial Brief, the right to effective assistance of counsel during the plea bargaining process is recognized in state court jurisprudence, including the right to have adequate and accurate information about the appellate ramifications of a plea.[Initial Brief, p.74-75]

While the State relies heavily on prior opinions of this Court which upheld Mr. Long's plea, the evidence presented at the postconviction evidentiary hearing sheds new light on the events surrounding the relationship between Mr. Long and Charles O'Connor, what information Mr. O'Connor had at significant points in time, and observations of other lawyers and personnel who were present during the relevant time periods, including the meeting which occurred after the trial court agreed to allow Mr. Long to withdraw his plea in December 1985. The testimony of the various witnesses as a whole contradicts the prior testimony of Mr. O'Connor. For example, investigator Tony Webb's testimony was that there was no actual written plea agreement had yet been received from the State Attorney when he and Mr. O'Connor went to the jail to talk to Mr. Long about the plea offer. Mr. Webb testified there was no written offer to show Mr. Long when Mr. O'Connor first confronted Mr. Long in

September 1985 with the issue of whether to plea. Mr. Webb's testimony contradicts Mr. O'Connor's 1989 testimony that he showed Mr. Long a written plea at the first meeting in September 1985. Mr. Webb's testimony corroborates Mr. Long's claim that he did not have a written copy of the plea to look over before deciding what to do in September 1985 and that Mr. O'Connor simply "counted off on his fingers" select aspects of the offer. The trial court was sufficiently concerned about the efforts that Mr. O'Connor made to adequately convey the terms and ramification of the plea as demonstrated by the decision to allow Mr. Long to withdraw the plea on December 11, 1985.

Mr. Grantham's and Mr. Alldredge's testimony about what occurred during the meeting of the Hillsborough lawyers and Pasco county lawyers in the court house on December 11, 1985 differs from the prior statement of Mr. O'Connor on the question of whether Mr. Long was given the plea agreement during those discussions and whether or not the terms, conditions, waivers, and ramifications of the plea were clearly explained to him by a Hillsborough lawyer. Mr. Grantham and Mr. Alldredge testified this did not occur, which is consistent with Mr. Long's testimony.

The State relies on Premo v. Moore, 131 S.Ct. 733 (2011) to support their argument that Mr. O'Connor did not perform

deficiently under Strickland and any deficiencies were strategic in order to avoid multiple death sentences. However, the facts in this case differ significantly from Premo. In Premo the defense attorney advised the defendant to enter a quick no-contest plea to felony murder before the State had even decided on the charges in order to avoid a life without parole or death sentence. No investigation had been done by defense counsel or the State Attorney. The plea was not the product of plea negotiations. Later, Premo filed a postconviction motion alleging that counsel was ineffective in advising him to plea without first investigating a motion to suppress one of his two incriminating statements. The United States Supreme Court focused on the uncertainty of the plea bargaining process and noted that even if the first statement was suppressed, a second statement of Premo would have been admissible. The Court observed that the State's case against Premo would have only gotten stronger as the investigation progressed and determined that Premo was not prejudiced and counsel's performance was not deficient.

This case differs significantly from Premo because this case involved a negotiated plea and defense counsel was aware of the significance of any motions to suppress Mr. Long's statement to police. Mr. O'Connor was not recommending a quick no-contest

plea to forestall the case against his client from becoming worse and to insulate his client from more severe charges. On the contrary, Mr. O'Connor was fully aware of the ramifications of a motion to suppress and had been actively involved in plea negotiations. Unlike Premo, this case held no potential surprises and was well-defined at the time of the plea.

Mr. Long will rely on the arguments contained in the Initial Brief on the question of prejudice.

ISSUE II

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING AS TO CLAIM V-PROSECUTORIAL MISCONDUCT IN OPENING STATEMENTS

Mr. Long argues that the trial court incorrectly summarily denied this claim under the mistaken belief that it had been raised on direct appeal. In postconviction Mr. Long identified six instances of prosecutorial misconduct in opening statements that were not objected to by trial counsel. In his direct appeal Mr. Long had challenged alleged instances of prosecutorial misconduct that had occurred during closing argument and had been preserved for appellate review.

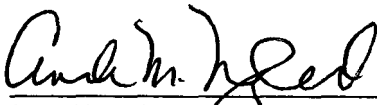
The State concedes that the direct appeal involved closing argument and that the postconviction claims involved opening statements.[Answer Brief, p.85] The State's only argument is that the allegations in the postconviction motion are "vague and

conclusory". This argument is not supported by the record. Each of the challenged statements was identified in the motion, there is nothing vague or illusory in the identification of the specific instances of misconduct. Mr. Long set forth his argument as to why these comments were objectionable and prejudicial by listing four violations of the evidence code. The State's argument that the claim is vague and illusory is without merit. Mr. Long is entitled to a hearing on the merits of this claim.

CONCLUSION

Based on the arguments and citations of law and other authorities contained in the Initial and Reply Briefs, the order of the trial court deny relief should be reversed. Mr. Long should be permitted to withdraw his plea in response to Issue I and an evidentiary hearing would be required on Issue II.

Respectfully submitted,



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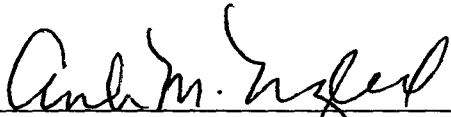
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Reply Brief has been furnished by E-Mail to the Office of the Attorney General, CrimappTPA@myfloridalegal.com, Tampa, FL 33607, this 28th day of December, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that 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. 9.210(a)(2).



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