IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE,

Appellant/Cross Appellee,

v. **CASE NO. SC12-107**

STATE OF FLORIDA, **Death Warrant Signed**
Execution Scheduled

Appellee/Cross Appellant. **February 15, 2012**

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS APPELLEE

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PRELIMINARY STATEMENT

The Appellant, Mr. Waterhouse will rely upon the Statement of Facts and the Appendix submitted in the Initial Brief. A response is made to both claims. The Answer Brief to the Cross Appeal is contained herein.

ISSUE I

THE RIGHTS GUARANTEED UNDER THE FLORIDA AND UNITED STATES CONSTITUTION SHOULD BAR THE EXECUTION OF A DEFENDANT WHERE POTENTIALLY EXONERATING EVIDENCE WAS DESTROYED BY A GOVERNMENT AGENCY IN VIOLATION OF STATE STATUTE FORCLOSING THE DEFENDANT'S OPPORTUNITY TO ESTABLISH HIS INNOCENCE.

Mr. Waterhouse maintains that his execution should be barred in this case because the State destroyed potentially exonerating evidence in violation of state statue, which precluded him from subjecting the evidence to DNA testing. Such testing had the potential to exonerate him.

The State contends that Mr. Waterhouse, under warrant, is no longer entitled to enhanced due process protection. Mr. Waterhouse disagrees. The death penalty "… is different in both severity and finality. From the point of view of society, the actions of the sovereign in taking the life of one if its citizens differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197 (1977). When determining

what degree of due process is to be afforded "Once it is determined that due process applies, the question remains is what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands… Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrissey v. Brewer, 408 U.S. 471, 481 92 S.Ct. 2593 (1972).

As has been previously argued by Mr. Waterhouse, the court has on ongoing obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society. Gardner v. Florida, 430 U.S. at 357. A civilized society will and should demand the greatest possible protections for the condemned.

The cases cited by the State for the proposition that some lesser standard should apply once a death warrant has been signed are not applicable to this case. None of the cases cited involved an active warrant. Mr. Waterhouse has not attempted to thwart the review of a claim in state

court, challenge clemency proceedings, or file successive federal motions. In McClesky v. Zant, 499 U.S. 467 (1991), the Court's concern was directed at successive federal writs of habeas corpus. Mr. Waterhouse has not caused excessive funds to be expended by the filing of successive writs. Neither has Mr. Waterhouse argued that the "cause and prejudice" test that would apply to the failure to properly raise a claim in state court and exhaust state remedies prior to bringing a claim for the first time to federal court is improper, as was the issue before the Court in Smith v. Murray, 477 U.S. 527 (1986). Smith did not hold that heightened due process standards do not apply in capital cases at the collateral relief stage.

The concurring opinion of Justice Powell in Ford v. Wainwright, 477 U.S. 399 (1986), did not represent the majority of the court. Further, the question in Ford was what degree of due process should be afforded in Florida's death penalty statute when determining whether or not a defendant is insane and therefore, cannot be executed. The Court held that due process would require a full evidentiary hearing and did not diminish due process standards that should be afforded during that hearing.

In Ohio Adult Parole Authority v. Woodard, 523 U.S.

272 (1998), the question confronting the Court was what level of due process should apply in clemency proceedings-what the State repeatedly asserts is a executive function without applicability to judicial determinations. The due process standard that applies to clemency proceedings has no bearing on the due process standard that should apply to this issue.

The State's claim that the issue before this Court was resolved in King v. State, 808 So.2d 498 (Fla. 2003), is misplaced. The facts in King differ significantly from this case. In King the defendant sought to test items that were possibly in the possession of the medical examiner, to wit: swabs that were used during the autopsy in 1977. The swabs had been tested in-house by the medical examiner. The swabs were destroyed by the medical examiner either shortly after the autopsy or within a year of that date. King sought DNA testing of the swabs. The trial court denied relief under Youngblood, finding that the destruction of the swabs by the medical examiners was not done in bad faith and was not done in violation of any state statute. Critical to the trial court's analysis was that in 1977, section 406.13 (Fla. 1977) did not require a medical examiner to maintain anything collected during the autopsy

for any period of time. In 1981 the statute was amended to require retention for one year, and remains the same today. Thus, the medical examiner violated no state statute when the swabs were thrown away.

King differs from this case in three critical areas overlooked by the State, and is thus distinguishable. First, what was destroyed in this case was the actual evidence that had been admitted at trial which was by statute under the custody and control of the Clerk, as opposed to items used in the autopsy that were never admitted as evidence at trial. Second, the evidence in this case was destroyed in violation of state statute, unlike in situation in King. Third, the evidence in this case was extremely important evidence. In King the swabs had no apparent value, or at best, limited value. These significant factual differences render any comparison between this case and King for purposes of precedent inappropriate.

This case is further distinguishable from Guzman v. State, 868 So.2d 498 (Fla. 2003), where the evidence destroyed was a clump of hair found on the back of the victim's thigh. The hair had never been tested by anyone and was not admitted as evidence at trial. There was

testimony that the hair appeared to match that of the victim. In postconviction proceedings Guzman raised a claim that the destroyed hair was evidence that would exonerate him. The factual differences between what occurred in this case and Guzman make clearly dissimilar. In this case the evidence that was destroyed was tested and served as a significant part of the State's evidence establishing guilt. The hair in Guzman was not evidence, had never been tested, and was not in any manner used to convict.

No defendant has been executed in Florida where the critical evidence admitted at trial and considered by the jury as evidence of guilt has been destroyed in violation of state statute.

The State alleges that undersigned counsel was aware of the fact that the evidence was destroyed prior to the filing of the Motion for Postconviction DNA Testing; however this specious claim has no factual support. Undersigned counsel was unaware of any destruction of evidence until the State response was filed. Had counsel been aware of the destruction, no hearing would have been sought nor any motion filed. At no time did undersigned counsel concede during any of the hearings that he was

aware of the destruction of evidence. Counsel did concede that the evidence was destroyed, but not that he knew of it prior to the State's response. Any characterization to the contrary is wrong.

Mr. Waterhouse firmly maintains that the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, sections 1,2,9,17, and 21 bar his execution under the unique facts present in this case and will rely upon the Initial Brief for his arguments on this point.

ISSUE II

THE TRIAL COURT ERRED IN DENYING RELIEF AFTER DETERMING THAT THE EVIDENCE PRESENTED WAS NEWLY DISCOVERED, BUT THAT NO PREJUDICE COULD BE ESTABLISHED. THE TRIAL COURT FURTHUR ERRED IN DETERMING THAT NO *BRADY* VIOLATION HAD OCCURRED.

In this issue Mr. Waterhouse maintains that the testimony of Hitchcox at the evidentiary hearing cannot be relied upon as competent substantial evidence when considered in conjunction with the evidence in the record from the 1980 proceedings that was related to the trial court by the prosecutors and by Hitchcox's sworn testimony. Hitchcox's self-serving statements that other police officers recorded the statements that Vasquez made about

seeing Mr. Waterhouse leave with a second person are contradicted by the record. In the Answer brief the State asserts that the only report Hitchcox was given at the evidentiary hearing was the January 7, 1980 report. The State asserts that Hitchcox did other reports and in a footnote points to other reports from Detective Long and Detective San Marco, implying that Vasquez's statements related to his interaction with Mr. Waterhouse are contained in another report from Hitchcox or those of Long and San Marco.[Answer Brief, p.38-39] However, the State has failed to affirmatively state to this Court that any of those reports, including any other report from Hitchcox, if any exists, contains the information that Vasquez gave to Hitchcox about Waterhouse leaving with two men. The State failed to attach those reports as an exhibit to establish this claim. If the State continues to maintain that the San Marco and Long reports contain the information about Waterhouse or that in 1980 Hitchcox wrote a report to memorialize the "exciting" information that Mr. Waterhouse left with two men, they should, as officers of the court, produce them. The State had the opportunity to do so at the evidentiary hearing, and could have supplemented the record from the hearing, or could have provided them to

this Court and has failed to do so. Further, if the State is in possession of such a report, the State should explain why Assistant State Attorney Merkle advised the trial court and defense counsel in 1980 in open court that there were no reports which memorialized Vasquez's conversation with Hitchcox about Mr. Waterhouse leaving with two other men and that only found out about this information because they saw Mr. Vasquez name in written on police report that was otherwise blank.

Hitchcox testified in 1980 that Vasquez told him that he intervened in a disturbance between the victim, her friend, and a man that was known to be a "pervert" at the bar that night. Vasquez testified to this at trial. Hitchcox testified at trial that he had some other officers look into this and there are police reports from other officers that document these efforts, but the reports that are in the possession of undersigned counsel contain no reference to any statement by any police officer as to what Vasquez testified to at trial.

The State's assertion that undersigned counsel knew about the information Vasquez testified to at trial came from police reports [Answer Brief, p. 39] is not only speculation, but false. Undersigned counsel knew about

Vasquez due to the facts contained in the record, as provided to this Court in Exhibits A and B of the Appendix and from a police report that only bears his name. As of this date, undersigned counsel has not seen a police report which contained the information that Vasquez testified to at trial and which Hitchcox admitted at the 1980 trial that Vasquez told him.

The State also maintains that it is improper for this Court to consider what evidence would be used at retrial, and instead must focus only on the evidence that was presented at the original trial. Mr. Waterhouse maintains that the rigid rule the State proposes would create a convoluted and illogical result. In a situation where the newly discovered evidence is being compared with evidence that would not be materially different from what was introduced at the original trial, then quite correctly the comparison should be to the evidence that was properly and legally presented at trial.

The standard is "the newly discovered evidence must be of such a nature that it would probably produce an acquittal at retrial." Johnston v. State, 27 So.3d 11, 18 (Fla. 2007), *quoting*, Jones v. State, [Jones II], 709 So.2d 512, 521 (1998)[emphasis added]. Thus, it is only fair to

consider exactly what the evidence at retrial would be.

Under circumstances such as this where evidence at the original trial has been determined to be inadmissible through legal rulings and where additional evidence has come to light that would be admissible at retrial a ridiculous result would be reached if the court were forced to ignore judicial rulings which altered the evidence. If, for example, a court determined that a confession was inadmissible, it would be wrong for that piece of evidence to be considered under the newly discovered evidence framework of Jones v. State, 709 So.2d 512 (Fla. 1998), since it would not be admissible at a retrial. The passage of time and revisions to evidence due to judicial proceedings should not be twisted to reach a result that would require the courts to ignore subsequent evidentiary developments in a case or in the law. Thus, it is entirely appropriate for this Court to consider what the actual evidence would be at a retrial when determining if the newly discovered evidence would produce an acquittal "at retrial" as the standard requires and appropriate for the Initial Brief to draw the Court's attention to those factors.

The State further claims that Mr. Sotolongo's

testimony would not be admissible because it was cumulative. While his testimony corroborated Vasquez, it would not be subject to exclusion under section 90.403 (Fla. Stat. 2011). Significantly, Mr. Sotolongo would not have suffered the same impeachment as Vasquez- he was not involved as a go-between in any drug dealing, whereas Vasquez he was. Had the jury heard Mr. Sotolongo's testimony which corroborated Vasquez, the jury would not have rejected it.

Mr. Waterhouse has established that the evidence from Sotolongo was material, that it was suppressed by the State, and that it was of such a nature that it reasonably would have produced a different result had it been disclosed. Mr. Waterhouse has met the criteria for relief under Brady v. Maryland, 393 U.S. 373 (1963).

Mr. Waterhouse has also established that Mr. Sotolongo's testimony constituted newly discovered evidence that is of such a nature that it would probably produce an acquittal at retrial. He is entitled to relief from this Court.

ANSWER BRIEF TO THE STATE'S CROSS-APPEAL

THE TRIAL COURT'S FINDING THAT CLAIM II OF THE MOTION WAS TIMELY FILED IS

CORRECT. COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THE CONTENT OF SOTOLONGO'S TESTIMONY WAS NOT DISCOVERABLE THROUGH THE USE OF DUE DILIGENCE.

This Court has stated that the standard of review on a trial court's ruling after an evidentiary hearing on a newly discovered evidence claim is the abuse of discretion. See, Aguirre-Jarquin v. State, 9 So.3d 593 (Fla. 2009). In this instance the trial court did not abuse his discretion when making the factual finding that Mr. Sotolongo's testimony was unknown at the time of trial and was not discoverable by counsel through the use due diligence.

The first prong of Jones v. State, 709 So.2d 512, 521 (Fla. 1998), requires that to be considered newly discovered evidence the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial and I must appear that defendant or his counsel could not have known [of it] by the use of due diligence." Relying upon Mungin v. State, 36 Fla. L. Weekly S610 (Fla. Oct. 27, 2011), the trial court determined that this prong was satisfied. The State claims that this finding is error, because Sotolongo's name was disclosed in a police report and trial counsel, appellate counsel, and all

collateral counsel should have discovered his statement through the use of due diligence, despite the fact that a review of the police reports would give no additional indication that Sotolongo would be able to provide the information he testified to at the evidentiary hearing. Based on a reliance on the information in the police report it would appear that Sotolongo did not see Mr. Waterhouse leave the bar with two other men and approximately the time he left with the two men.

The State's argument must fall under Mungin. In Mungin, during collateral proceedings, collateral counsel came into contact with a witness, George Brown, who had been previously mentioned in a police report. The police report contained statements attributed to Brown that he did not see anything. In his affidavit in the collateral proceedings, Brown maintained that the police report was false, that he told the officer he was the first person on the scene and that no one else was there. This testimony would significantly contradict the testimony of a key state witness. Trial counsel filed an affidavit, attesting that he did not interview or depose Brown based on the content of the police report. In addressing the diligence prong,

this Court noted that it was troubled by the prospect that a false police report was submitted and relied on by trial counsel. Mungin, at p.9

During the evidentiary hearing in this case the affidavits of the trial attorney's were admitted into evidence. Both avowed that they did not interview Sotolongo based on the content of Hitchcox's report.

Due to the actions of the State in this appeal with regards to the efforts of prior counsel, at this juncture it is necessary for this case to be remanded to the trial court for further proceedings. After the State asserted that collateral counsel actions regarding due diligence were at issue during the evidentiary hearing, undersigned counsel moved for a continuance in order to procure the affidavits or appearances of all prior collateral counsel.[R635-36] The record reflects that undersigned counsel did not represent Mr. Waterhouse in his initial collateral proceedings or in the first collateral proceedings after the resentencing proceeding. The State then responded, telling the trial court that "I'm not representing that about other counsel. I'm talking about Mr. Norgard. … So he's got to show that within the last year, in 2011—not Mr. Bright, not Clive A. Stafford Smith,

none of the other lawyers that went before, but only Mr. Norgard."[R636-37]

Undersigned counsel then advised the trial court that he did not interview Mr. Sotolongo because he also relied on the contents of Hitchcox's report which stated that Mr. Sotolongo had no information about Mr. Waterhouse on the night of January 2 that was relevant to seeing Mr. Waterhouse leave the bar with two other men and the time they left. Counsel advised the trial court that he did not feel that this Court would impose a burden on defense counsel that would require them to investigate every single name in a police report and verify the accuracy of their statement as contained in the report, particularly if the person were not listed as a witness by the State. The trial court appropriately determined that lawyer should be able to rely upon the veracity of a police report and not waste limited pre-trial resources by interviewing or deposing witnesses which the police claimed to have interviewed, but who had no information relative to a material issue in the case. The ruling by the trial court is sound and based on common sense. The ruling supports the integrity of the criminal justice system and imposes no burden on police other than to tell the truth in their reports.

In this proceeding the State is claiming that the trial court erred because Sotolongo was known "to Appellant, trial counsel, and all subsequent collateral counsel based on his documentation in Detective Hitchcox's report, the State submits that the lower court erred in finding this claim was timely filed pursuant to Rule 3.851(d)(2)(A)."[Answer Brief at 49-50] The State further cites to Owen v. Crosby, 854 So. 2d 182, 187 (Fla. 2003), arguing that it is incumbent upon counsel to show why the facts could not have been discovered by the use of due diligence by collateral counsel and raised in the initial post-conviction motion. In light of the State's current position, it is necessary to remand this case back to the trial court in order for the testimony or affidavits from all collateral counsel, including, if necessary, undersigned counsel to be put on the record. In reliance on the State's representations to the trial court [R637], this additional evidence was not procured.

Further, the State's argument that undersigned counsel did not establish his diligence is without merit. Until January 5, 2012, if one accepts the premise that the Hitchcox's report was truthful, no one but Mr. Sotolongo knew the content of his testimony at the evidentiary

hearing. If the report is true, then Mr. Sotolongo has recanted his prior statements. If the report is false, then for thirty years multiple lawyers improperly relied on the belief that police officers tell the truth in their reports. Undersigned counsel behaved reasonably, as did trial counsel, in relying on the report until Sotolongo came forward in January 2012. Counsel had no reason to doubt the veracity of the report until Mr. Sotolongo stepped forward.

In this case, undersigned counsel advised the trial court that he reviewed the police reports and evidence. He relied upon the veracity of the report with regards to Sotolongo and accepted those representations as true.[R637-39] Those efforts satisfy the due diligence requirement. This Court has never held that due diligence is some type of hyper-diligence that would require a lawyer to continually contact and re-contact every witness in a case to see if they were changing there testimony and to constantly verify that the police report accurately reflects their statements to police. The trial court did not incorrectly interpret or apply Mungin in this regard.

The State's argument that the fact that Sotolongo's name appeared in a police report is sufficient to deny any

newly discovered evidence or *Brady* claim overlooks one critical fact. Both newly discovered evidence claims and *Brady* claims focus on the evidence, not just the name of a witness. In this case the critical evidence is the content of Sotolongo's testimony, not merely the identification of his name. There is an important distinction between a newly discovered witness and newly discovered evidence. While Sotolongo's name may have been in the report, the evidence that he had to offer was not.

The State's claim that undersigned counsel has sat back and waited until a warrant is signed, then produced an untimely allegation [Answer Brief, p. 51] is without merit and without any support in the record. The evidence in the record is that Mr. Sotolongo came forward after seeing a newspaper article on January 5, 2012 regarding a death warrant being signed in this case. Mr. Sotolongo talked two friends who frequented his business: a former police officer who was now a private investigator and lawyer. That lawyer contacted undersigned counsel. Within a mere week of learning of the basis for Claim 2, the claim was presented to the court.

Mr. Waterhouse's Sixth Amendment rights to counsel, to present a defense, and to compulsory process were

undermined by the issues regarding the presentation of Mr. Sotolongo's testimony in this case. A *Brady* violation, such as occurred in this case, preludes the defendant from calling a witness favorable to his case. A *Brady* violation interferes with the defendant's right to counsel because the lawyer cannot provide effective representation by presenting evidence favorable to the defense and ensuring that the States evidence is subjected to a rigorous adversarial testing.

When newly discovered evidence that is material is found to exist, it likewise impinges on the Sixth Amendment guarantees of counsel, to present a defense, and compulsory process at the original trial. The right to effective counsel in this case was hampered by the failure to present Mr. Sotolongo as a witness. The efforts at presenting a defense and subjecting the State's evidence to rigorous adversarial testing were defeated by the absence of Sotolongo's testimony.

The trial court's finding that, under the facts presented in the record, Mr. Sotolongo's testimony would not have been discoverable through the use of due diligence was correct. The findings of the trial court as to the timeliness of the motion as to Claim 2 should be upheld.

CONCLUSION

Based upon the forgoing Arguments, Citations of Law, and other Authorities, as to Issue I, that a stay of execution be ordered with a remand for appropriate proceedings, as to Issue II, a stay of execution be ordered with a remand for a new trial, as to Issue I of the Cross Appeal, the finding of the trial court should be affirmed as to the timeliness of the Appellant's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Initial Brief has been furnished by U.S. mail and electronic mail to warrant@flcourts.org, and the Office of the Attorney General, Assistant Attorney General Candance M. Sabella, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607 [candance.sabella@myfloridalegal.com], this ___ day of February, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the preparation of this Reply Brief of Appellant/Answer Brief of Cross Appellee is Courier New 12 point in compliance with Fl. R. App. Pro. 9.210(a)(2).

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