

No. 17-8388

In the
Supreme Court of the United States

JAMES AREN DUCKETT,

PETITIONER,

v.

STATE OF FLORIDA,

RESPONDENT.

**On Petition for a Writ of Certiorari to the
Supreme Court of Florida**

CORRECTED

PETITION FOR WRIT OF CERTIORARI

MARY ELIZABETH WELLS
623 GRANT STREET
ATLANTA, GEORGIA 30312
T. 404.408.2180
MEWELLS27@COMCAST.NET

• *Counsel of Record*

BRITTNEY LACY
1 E. BROWARD BLVD – ST. 444
FT. LAUDERDALE, FLORIDA
33301
T. 954.713.1284
LACYB@CCSR.STATE.FL.US

Counsel for Petitioner James Aren Duckett

QUESTION PRESENTED

1. Whether the Florida Supreme Court improperly applied de novo review to the circuit court's factual findings that the state's expert testified falsely at trial?
2. In evaluating a *Brady* or *Giglio* claim and conducting the cumulative materiality analysis, is the reviewing court required to include in the materiality analysis the fact that scientific studies and research conducted after the trial was concluded have revealed that misleading and inaccurate expert testimony was part of the State's case?

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CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI

Petitioner James Aren Duckett is a condemned prisoner on death row in the State of Florida. Petitioner respectfully petitions this Honorable Court for a writ of certiorari to review a judgment in *Duckett v. State*, 231 So. 3d 393 (Fla. 2017).

OPINIONS BELOW

The Florida Supreme Court's decision is reported at 231 So. 3d 393 (Fla. 2017) and is reproduced in the appendix at App. 1. The unpublished order denying rehearing is reproduced in the appendix at App. 2. The unpublished order of the circuit court denying relief under Fl. Rule. C. P. 3.851 is reproduced in the appendix at App. 3.

JURISDICTION

The Florida Supreme Court entered judgment on October 12, 2017. It denied a petition for rehearing on December 28, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

James Duckett did not get a fair trial. He has presented to the courts below a multitude of constitutional violations, all of which support his assertion that he has been imprisoned and sentenced to death for a crime that he did not commit. The most recent discovery, that the State used false and misleading expert testimony to secure a conviction, demands relief.

A. Proceedings Below

In May of 1988, Mr. Duckett was convicted of first degree murder and one count of sexual battery. He was sentenced to death by a jury vote of eight to four. The evidence against Mr. Duckett was circumstantial. Duckett appealed his convictions and sentences which were affirmed. *Duckett v. State*, 568 So. 2d 891 (Fla. 1990).

On August 15, 2015, Mr. Duckett filed a Successive Motion to Vacate Convictions and Sentences in the circuit court raising one issue. Mr. Duckett alleged that the state withheld evidence that was material and exculpatory in nature and/or knowingly presented misleading evidence by presenting false expert testimony concerning the pubic hair found on the victim. Mr. Duckett further argued that the favorable evidence constitutes newly discovered evidence of innocence which should have resulted in a new trial. The circuit court denied Mr. Duckett's motion without an evidentiary hearing on April 1, 2016. The Florida Supreme Court affirmed. *Duckett v. State*, 231 So. 3d 393 (Fla. 3017).

B. Statement of Relevant Facts

1. The Case Against Mr. Duckett at Trial.

The case against James Duckett was entirely circumstantial. On May 12, 1987, the body of Teresa McAbee was discovered in a pond less than one half mile from her home. She had not been seen since the previous night when she had gone to a store near her home to purchase a pencil. The events leading up to her death are as follows:

On May 11, 1987, Mr. Duckett was working the night shift as a police officer in the small town of Mascotte, Florida. At around 10:30 p.m. Mr. Duckett was running radar. The Circle K sat on the corner of Highway 50 and Sunset Drive. While sitting there, Mr. Duckett noticed a young girl and a young boy standing behind the dumpster by the convenience store across the street, the Circle K. Mascotte had a curfew and based upon the apparent youth of the two individuals, Mr. Duckett decided to go across the street and speak with them.

Mr. Duckett parked in front of the store and went into the store to ask the clerk if she knew the name and age of the girl and was told by the clerk that she thought the girl was 10 to 13 years of age. The boy with her was Salvador Calisto. Mr. Duckett then went back outside and asked the two to come speak with him. They stood in front of Mr. Duckett's police car while he spoke with them. Ms. McAbee told him that she was 11 and Mr. Calisto told him that he was 16. Soon

after this conversation Calisto's uncle arrived, and after Mr. Duckett spoke with the uncle, he and his nephew left.

Mr. Duckett asked Ms. McAbee to sit in the police car so he could speak with her further, explained to her that she should not be at the store at that time of night, and told her she needed to go home. Mr. Duckett made notes of the interview in his police notebook, noting that Ms. McAbee was wearing a white and tan sweater and that she was eleven years of age. Ms. McAbee then exited the car and left to walk around the dumpster behind the Circle K in the direction of her home which was less than 400 feet behind the convenience store.

Several persons were at the store at this time, each of whom reported that Mr. Duckett got back into his car after Ms. McAbee left and drove off alone down Highway 50 towards Groveland, in the opposite direction of Ms. McAbee. Some of these people testified at trial, and some of them did not. Nonetheless, with one glaring exception, all agreed that Mr. Duckett left the Circle K without anyone in his car and headed in the opposite direction as Ms. McAbee and her home.

The victim's mother reported her daughter missing at about midnight. She initially went to the neighboring police station, but ultimately met with Mr. Duckett who took a statement from her concerning the last time that she had seen her daughter and what her daughter was wearing at this time and after filing a missing person's report, the mother returned home. Shortly thereafter Mr. Duckett went to

the victim's home to get a picture of her which he took to the Circle K and two other convenience stores.

The next morning, a local man spotted a body in a small lake in the orange groves approximately 3200 feet behind the Circle K. The man contacted the police chief who returned to the lake with him and confirmed that the body was that of Ms. McAbee. The Lake County Sheriff's Office took over the investigation, and based on nothing more than a personal hunch, the chief investigator determined on May 11 that James Duckett was somehow involved in the homicide ("the feeling was there"), and any chance of investigating other suspects ceased. Despite knowing this, Mr. Duckett voluntarily met with LCSO officers and gave a statement. Mr. Duckett was subsequently indicted for the murder of Ms. McAbee.

What occurred after Mr. Duckett left the Circle K alone is in dispute. The state argued at trial that Mr. Duckett turned right off of Highway 50, went around the block, came back to the Circle K down the side road, parked at the dumpster and enticed Ms. McAbee to get into his car. The state then argued that Mr. Duckett drove Ms. McAbee past her home and down to the lake about a half mile from her home. Once at the lake, the state argued that Mr. Duckett sexually assaulted Ms. McAbee on the hood of his police car, strangled her, fully redressed her, and then threw her in the lake where her body was discovered the next morning.

The state's case relied primarily on four factors: testimony from a witness, Gwen Gurley, that Mr. Duckett actually returned to the Circle K and picked Ms. McAbee up in his car; a pubic hair found on the victim that was allegedly consistent with Mr. Duckett's; tire tracks found at the scene that allegedly matched those found on the police car Mr. Duckett was driving; and, fingerprints of Ms. McAbee that were found on the hood of Mr. Duckett's police car.

In October of 1987, five months after the crime, the state's key witness, Gwen Gurley, came to light. She was an inmate at the local jail and after seeing the case on television, mentioned to the guard that she was from the area and knew Mr. Duckett. Although initially Gurley did not tell the jail officer that she had observed anything relevant to the disappearance of Teresa McAbee, by the time of trial, and after she had been removed from the jail repeatedly by jailers, she had changed her story. Although her version of events changed each time she told her story, by trial she testified Mr. Duckett drove off alone in the opposite direction of the orange grove where the victim was found and then circled back around, picking up his passenger on the side of the Circle K by the dumpster. The only inference the jury could draw from this, and the proposition the state argued throughout the trial, was that Mr. Duckett snuck back to pick up Ms. McAbee so that he could sexually assault and kill her.

We know now that the testimony was false. Gurley has now recanted her trial testimony on six different occasions, both in sworn deposition testimony and in a sworn affidavit. Both witnesses who were with Ms. Gurley on the night Ms. McAbee was last seen discount Gurley's account of events on that night and neither of those witnesses support Gurley's assertion that she ever saw Ms. McAbee in Mr. Duckett's car. When Gurley was subpoenaed to testify in post-conviction regarding her trial testimony, she encountered a Florida law that would find her guilty of perjury if she changed her trial testimony in any manner, regardless of whether she was not telling the truth, so she opted to exercise her Fifth Amendment Right to remain silent.

Similarly, both the tire track evidence and the fingerprint evidence were refuted in post-conviction proceedings. The State's entirely circumstantial case against Mr. Duckett has crumbled.

2. The Microscopy Hair Evidence in Mr. Duckett's Case.

FBI Agent Michael Malone's testimony at Mr. Duckett's trial, which stated that the pubic hair found on the victim was microscopically identical to Mr. Duckett's hair, was the linchpin of the state's case. In opening argument, the state told the jury that their expert, FBI Special Agent Malone, would tell them that the hair found on the victim belonged to Mr. Duckett:

Special Agent Malone is going to come in here and testify to you that in his expert opinion, that public hair belonged to this man, the Defendant.

Opening Statement, ROA. 203 (emphasis added). The state then emphasized the testimony in closing, arguing that with Malone's testimony, they had proven their case.

And then we proved probably the most damning piece of evidence that we have shown. The Defendant's pubic hair in Teresa's panties. Remember the testimony? The panties were swept and one hair was found? That hair was recovered in the crotch of Teresa's panties. We are not talking about outside on her shirt. We are not talking about on her pants, or on her head. We are talking about inside the crotch of her panties. And that hair, I promised you in opening statement, Special Malone would testify that in his opinion, it was the Defendant's. And that is exactly what he testified to. He said they were microscopically indistinguishable. So we have proven our case, and then some.

Closing Statement, ROA. 1897-98 (emphasis added).

Mr. Duckett asserted throughout trial and post-conviction that this testimony concerning the hair evidence was false and misleading and should not have been presented to the jury. But not until 2014 did Mr. Duckett receive irrefutable evidence that the State presented false and misleading evidence regarding the hair analysis at Mr. Duckett's trial.

During trial, the State contacted the FDLE to analyze the hair evidence, but that expert concluded she was not able to make a match between the question hair

and Mr. Duckett's known hair so the State chose not to use her at trial. The State then made the unprecedented move of expert shopping and sent the hair to FBI Agent Mike Malone. Mr. Malone was able to make the match that was apparently sought by the State and testified to that during the trial. Although trial counsel made efforts to impeach Malone through cross examination, his efforts were rebuked by Malone who stayed firm in his testimony.

In April of 1998, the Department of Justice issued a report which detailed many deficiencies within the FBI Laboratories, including problems within the field of hair microscopy. The report outlined several problems within the laboratories, including, but not limited to, problems with the testimony of Malone in a 1985 hearing relating to former U.S. District Judge Alcee Hastings. Mr. Duckett presented this evidence to the circuit court in an effort to show that Malone was not trustworthy but again, both the FBI and Malone stuck with their testimony. Mr. Duckett also presented evidence that Malone had knowingly violated FBI policy when he retested the hair evidence in this case after it had been tested by the FDLE. Mr. Duckett presented further evidence that the chain of custody of the hair was destroyed by the expert shopping in the case.

Due to concerns about the scope of review done by the DOJ in the initial report and the failure to analyze each case evaluated by Malone, the DOJ and FBI began sending out independent examiners to retest evidence in each capital case in which

Malone had worked as an expert. Defense counsel were not notified of this review and only became aware of it happening if the prosecutor on their case informed them of said results. When Mr. Duckett learned that other defendants were having their cases independently reviewed, he began requesting information from the State concerning his review. No answers were forth-coming so counsel ultimately called the agency directly to learn why Mr. Duckett's case was not being reviewed. Apparently, Mr. Duckett's case had been overlooked due to a change in staff, and when the FBI were made aware of this oversight, they undertook the review of Mr. Duckett's case. The independent examiner reviewed Malone's work in Mr. Duckett's case and concluded that all areas of Mr. Malone's work and testimony he had been asked to review raised concerns. The review done by the independent analyst hired by the FBI, Steve Robertson, was the subject of a previous motion to vacate filed in the circuit court.

3. The 2014 DOJ Review of Michael Malone's Testimony.

"[W]e have determined that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in your case."

Department of Justice letter to State Attorney Brad King, August 15, 2014.

On August 27, 2014, counsel for Mr. Duckett received a letter from Norman Wong, Special Counsel for the Department of Justice, dated August 22, 2014, informing counsel that the DOJ had undertaken another review of Michael

Malone's testimony in Mr. Duckett's case. This review differed significantly from the review done by Mr. Robertson, both in scope and in findings. Included with that letter were the results from the FBI review of Mr. Malone's testimony, the materials upon which the FBI relied in their review, a response from the Innocence Project and NACDL, and a copy of the August 14, 2014, letter to Brad King.

The 2014 review of Malone's testimony in Mr. Duckett's case came about when the FBI commenced an internal review of microscopic hair analysis cases to determine the extent to which flawed evidence may have tainted convictions following a trio of DNA exonerations in Washington, DC (from 2009-2012). All three of the exonerated defendants were convicted on FBI microscopic hair comparison evidence which turned out to be wrong. The FBI estimated that approximately 21,000 cases involved microscopic hair analysis would be reexamined. In July of 2012, the Department of Justice publicly announced this historical review and noted that the review would include collaboration with the Innocence Project and NACDL.

The FBI flagged Mr. Duckett's case to determine if it "exceeded the limits of science by overstating the conclusions that may appropriately be drawn from a positive association between evidentiary hair and a known sample."

In conducting the review, the FBI considered three possible errors, including whether:

(Error 1) the examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all other-this type of testimony exceeded the limits of science,

(Error 2) the examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association–this type of testimony exceeded the limits of the science; and

(Error 3) the examiner cites the number of cases or hair analyses worked in the laboratory and the number of samples as predictive value to bolster the conclusion that a hair belongs to a specific individual-this type of testimony exceeded the limits of science.

The report prepared by the FBI for the DOJ in Mr. Duckett’s case found repeated instances of both error 2 and error 3. For example, the report found the following two statements were errors under their protocol:

...therefore, I concluded that the hair from the panties is consistent with having originated from Mr. Duckett.

ROA 1004, line 3-4, Error 2.

I would say that it would be a very high probability that it does. Or to reverse it, I would say the chances of it being from somebody else, other than Mr. Duckett would be highly unlikely at best.

ROA 1011, line 7-18, Error 2.

The documents provided by the DOJ in this report are directly on point and support the allegations raised in Mr. Duckett’s initial Rule 3.851 proceedings – that

the jury heard false and misleading testimony concerning the hair analysis that occurred. Additionally, the documents clearly undermine the Florida Supreme Court's previous findings as to the reliability of Malone's testimony and the determination that Malone did not overstate the results of the hair analysis.

At the same time that the DOJ and FBI were analyzing the hair analysis evidence in Mr. Duckett's case, the Office of the Inspector General (OIG) was compiling an assessment of the previous Task Force review of the FBI Laboratory. The results of that review were published in July of 2014 in An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory (OIG Report). That Assessment provides a background for the review of Malone's testimony in Mr. Duckett's case and an explanation for how the review of cases such as Mr. Duckett's came to occur.

In the OIG report, the FBI – the agency responsible for developing the hair comparison technique, training hundreds of examiners, and the most ardent supporter of hair microscopy evidence – publicly conceded that testimony offered for decades by its hair examiners has been exaggerated and is scientifically invalid with respect to the significance of the claimed link between a suspect's hair and a crime scene hair.

The report also provides a blistering critique of Malone's misconduct in the field of hair microscopy. Based on the 2014 OIG Report, Malone "handled a

disproportionately large number of cases” and provided seriously flawed analysis and testimony in many cases the Task Force Reviewed.” Indeed, “[w]e found that, of the 13 FBI lab examiners whose cases the Task Force reviewed, Malone’s conduct was the most egregious.” Malone “repeatedly created scientifically unsupportable lab reports and provided false, or inaccurate testimony at criminal trials.” The 2014 OIG report found a deficiency in the previous review undertaken in 1997 because the Department did not direct the Task Force to review all cases involving Michael Malone who was known as being “consistently problematic.” The 2014 OIG report recommended such a review.

The documents contained in the assessment reflect that in approximately ninety six percent of the cases reviewed, Malone was criticized for the testimony he provided as to hair analysis – testimony similar to the testimony he provided to Mr. Duckett’s jury. OIG report, p. 48. Specifically, Malone was rebuked for testifying to statistically invalid rates of error. *Id.* And, Malone was criticized for misleading courts and fact finders as to the science behind hair analysis, i.e., that a particular number of characteristics were needed to make a “match”. OIG report, pp. 52-53. Malone’s comparison and conclusions were not based on any research or literature and were completely fabricated to support his opinions. In Mr. Duckett’s case, Malone told the jury: “Most normal hairs, average hairs, will have about twenty

individual microscopic characteristics. You have a hair with twenty characteristics, you have got a very good hair to work with.” ROA 991. This statement was false.

Malone was also highly criticized for failing to use appropriate tests in a scientifically acceptable manner, and for providing unsupportable testimony on the basis of his bench notes, lab reports or accepted standards in the scientific community. There is no question that, had this information been available at the time of trial, Mr. Duckett would have been acquitted of all charges. The agency which hired Michael Malone, the agency which trained Michael Malone, the agency which put forth Michael Malone as an expert in the field of hair microscopy has now categorically stated that Malone’s testimony in Mr. Duckett’s case was not true. While Mr. Duckett was able to nibble at the corners of this in previous pleadings, it was not until he received the August 27, 2014, letter from the DOJ that he was able to present irrefutable evidence that Malone testified falsely at his trial.

REASONS FOR GRANTING THE PETITION

I. THE FLORIDA SUPREME COURT IMPROPERLY APPLIED DE NOVO REVIEW WHEN ANALYZING THE FIRST PRONG OF PETITIONER'S *GIGLIO* CLAIM, THAT THE STATE'S EXPERT HAD TESTIFIED FALSELY AT TRIAL.

Although the Florida Supreme Court noted correctly that deference was to be afforded to all circuit court factual findings supported by competent, substantial evidence, the court then proceeded to review the facts found by the circuit de novo, contrary to established Supreme Court law. *See Duckett v. State*, 231 So. 3d at 400-401. Contrary to the Florida Supreme Court's holding, the circuit court did not find that the testimony given by Malone at trial was false nor that it met the first prong of *Giglio v. United States*, 405 U.S. 150 (1972) but instead found that Mr. Duckett could not prevail on this claim because there was no evidence that the prosecutor knew that the testimony was false.

The Florida Supreme Court has stated that “[t]o establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003). *There is no dispute as to whether Malone’s testimony exceeded the bounds of science, but there is nothing – except counsel’s assertion – that the prosecutor knew the testimony was false.*”

App. 3, Circuit Court Order, PC-R3 309 (emphasis added).

Similarly, the State conceded at the status hearing in the circuit court that Malone's testimony was inaccurate: “And the State is not contesting, you know, we're

not hearing [sic] backing Malone's testimony. It's well accepted that it's come out subsequently that he overstated the hair analysis comparison, but we knew about that in the first successive post-conviction motion." PC-R3 379. Despite the clear finding of fact by the circuit court that Malone's testimony was false, which was supported by competent, substantial evidence, the Florida Supreme Court inserted its own fact findings in the proceedings.

Rather than conduct an appropriate analysis under *Giglio*, the Florida Supreme Court sidestepped its duty not by finding that the circuit court's factual findings were clearly erroneous, but instead by either ignoring or re-characterizing the facts. There is no explanation of how this can be reconciled with the circuit court's findings, supported by the record and by the concession of the state, that Malone testified falsely at trial. This Court should remand the case to the Florida Supreme Court for appropriate analysis of the *Giglio* claim supported by the factual finding of the Florida Supreme Court that the state's key expert testified falsely at trial.

II. **WHEN ADVANCEMENTS IN SCIENCE SHOW THE JURY HEARD MISLEADING AND/OR INACCURATE EVIDENCE IN A CAPITAL CASE, THERE IS CONFUSION THAT ONLY THIS COURT CAN RESOLVE AS TO WHETHER THE SIXTH, EIGHTH, AND/OR FOURTEENTH AMENDMENTS REQUIRE CONSIDERATION OF MISLEADING AND/OR INACCURATE EVIDENCE AS PART OF A *BRADY* OR *GIGLIO* MATERIALITY ANALYSIS OR SEPARATELY AS AN EIGHTH AMENDMENT ANALYSIS UNDER *JOHNSON V. MISSISSIPPI*.**

This Court held in *Johnson v. Mississippi* that in a capital case the Eighth Amendment was implicated when “the jury was allowed to consider evidence that has been revealed to be materially inaccurate.” 486 U.S. 578, 590 (1988). Further, both *Brady* and *Giglio* are about insuring the reliability of the outcomes of criminal trials and penalty phase proceedings as to whether a death sentence will be imposed. A reliable criminal justice system is clearly a constitutional concern.

During the past twenty years or so, advances in science and particularly in scientific methodology have led to the recognition by the Justice Department, by the Federal Bureau of Investigation, and by law enforcement in general that misleading, inaccurate, and often downright wrong evidence was presented to the jury and or the judge in cases that have become final. This Court has yet to address this and grapple with the effect that these scientific revelations or developments have had on the public’s view of the criminal justice system. The Constitution is concerned with the need to have citizens feel confident in the fairness and reliability of the results produced by the criminal justice machinery. *See Brady v. Maryland*, 373 U.S. 87

(1963) (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.”).

Certainly, when the new scientific information is DNA results establishing innocence, it is much easier and cleaner to provide an appropriate remedy. But what about the scientific recognition that the underpinnings for hair analysis were simply inadequate, or where advancements in scientific methodology demonstrate that misleading or inaccurate testimony was presented to the jury? When a *Brady* analysis is conducted analyzing the reliability of a guilty verdict, shouldn't the new scientific information be part of the analysis? Moreover, what about the Eighth Amendment and *Johnson v. Mississippi*? When the capital sentencer was presented with and considered misleading and/or inaccurate evidence and a death sentence resulted, does the Eighth Amendment require a higher degree of reliability?

Mr. Duckett submits that the writ should issue so that this Court can address the constitutional implications of new scientific understanding and/or methodology that reveals inaccurate and/or misleading evidence was used to convict a defendant and sentence him to death.

CONCLUSION

Because Petitioner was denied the individualized determination of culpability to which he was constitutionally entitled, Mr. Duckett respectfully requests that this Court grant the petition for certiorari, or, in the alternative, that the Court remand the case to the Florida Supreme Court for a proper analysis pursuant to *Giglio v. United States*.

This the 21st day of May 2018.

Respectfully submitted,

/s/ Mary E. Wells

Counsel for Mr. Duckett

MARY ELIZABETH WELLS

623 Grant Street, SE

Atlanta, Georgia 30312

T: 404.408.2180

mewells27@comcast.net

BRITTANY NICOLE LACY

Capital Collateral Regional Counsel –

South 1 East Broward Blvd., Suite 444

Ft. Lauderdale, FL 33301

T: 954.713.1284

lacyb@ccsr.state.fl.us

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BRITTNEY LACY
1 E. BROWARD BLVD – ST. 444
FT. LAUDERDALE, FLORIDA
33301
T. 954.713.1284
LACYB@CCSR.STATE.FL.US

Counsel for Petitioner James Aren Duckett

APPENDIX 1

231 So.3d 393
Supreme Court of Florida.

James Aren DUCKETT, Appellant,
v.
STATE of Florida, Appellee.

No. SC16-793
|
October 12, 2017

Synopsis

Background: Defendant, whose conviction for first-degree murder and sexual battery and sentence of death were affirmed on appeal, 568 So.2d 891, and whose initial motion for postconviction relief was affirmed on appeal, 918 So.2d 224, as well as his first successive postconviction motion, 148 So.3d 1163, filed a second successive motion for postconviction relief. The Circuit Court, Lake County, No. 351987CF001347AXXXXX, William Gray Law, Jr., J., denied the motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defendant failed to establish that the 2014 Department of Justice (DOJ) review of Federal Bureau of Investigation (FBI) hair and fiber analyst’s lab work and testimony in defendant’s trial was of such a nature that it would probably produce an acquittal on retrial;

[2] defendant failed to establish that evidence of problems with FBI hair and fiber analyst’s lab work and testimony was willfully or inadvertently suppressed by the State; and

[3] defendant failed to establish that the testimony of FBI hair and fiber analyst was false, as required to state a violation of *Giglio*.

Affirmed.

West Headnotes (18)

🔑 Review De Novo

The Supreme Court reviews the postconviction court’s decision to summarily deny a petitioner’s second successive postconviction motion de novo.

Cases that cite this headnote

[2] **Criminal Law**

🔑 Proceedings

A successive postconviction relief motion may be denied without an evidentiary hearing if the records of the case conclusively show that the movant is entitled to no relief. Fla. R. Crim. P. 3.851(f)(5)(B).

Cases that cite this headnote

[3] **Criminal Law**

🔑 Proceedings

The burden is on the defendant asserting a successive postconviction relief motion to establish a legally sufficient claim.

Cases that cite this headnote

[4] **Criminal Law**

🔑 Post-conviction relief

Defendant failed to preserve for appellate review his due process claim, during second successive postconviction relief proceeding, where defendant failed to raise the claim before the trial court. U.S. Const. Amend. 14.

Cases that cite this headnote

[1] **Criminal Law**

^[5] **Criminal Law**
🔑 Particular evidence or cases

Defendant failed to establish that the 2014 Department of Justice (DOJ) review of Federal Bureau of Investigation (FBI) hair and fiber analyst’s lab work and testimony in defendant’s trial was of such a nature that it would probably produce an acquittal on retrial, as required to be granted a new trial based on newly discovered evidence; the DOJ review, while indicating analyst’s lab reports and trial testimony contained some erroneous statements that exceeded the limits of science, also indicated analyst accurately represented the reliability of hair analysis, analyst’s testimony was challenged extensively at trial, the field of forensic hair analysis had not been discredited, and the hair evidence was not the only evidence that tied defendant to the sexual battery and murder.

Cases that cite this headnote

^[6] **Criminal Law**
🔑 Newly discovered evidence

A defendant must satisfy a two-prong test in order to obtain postconviction relief on the basis of newly discovered evidence: first, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence, and second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Cases that cite this headnote

^[7] **Criminal Law**
🔑 Newly discovered evidence

Newly discovered evidence is of such nature that it would probably produce an acquittal on retrial if it weakens the case against the

defendant so as to give rise to a reasonable doubt as to his culpability.

Cases that cite this headnote

^[8] **Criminal Law**
🔑 Affidavits and Evidence as to Newly Discovered Evidence

In determining whether a new trial is warranted based on newly discovered evidence, the reviewing court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial.

Cases that cite this headnote

^[9] **Criminal Law**
🔑 Information Within Knowledge of Prosecution

Defendant failed to establish that evidence of problems with Federal Bureau of Investigation (FBI) hair and fiber analyst’s lab work and testimony was willfully or inadvertently suppressed by the State, as required to state a *Brady* claim; there was no evidence the prosecutor knew of any problems with analyst’s analysis of hair samples or suppressed such evidence.

Cases that cite this headnote

^[10] **Criminal Law**
🔑 Constitutional obligations regarding disclosure

To establish a *Brady* violation, the defendant has the burden to show that: (1) the evidence was either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant was

prejudiced.

🔑Discovery and disclosure

Cases that cite this headnote

The Supreme Court applies a mixed standard of review to *Giglio* claims, deferring to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviewing de novo the application of those facts to the law.

[11]

Criminal Law

🔑Review De Novo

Criminal Law

🔑Discovery and disclosure

Cases that cite this headnote

In reviewing a *Brady* claim, the Supreme Court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviews de novo the application of those facts to the law.

[15]

Criminal Law

🔑Grounds in general

Defendant failed to establish he was entitled to a new guilt phase murder trial due to cumulative errors, where defendant failed to establish any guilt phase errors occurred.

Cases that cite this headnote

Cases that cite this headnote

[12]

Criminal Law

🔑Use of False or Perjured Testimony

Defendant failed to establish that the testimony of Federal Bureau of Investigation (FBI) hair and fiber analyst during murder trial was false, as required to state a violation of *Giglio*.

[16]

Criminal Law

🔑Grounds in general

Where several errors are identified, the Supreme Court considers the cumulative effect of evidentiary errors and ineffective assistance of counsel claims together. U.S. Const. Amend. 6.

Cases that cite this headnote

Cases that cite this headnote

[13]

Criminal Law

🔑Use of False or Perjured Testimony

To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material.

[17]

Criminal Law

🔑Grounds in general

Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.

Cases that cite this headnote

Cases that cite this headnote

[14]

Criminal Law

🔑Review De Novo

Criminal Law

^[18] **Criminal Law**

🔑 Grounds in general

Claims of error that have previously been presented to the Supreme Court on direct appeal or in postconviction and subsequently rejected cannot form the basis for a valid claim of cumulative error.

Cases that cite this headnote

***395** An Appeal from the Circuit Court in and for Lake County, William Gray Law, Jr., Judge—Case No. 351987CF001347AXXXXX

Attorneys and Law Firms

Mary Elizabeth Wells of Law Office of M.E. Wells, Atlanta, Georgia; Neal A. Dupree, Capital Collateral Regional Counsel, and Michael C. Meyer, Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, Vivian Singleton, Assistant Attorney General, Daytona Beach, Florida, for Appellee

Opinion

PER CURIAM.

James Aren Duckett, a prisoner under sentence of death, appeals the circuit court’s order summarily denying his second successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the postconviction court’s denial of relief.

***396 I. BACKGROUND**

In 1988, Duckett was convicted of the 1987 first-degree murder and sexual battery of eleven-year-old Teresa McAbee. Michael Malone, an FBI hair and fiber analyst, testified at Duckett’s trial regarding the pubic hair found in the victim’s underpants. At the time of trial, Malone was a well-qualified and recognized FBI expert in the

area of hair and fiber analysis. Duckett v. State (Duckett I), 568 So.2d 891, 893 (Fla. 1990). We summarized Malone’s trial testimony in this case as follows:

A pubic hair was found in the victim’s underpants. While other experts could not reach a conclusion by comparing that hair with Duckett’s pubic hair, Michael Malone, an FBI special agent who had been qualified as an expert in hairs and fibers in forty-two states, examined the hair sample, concluding that there was a high degree of probability that the pubic hair found in her underpants was Duckett’s pubic hair. Malone also testified that the pubic hair did not match the hairs of the sixteen-year-old boy, the uncle, or the others who were in contact with the victim that evening.

Id. We affirmed Duckett’s convictions and sentence of death on direct appeal. Id. at 891. We also upheld the denial of Duckett’s initial motion for postconviction relief and denied his petition for a writ of habeas corpus. Duckett v. State (Duckett II), 918 So.2d 224, 227 (Fla. 2005).

In his first successive postconviction motion, Duckett claimed that “the postconviction court erred in summarily denying his claim that a 2011 independent analysis of Malone’s 1987–88 lab work and trial testimony in this case constitutes newly discovered evidence that Malone’s trial testimony was false and misleading.” Duckett v. State (Duckett III), 148 So.3d 1163, 1166 (Fla. 2014). This Court summarized the “2011 Report” written by Steve Robertson—an independent analyst—as follows:

After the 1997 Department of Justice report was issued, [which was critical of the FBI laboratories and some of the forensic examinations of the agency’s analysts, including Malone,] the FBI hired independent experts to examine the prior work and testimony of various agent analysts, including Malone. One independent analyst reviewed many cases—particularly death penalty cases—in which Malone offered expert testimony. Subsequently, in August 2011, the same independent analyst reviewed Malone’s hair-analysis work and testimony in Duckett’s trial and issued a report (2011 Report).

In the 2011 Report, the independent analyst addressed the same areas that he had examined in his prior

reviews of Malone's work in other cases. In sum, the analyst concluded that no written protocols prescribing the scientifically acceptable examination and testing procedures for hair analysis existed until a decade after Malone's work in this case was done. Accordingly, the independent analyst could not determine whether Malone's work conformed to the standards or analytic techniques applicable at the time Malone worked on this case. Second, Malone's laboratory reports were not adequately documented in the laboratory bench notes, as there was no abbreviation key, small portions of notes were illegible, and some notes were undated. Finally, Malone's testimony at trial was not consistent with the laboratory reports, the bench notes, or Malone's area of expertise.

In reaching the conclusion that Malone's trial testimony was inconsistent with his reports, notes, and area of expertise, the independent analyst explained that at trial, Malone sometimes *397 overstated or exaggerated the accuracy of hair analysis. For example, the independent analyst opined that some of Malone's testimony conveyed the idea that no person other than Duckett could be the source for the pubic hair found in the victim's underpants. Similarly, Malone testified that there was a "high degree of probability" the pubic hair found in the victim's underpants was Duckett's. Duckett I, 568 So.2d at 893. The independent analyst explained that hair analysis does not support this degree of analytical certainty. That is, microscopic hair analysis can show consistency but not absolute identity.

Nevertheless, the independent analyst also found that in other instances, Malone properly stated the correct standard in his trial testimony. For example, Malone correctly testified that the pubic hair found in the victim's underpants was "consistent with Duckett's pubic hair" but was not consistent with the pubic hairs of others who had been in contact with the victim that evening. Id. at 895. Malone also explained that hair analysis is not as precise as fingerprints for identifying someone. Malone expressly stated that he could not say that a particular hair came from a specific person to the exclusion of anyone else.

Id. at 1167. This Court rejected Duckett's newly discovered evidence claim regarding the 2011 Report. As this Court explained:

[A]lthough some of Malone's testimony overstated the significance of the hair comparison, Duckett did not establish that Malone's testimony—when considered in its full context—was false. Moreover, as we noted in our decision affirming Duckett's convictions and sentences, Malone's testimony was "extensively

challenged" at trial, first on cross-examination and then "during the testimony of a Florida Department of Law Enforcement expert on hair analysis." Duckett I, 568 So.2d at 895.

....

Unlike [comparative bullet lead analysis], the field of forensic hair analysis has not been discredited, and the FBI has not discontinued the use of such analysis. Moreover, Malone's expert testimony in this case was not without basis. Although some of his testimony overstated the degree of accuracy of his analysis, other statements were well within the bounds of the field. Nothing has been presented that undermines Malone's testimony that the pubic hair from the victim's underpants was consistent with Duckett's and inconsistent with the pubic hair of others who had been in contact with the victim on the night she disappeared. In addition, as previously noted, his testimony was challenged extensively at trial. See Duckett I, 568 So.2d at 895.

Moreover, as recounted more specifically in our prior opinions, the hair evidence was by no means the only evidence supporting the conviction in this case. Significantly, the victim was last seen at the convenience store in Duckett's patrol car, and the unusual tire tracks at the lake where the victim's body was found matched those of Duckett's patrol car. Duckett II, 918 So.2d at 228–29. In addition, although Duckett had stated that the victim never sat on the hood of his car, "[b]oth Duckett's and Teresa's fingerprints were discovered on the hood of Duckett's patrol car." Id. at 229. In fact, "Duckett's prints were commingled with the victim's, whose prints indicated that she had been sitting backwards on the hood and had scooted up the car." Id.

Given this context, we conclude that the newly discovered evidence does not give rise to a reasonable doubt as to *398 Duckett's culpability. Accordingly, we affirm the postconviction court's summary denial of this claim.

Id. at 1168–69 (third alteration in original). We upheld the denial of Duckett's first successive motion for postconviction relief. Id. at 1171.

In 2014, the Department of Justice conducted a new review (2014 DOJ Review) of Malone's lab work and testimony in Duckett's trial. However, "[t]he science underlying microscopic hair comparison [was] not the subject of this [new DOJ] review." The 2014 DOJ Review is based, in part, upon a review of Malone's lab work and trial testimony conducted by the FBI in 2014 (2014 FBI

Review). The 2014 FBI Review identifies numerous types of errors within Malone’s lab reports and trial testimony. The 2014 DOJ Review—summarized in a letter from Norman Wong, Special Counsel for the Department of Justice, to Brad King, the State Attorney for the Fifth Judicial Circuit of Florida—“determined that the microscopic hair comparison analysis testimony or laboratory report presented in [Duckett’s] case included [some erroneous] statements that exceeded the limits of science and were, therefore, invalid.”

Duckett filed his current second successive postconviction motion in August 2015. In April 2016, the postconviction court entered an order summarily denying Duckett’s second successive postconviction motion. Duckett v. State, Nos. 87–CF–1347(01) & 88–CF–0262 (Fla. 5th Cir. Ct. Apr. 1, 2016) (Postconviction Order). This appeal follows.

II. ANALYSIS

[1] [2] [3] [4] On appeal, Duckett argues that the postconviction court erred in summarily denying: (1) Duckett’s newly discovered evidence claim regarding Malone’s trial testimony; (2) Duckett’s Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), claim; (3) Duckett’s Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), claim; and (4) Duckett’s cumulative error claim.¹ This Court reviews the postconviction court’s decision to summarily deny Duckett’s second successive postconviction motion de novo. See Kormondy v. State, 154 So.3d 341, 351 (Fla. 2015). As this Court has explained:

A successive rule 3.851 motion may be denied without an evidentiary hearing if the records of the case conclusively show that the movant is entitled to no relief. See Fla. R. Crim. P. 3.851(f)(5)(B). This Court reviews the circuit court’s decision to summarily deny a successive rule 3.851 motion de novo, accepting the movant’s factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief.

Id. (quoting Walton v. State, 3 So.3d 1000, 1005 (Fla. 2009)). “The burden is on the defendant to establish a

legally sufficient claim.” Nixon v. State, 932 So.2d 1009, 1018 (Fla. 2006).

A. Newly Discovered Evidence

[5] [6] [7] [8] In his first claim on appeal, Duckett asserts that the postconviction court erred in summarily denying his claim that newly discovered evidence establishes that Malone’s trial testimony regarding the hair evidence was false and misleading. *399 A defendant must satisfy a two-prong test in order to obtain relief on the basis of newly discovered evidence:

First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Marek v. State, 14 So.3d 985, 990 (Fla. 2009). “Newly discovered evidence satisfies the second prong of this test if it ‘weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.’ ” Henry v. State, 125 So.3d 745, 750 (Fla. 2013) (alteration in original) (quoting Heath v. State, 3 So.3d 1017, 1023–24 (Fla. 2009)). In determining whether a new trial is warranted, the reviewing court “must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial.” Hildwin v. State, 141 So.3d 1178, 1184 (Fla. 2014) (citing Swafford v. State, 125 So.3d 760, 775–76 (Fla. 2013)).

Even assuming that Duckett’s claim is timely, we conclude that Duckett has failed to demonstrate that the alleged newly discovered evidence—the 2014 DOJ Review—is of such a nature that it would probably produce an acquittal on retrial.² First, Duckett has “not establish[ed] that Malone’s [trial] testimony—when considered in its full context—was false.” Duckett III, 148 So.3d at 1168 (emphasis added). Although the 2014 DOJ Review concluded that Malone’s lab reports or trial testimony contained some erroneous and invalid statements that exceeded the limits of science, the full context of Malone’s trial testimony indicates that “Malone also accurately represented the reliability of hair analysis by testifying that hair analysis is not on a par

with fingerprints for purposes of identification” and “expressly and correctly stated that hair analysis cannot support a conclusion that a hair came from a single person to the exclusion of anyone else.” *Id.* Second, Malone’s “testimony was challenged extensively at trial.” *Id.* at 1169. As this Court has explained, “Duckett’s counsel extensively challenged Malone’s credibility during the cross-examination of Malone and during the testimony of a Florida Department of Law Enforcement expert on hair analysis.” *Duckett II*, 918 So.2d at 234 (quoting *Duckett I*, 568 So.2d at 895). Third, “the field of forensic hair analysis has not been discredited, and the FBI has not discontinued the use of such analysis.” *Duckett III*, 148 So.3d at 1169. And fourth, “the hair evidence was by no means the only evidence supporting the conviction in this case.” *Id.* As this Court has explained:

Significantly, the victim was last seen at the convenience store in Duckett’s patrol car, and the unusual tire tracks at the lake where the victim’s body was found matched those of Duckett’s patrol car. *Duckett II*, 918 So.2d at 228–29. In addition, *400 although Duckett had stated that the victim never sat on the hood of his car, “[b]oth Duckett’s and Teresa’s fingerprints were discovered on the hood of Duckett’s patrol car.” *Id.* at 229. In fact, “Duckett’s prints were commingled with the victim’s, whose prints indicated that she had been sitting backwards on the hood and had scooted up the car.” *Id.*

Id. (alteration in original). Moreover, “no one saw Duckett, the only policeman on duty in Mascotte, from the time he was last seen with the victim until the time he met the victim’s mother at the police station.” *Duckett I*, 568 So.2d at 894–95. Given this context, we conclude that the alleged newly discovered evidence does not give rise to a reasonable doubt as to Duckett’s culpability. The alleged newly discovered evidence would not probably produce an acquittal on retrial even when it is considered cumulatively with all of the admissible evidence that could be introduced at a new trial.

We therefore affirm the postconviction court’s summary denial of Duckett’s newly discovered evidence claim.

B. Brady

¹⁰¹ ¹¹⁰ ¹¹¹In his second claim on appeal, Duckett asserts that the postconviction court erred in summarily denying his claim that the State violated Brady by withholding material and exculpatory evidence regarding Malone’s trial testimony. “To establish a Brady violation, the defendant has the burden to show that: (1) the evidence

was either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) because the evidence was material, the defendant was prejudiced.” *Davis v. State*, 136 So.3d 1169, 1184 (Fla. 2014). “In reviewing a Brady claim, ‘this Court defers to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviews de novo the application of those facts to the law.’ ” *Johnson v. State*, 135 So.3d 1002, 1028 (Fla. 2014) (quoting *Lightbourne v. State*, 841 So.2d 431, 437 (Fla. 2003)).

Duckett’s Brady claim fails to meet the second prong of Brady. As the postconviction court found: “There is absolutely no evidence in any of the documents indicating the prosecutor knew of any problems regarding Mr. Malone’s [hair] analysis, much less suppressed such evidence.” We conclude that competent, substantial evidence supports the postconviction court’s suppression finding.

We therefore affirm the postconviction court’s summary denial of Duckett’s Brady claim.

C. Giglio

¹²¹ ¹³¹ ¹⁴¹In his third claim on appeal, Duckett asserts that the postconviction court erred in summarily denying his claim that the State violated Giglio by knowingly presenting false testimony at his trial through Malone. “To establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material.” *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003). “This Court applies a mixed standard of review to Giglio claims, ‘defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law.’ ” *Suggs v. State*, 923 So.2d 419, 426 (Fla. 2005) (alterations in original) (quoting *Sochor v. State*, 883 So.2d 766, 785 (Fla. 2004)).

Duckett’s Giglio claim fails to clear the hurdle of the first prong of Giglio. As explained previously, Duckett has “not establish[ed] that Malone’s [trial] testimony—when considered in its full context—*401 was false.” *Duckett III*, 148 So.3d at 1168 (emphasis added).

We therefore affirm the postconviction court’s summary denial of Duckett’s Giglio claim.

D. Cumulative Error

[15] [16] [17] [18] In his fourth claim on appeal, Duckett asserts that errors demonstrated in the proceedings below cumulatively entitle him to a new guilt phase. “Where several errors are identified, the Court ‘considers the cumulative effect of evidentiary errors and ineffective assistance [of counsel] claims together.’ ” Diaz v. State, 132 So.3d 93, 118 (Fla. 2013) (alteration in original) (quoting Hurst v. State, 18 So.3d 975, 1015 (Fla. 2009)). However, “[i]t is well established that ‘where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail.’ ” Mendoza v. State, 87 So.3d 644, 657 (Fla. 2011) (quoting Griffin v. State, 866 So.2d 1, 22 (Fla. 2003)). “Moreover, claims of error that have previously been presented to this Court on direct appeal or in postconviction and subsequently rejected cannot form the basis for a valid claim of cumulative error.” Wright v. State, 213 So.3d 881, 911 (Fla. 2017). Because Duckett has failed to establish that any guilt phase errors occurred that either individually or cumulatively would entitle him to a new

guilt phase, we deny relief on this claim.

III. CONCLUSION

Based on the foregoing, we affirm the postconviction court’s denial of all relief.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

All Citations

231 So.3d 393, 42 Fla. L. Weekly S844

Footnotes

- 1 Duckett presents a due process claim in his initial brief on appeal. However, because this claim was not argued in the postconviction motion before the circuit court, it was not preserved for appeal. See Bryant v. State, 901 So.2d 810, 822 (Fla. 2005) (“This issue was not argued in the postconviction motion before the circuit court and was, therefore, not preserved for appeal.”).
- 2 To the extent that Duckett claims that the 2014 Office of the Inspector General Report (2014 OIG Report) constitutes newly discovered evidence, that claim is untimely. See Jimenez v. State, 997 So.2d 1056, 1064 (Fla. 2008) (“To be considered timely filed as newly discovered evidence, [a] successive rule 3.851 motion [is] required to have been filed within one year of the date upon which the claim became discoverable through due diligence.”); see also Long v. State, 183 So.3d 342, 347 (Fla. 2016) (“Therefore, because Long failed to timely file this motion after he was first notified as to the problems with Malone and his inadequate forensic work, we find that the postconviction court’s summary denial was proper.”). We note that Duckett’s case was not included in the 2014 OIG Report.

APPENDIX 2

2017 WL 6616899
Only the Westlaw citation is currently available.

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Supreme Court of Florida.

James Aren DUCKETT, Appellant(s)

v.

STATE of Florida, Appellee(s)

CASE NO.: SC16-793

|
DECEMBER 28, 2017

Lower Tribunal No(s): 351987CF001347AXXXXX; 351988CF000262AXXXXX

Opinion

*1 Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

All Citations

Not Reported in So.3d, 2017 WL 6616899

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APPENDIX 3

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY,
FLORIDA

STATE OF FLORIDA

v.

JAMES AREN DUCKETT,

Defendant.

CASE NO.: 87-CF-1347(01)
88-CF-0262

CLERK OF CIRCUIT
AND COUNTY COURT
LAKE COUNTY
TAVAN ST. 1100000

FELONY DIVISION
2016 APR -1 P 3:57

ORDER ON DEFENDANT'S SUCCESSIVE MOTION

This matter came on for consideration on Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court held a case management conference on January 12, 2016 at which time the parties addressed the issue of whether an evidentiary hearing was required. The Court has read the pleadings including the Defendant's Motion and Appendix, the State's Response, considered the arguments presented at the January 12, 2016 hearing and has otherwise been fully advised in the premises.

ISSUES

Counsel for the Defendant filed this successive 3.851 motion on or about August 25, 2015. She argues the Defendant was deprived of his constitutional rights because either: (1) the State withheld evidence that was material or exculpatory in nature; (2) the State knowingly presented misleading evidence; (3) defense counsel unreasonably failed to discover and present exculpatory evidence; and/or (4) the favorable evidence constitutes newly discovered evidence of innocence. She argues the cumulative evidence requires an evidentiary hearing. She requests this Court schedule an evidentiary hearing and vacate and set aside the Defendant's convictions.

Issue:

A. Department of Justice ("DOJ") review of Michael Malone's Testimony:

On August 22, 2014, Mr. Norman Wong, Special Counsel for the Department of Justice, sent a letter

to defense counsel stating the DOJ had reviewed this case, in particular, the testimony of Mr. Michael Malone, an FBI expert on hair and fiber analysis. (See exhibit A). Attached to the letter were certain documents including a letter sent by the DOJ to Mr. Brad King, the State Attorney for the Fifth Judicial Circuit, regarding this case. The letter to Mr. King stated, “we have determined that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case.” (See exhibit B). The documentation also included, inter alia, the results of an FBI review of Malone’s testimony and responses from the Innocence Project (“IP”) and the National Association of Criminal Defense Lawyers (“NACDL”).¹

Defense counsel notes the FBI had examined this case to determine whether Mr. Malone’s testimony contained errors and noted the agency found repeated errors. (See exhibit B). Counsel concludes the documents prove the jury heard false and misleading testimony from Malone concerning the hair analysis. She claims the documents undermine this Court’s previous findings as to the reliability of Malone’s testimony and the determination Malone did not overstate the results of the hair analysis.

Counsel also cites a report by the Office of the Inspector General (OIG) (published in 2014) which compiled an assessment of the previous Task Force review of the FBI laboratory. She notes the report was highly critical of Malone and found, inter alia, that: (1) his conduct was egregious; (2) he repeatedly created lab reports which were scientifically unsupportable; (3) he provided false or inaccurate testimony at criminal trials; (4) he testified to statistically invalid rates of error; and (5) he mislead courts and fact finders as to the science behind hair analysis. Counsel also notes the report criticizes Malone for failing to use appropriate tests in a scientifically acceptable manner and for providing unsupportable testimony on the basis of his bench notes, lab reports or accepted standards in the scientific community. Counsel points out this is consistent with the report prepared by Steve Robertson, an independent analyst, who had previously

¹ The Appendix also includes the transcript of Malone’s testimony from the trial and a report by the Office of the Inspector General (“OIG”) that reviewed the previous task review of the FBI laboratory.

evaluated Malone's work in the Defendant's case.²

B. Evaluating the Defendant's claim:

Defense counsel argues the Defendant's constitutional rights were violated, i.e., the prosecutor committed a Brady³ violation and a Giglio⁴ violation by the State's presentation of false testimony by Malone. Based on this argument, she contends this Court must consider the materiality of the evidence not presented to the jury collectively.

Citing the State's closing argument at trial, counsel argues Malone's testimony was the linchpin of the State's case. She notes the Defendant has repeatedly asserted Malone's testimony was false and misleading and cited: (1) the Department of Justice 1998 report detailing deficiencies within the FBI laboratory; (2) the review done by Mr. Steve Robertson, an independent analyst; and (3) the recently disclosed information as proof. Counsel argues the recently disclosed information establishes the State failed to disclose and/or trial counsel failed to discover false evidence relating to the hair analysis.

Building on her arguments above, counsel argues this Court must consider all the issues/evidence presented in prior proceeding in evaluating this new information. Among other evidence, counsel cites: (1) issues around Ms. Gurley's recanted trial testimony; (2) issues around the tire tracks; (3) evidence and testimony from post-conviction hearings; and (4) evidence of possible other suspects.

Analysis:

This Court begins its analysis by noting this Motion is successive. A successive rule 3.851 motion may be denied without an evidentiary hearing if the records of the case conclusively show that the movant is entitled to no relief. See Fla. R. Crim. P. 3.851(f)(5)(B). Moreover, a claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior

² Significantly, she does not allege the report has any analysis or conclusions specifically relating to the Defendant's case.

³ Brady v. Maryland, 373 U.S. 83, 87 (1963).

⁴ United States v. Giglio, 405 U.S. 150 (1972).

determination was on the merits. . . .” See Fla. R. Crim. P. 3.851(e)(2).

Prior to considering the Defendant’s Motion and Appendix, this Court finds the following brief history relevant to this issue. During the Defendant’s trial, Michael Malone, a FBI hair and fiber analyst, testified. In Duckett v. State (Duckett I), 568 So. 2d 891 (Fla. 1990), the Florida Supreme Court summarized Malone’s trial testimony:

A pubic hair was found in the victim’s underpants. While other experts could not reach a conclusion by comparing that hair with Duckett’s pubic hair, Michael Malone, an FBI special agent who had been qualified as an expert in hairs and fibers in forty-two states, examined the hair sample, concluding there was a high degree of probability that the pubic hair found in her underpants was Duckett’s pubic hair. Malone also testified that the pubic hair did not match the hairs of the sixteen-year old boy, the uncle, or the others who were in contact with the victim that evening.

Id. at 893. In 1997, the DOJ issued a report that, inter alia, criticized certain forensic analysts including Malone. The report stated Malone testified falsely in a proceeding unrelated to this case.⁵

In 2011, the F.B.I. requested Mr. Steve Robertson, an independent analyst for hair and fiber evidence, to review Mr. Malone’s work including his testimony at trial. (See exhibit C). Reviewing Malone’s laboratory reports, Robertson concluded that he was unable to determine whether Malone performed the appropriate tests in a scientifically acceptable manner based on the methods, protocols, and analytic techniques available at the time. In his notes, Robertson noted Malone’s examination notes contained documentation of the observed characteristics used in his hair comparison, but it could not be determined whether the hair comparison was properly performed from a review of such notes. Robertson further noted the F.B.I. lab did not have written hair examination protocols at the time Malone did his analysis and, therefore, it could not be determined if the examiner performed the appropriate tests in a scientifically acceptable manner. He also concluded that Malone’s examination results set forth in laboratory results were not supported and adequately documented in the bench notes. Specifically, he found the screening notes and the hair examination notes were not marked to reflect the date the work was performed; some notes were

⁵ The report did not consider or address this case.

illegible; and there was no abbreviation key to explain the abbreviations.

Considering Malone's testimony, Robertson concluded the testimony was not consistent with the laboratory results, the bench notes and the testimony was not within the bounds of examiner's expertise. Robertson pointed out that certain statements Malone made were consistent with the laboratory report, e.g., hair analysis could not be taken to the point of fingerprint analysis and you could not say this hair came from one person and no one else. He found other statements were not consistent with the laboratory report. Robertson faulted Malone for testimony that strongly suggested there might not be another source for the hair other than the Defendant. He also faulted Malone for stating there was a very high degree of probability that the pubic hair found in the victim's underpants came from the Defendant and it was highly unlikely the hair came from anyone else other than the Defendant. Robertson concluded these statements were not consistent with the results stated in the laboratory report and overstated the significance of the hair comparison.

Robertson found there was no documentation in the laboratory report indicating there was any microscopic characteristic with the Defendant's pubic hair sample that would make it so unusual that another person having the same microscopic characteristics in their pubic hair could not exist. Further, there is no documentation in the bench notes supporting Malone's opinion that the Defendant is the source of the Q7 pubic hair with a "very high degree of probability" or the chances of that hair coming from someone else was "highly unlikely at best."

In addition, Robertson also faulted Malone's testimony for not being within the bounds of his expertise. He faults Malone with providing the jury with unsupported statistics of the random change occurrence of microscopic hair association. Robertson also questions Malone's assumption that if another person existed, the person would have had to been in a position to be in contact with the victim's panties. Robertson also found Malone's statements that the pubic hair came from the Defendant with a "very high degree of probability" or the chances of that hair coming from someone else being "highly unlikely at best" was not within the bounds of Malone's expertise. He faulted Malone for overstating the significance of the hair comparison by using language forensic scientists would not use.

Based, in part, on Robertson's analysis, defense counsel filed a successive 3.851 motion arguing, inter alia, that Malone's testimony at trial regarding the hair evidence was erroneous and the trial court should hold an evidentiary hearing to consider this claim. This Court summarily denied this 3.851 motion and Defendant appealed. On appeal, the defense counsel argued this Court erred in summarily denying Defendant's claim that Robertson's analysis of Malone's lab work and trial testimony constituted newly discovered evidence demonstrating Malone's trial testimony was false and misleading. Duckett v. State, 148 So. 3d. 1163, 1166 (Fla. 2014). The Florida Supreme Court concluded the newly discovered evidence "did not give rise to a reasonable doubt as to Duckett's culpability." Id. at 1169.

This Court has reviewed the Appendix submitted by the Defendant in support of his claim. As stated above, it includes a letter from Mr. Norman Wong, Special Counsel for the Department of Justice, to Mr. Brad King. The purpose of the letter is to inform Mr. King of the results of the review performed by the DOJ and the FBI of laboratory reports and testimony by FBI examiners involving microscopic hair comparison. Mr. Wong informed Mr. King that "we have determined that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case." The letter went on to state:

We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included statements that exceeded the limits of science and were, therefore, invalid: (1) the examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others - this type of testimony exceeded the limits of science; (2) the examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association - this type of testimony exceeded the limits of the science; (3) the examiner cites the number of cases or hair analyses worked in the laboratory and the number of samples from different individual that could not be distinguished from one another as a predictive value to bolster the conclusion that hair belongs to a specific individual - this type of testimony exceeded the limits of the science.

This Court notes that the DOJ letter to Mr. King stated in a footnote:

You should be aware that after reviewing transcripts and laboratory reports in a number of different case, the F.B.I. conducted additional review of this case. However, certain aspects of the approach of the additional review

were rejected by the DOJ. Accordingly, the results embodied in the attached report represent the official findings of the FBI's review of this case.

The Appendix also includes the letter to defense counsel, Malone's trial testimony, responses from the Innocence Project ("IP") and the National Association of Criminal Defense Lawyers ("NACDL"), several Reports of the FBI and FBI Microscopic Hair Comparison Analysis Review Evaluation Form.

First, Defendant argues the State withheld evidence that was material or exculpatory in nature, i.e., a Brady claim. In Brady v. Maryland, 373 U.S. 83, 87, (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." There is absolutely no evidence in any of the documents indicating the prosecutor knew of any problems regarding Mr. Malone's analysis, much less suppressed such evidence. As the State points out, concerns regarding Mr. Malone's testimony did not surface until much later. Without any support in the documentation, this Court finds this accusation is little more than a conclusory allegation.

Next, the Defendant argues the State knowingly presented misleading evidence, i.e., a Giglio claim. The Florida Supreme Court has stated that "[t]o establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." Guzman v. State, 868 So.2d 498, 505 (Fla. 2003). There is no dispute as to whether Malone's testimony exceeded the bounds of science, but there is nothing - except counsel's assertion - that the prosecutor knew the testimony was false. The Defendant fails to explain how the prosecutor could know Malone's testimony was false when issues regarding Malone's testimony arose much later than his trial. Thus, this Court concludes this is also little more than a conclusory allegation. This Court emphasizes there is nothing, absolutely nothing, in the documentation indicating the prosecutor knew the testimony was false or misleading or attempted to suppress it.

The Defendant argues defense counsel unreasonably failed to discover and present the exculpatory evidence. This argument is also without merit. The documentary evidence which is a basis of this Motion

was not in existence at the time of trial. Thus, counsel cannot be faulted for not discovering evidence that was not in existence.

The fourth issue, the issue of newly discovered evidence, requires the evidence was not, or could not, have been known by the court, the party or counsel by the use of due diligence. The Florida Supreme Court has defined the requirements for newly discovered evidence claims as follows:

First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). Newly discovered evidence satisfies the second prong of this test if it “weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability.” Id. at 526 (quoting Jones v. State, 678 So. 2d 309, 315 (Fla. 1996)).

Walton v. State, 3 So. 3d 1000, 1008 (Fla. 2003). There is no dispute regarding the first prong of this test because the evidence did not exist at the time of trial.

After reading the Appendix, this Court finds there is nothing presented of such a nature that would probably produce an acquittal at trial. This Court finds the analysis of Malone’s testimony submitted with this Motion is reflective of Mr. Robertson’s findings. Each of the conclusions cited by Mr. Wong in his letter were addressed by Mr. Robertson in his evaluation. The Florida Supreme Court concluded Mr. Robertson’s conclusions “did not give rise to a reasonable doubt as to Duckett’s culpability.” Duckett v. State, 148 So. 3d. 1163, 1169 (Fla. 2014). Based on the Florida Supreme Court’s decision, this Court finds the newly discovered information mirrors Robertson’s findings and, therefore, does not give rise to a reasonable doubt of the Defendant’s innocence. Also, the Defendant concedes the FBI overlooked this case and this case was not included in the OIG Assessment. (See Def.’s 3.851 Mot. at 13 n.10). Thus, this Court finds the OIG report does not fulfill the requirement of newly discovered evidence. The Responses by IP and NACDL are independent reviews by lawyers and do not appear to contain any independent expert analysis. Thus, these Responses are of no help to the Defendant. Accordingly, this Court finds there is nothing presented indicating the Defendant is entitled to relief.

Based on the above, it is ORDERED and ADJUDGED that Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence filed pursuant to Florida Rule of Criminal Procedure 3.851 is DENIED. The Defendant has 30 days from the date of this Order to file an appeal.

DONE AND ORDERED in Chambers at Tavares, Lake County, Florida this 1 day of April, 2016.



William G. Law, Circuit Judge

Copies to:

RM

Mary Elizabeth Wells, Esq.
623 Grant Street, SE
Atlanta, GA 30312

Stacy E. Kircher, Esq.
444 Seabreeze Blvd., 5th Floor
Daytona, Beach FL 32118

Exhibit A



U.S. Department of Justice

950 Pennsylvania Ave., NW
Washington, DC 20530

August 22, 2014

M. Elizabeth Wells
376 Milledge Avenue, S.E.
Atlanta, GA 30312-3240

Re: State of Florida v. James Aren Duckett, Case Nos. 1987 CF 001347, 1988 CF 00262

Dear Ms. Wells:

We recently undertook a review of certain evidence that was presented in the above captioned case. Enclosed please find a letter dated August 15, 2014, that we sent to the prosecutor in this case. We have also forwarded that letter to the Innocence Project and the National Association of Criminal Defense Attorneys.

Please send an acknowledgement of your receipt of this letter to the following email address: USAEO.HairReview@usdoj.gov. If you have any questions, please direct them to the same email address. Thank you for your cooperation on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Norman Wong".

Norman Wong
Special Counsel

Enclosure

Exhibit B



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C., 20535-0001

**MICROSCOPIC HAIR COMPARISON ANALYSIS
RESULT OF REVIEW**

Date: July 24, 2014

To: Innocence Project
Microscopic Hair Comparison Analysis Review Team

From: Federal Bureau of Investigation
Microscopic Hair Comparison Analysis Review Team

FBI File Number: 95-HQ-278990

Criminal Docket Number: 1987 CF 001347, 1988 CF 000262

Defendant: Duckett, James A.

Victim: McAbee, Teresa

Trial Plea Stipulation
 Transcript enclosed
 Lab Report enclosed

Pursuant to the Letter of Agreement between our organizations, this letter serves to provide your office with the results from the Federal Bureau of Investigation (FBI) Microscopic Hair Comparison Analysis Review regarding the analysis of testimony and lab reports provided in the above-referenced case. Please notify the FBI, within 14 days of receipt of this letter, as to whether or not the Innocence Project (IP) agrees with the FBI's conclusions.

The FBI has conducted its review of the report issued in this case and found it to contain:

Appropriate Statements

Inappropriate Statements

The FBI has conducted its review of the FBI testimony transcript and/or stipulation in accordance with the November 9, 2012 agreed upon scientific standards between the IP and FBI with the following results:

Error Type 1: The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. This type of testimony exceeds the limits of the science.

Error Type 2: The examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association. This type of testimony exceeds the limits of the science.

Error Type 3: The examiner cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual. This type of testimony exceeds the limits of the science.

Appropriate

This document may contain information protected by the Privacy Act of 1974 and is provided by the FBI to your agency solely for authorized law enforcement purposes. The information contained herein may not be further disclosed or disseminated without the express consent of the FBI.

**FBI Microscopic Hair Comparison Analysis Review
Evaluation Form**

Case Information:	
Case Number:	95-HQ-278990
Defendant(s):	James A. Duckett
Date of Review:	06/12/2013; 12/20/2013; and 7/31/2014
Standard Applied:	MHCA Standards dated 11/9/2012

Review of Laboratory Report(s):	
Date of Laboratory Report:	12/24/1987
Examiner Issuing Report:	Malone
Lab Report Results (mark as appropriate):	
Positive Association:	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Inappropriate Statements :	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Limitations Language Included in Report?	<input checked="" type="checkbox"/> Yes (page #) 3 <input type="checkbox"/> No
If Laboratory report contained an Inappropriate Statement, cite statement by Error type(s) and page number(s) (quote if necessary):	
Page 3 – "...consistent with coming from James Duckett." – Error 2	

Review of Laboratory Report(s):	
Date of Laboratory Report:	02/01/1988
Examiner Issuing Report:	Malone
Lab Report Results (mark as appropriate):	
Positive Association:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Inappropriate Statements :	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Limitations Language Included in Report?	<input type="checkbox"/> Yes (page #) <input checked="" type="checkbox"/> No
If Laboratory report contained an Inappropriate Statement, cite statement by Error type(s) and page number(s) (quote if necessary):	
Page 1-2 – "...matched the pubic hairs of DUCKETT..." – Error 1	

Review of Laboratory Report(s):	
Date of Laboratory Report:	04/15/1988
Examiner Issuing Report:	Malone
Lab Report Results (mark as appropriate):	
Positive Association:	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Inappropriate Statements :	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Limitations Language Included in Report?	<input type="checkbox"/> Yes (page #) <input checked="" type="checkbox"/> No
If Laboratory report contained an Inappropriate Statement, cite statement by Error type(s) and page number(s) (quote if necessary):	

**FBI Microscopic Hair Comparison Analysis Review
Evaluation Form**

Defendant: James A. Duckett	Case File Number: 95-HQ-278990
------------------------------------	---------------------------------------

Review of Testimony:	
Date of Testimony:	04/29/1988
Testifying Examiner:	Malone
Name of Prosecutor:	Tom Hogan and Stephen Hurm
Name of Defense:	Jack Edmund
Testimony Results (mark as appropriate):	
Inappropriate Statements :	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Limiting Language Included in Testimony?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Identify by Page and Line Number(s):	Page 992, ln 2-4
If testimony contained Inappropriate Statements, cite each by Error type, page(s) and line number(s):	
Pg 985, ln 10-16 – Error 2 Pg 992, ln 6-10 – Error 2/3 Pg 992, ln 22 to pg 993, ln 1 – Error 2 Pg 1004, ln 3-4 – Error 2 Pg 1006, ln 4-10 – Error 2/3 Pg 1010, ln 7-18 – Error 2 Pg 1011, ln 5-12 – Error 2	

Approved By:



Date: 08/06/2014

Exhibit C

INDEPENDENT CASE REVIEW REPORT

Independent Review conducted by: Steve Robertson

Area(s) of Expertise: Hair, Fiber

Review commenced at: 2:45 PM (Time), May 16, 2011 (Date)

File #: 95-278990

Laboratory #(s) 71117056 80120099
71207036
71228056

Examiner(s) & Symbols

	Reviewed	Not Reviewed	Reviewed	Not Reviewed
<u>RO</u>	<u>X</u>			

Materials Reviewed

Trial Testimony transcripts(s) of Michael Malone

Testimony date(s): Unknown Pages: 978 - 1039

Laboratory Report(s):

Laboratory Number: 71117056, 71207036 Date: December 24, 1987

Laboratory Number: 71228056, 80120099 Date: February 1, 1988

Laboratory Number: _____ Date: _____

Examiner Bench Notes of: RO and unidentified technician(s)

Laboratory Number: 71117056
71207036
71228056
80120099

Initials SMA

Was any other material reviewed?

Yes

No

If yes, please identify and /or describe the material: Lake County Sheriff Office letters dated 11-16-87 and 12-3-87

Results of Review

File # 95-278990

O9, K3, K5, K6, K7

Item or Specimen # Reviewed: Q5 through

Review of Laboratory Report(s) and Bench Notes:

Note: Numbered comments are required below or on additional pages for any "No" or "Unable to Determine" Responses

1) Did the examiner perform the appropriate tests in a scientifically acceptable manner, based on the methods, protocols, and analytic techniques available at the time of the original examination(s)?

Yes No Unable to Determine

2) Are the examination results set forth in the laboratory reports(s) supported and adequately documented in the bench notes?

Yes No Unable to Determine

Review of Testimony:

Note: Numbered comments are required below or on additional pages for any "No" or "Unable to Determine" Responses

Transcript not available

3) Testimony consistent with laboratory report(s)? Yes No Unable to Determine

4) Testimony consistent with bench notes? Yes No Unable to Determine

5) Testimony w/in bounds of examiner's expertise? Yes No Unable to Determine

Page 2 of 5

Initials SM

Comments

(Set forth by above question #, if applicable.
Use "Additional Comments" Sheet, if needed)

File # 95-278990

#1. Malone's hair examination notes contain documentation of the observed characteristics used in his hair comparison. While this is normal procedure for microscopic hair comparisons, it cannot be determined that the hair comparison was performed properly from a review of such notes.

This reviewer was informed that the FBI Lab did not have written hair examination protocols until around 1997 when the lab became accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). It cannot be determined if the examiner performed the appropriate tests in a scientifically acceptable manner, based on the methods, protocols, and analytic techniques available at the time of the original examination(s), as there apparently were no written protocols.

#2. The notes made during the screening of the evidence and preparation of the hair slides appear to be from more than one unidentified technician.

The screening notes and the hair examination notes are not marked to reflect the date of the work performed.

Small parts of the notes are illegible.

Abbreviations are used in the hair examination notes but there is no abbreviation key to interpret them.

There is a comment on the bench notes marked 7117056 that seems to be "(conf. by VB 11/24/87)". This may be a notation that another unidentified examiner confirmed Malone's results of the comparison of the hair from the victim's panties Q7 to the pubic hair standard from the suspect K5.

A 76 page electronic copy of FBI File#95-278990 was provided for this review. Included in this electronic copy of FBI File#95-0278990 is bench notes and a laboratory report on a different homicide from Polk County, Florida. The notes and report concerning the Polk County homicide were not reviewed.

Review completed at: 9:00 AM (Time) August 01, 2011 (Date)

Total time spent conducting review (to nearest ¼ hour): 8.0 hours

I hereby certify that I conducted this review in an independent, unbiased manner and that the results of my review are fully documented on this report consisting of a total of 5 pages.

Thomas Roberts
(Signature)

8-1-2011
(Date)

Additional Comments Sheet

File # 95-278990

#3. The results section of the laboratory report dated December 24, 1987 states the pubic hair from Q7 (the victim's panties) "exhibits the same individual microscopic characteristics as the pubic hairs of JAMES DUCKETT, and accordingly, is consistent with having originated from JAMES DUCKETT.

It is pointed out that hair comparisons do not constitute a basis for absolute personal identification."

On page 992 of the trial transcript, Mr. Malone states "I don't want to mislead you, you can never take it to the point of fingerprints. In other words, where you can say "this hair came from that person and nobody else in the world".

On page 1004 of the trial transcript, Mr. Malone testifies "the hair from the panties is consistent with having originated from Mr. Duckett."

These statements are consistent with the laboratory report. However, other parts of Mr. Malone's testimony are not consistent with the laboratory report in the following ways:

- On page 1010 of the trial transcript, when asked how somebody else could have gotten their pubic hair into Teresa McAbee's underpants, Mr. Malone's response includes the phrase "if that person exists". Use of the term "if that person exists" is a very strong statement that conveys to the jury the idea that there may not be another possible source of the hair, making the hair comparison almost equal to an identification of Mr. Duckett as the only possible source of the hair recovered from the victim's panties.
- On page 1011 of the trial transcript, Mr. Malone states it is with a "very high degree of probability" that the pubic hair found in the underpants of Teresa McAbee came from James Duckett, and that the "chances of it being from somebody else other than Mr. Duckett would be highly unlikely at best".

These two statements are an extremely different opinion than what is in the laboratory report and much, much stronger than the testimony of Mr. Malone on page 992 and 1004 of the transcript.

Conveying the significance of an association made by microscopic hair comparison using the terminology such as used by Mr. Malone on pages 1010-1011 is not consistent with the results stated in the laboratory report and is overstating the significance of the hair comparison. It is not testimony that other Forensic Scientists would give and it exceeds the limitations of microscopic hair comparisons.

Please refer to the Forensic Science Handbook, Volume 1, R. Saferstein (editor), published in 1982. Richard Bisbing (Supervisor, Micro-Chemical Unit, Michigan State Police) is the author of Chapter 5, "The Forensic Identification and Association of Human Hair". On page 211, Bisbing states "The limits of human hair comparisons should be explained to the jury. Even though the questioned hairs may be similar in all respects to a person's hair, and dissimilar to most other hair, the forensic examiner can never say with certainty that here might not be another individual who possesses similar hair."

Additional Comments Sheet

File # 95-278990

#4. Mr. Malone's testimony is not consistent with the bench notes:

- There is no documentation in Mr. Malone's bench notes to indicate the presence of any microscopic characteristic within Mr. Duckett's pubic hair sample that would make Mr. Duckett's pubic hair so unusual that another person having the same microscopic characteristics in their pubic hair may not exist, as he testifies on page 1010.
- There is no documentation in Mr. Malone's bench notes upon which to base his stated opinion (on page 1011 of the transcript) that Mr. Duckett is the source of the Q7 pubic hair with a "very high degree of probability", or that the chances of that hair coming from someone else is "highly unlikely at best".

#5. Mr. Malone's testimony is not within the bounds of his expertise:

- On page 992 of the trial transcript, Mr. Malone talks of his personal experience that he has looked at hairs from about 10,000 different people and has only run across two occasions out of 10,000 times where he had hairs from two different people that he could not tell apart.

With this testimony, Mr. Malone provides the jury with unsupported statistics of the random, chance occurrence of a microscopic hair association. Mr. Malone may have examined samples from 10,000 people over the course of his career, but he fails to state he has not compared all 10,000 samples to each other.

- On page 1010, Mr. Malone testifies that another person, if that person exists, would have had to "have been in a position where they could have had contact with Teresa McAbee's panties and the hair transfer from them to her. That is the only other possible scenario."

This is an assumption on Mr. Malone's part. He has assumed that another person with hair microscopically similar to the hair of Mr. Duckett may not exist. He has also assumed there is no other possible scenario to explain the hair transfer. However, could it be possible the hair recovered from the panties may indeed have come from Mr. Duckett, but may have somehow been picked up from the upholstery of Duckett's car when the victim sat in it and, therefore, the hair may not be associated with the murder?

- On page 1011 of the trial transcript, Mr. Malone states it is with a "very high degree of probability" that the pubic hair found in the underpants of Teresa McAbee came from James Duckett, and that the "chances of it being from somebody else other than Mr. Duckett would be highly unlikely at best".

This testimony is not within the bounds of Mr. Malone's expertise as a microscopic hair examiner. He is exceeding the limitations of microscopic hair comparisons. He is overstating the significance of the hair comparison, using language that other Forensic Scientists would not testify to.

The reader is referred to the article "Correlation of Microscopic and Mitochondrial DNA Hair Comparisons" in the Journal of Forensic Science, Sept. 2002, Vol. 47, No. 5. The FBI examined 80 hairs that were microscopically associated by FBI examiners and found that 9 were excluded by mitochondrial DNA.

CAPITAL CASE
Case No. 17-8388
In the United States Supreme Court

JAMES AREN DUCKETT,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the forgoing pleading upon counsel for Respondent by mail, first class postage prepaid, and electronically, at the following address:

Lisa-Maire Lerner
Ilana Mitzner
Office of the Attorney General
1515 North Flagler Drive, Suite 900
West Palm Beach, Florida 33402

Dated, this the 21st day of May, 2018.

/s/ Mary E. Wells
Counsel for Mr. Duckett