

IN THE SUPREME COURT OF FLORIDA

BRETT A. BOGLE,

Appellant,

v.

**Case No. SC17-2151
DEATH PENALTY CASE**

STATE OF FLORIDA,

Appellee.

_____ /

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

ANSWER BRIEF OF THE APPELLEE

**PAMELA JO BONDI
ATTORNEY GENERAL**

**LISA MARTIN
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 72138
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com [and]
lisa.martin@myfloridalegal.com**

COUNSEL FOR APPELLEE

RECEIVED, 08/03/2018 03:48:25 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

 ISSUE I..... 13

 THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE’S CLAIM THAT THE DOJ REPORT ON AGENT MALONE’S HAIR ANALYSIS CONSTITUTED NEWLY DISCOVERED EVIDENCE BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS. 13

 ISSUE II:..... 31

 THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE’S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *HURST v. FLORIDA* BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS. 31

 ISSUE III 41

 WHETHER THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE’S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT UNDER *HURST v. STATE* BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS. 41

ISSUE IV:.....	44
THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE’S CLAIM THAT POSTCONVICTION DEFENDANTS SENTENCED PURSUANT TO FLORIDA STATUTE § 921.141 WERE NOT CONVICTED OF CAPITAL MURDER BECAUSE THE JURY DID NOT UNANIMOUSLY FIND ALL OF THE ELEMENTS REQUIRED TO CONVICT OF CAPITAL MURDER BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS.	44
CONCLUSION.....	49
CERTIFICATE OF SERVICE.....	50
CERTIFICATE OF FONT COMPLIANCE	50

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	37
<i>Asay v. State</i> , 210 So. 3d 1 (Fla. 2016)	35
<i>Bleau v. Wall</i> , 808 A.2d 637 (R.I. 2002).....	24
<i>Bogle v. State</i> , 213 So. 3d 833 (Fla.), <i>reh'g denied</i> , 2017 WL 1366109 (Fla. Apr. 13, 2017).....	passim
<i>Bogle v. State</i> , 655 So. 2d 1103 (Fla.), <i>cert. denied</i> 516 U.S. 978 (1995)	3
<i>Bolin v. State</i> , 184 So. 3d 492 (Fla. 2015)	12
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985)	37, 38
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	37
<i>Danforth v. Minnesota</i> , 522 U.S. 264 (2008)	38
<i>Diaz v. Dugger</i> , 719 So. 2d 865 (Fla. 1998)	13
<i>Duckett v. State</i> , 148 So. 3d 1163 (Fla.), <i>reh'g denied</i> (Oct. 6, 2014).....	13, 20

<i>Duckett v. State</i> , 231 So. 3d 393 (Fla. 2017)	30
<i>Duckett v. State</i> , 918 So. 2d 224 (Fla. 2005)	21
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	40
<i>Finney v. State</i> , 660 So. 2d 674 (Fla. 1995).....	47
<i>Fla. Dept. of Transp. v. Juliano</i> , 801 So. 2d 101 (Fla. 2001)	17, 32
<i>Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.</i> , 67 So. 3d 187 (Fla. 2011).....	44
<i>Floyd v. State</i> , 497 So. 2d 1211 (Fla. 1986).....	47
<i>Foster v. State</i> , 132 So. 3d 40 (Fla. 2013)	20
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987)	39
<i>Hamilton v. State</i> , 236 So. 3d 276 (Fla. 2018)	34, 36
<i>Henry v. State</i> , 134 So. 3d 938 (Fla. 2014)	42
<i>Hitchcock v. State</i> , 226 So. 3d 216 (Fla.), <i>cert. denied</i> , 138 S. Ct. 512 (2017)	36, 39
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016)	passim

<i>Hurst v. State</i> , 202 So. 3d 40 (Fla. 2016), <i>cert. denied</i> , 137 S. Ct. 2161 (2017)	passim
<i>James v. State</i> , 615 So. 2d 668 (Fla. 1994)	35
<i>Jenkins v. Hutton</i> , 137 S. Ct. 1769 (2017)	36
<i>Johnson v. State</i> , 904 So. 2d 400 (Fla. 2005)	43
<i>Johnston v. State</i> , 27 So. 3d 11 (Fla. 2010)	20, 22, 23, 30
<i>Kansas v. Carr</i> , 136 S. Ct. 633 (2016)	37
<i>Lambrix v. Sec’y, Fla. Dept. of Corr.</i> , 872 F.3d 1170 (11th Cir.), <i>cert. denied</i> , 138 S. Ct. 312 (2017)	45
<i>Long v. State</i> , 183 So. 3d 342 (Fla. 2016)	19
<i>Lowenfield v. Phelps</i> , 484 U.S. 231 (1988)	37
<i>Mazzara v. State</i> , 51 So. 3d 480 (Fla. 1st DCA 2010)	30
<i>McManus v. State</i> , 177 So. 3d 1046 (Fla. 1st DCA 2015)	17, 32
<i>Miles v. United States</i> , 103 U.S. 304 (1880)	47
<i>Mills v. State</i> , 684 So. 2d 801 (Fla. 1996)	18, 19, 33, 34

<i>Mosley v. State</i> , 209 So. 3d 1248 (Fla. 2016)	35, 36
<i>Nixon v. State</i> , 932 So. 2d 1009 (Fla. 2006)	12
<i>Pardo v. State</i> , 108 So. 3d 558 (Fla. 2012)	11
<i>Parker v. Dugger</i> , 498 U.S. 308 (1991)	47
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989)	39
<i>Rhodes v. State</i> , 986 So. 2d 501 (Fla. 2008)	24
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	passim
<i>Romano v. Oklahoma</i> , 512 U.S. 1 (1994)	38
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	48
<i>Royster Guano Co. v. Virginia</i> , 253 U.S. 412 (1920)	40
<i>Rutherford v. State</i> , 940 So. 2d 1112 (Fla. 2006)	20
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	43
<i>Schwab v. State</i> , 969 So. 2d 318 (Fla. 2007)	20

<i>Senate Joint Resolution of Legislative Apportionment 2-B,</i> 89 So. 3d 872 (Fla. 2012)	17, 33
<i>Sireci v. State,</i> 773 So. 2d 34 (Fla. 2000)	18, 19, 33, 34
<i>Spaziano v. Florida,</i> 468 U.S. 447 (1984)	41, 42
<i>Topps v. State,</i> 865 So. 2d 1253 (Fla. 2004)	33
<i>Troy v. State,</i> 57 So. 3d 828 (Fla. 2011)	38
<i>Walton v. State,</i> 3 So. 3d 1000 (Fla. 2009)	12
<i>Williamson v. State,</i> 961 So. 2d 229 (Fla. 2007)	12
<i>Witt v. State,</i> 387 So. 2d 922 (Fla.), <i>cert. denied</i> , 449 U.S. 1067 (1980)	35
<i>Wright v. State,</i> 995 So. 2d 324 (Fla. 2008)	30
<i>Zeigler v. State,</i> 116 So. 3d 255 (Fla. 2013)	18, 32, 33
<i>Zeigler v. State,</i> 580 So. 2d 127 (Fla. 1991)	47
Other Authorities	
§ 921.141(2)(a), Fla. Stat. (2017)	46
§ 921.141(6), Fla. Stat. (2017)	48

§ 921.141, Fla. Stat. (2017).....	44
Art. I, § 17, Fla. Const.	42
Fla. R. Crim. P. 3.851(d)(2)(B).....	19, 34
Fla. R. Crim. P. 3.851(e)(2)	11, 18
Fla. R. Crim. P. 3.851(f)(5)(B)	12
Fla. Sen. 280 (Feb. 21, 2017)	44

STATEMENT OF THE CASE AND FACTS

Appellant, Brett A. Bogle, was convicted of first-degree murder and sentenced to death. The following facts are drawn from this Court's opinion affirming Bogle's conviction:

Margaret Torres (the victim) was the sister of Katie Alfonso and stayed at Alfonso's house four or five nights a week. In June 1991, Bogle met Alfonso and shortly thereafter he moved in with Alfonso and the victim. Bogle and the victim did not get along and Alfonso eventually asked Bogle to move out. The following week, Bogle, Alfonso, the victim, and another person went out together and things seemed to be going better. During the outing, however, Bogle and the victim began to argue again. Subsequently, Alfonso and the victim refused to allow Bogle into Alfonso's house. Bogle then broke through the screen door of Alfonso's house, grabbed Alfonso's neck to push her out of the way, grabbed the victim's arm to remove the telephone from her hand as she tried to call 911, pulled the telephones out of the kitchen and bedroom, and took clothing from the house. As he left the house, Bogle told the victim that she would not live to tell about it if she called the police and pressed charges. In response to the victim's uncompleted call to 911, a deputy sheriff arrived shortly after Bogle left. The deputy referred the matter to the state attorney's office. Several days later, Bogle called Alfonso and again threatened the victim, stating that, if the victim pressed charges, she would not live to tell about it.

About two weeks later, Bogle called Alfonso to ask if he could come over to her house. The victim was out for the evening. When Alfonso told Bogle that he could not come over, he became furious and hung up. Later that night, Bogle and the victim ran into each other at a bar called Club 41. Witnesses saw them talking briefly. Witnesses also noticed that Bogle was clean and had no noticeable injuries of any kind when he arrived at Club 41. The victim left Club 41 at about 1 a.m.; Bogle left approximately five minutes later. About forty-five

minutes after that, Bogle approached a car outside Club 41 and asked for a ride. At that time, his forehead was scratched, his clothes were dirty, and his crotch was wet.

The next day, the victim's nude and badly beaten body was found outside an establishment located next to Club 41. Her head had been crushed with a piece of cement, and she had died of blows to the head. Additionally, she had semen in her vagina and trauma to her anus consistent with sexual activity that was likely inflicted before death. The DNA extracted from the semen was consistent with Bogle's DNA (12.5% of Caucasian males could have contributed the semen), and a pubic hair found on the crotch area of Bogle's pants matched the victim's.

Bogle put on no evidence in his defense. The jury found him guilty of burglary of Alfonso's home with force, retaliation against the victim as a witness to that burglary, and first-degree murder of the victim. A penalty phase proceeding was held on the first-degree murder conviction, and the jury recommended death by a seven-to-five vote. The trial judge, however, granted a new penalty phase proceeding after determining that improper rebuttal evidence had been presented by the State.

At the second penalty phase proceeding, the State presented the same evidence it relied on in the guilt phase. Bogle put on eight witnesses who testified that Bogle had been subjected to physical and mental abuse as a child, had used drugs at his father's urging from the time he was five or six years old, was under the influence of alcohol at the time of the murder, had a personality disorder and suffered from some mental disturbance at the time of the murder, was kind to others, and had been injured in an automobile accident a week before the murder. The jury recommended death by a ten-to-two vote. The trial judge subsequently sentenced Bogle to death, finding four aggravating circumstances: (1) previous conviction of a violent felony (burglary with force on Alfonso and the victim two weeks before the murder); (2) the murder was committed while engaged in the commission of a sexual battery; (3) the murder was committed for the purpose of

avoiding arrest; and (4) the murder was heinous, atrocious, or cruel (HAC). In mitigation, the trial judge gave some weight to the statutory factor of impaired capacity but stated that substantial impairment had not been proven; gave substantial weight to Bogle's family background; little weight to his alcohol and drug abuse; gave some weight to his good conduct during trial; gave some, but not a great deal, of weight to his kindness to others; and gave no weight to his involvement in an automobile accident. Bogle also received consecutive sentences of life in prison for the burglary-with-assault-or-battery conviction and five years in prison for the retaliation-against-a-witness conviction.

Bogle v. State, 655 So. 2d 1103, 1105–06 (Fla.), *cert. denied* 516 U.S. 978 (1995).

Postconviction Proceedings

Bogle's postconviction motion was filed on or about March 14, 1997. An extensive evidentiary hearing was held from June 9-13, 2008, November 30-December 1, 2009, and August 23-24, 2010. *Bogle v. State*, 213 So. 3d 833, fn. 2 (Fla.), *reh'g denied*, 2017 WL 1366109 (Fla. Apr. 13, 2017). Relief was denied on October 25, 2011. (R. 280). Bogle filed a notice of appeal of the denial of his postconviction motion to this Court on December 12, 2011. (R. 280). Bogle's challenge to the FBI testing of the hair retrieved from Bogle's pants was on appeal before this Court in Case No. SC11-2403. Defendant Bogle filed a successive motion in the postconviction court on or about January 23, 2014, once again seeking review of the FBI testing of the hair sample found on the Defendant's pants. (R. 159-82). At the February 13, 2014 status hearing, the postconviction

court entered a written order granting the DNA testing of the hair sample. (R. 280) Mitochondrial DNA testing confirmed that the pubic hair found on Bogle's pants was consistent with the victim's profile¹. On February 17, 2014, the postconviction court ordered that the successive motion was to be held in abeyance pending this Court's decision in SC11-2403. (R. 280-282) Bogle filed another successive motion to vacate on December 20, 2016, raising *Hurst* related claims [R. 283-326], which was also held in abeyance by the postconviction court pending the outcome of this Court's decision in SC11-2403. (R. 333)

While the postconviction appeal was pending, Bogle filed an original habeas petition in this Court raising six claims of ineffective assistance of appellate counsel and a sentencing claim based on *Ring v. Arizona*, 536 U.S. 584 (2002). *Bogle*, 213 So. 3d at 853-55. This Court consolidated the postconviction appeal and the habeas petition, and issued its opinion February 9, 2017, affirming the denial of postconviction relief and denying Defendant's petition for writ of habeas corpus. Concerning Bogle's *Brady* and *Giglio* "hair evidence" claims, this Court found that no relief was warranted:

¹ See Hillsborough County case no. 91-CF-12952: 12/2/15 Notice of Filing of Results of Mitochondrial Testing.

II. *Brady* and *Giglio* Claims

Bogle contends that the trial court erred in denying his *Brady* and *Giglio* claims. This Court, in *Franqui v. State*, 59 So.3d 82 (Fla. 2011), articulated the standard of review for *Brady* and *Giglio* claims as follows:

Brady requires the State to disclose material information within its possession or control that is favorable to the defense. To demonstrate a *Brady* violation, the defendant has the burden to show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. To meet the materiality prong of *Brady*, the defendant must demonstrate “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” “... [M]ateriality under *Brady* requires a probability sufficient to undermine confidence in the outcome.” [For t]he materiality inquiry ... [“]the question is whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’ ” “It is the net effect of the evidence that must be assessed.” “Although reviewing courts must give deference to the trial court’s findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review.”

In order to prove a *Giglio* violation, “a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material.” If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury’s verdict. The State must then “prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt.” Under the harmless error test, the State must

prove “ ‘there is no reasonable possibility that the error contributed to the conviction.’ ”

Both *Giglio* and *Brady* claims present mixed questions of law and fact. Thus, as to findings of fact, [the Court] defer[s] to the lower court's findings if they are supported by competent, substantial evidence. “[T]his Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.” We review the trial court's application of the law to the facts de novo.

Franqui, 59 So. 3d at 101–02 (citations omitted).

...

D. Agent Malone

Bogle also contends that the State violated *Brady* by failing to furnish F.B.I. Agent Malone's bench notes to the defense. The trial court found that the notes were insufficient to undermine confidence in the proceedings and were unlikely to produce an acquittal on retrial because the notes have “minimal” value to the defense. At trial, Malone, an expert in hair and fibers, testified that one Caucasian pubic hair (Q–18) recovered from the debris of Bogle's pants was microscopically indistinguishable from Torres's pubic hair (K–6). This finding was consistent with Malone's report and confirmed by an examiner. Malone's bench notes, however, stated that Q–18 equaled K–7, which referred to Torres's head hair sample. Malone testified at the evidentiary hearing that this was a transcription error: his bench notes should have said that Q–18 equaled K–6. We find that no *Brady* violation has been demonstrated because Bogle has failed to establish that trial counsel attempted to obtain and the State suppressed Malone's notes. *See Peede v. State*, 955 So.2d 480, 497 (Fla. 2007) (finding no *Brady* violation where the defense could have obtained the information in question with reasonable diligence).

E. Testimony Regarding Bogle's Pants in Evidence

Bogle asserts in his next *Brady* claim that the State suppressed the fact that Bogle's pants were placed in a drying shed after Detective Lingo's collection of the pubic hair and that Detective Lingo removed evidence from the evidence room to conduct an investigation. Bogle relies on a Hillsborough County Sheriff's Office disciplinary report stating that Ronald Cashwell, a Crime Scene Technician, "placed damp clothing into Evidence without first ascertaining that the articles were sufficiently dried." A written request for discipline noted that Cashwell:

should have taken extreme caution to insure that the pants were dry since crucial evidence could have been obtained and used to assist in the prosecution of the suspect. Instead, the pants could have become molded and the evidence severely damaged or destroyed.

In detailing the events, Cashwell made a written statement that "[t]he items placed in the shed are unable to be separate[d] from each other and could contaminate each other and the shed was full of other evidence drying."

At trial, F.B.I. Agent Malone was asked whether anyone else came "into contact with the pants from the time that they were put into property until the time that you took them out to collect this evidence." Malone answered, "No, they were sealed when I checked them out." Malone was not asked whether anyone else came into contact with the pants throughout the whole time they were in evidence. Thus, the disciplinary report, which indicates that a Crime Scene Technician removed the pants from the evidence room after Malone collected the hairs, is consistent with Malone's trial testimony.

Bogle has not shown that the State suppressed evidence of contamination. The disciplinary report and Cashwell's statement on which Bogle relies do not show that any evidence was

actually contaminated but convey that the evidence could have been contaminated or destroyed. Malone testified at the evidentiary hearing that he found no evidence of contamination on the hairs retrieved from Bogle's pants and that the disciplinary report did not cause him to change his opinion of the match. Even if Bogle met the first two prongs of *Brady*, showing favorable evidence and suppression, the materiality prong has not been satisfied. Accordingly, we find that Bogle has failed to establish a *Brady* violation.

Bogle additionally claims that prosecutor Cox violated *Giglio* because she knew Detective Lingo's testimony about the pants was false and misleading. The trial court denied this claim, finding the testimony unclear but not false. The trial court reasoned that there was no evidence presented that anyone touched the pants between the time they were sealed and placed in the evidence room until the pants were examined by Detective Lingo. Because we agree that Detective Lingo did not testify falsely, we deny this *Giglio* claim.

Bogle, 213 So. 3d at 841-45. In denying Bogle's *Ring/Hurst* claim, this Court decided:

Bogle asserts that Florida's capital sentencing scheme is unconstitutional under *Ring*, 536 U.S. 584, 122 S.Ct. 2428, and *Hurst v. Florida*, —U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). Bogle's first-degree murder conviction and sentence of death were final in 1995, before the Supreme Court decided *Ring*. We acknowledge that *Hurst v. Florida*, in which the United States Supreme Court found Florida's death penalty scheme defective to the extent that a jury must at least “make a specific factual finding with regard to the existence of mitigating or aggravating circumstances,” supporting a death sentence in order to preserve the Sixth Amendment right to a jury trial, is an extension of *Ring*. 136 S.Ct. at 622. **Bogle is not, however, entitled to *Hurst* relief because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided. See**

Asay v. State, 210 So.3d 1, 22, 41 Fla. L. Weekly S646, S652, 2016 WL 7406538 (Fla. Dec. 22, 2016). Therefore, we deny relief on this claim.²²

Bogle v. State, 213 So. 3d at 855. The mandate issued May 1, 2017. *Bogle v. State*, 213 So. 3d 833 (Fla. 2017).

On May 9, 2017, a status hearing was held in circuit court, where Bogle stated intent to file a Second Amended Motion to Vacate. (R. 8). On May 19, 2017, Bogle filed his “Second Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend.” (R. 338-416). In Bogle’s Second Amended motion, he presented both a newly discovered evidence claim regarding hair/DNA testimony and a claim that he is entitled to a new sentencing phase based on *Hurst*. (R. 338-416). Following a Case Management Conference, the postconviction court issued its Order denying Bogle’s second amended motion to vacate, on September 25, 2017. (R. 448-462). Bogle’s motion for rehearing [R. 710-16] was denied on November 9, 2017, and a notice of appeal was filed on December 7, 2017. (R. 734-36).

On October 10, 2017, Bogle filed a Third Successive Motion to Vacate alleging that the United States Senate Judiciary Committee inquiry into when the FBI became aware of issues concerning agent testimony, including two internal FBI memorandums based on a review of Agent Malone’s testimony in one case

from late 1991, constituted newly discovered evidence. (R. 677-700). Following the State's response, on December 19, 2017, the postconviction Court ordered Bogle and the State to address whether it had jurisdiction to continue proceedings based on the notice of appeal filed on December 7, 2017. (R. 744-45). Following the responses from the parties, on January 22, 2018, the postconviction court entered an order holding the motion in abeyance pending the outcome of the instant case. (R. 756-57).

On April 11, 2018, Bogle filed a motion to relinquish jurisdiction and a motion to toll time in the instant case, so that the postconviction court may rule on the third successive motion to vacate. *See* Docket SC17-2151. This Court ordered the State to respond to the motion, which it did on April 23, 2018. *See* Docket SC17-2151. On May 25, 2018, this Court denied the motion to relinquish. *See* Docket SC17-2151. Bogle filed a motion for extension of time to file his initial brief on June 1, 2018, and the brief was filed on July 16, 2018. *See* Docket SC17-2151.

SUMMARY OF THE ARGUMENT

Summary denial of Bogle’s “hair evidence” claim was correct. The hair analysis claim is procedurally barred in its entirety because it has already been decided by this Court on the merits. *Bogle v. State*, 213 So. 3d 833 (Fla. 2017) Recasting this claim and adding new components that do not rise to the level of newly discovered evidence does not cure the clear procedural bar here. *Pardo v. State*, 108 So. 3d 558, 567 (Fla. 2012) (denying postconviction motion as barred where claim was previously raised both on direct appeal and in prior postconviction motion); Fla. R. Crim. P. 3.851(e)(2) (limits on contents of successive motions). The 2013 United States Department of Justice (USDOJ) report component of this appeal fails to provide evidence sufficient to produce an acquittal on retrial. This Court already concluded that Bogle is not entitled to postconviction relief on the hair analysis issue, and the successive postconviction motion was merely another attempt to relitigate the same issue, albeit, with more tenuous evidence.

Summary denial of Bogle’s *Hurst*-related claims was also correct. This Court has already decided that Bogle was not entitled to relief because his conviction was final in 1995, before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). *Bogle*, 213 So. 3d at 855.

STANDARD OF REVIEW

This Court reviews the postconviction 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. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009), *citing State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); Fla. R. Crim. P. 3.851(f)(5)(B). Conclusory allegations are not sufficient, and the defendant must establish a prima facie case based on a legally valid claim. *Bolin v. State*, 184 So. 3d 492 (Fla. 2015), *citing Jackson v. State*, 147 So. 3d 469, 485 (Fla. 2014) Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits summary denial of a successive motion for postconviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007). In order to support summary denial, "the trial court must either state its rationale in the order denying relief or attach portions of the record that would refute the claims." *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006).

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE’S CLAIM THAT THE DOJ REPORT ON AGENT MALONE’S HAIR ANALYSIS CONSTITUTED NEWLY DISCOVERED EVIDENCE BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS.

Bogle contends that he is entitled to a new trial based upon the claimed “defects” in the hair analysis evidence presented at his 1993 trial. Assuming *arguendo* this claim is properly before this Court, “[t]he question before [this Court] is not whether the new evidence warrants a new trial but whether this case should be remanded for an evidentiary hearing regarding the [“new” evidence]. *See Duckett v. State*, 148 So. 3d 1163, 1168 (Fla.), *reh’g denied* (Oct. 6, 2014).

A. Bogle’s claim is procedurally barred.

Bogle is not entitled to any relief because the postconviction court correctly determined the hair evidence issue to be procedurally barred. In fact, this issue is barred by the law of the case doctrine and *res judicata*, as well as being successive and time barred. Florida law is well settled that a trial court’s summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998).

Bogle is not entitled to relitigate matters that have already been decided adversely to him. In denying relief on this claim, the postconviction court stated:

The Court finds that Defendant has already raised in his previous postconviction proceeding, newly discovered evidence and ineffective assistance of counsel claims relates to Malone's testimony regarding the examination of the hair at issue and the USDOJ/FBI's review of Malone's work. (See motions, order, attached). The postconviction court held evidentiary hearings and denied Defendant's claims, and the Florida Supreme Court affirmed the court's denial of those claims. (See order, attached). *See Bogle*, 2013 So. 3d 844-45. The Florida Supreme Court further affirmed the court's rulings limiting the cross-examination of Malone and Steve Robertson and Defendant's discovery requests for information regarding errors and also testimony committed by Malone since trial. See *id.* at 840-41.

In the instant claim, Defendant continues to challenge Malone's hair analysis and testimony based on additional information related to a second USDOJ/FBI review of Malone's work in this case. The Court agrees with the State's assertion that the 2013 report at issue "contains nothing beyond additional review by other examiners that in no way produces evidence that was not available to be pursued, or that was not pursued, at the time of Bogle's extensive 3.851 evidentiary hearing." Additionally, the report is dated 2013 and did not exist at the time of trial, therefore, Defendant has failed to demonstrate it was suppressed or withheld by the State. See *Duckett v. State*, 918 So. 2d 224, 235 (Fla. 2005) (finding defendant failed to establish the State suppressed information contained in a 1997 USDOJ report indicating that Malone testified falsely in a court proceeding in 1985 where the 1997 report indicating that Malone testified falsely in a court proceeding in 1985 where the 1997 report did not exist at the time of trial or direct appeal). The new information at issue does not constitute newly discovered evidence of a Brady violation or otherwise.

Defendant's instant allegations are an expansion of the issues that were previously raised, and thoroughly vetted and decided in Defendant's previous postconviction proceeding. Defendant's allegations in claim I are procedurally barred.

(R. 453-454)

The postconviction court, in denying the successive claim, cited this Court's analysis of Agent Malone's testimony and the hair evidence in Bogle's case:

D. Agent Malone

Bogle also contends that the State violated *Brady* by failing to furnish F.B.I. Agent Malone's bench notes to the defense. The trial court found that the notes were insufficient to undermine confidence in the proceedings and were unlikely to produce an acquittal on retrial because the notes have "minimal" value to the defense. At trial, Malone, an expert in hair and fibers, testified that one Caucasian pubic hair (Q-18) recovered from the debris of Bogle's pants was microscopically indistinguishable from Torres's pubic hair (K-6). This finding was consistent with Malone's report and confirmed by an examiner. Malone's bench notes, however, stated that Q-18 equaled K-7, which referred to Torres's head hair sample. Malone testified at the evidentiary hearing that this was a transcription error: his bench notes should have said that Q-18 equaled K-6. We find that no *Brady* violation has been demonstrated because Bogle has failed to establish that trial counsel attempted to obtain and the State suppressed Malone's notes. *See Peede v. State*, 955 So. 2d 480, 497 (Fla. 2007) (finding no *Brady* violation where the defense could have obtained the information in question with reasonable diligence).

E. Testimony Regarding Bogle's Pants in Evidence

Bogle asserts in his next *Brady* claim that the State suppressed the fact that Bogle's pants were placed in a drying shed after Detective Lingo's collection of the pubic hair and that Detective Lingo removed evidence from the evidence room to conduct an investigation. Bogle relies on a Hillsborough County Sheriff's Office disciplinary report

stating that Ronald Cashwell, a Crime Scene Technician, “placed damp clothing into Evidence without first ascertaining that the articles were sufficiently dried.” A written request for discipline noted that Cashwell:

should have taken extreme caution to insure that the pants were dry since crucial evidence could have been obtained and used to assist in the prosecution of the suspect. Instead, the pants could have become molded and the evidence severely damaged or destroyed.

In detailing the events, Cashwell made a written statement that “[t]he items placed in the shed are unable to be separate[d] from each other and could contaminate each other and the shed was full of other evidence drying.”

At trial, F.B.I. Agent Malone was asked whether anyone else came “into contact with the pants from the time that they were put into property until the time that you took them out to collect this evidence.” Malone answered, “No, they were sealed when I checked them out.” Malone was not asked whether anyone else came into contact with the pants throughout the whole time they were in evidence. Thus, the disciplinary report, which indicates that a Crime Scene Technician removed the pants from the evidence room after Malone collected the hairs, is consistent with Malone's trial testimony.

Bogle has not shown that the State suppressed evidence of contamination. The disciplinary report and Cashwell's statement on which Bogle relies do not show that any evidence was actually contaminated but convey that the evidence could have been contaminated or destroyed. Malone testified at the evidentiary hearing that he found no evidence of contamination on the hairs retrieved from Bogle's pants and that the disciplinary report did not cause him to change his opinion of the match. Even if Bogle met the first two prongs of *Brady*, showing favorable evidence and suppression, the materiality prong has not been satisfied. Accordingly, we find that Bogle has failed to establish a *Brady* violation.

Bogle additionally claims that prosecutor Cox violated *Giglio* because she knew Detective Lingo's testimony about the pants was false and misleading. The trial court denied this claim, finding the testimony unclear but not false. The trial court reasoned that there was no evidence presented that anyone touched the pants between the time they were sealed and placed in the evidence room until the pants were examined by Detective Lingo. Because we agree that Detective Lingo did not testify falsely, we deny this *Giglio* claim.

Bogle, 213 So. 3d at 844-45.

Since Bogle's claim has been litigated between the State and Bogle previously and has been resolved against Bogle, it is barred by the doctrine of *res judicata*. See *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 883-884 (Fla. 2012) and *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits).

This issue is also barred by the law of the case doctrine, which bars reconsideration of those legal issues that were actually considered and decided in a former appeal. *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001). The law of the case doctrine, which is designed to prevent re-litigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So. 3d 1046, 1047 (Fla. 1st DCA 2015) (citing *State v. McBride*, 848 So. 2d 287,

290-91 (Fla. 2003)). In *Zeigler v. State*, 116 So. 3d 255, 258 (Fla. 2013), this Court affirmed the denial of a second rule 3.853 motion for DNA testing because the Court had previously affirmed the denial of the first DNA motion. This Court has explained that the doctrine “prevents the same parties from relitigating issues that have already been fully litigated and determined.” *Id.* (citing *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)). The law of the case doctrine applies regardless of whether a party employs different arguments to raise the same claim. *Sireci v. State*, 773 So. 2d 34, 40-41 (Fla. 2000) (finding claims procedurally barred and noting that “to the extent that Sireci uses a different argument to relitigate the same issue, the claim remains procedurally barred”); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely variation of prior postconviction issue).

Even if not barred by *res judicata* and the law of the case doctrine, the claim was procedurally barred as successive. *See* Florida Rule of Criminal Procedure 3.851(e)(2):

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 determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted

an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).

See also Sireci v. State, 773 So. 2d 34, 41 (Fla. 2000) (finding claims procedurally barred because they either were or could have been raised in prior proceedings and noting that “to the extent that Sireci uses a different argument to relitigate the same issue, the claims remain procedurally barred.”); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (*Brady* claim barred where it was merely variation of prior postconviction issue). Bogle’s attempt to raise the same challenge to the hair evidence in a piecemeal fashion does not overcome the procedural bar.

Rule 3.851(d)(2)(B) provides that a motion for postconviction relief may be filed out of time only where there is newly discovered evidence or “the fundamental constitutional right was not established within the time period provided for in subdivision (d)(1) and has been held to apply retroactively.” Bogle’s attempt to relitigate this claim based on the issuance of another DOJ/FBI report does not constitute newly discovered evidence. As this Court recognized in *Long v. State*, 183 So. 3d 342 (Fla. 2016), the evidence provided in the 2013 OIG report concerning FBI examiner Malone's questionable methods of forensic testing was available long before the report was issued and was, therefore, untimely.

Here, Bogle, like Long, was put on notice of potential issues with Agent Malone's testimony in 2000, and the 2013 report was not "new" information, merely supplemental to the information provided in 2000. Therefore, this claim is untimely. However, unlike Long, Bogle has raised this claim and the postconviction court held an evidentiary hearing to allow him to challenge the results of Michael Malone's testing and the handling of the evidence specific to Bogle's trial. The 2013 report contains nothing beyond additional review by other examiners that in no way produces any evidence that was not available to be pursued, or that was not pursued, at the time of Bogle's extensive 3.851 evidentiary hearing. The existence of a new report does not qualify as newly discovered evidence. *See Duckett v. State*, 231 So. 3d 393 (Fla. 2017) (2014 DOJ review of Agent Malone's hair analysis did not constitute newly discovered evidence); *Johnston v. State*, 27 So. 3d 11, 21 (Fla. 2010) (declining to find the NAS report on forensic evidence constituted newly discovered evidence); *Foster v. State*, 132 So. 3d 40, 72 (Fla. 2013) (NAS report on use of forensic evidence in criminal cases did not constitute newly discovered evidence); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (holding that "new opinions" or "new research studies" contained in journal articles are not newly discovered evidence); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006) (holding American Bar Association report

published in 2006 was not newly discovered evidence because it was “a compilation of previously available information related to Florida’s death penalty system”).

B. Bogle’s claim lacks merit.

Bogle contends that in 2013 the FBI flagged Mr. Bogle’s case for review to consider whether FBI Agent Michael Malone “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.” Bogle then goes on to contend that this review concluded that Bogle’s jury and resentencing jury heard testimony that exceeded the bounds of science as to all three areas, that these new documents would have served to impeach the testimony of Malone at the evidentiary hearing and that when this, and all other, evidence is considered cumulatively, there can be no confidence that it would have returned a verdict finding Mr. Bogle guilty beyond a reasonable doubt and/or recommended a sentence of death.

Of course, the very nature of the claim belies either of those allegations because the evidence did not exist at the time of trial. Documents that did not exist at the time of trial, could not have been suppressed by the State or discovered by trial counsel. *See, Duckett v. State*, 918 So. 2d 224, 235 (Fla. 2005). Moreover, the

hair and Malone's testing were thoroughly addressed at the prior evidentiary hearing and relief was denied. Accordingly, in order to obtain successive review Bogle must satisfy the newly discovered evidence standard.

This Court, in *Johnston v. State*, 27 So. 3d 11 (Fla. 2010), explained:

In order for Johnston to obtain a new trial based on newly discovered evidence, he must meet two requirements. 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." *Jones II*, 709 So.2d at 521. Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 709 So.2d at 526 (quoting *Jones v. State*, 678 So.2d 309, 315 (Fla. 1996)). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." *Marek v. State*, 14 So.3d 985, 990 (Fla.2009) (citing *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991) (*Jones I*)).

In determining whether the evidence requires a new trial, the circuit court must "consider all newly discovered evidence which would be admissible" and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Heath v. State*, 3 So.3d 1017, 1024 (Fla. 2009) (quoting *Jones I*, 591 So.2d at 916). Once it is determined that the newly discovered evidence would be admissible, "an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence." *Jones II*, 709 So.2d at 521. "The trial court should also determine whether the evidence is cumulative to other evidence in the case" and consider "the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence." *Id.*; see also *Lowe v. State*, 2 So.3d 21, 33 (Fla. 2008).

Johnston v. State, 27 So. 3d at 18-19.

The postconviction court utilized the correct law and followed this Court's authority in rendering its decision that no relief was warranted on Bogle's claims. When considering the impact of a challenge to Malone's testimony concerning this hair, Bogle suffered no prejudice. When considered in light of the 2013 review from DOJ through the lens of the newly discovered evidence standard, the newly discovered evidence is not of "such nature that it would probably produce an acquittal on retrial or reduce his sentence." This is especially true when this Court adds to the equation, as it must, newly discovered evidence of guilt produced at the postconviction evidentiary hearing.

At Bogle's trial, FBI Agent Michael Malone testified that he examined the evidence recovered from Bogle's trousers and found one Caucasian pubic hair which microscopically matched the known pubic hair of victim Margaret Torres; it had been naturally (as opposed to forcibly) removed. (DR V6/317-18) Malone conceded that hair "is not like a fingerprint," and hair comparisons do not constitute a basis for absolute personal identification. (DR V6/313, 320).

In July of 2000, Bogle's then counsel, Terri Backhus received a letter about the OIG report explaining that the U.S. Department of Justice had conducted an

independent review of the forensic work conducted by FBI laboratory examiner Michael Malone on the evidence from the Bogle investigation in the instant case. The letter explained that Steve Robertson conducted an independent review of the Bogle evidence and his report was attached to the letter.

The issue was raised in the postconviction motion and fully explored during the evidentiary hearing. Malone and Robertson testified concerning the testing. Malone testified that he conducted the hair analysis in this case and that a pubic hair found in debris on the suspect's pants was microscopically indistinguishable from the victim Margaret Torres. He noted that there was a transcription error in his bench notes; that instead of putting down K-6 (a pubic hair), he put down K-7 (a head hair), but his final finding remained the same. (PCR V75/1455-58; 1508-10).

On cross-examination, collateral counsel questioned Malone regarding an investigation into his work by the Office of the Inspector General, and the witness testified that he had only been found to have testified falsely in one civil case. (V75/1459) Collateral counsel proceeded to question the witness regarding published opinions from this Court, *see Rhodes v. State*, 986 So. 2d 501 (Fla. 2008), and the Rhode Island Supreme Court, *see Bleau v. Wall*, 808 A.2d 637 (R.I. 2002). Because the witness was unaware of both cases, the court allowed counsel

to proffer the opinions rather than read them to the witness. (PCR V75/1459-71)

The State also presented the testimony of Steven Robertson, an expert in the field of hair analysis. Robertson testified that he was contacted by the FBI in 1999 to review FBI Agent Malone's work in approximately 150 cases, including the instant case. (PCR V88/5190-93) Robertson testified that there was an inconsistency between Malone's written report and his bench notes based on the misidentification of a pubic hair as a head hair. Nevertheless, Robertson concluded that Malone's trial testimony was consistent with his final report as to the comparison of the victim's known pubic hair to the hair found on Bogle's pants. (PCR V88/5192-97, 5228-29)

During the cross-examination of Robertson, collateral counsel attempted to question the witness on whether his review of Malone's cases demonstrated that Malone had a history of making bookkeeping errors. The prosecutor objected that it was improper impeachment and the witness indicated that the Department of Justice precluded him from testifying as to any of Malone's other casework. After hearing argument from counsel, the trial court sustained the State's objection and allowed defense counsel the opportunity to proffer Robertson's response within the limitations placed on him by the DOJ, at which time Robertson confirmed that he was not allowed to discuss Malone's other casework or he would face possible

sanctions. (PCR V88/5208-19) Thus, the record shows that the limitation on questioning by virtue of Robertson's confidentiality contract with the Department of Justice regarding his review of other cases was only during the proffer; that the court had sustained the state's objection as improper impeachment. (PCR V88/5208-19) Nothing in this appeal supports any contention that these facts have changed or that additional evidence of Malone's work in other cases is relevant, admissible or would undermine confidence in the conviction and sentence.

Key pieces of the evidence against Bogle at trial included: (1) evidence Bogle was angry with the victim, physically assaulted her, and threatened if she pressed charges "she would not live to tell about it"; (2) testimony that in the early morning hours of the night of the murder Bogle (who earlier appeared clean and uninjured) now appeared dirty, his crotch was wet, and he had scratches on his forehead; (3) the evening following the murder, Bogle was found clothed, hiding in a shower with the pants he wore the previous night on the shower floor, and he appeared to have fresh scratches on his face; (4) a hair from these pants was consistent with the victim's pubic hair; and (5) a DNA profile was created from the semen present on the victim's vaginal swab, and Bogle was in 12.5% of the Caucasian population that was a match to that profile. (DR V16/3091)

Additionally, the testimony of Bogle's experienced defense attorney, Douglas Roberts, must be considered when evaluating the potential prejudice that the introduction of the "hair match" evidence had on Bogle's trial. At the evidentiary hearing, Roberts testified that he thought Malone's testimony actually helped them. Roberts noted that Malone conceded on cross that the pubic hair that had been found on Mr. Bogle's pants had been shed naturally which aided defense theory -- contrary to violent rape. He also noted that this was consistent with Dr. Adams who never testified that it was a rape or sexual battery, and the fact that her clothing was found neatly folded at the scene which was consistent with their argument she was engaged in consensual sex. Malone also couldn't give a time frame of when the hair had been deposited on the pants. (EH/6-10-2008/261-62, 301-302) It could have been a day-a week-a year which was consistent with evidence at trial that on September 1, when Mr. Bogle was accused of forcibly entering Katie Alfonso's residence, that he removed those pants from the washing machine in Katie Alfonso's house. (EH/6-10-2008/302) He thought Malone further helped them because he pointed out there was a mixed-race hair that hadn't been identified or submitted for exam -- indicating sloppy investigation and that they never tested the shoes for soil, blood or anything else.

Roberts capitalized on this evidence during closing arguments by not only pointing out that the pants came from the washing machine at Alfonso's house but also, that she had identified them as belonging to her son and not Brett Bogle. (DR V8/575-77) He also pointed out that Malone had explained about hair transfer and that this was not the only pubic hair found on the pants -- just the only one they chose to try and match because they were focused on Brett Bogle. (DR V8/578)

Finally, Bogle's contention that a cumulative analysis requires this Court to consider all of the evidence does not provide support for his claim. Indeed, far from casting any doubt upon Bogle's guilt, the postconviction evidence in this case substantially strengthened the State's case. While Bogle attempts to conflate various minor points or contradictions surrounding the periphery of the State's case, he ignores the fact that, upon retesting with STR technology, the statistical numbers establishing Bogle's identity as the person who left the semen in the murdered victim.

Patricia Bencivenga, crime laboratory analyst in the biology DNA section of FDLE, testified that upon testing the DNA sample that was remaining after the prior RFLP testing done at the time of trial she got two profiles, one major contributor which was male and one small contributor which was a profile that matched the victim, Margaret Torres. "There was so much more male present I

could see him at all 13 areas and she present at 3.” There was no third profile, just the victim and the male contributor. She uploaded the male contributor to CODIS and hit a convicted offender sample belonging to Brett Bogle. She also requested a sample from Bogle and she ran an in-house test as a third verification. She was able to establish a DNA profile from a stain card that matched the male contributor on the vaginal swab at all 13 areas tested. The frequency of occurrence of that particular profile is approximately 1 in 45 quadrillion Caucasians. She also did DNA testing on black underwear of the victim; the profile was a mixture, one was Margaret Torres’ profile and one was consistent with the profile from Bogle. (PCR V75/1556-70) Dr. Martin Tracey confirmed her statistical findings. (PCR V81/1920, 1927)

Also ignored by Bogle is the fact that mitochondrial DNA testing confirmed that the pubic hair found on Bogle’s pants was consistent with the victim’s profile², a determination which effectively renders Bogle’s prejudice claim moot. There is no doubt that with the evidence available for a retrial, concerns with the hair analysis testimony would not produce an acquittal. Furthermore, the concern about

² See Hillsborough County case no. 91-CF-12952: 12/2/15 Notice of Filing of Results of Mitochondrial Testing.

Agent Malone’s testimony does not negate the fact that the field of hair analysis has not been discredited, and the FBI continues to use this analysis. *See Duckett v. State*, 231 So. 3d 393, 399 (Fla. 2017) Finally, and most importantly, Bogle’s semen, which was retrieved from the victim’s vagina, renders the challenged hair fiber analysis superfluous and immaterial:

At all thirteen areas tested, Bogle's DNA profile matched the DNA of the major male contributor on the vaginal swabs. The frequency of the occurrence of that profile is approximately 1 in 45 quadrillion Caucasians, one in 8.1 quintillion African–Americans, and 1 in 81 quadrillion Southeastern Hispanics. After conducting DNA testing on Torres's underwear, Bencivenga found a profile of a mixture at one area: one of Torres and one consistent with Bogle's profile. Guy Douglas was excluded in postconviction as the source of the foreign DNA profile from the vaginal swabs and excluded as a contributor to the mixed DNA profile obtained from Torres's underwear.

Bogle, 213 So. 3d at 851. Certainly, since Bogle was close enough to the victim to have his semen in her vagina, having her hair on his pants is inconsequential.

Hence, the evidence establishing Bogle as the victim’s murderer has gone up exponentially since the time of trial. *See Johnston*, 27 So. 3d at 19 (“[I]n deciding if a new trial is warranted, the trial court must consider all admissible evidence, which in this case includes the new DNA evidence matching Johnston’s profile.”). *Mazzara v. State*, 51 So. 3d 480, 485 (Fla. 1st DCA 2010); *Wright v. State*, 995 So. 2d 324, 327-28 (Fla. 2008) (Postconviction courts consider all admissible evidence

when evaluating whether a new trial is warranted, including new evidence of guilt.) Thus, even assuming there was some error in the handling of the hair, the newest report from the DOJ simply does not meet the standard for newly discovered evidence and relief should be denied.

ISSUE II:

THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE’S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *HURST v. FLORIDA* BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS.

Bogle asserts he is entitled to relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017) because his death sentence violates the Sixth Amendment to the United States Constitution. Bogle, however fails to mention that he has already raised this claim in this Court and relief has been denied. In addressing Bogle’s *Hurst/Ring* claim, this Court found that he was not entitled to relief because his sentence became final prior to the issuance of *Ring*. This Court explained:

Bogle asserts that Florida's capital sentencing scheme is unconstitutional under *Ring*, 536 U.S. 584, 122 S.Ct. 2428, and *Hurst v. Florida*, —U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). Bogle's first-degree murder conviction and sentence of death were final in 1995, before the Supreme Court decided *Ring*. We acknowledge that *Hurst v. Florida*, in which the United States Supreme Court found Florida's death penalty scheme defective to the

extent that a jury must at least “make a specific factual finding with regard to the existence of mitigating or aggravating circumstances,” supporting a death sentence in order to preserve the Sixth Amendment right to a jury trial, is an extension of *Ring*. 136 S.Ct. at 622. **Bogle is not, however, entitled to *Hurst* relief because *Hurst* does not apply retroactively to cases that were final before *Ring* was decided.** See *Asay v. State*, 210 So.3d 1, 22, 41 Fla. L. Weekly S646, S652, 2016 WL 7406538 (Fla. Dec. 22, 2016). Therefore, we deny relief on this claim.²²

Bogle v. State, 213 So. 3d 833, 855 (Fla. 2017), reh'g denied, 2017 WL 1366109 (Fla. Apr. 13, 2017) (emphasis supplied).

Since the issue of whether Bogle is entitled to *Ring/Hurst* relief has been previously litigated between the State and Bogle and has been resolved against Bogle, it is barred by the law of the case doctrine, which bars reconsideration of those legal issues that were actually considered and decided in a former appeal³. *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001). The law of the case doctrine, which is designed to prevent re-litigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So. 3d 1046, 1047 (Fla. 1st DCA 2015) (citing *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)). In *Zeigler v. State*, 116 So. 3d 255, 258 (Fla. 2013), this Court affirmed the denial

³ The issue was raised in an original habeas petition to this Court, the highest appellate court in the state.

of a second rule 3.853 motion for DNA testing because the Court had previously affirmed the denial of the first DNA motion. This Court has explained that the doctrine “prevents the same parties from relitigating issues that have already been fully litigated and determined.” *Id.* (citing *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003)). The law of the case doctrine applies regardless of whether a party employs different arguments to raise the same claim. *Sireci v. State*, 773 So. 2d 34, 40-41 (Fla. 2000) (finding claims procedurally barred and noting that “to the extent that Sireci uses a different argument to relitigate the same issue, the claim remains procedurally barred”); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely variation of prior postconviction issue).

This issue is also barred by the doctrine of *res judicata*. See *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So. 3d 872, 883-884 (Fla. 2012) and *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (discussing application of *res judicata* to claims previously litigated on the merits). Accordingly, this claim may not be relitigated here and the instant motion should be summarily dismissed or denied. Since this Court has determined that defendants whose sentences were final prior to the issuance of *Ring* are not entitled to *Hurst*

relief, the issue raised herein has already been decided.

Even if not barred by law of the case or res judicata, the claim would also be procedurally barred from review in this successive motion. See *Sireci v. State*, 773 So. 2d 34, 41 (Fla. 2000) (finding claims procedurally barred because they either were or could have been raised in prior proceedings and noting that “to the extent that Sireci uses a different argument to relitigate the same issue, the claims remain procedurally barred.”); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (*Brady* claim barred where it was merely variation of prior postconviction issue).

Moreover, Rule 3.851(d)(2)(B) provides that a motion for postconviction relief may be filed out of time only where there is newly discovered evidence or “the fundamental constitutional right was not established within the time period provided for in subdivision (d)(1) and has been held to apply retroactively.” As this Court made clear in denying Bogle’s last Rule 3.851 appeal, *Hurst v. Florida* does not apply retroactively to cases like Bogle’s that were already final when the United States Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *Bogle v. State*, 213 So. 3d at 855. See also *Hamilton v. State*, 236 So. 3d 276 (Fla. 2018).

Despite the Florida Supreme Court’s unequivocal rulings on the issue, Bogle claims his motion is timely and that *Hurst* can be applied to his case. Specifically,

Bogle argues that *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) in fact created two sets of capital defendants entitled to seek relief under *Hurst*: (1) all cases which were not yet final when *Ring* was decided in June 2002; and (2) all cases where the defendants specifically preserved a *Ring* issue, regardless of the date of finality. Bogle claims to be a member of the second class, and therefore entitled to relief under *Hurst*.

However, Bogle’s interpretation is not supported by a reasonable reading of *Mosley*. Although the Florida Supreme Court analyzed the issue under both the “fundamental fairness” principles of *James v. State*, 615 So. 2d 668 (Fla. 1994), and the traditional retroactivity factors of *Witt v. State*, 387 So. 2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980), the opinion gives no indication that any defendant who has challenged the lack of jury factfinding at sentencing at any time can now seek relief under *Hurst*. To the contrary, *Mosley* cited to and built on *Asay v. State*, 210 So. 3d 1 (Fla. 2016), where the court expressly held that *Ring* does not apply to cases that were final prior to *Ring*. *Mosley*, 209 So. 3d at 1274. Accordingly, the time-of-finality factor was in play prior to *Mosley* even being decided and applies to both retroactivity analyses conducted in that case. *Id.* at 1283 (Thus, *Mosley*, whose sentence was final in 2009, falls into the category of defendants who should receive the benefit of *Hurst*.”) (emphasis added).

If *Mosley* itself is not clear on the issue, in *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 512 (2017), this Court reaffirmed its previous holdings in which it held that *Hurst v. Florida* as interpreted by *Hurst v. State* is not retroactive to defendants whose death sentences were final prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002).

Despite Bogle's complaints that the result is not fair, this Court's rulings are clear. There is no language in *Hitchcock* or any other case which supports the suggestion that retroactivity is to be reconsidered anew in every case. The rules of procedure counsel against such action, since a successive motion is only timely once a new constitutional decision has been affirmatively held to be retroactive. This rule is meaningless if retroactivity is to be a case-by-case, individualized determination. Accordingly, this claim is untimely. *Hamilton v. State*, 236 So. 3d 276 (Fla. 2018).

Additionally, the unanimous verdict by Appellant's jury establishing his guilt of his previous violent felony, an aggravator under well-established Florida law, was sufficient to meet the Sixth Amendment's fact-finding requirement. *See Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible

for the death penalty); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is “mostly a question of mercy.”); *Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (recognizing the “narrow exception . . . for the fact of a prior conviction” set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) (“The use of “aggravating circumstances” is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase”). Nevertheless, even if this Court were to find Sixth Amendment error, it would be harmless beyond a reasonable doubt in this case as *Hurst* errors are subject to harmless error analysis. *See Hurst v. Florida*, 136 S. Ct. at 624; *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967). Here, an aggravator found by the trial court was either uncontestable (as unanimously found by the jury at the guilt phase in the case of the burglary conviction) or established by overwhelming evidence.

Bogle’s next suggestion that *Caldwell v. Mississippi*, 472 U.S. 320 (1985), mandates relief in this case is patently without merit. First, any complaint about

jury instructions at this point is untimely and procedurally barred from consideration in this successive postconviction motion. *Troy v. State*, 57 So. 3d 828, 838 (Fla. 2011). In addition, to establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury “improperly described the role assigned to the jury by local law.” *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). The jury was properly instructed on its role based on the law existing at the time of Bogle’s trial. It is ludicrous to suggest that the jury should have been instructed in accordance with a constitutional change in the law which occurred long after the trial.

Finally, *Hurst* relief is not being granted in an arbitrary and capricious manner. Bogle invokes the Eighth Amendment to the United States Constitution and claims that the Florida Supreme Court’s adoption of partial retroactivity is unconstitutional. However, the United States Supreme Court has acknowledged that the issue of postconviction retroactivity, even for federal constitutional violations, is primarily a matter of state law. *Danforth v. Minnesota*, 522 U.S. 264, 288 (2008). There is no United States Supreme Court Eighth Amendment decision which supports Bogle’s claim.

Bogle is not being treated any differently than similarly situated capital defendants. In fact, Bogle should be treated exactly the same as *similarly situated*

capital defendants. That is, all of his claims premised on *Hurst* should be rejected because his death sentence was final when the decision in *Ring* was announced. *Hitchcock*.

In the traditional sense, new rules are applied retroactively only to cases which are not yet final. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (“a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past”); *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). Under this “pipeline” concept, *Hurst* would only apply to the cases which were not yet final on the date of the decision in *Hurst*. Even under the “pipeline” concept, cases whose direct appeal was decided on the same day might have their judgment and sentence become final on either side of the line for retroactivity. Additionally, under the “pipeline” concept, “old” cases where the judgment and/or sentence has been overturned will receive the benefit of new law as they are no longer final. Yet, this type of traditional retroactivity is proper and not violative of the Eighth or Fourteenth Amendment.

The only difference between this more traditional type of retroactivity and the retroactivity implemented by this Court is that it stems from the date of the

decision in *Ring* rather than from the date of the decision in *Hurst*. In moving the line of retroactive application back to *Ring*, this Court reasoned that, since Florida's death penalty sentencing scheme should have been recognized as unconstitutional upon the issuance of the decision in *Ring*, defendants should not be penalized for time that it took for this determination to be made official in *Hurst*. Certainly, this Court has demonstrated "some ground of difference that rationally explains the different treatment" between pre-*Ring* and post-*Ring* cases. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *see also Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (To satisfy the requirements of the Fourteenth Amendment, "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").

Unquestionably, extending relief to more individuals, defendants who would not receive the benefit of a new rule under the pipeline concept because their cases were already final when *Hurst* was decided, cannot violate the Eighth or Fourteenth Amendment. Thus, just like the more traditional application of retroactivity, the *Ring*-based cutoff for the retroactive application of *Hurst* is not in violation of the Eighth or Fourteenth Amendment. The postconviction court correctly determined that *Hurst* is not retroactive to Bogle. For all these reasons,

Bogle is not entitled to relief.

ISSUE III

WHETHER THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE’S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT UNDER *HURST* v. *STATE* BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS.

Bogle also asserts another argument of constitutional error based on the Eighth Amendment, but this claim similarly does not warrant relief. As the United States Supreme Court has never held that the Eighth Amendment requires a unanimous jury recommendation, this claim is not only procedurally barred⁴, it is meritless.

In *Spaziano v. Florida*, 468 U.S. 447, 463-64 (1984), the United States Supreme Court held that the Eighth Amendment is not violated in a capital case when the ultimate responsibility of imposing death rests with the judge. In deciding *Hurst v. Florida*, the United States Supreme Court analyzed the case pursuant to Sixth Amendment grounds and overruled *Spaziano* to the extent that it allows a sentencing judge to find aggravating circumstances independent of a jury’s factfinding. *Hurst v. Florida*, 136 S. Ct. at 618. The Court did not address the issue

⁴ The State’s procedural bar argument as to all of Bogle’s *Hurst/Ring* claims (issues II to IV) is laid out in issue II.

of any possible Eighth Amendment violation, and similarly, it did not overrule *Spaziano* on Eighth Amendment grounds.

While the Florida Supreme Court initially included the Eighth Amendment as a reason for warranting unanimous jury recommendations in its *Hurst* decision, the court did not, and cannot, overrule the United States Supreme Court's surviving precedent in *Spaziano*. In addition, Florida has a conformity clause in its state constitution that requires the state courts to interpret Florida's prohibition on cruel and unusual punishments in conformity with the United States Supreme Court's Eighth Amendment jurisprudence. Art. I, § 17, Fla. Const.; *Henry v. State*, 134 So. 3d 938, 947 (Fla. 2014) (noting that under Article I, section 17 of the Florida Constitution, Florida courts are "bound by the precedent of the United States Supreme Court" regarding Eighth Amendment claims). Given that there is no United States Supreme Court case holding that the Eighth Amendment requires the jury's final recommendation be unanimous, Bogle's argument must fail.

While the Florida Supreme Court found unanimity necessary under the state and federal constitutions in *Hurst*, as previously demonstrated, that case is not retroactive to Bogle.

Finally, reliance on any purported fairness in jury factfinding is misplaced. Just like *Ring* did not enhance the fairness or efficiency of death penalty

procedures, neither does *Hurst*. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005). As the United States Supreme Court has explained, “for every argument why juries are more accurate factfinders, there is another why they are less accurate.” *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Because the accuracy of Bogle’s death sentence is not at issue, fairness does not demand retroactive application of *Hurst*.

The postconviction court correctly determined that *Hurst* is not retroactive to Bogle, as this Court has made it very clear that *Hurst* should not be applied retroactively to cases in which the death sentence became final before the issuance of *Ring*. Bogle’s case squarely falls within this parameter. Each *Hurst*-related claim presented in this appeal is premised on *Hurst* being applied to Bogle’s case, which is contrary to established law. Therefore, all relief must be denied.

ISSUE IV:

THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED BOGLE'S CLAIM THAT POSTCONVICTION DEFENDANTS SENTENCED PURSUANT TO FLORIDA STATUTE § 921.141 WERE NOT CONVICTED OF CAPITAL MURDER BECAUSE THE JURY DID NOT UNANIMOUSLY FIND ALL OF THE ELEMENTS REQUIRED TO CONVICT OF CAPITAL MURDER BECAUSE IT WAS PROCEDURALLY BARRED AND MERITLESS.

Bogle asserts an argument based on the revisions made to § 921.141. However, this claim is procedurally barred⁵ and meritless. The postconviction court correctly determined that § 921.141 is not retroactive to Bogle. Florida's death penalty statute, Fla. Stat. § 921.141 (2017), was amended after, and in comport with, the decisions in *Hurst v. Florida* and *Hurst v. State*. Neither *Hurst* nor the new statute create a new crime with new elements. The same conduct remains prohibited. Only the process by which the sentence is determined has been altered. No substantive change has occurred.

In general, there is a presumption against retroactive application of statutes absent an express statement of legislative intent. *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 195 (Fla.

⁵ The State's procedural bar argument as to all of Bogle's *Hurst/Ring* claims (issues II to IV) is laid out in issue II.

2011). There is no express statement that the legislature intended that chapter 2017-1 be applied retroactively, and thus this presumption cannot be rebutted. *See also* Senate Bill Analysis and Fiscal Impact Statement, SB 280, Feb. 21, 2017, at 6. (noting that the Florida Supreme Court's retroactive application to post-*Ring* decisions will "significantly increase both the workload and associated costs of public defender offices for several years to come"). Further,

no U.S. Supreme Court decision holds that the failure of a state legislature to make revisions in a capital sentencing statute retroactively applicable to all of those who have been sentenced to death before the effective date of the new statute violates the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

Lambrix v. Sec'y, Fla. Dept. of Corr., 872 F.3d 1170, 1183 (11th Cir.), *cert. denied*, 138 S. Ct. 312 (2017).

Since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute. Appellant's judgment became final in 1995 and he has not received a new guilt or penalty phase since that time. Thus, the 2017 enactment of changes to the capital sentencing statute would not be

applicable to Appellant's case unless Appellant were to receive a new guilt and/or penalty phase.

The changes to Florida's death penalty statute were made in the aftermath of *Hurst* and implement the changes from *Hurst*. The changes include requiring a unanimous jury vote for a recommendation of death instead of a majority vote, requiring specific findings from the jury regarding the existence and sufficiency of the aggravation and the weighing of aggravation against mitigation, and disallowing judicial override of a jury's recommendation of life. As discussed above, these are procedural changes not substantive ones.

These changes to the sentencing procedure did not create a new offense. The class of persons who are death eligible and the range of conduct which causes those defendants to be death eligible did not change. The aggravating factors necessary to qualify a defendant as eligible for the death penalty were not changed. In fact, the specific aggravators used in Appellant's case had been in place for decades. The only changes made for a death recommendation were the requirement of specific jury findings of unanimity for the existence and sufficiency of the aggravating factors and that they outweigh mitigation.

Appellant also argues that two of the elements identified in *Hurst v. State* were not found proven beyond a reasonable doubt in his case, "sufficiency of the aggravators and whether they outweigh the mitigators." (*IB* at 58). However, the only requirements of proof beyond a reasonable doubt are the elements for a finding of guilt for first-degree murder and that the aggravating factors were proven. Fla. Stat. § 921.141(2)(a) (2017) ("the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor ..."). The standard of proof for guilt has long been proof beyond a reasonable doubt, and certainly was at Appellant's trial. *See Miles v. United States*, 103 U.S. 304, 312 (1880). Similarly, the standard of proof for proving aggravating factors was beyond a reasonable doubt at Appellant's trial. *See Floyd v. State*, 497 So. 2d 1211, 1214-15 (Fla. 1986); *Zeigler v. State*, 580 So. 2d 127, 129 (Fla. 1991); *Finney v. State*, 660 So. 2d 674, 680 (Fla. 1995). Thus, all elements which required findings beyond a reasonable doubt were in fact found beyond a reasonable doubt at Bogle's trial.

Similarly, the requirement that aggravators be sufficient and outweigh mitigation has long been a requirement of Florida law. "The death penalty may be imposed only where sufficient aggravating

circumstances exist that outweigh mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308, 313 (1991); *citing* Fla. Stat. § 921.141(3) (1985). The 2017 change to the statute merely requires that the jury make these findings unanimously in order for the defendant to be eligible to receive a death sentence.

As related to the finding that aggravation is sufficient, *Hurst* did not ascribe a standard of proof. *Hurst*, 202 So. 3d at 54. The Eighth Amendment requires that "States must give narrow and precise definition to the aggravating factors that can result in a capital sentence." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). The State of Florida has a list of sixteen aggravating factors enumerated in the statute. Fla. Stat. § 921.141(6) (2017). These aggravating factors have been deemed sufficient to impose the death penalty by virtue of their inclusion in the statute. Any one of these aggravating factors is sufficient to cause a defendant to be eligible to receive a sentence of death. Thus, if one of these enumerated aggravating factors has been proven beyond a reasonable doubt, any Eighth Amendment concerns have been satisfied. However, the weight that a juror gives to the aggravator based on the evidence is not something that can be defined by a beyond-a-reasonable-doubt standard.

CONCLUSION

The postconviction court entered a comprehensive written order, with attached exhibits, setting out the basis for the summary denial of Bogle's claims and its findings are supported by the record. The files and records of the case conclusively show that Bogle is not entitled to any relief, and the successive motion to vacate was properly denied without an evidentiary hearing. In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying relief.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL, STATE OF FLORIDA

/s/ Lisa Martin

LISA MARTIN

Assistant Attorney General

Florida Bar No. 72138

Office of the Attorney General

3507 East Frontage Road, Suite 200

Tampa, Florida 33607-7013

Telephone: 813-287-7910

capapp@myfloridalegal.com [*and*]

lisa.martin@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of July 3rd, 2018, I filed the foregoing with the Clerk of Court by using the E-Portal Filing System which will send a notice of electronic filing to the following: Linda McDermott, Esquire, McClain & McDermott, P.A., 20301 Grand Oak Boulevard, Suite 118-61, Estero, Florida 33928, **lindammcdermott@msn.com**

/s/ Lisa Martin
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Lisa Martin
COUNSEL FOR APPELLEE