CASE NO. SC17-2151

LOWER COURT CASE NO. 91-12952

BRETT A. BOGLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Bogle has presented several issues which involve mixed questions of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. *See Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under *Porter v. McCollum*, deference is given only to historical facts. All other facts must be viewed in relation to how Bogle's jury would have viewed those facts. *See Porter v. McCollum*, 130 S.Ct. 447 (2009).

REQUEST FOR ORAL ARGUMENT

Bogle has been sentenced to death. The resolution of the issues in this action will determine whether Bogle lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Bogle, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE[1]

On October 2, 1991, Brett Bogle was indicted for first degree murder, burglary of a dwelling with assault or battery, retaliation against a witness, and robbery (R. 24-26). Trial commenced on September 28, 1992. The trial court entered a judgment of acquittal as to the robbery charge (R. 181). Bogle was found guilty as to the remaining charges (R. 179-80). Subsequent to a penalty phase, the jury recommended death by a vote of 7 to 5 (R. 182). However, on December 22, 1992, the trial court granted a motion for new trial as to the penalty phase (R. 217).

On February 8, 1993, a second penalty phase commenced. The jury recommended death by a vote of 10 to 2 (R. 234). On February 15, 1993, Bogle was sentenced to death (R. 261-67). On direct appeal, this Court affirmed Bogle's convictions and sentences. *Bogle v. State*, 655 So. 2d 1103 (Fla. 1995). Bogle filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on November 13, 1995. *Bogle v. Florida*, 516 U.S. 978 (1995).

On March 18, 1997, Bogle filed a Rule 3.851 motion in the circuit court. Following several amendments and an interlocutory appeal, an evidentiary hearing was held over a series of dates, commencing on June 9, 2008 and concluding on August 4, 2010.

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[1]The following will be utilized to cite to the record: "R. _____" – record on direct appeal; "T. ___ " – transcript of the trial; "PC-R. ___" – record on postconviction appeal; "PC-T. ___." - transcript of postconviction proceedings; "Ex. ___." – exhibits introduced during the postconviction evidentiary hearing; "R2. ___" - record on appeal from the successive postconviction motion.

On October 25, 2011, the circuit court denied Bogle's Rule 3.851 motion. Bogle filed a motion for rehearing, which was denied on November 16, 2011. Bogle timely appealed and briefing occurred in this Court.

On September 7, 2013, Bogle received information from the United States Department of Justice (DOJ). The information related to the FBI's review of Agent Michael Malone's testimony at both Bogle's trial and resentencing proceeding. According to the FBI, Bogle's jury repeatedly heard testimony that "exceeded the bounds of science".

Based on the information disclosed by the DOJ, Bogle's counsel also learned that documents surrounding a 1997 initial investigation and review of Malone had been disclosed to journalists pursuant to a FOIA request. Bogle was able to gain access to the documents in October, 2013.

On January 23, 2014, Bogle filed a second Rule 3.851 motion based upon the 2013 DOJ review and the documents he obtained relating to the initial DOJ review (R2. 159-92). The circuit court ultimately held Bogle's motion in abeyance pending his appeal to this Court.

On February 9, 2017, this Court affirmed the denial of relief as to Bogle's initial postconviction motion. *Bogle v. State*, 213 So. 3d 833 (Fla. 2017).[2] Bogle filed a motion for rehearing, which was denied on April 13, 2017.

On April 26, 2017, Bogle filed a federal habeas petition in the Middle District of Florida. Bogle's petition is currently

[2]Bogle also filed a state habeas petition, which was denied by this Court in the same opinion.

pending.

Bogle subsequently amended his second postconviction motion on December 20, 2016 and May 19, 2017, with claims related to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016) (R2. 283-326; 338-415).

On June 12, 2017, the circuit court held a case management conference. The court took the matter under advisement, but scheduled an evidentiary hearing for October 4, 2017.

On September 15, 2017, Bogle requested a continuance of the evidentiary hearing, due to effects related to Hurricane Irma (R2. 445-47). Bogle's counsel was informed that the hearing would be rescheduled at a status hearing in October.

On September 25, 2017, the circuit court summarily denied Bogle's second Rule 3.851 motion (R2. 448-676). Bogle filed a motion for rehearing, which was denied by the circuit court on November 9, 2017 (R2. 734-35).

On October 10, 2017, Bogle filed a third postconviction motion based on memos he received regarding Agent Malone while preparing for the since-cancelled October 4, 2017 evidentiary hearing (R2. 677-700). On January 22, 2018, the circuit court issued an order holding the motion in abeyance pending the conclusion of Bogle's second postconviction appeal or this Court's relinquishment of jurisdiction (R2. 756-57).[3]

On December 8, 2017, Bogle filed a notice of appeal as to the circuit court's denial of his second Rule 3.851 motion. This

[3]On April 11, 2018, Bogle requested that this Court relinquish jurisdiction to allow the circuit court to consider Bogle's third motion in conjunction with his second motion. This Court denied Bogle's motion on May 25, 2018.

appeal follows.

STATEMENT OF THE FACTS

A. INTRODUCTION

For more than twenty-five years since his conviction, Bogle has maintained his innocence. He was convicted in 1992 and sentenced to death in 1993 because the State, through "the greatest crime laboratory in the world", misled the jury about the hair analysis. Over two decades later, the FBI publicly conceded for the first time that its microscopic hair analysts had no scientific basis to testify that hair evidence collected from a criminal defendant came from or even likely came from a particular victim. The FBI and DOJ has audited thousands of criminal cases in which their agents testified to identify three specific types of errors made by FBI hair examiners. All three types of errors exist in this case and establish that expert testimony in Bogle's case was scientifically invalid, false and misleading.

B. THE TRIAL

During Bogle's trial, a critical piece of evidence presented by the State concerned a hair found on Bogle's clothing. FBI Agent Michael Malone outlined his extensive training in hair analysis, telling the jury that he had given hundreds of lectures, published articles and testified four hundred and fifty times (T. 304-05). Malone also stated:

> Now, I've been doing this for eighteen years and I've looked at hairs from thousands and thousands of people over that time and I've only had three occasions now in eighteen years where I had hairs from two different people that I looked at and I could not tell apart.

(T. 313-14).

Malone testified that he examined and compared the contents of State's Exhibit 13, which was the debris from Bogle's pants, with the known head hair and pubic hair from the victim, Margaret Torres (T. 317).[4] According to Malone, there was a single "Caucasian pubic hair which microscopically matched the pubic hairs of Margaret Torres. In other words, it was microscopically indistinguishable from her's and, therefore, I concluded this one pubic hair from the pants was consistent with coming from Margaret Torres." (T. 317-18). Malone also testified that the hair was shed naturally. All of the other hairs taken from Bogle's pants and other items were his (T. 328).

Following Bogle's conviction, both the trial court and this Court relied upon Malone's testimony in sentencing Bogle to death and in upholding his conviction. In finding the aggravating factor of committed while engaged in the commission of a sexual battery, the trial court relied in part on the finding that "a pubic hair found on the victim's pants, in the crotch area, was consistent with the pubic hair of the victim." *Bogle*, 655 So. 2d at 1108.[5] And this Court in its opinion affirming Bogle's conviction stated that "a pubic hair found on the crotch area of Bogle's pants matched the victim's." *Id.* at 1105.

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[4]Prosecutor Karen Cox showed Malone State's Exhibit 13 which he identified as "a large manilla envelope, inside it was originally a small white envelope and inside of these envelopes were debris that was reported to me as being from the pants of Mr. Bogle." (T. 316).

[5]During her opening statement at the second penalty phase, prosecutor Cox told the jury that Torres' pubic hair was found "in the crotch of the pants" of Bogle (T. 1157).

C. POSTCONVICTION PROCEEDINGS

During Bogle's postconviction evidentiary hearing, extensive evidence was presented that had not been heard by the jury, either as a result of the State's failure to disclose, trial counsel's failure to adequately investigate and prepare, and or through newly discovered evidence. This evidence included the following:

1. Marcia Turley

Bogle presented compelling evidence that someone other than him killed Torres. Indeed, an individual named Guy Douglas was a target of investigation of Bogle's defense (PC-T. 594). Notes from the prosecutor, Karen Cox, reflect she had been provided information that Douglas confessed to involvement in the crime:

> Marcia Bowerly, sister of Jeane Burile, 6903 Michigan Avenue, Gibsonton, FL
>
> Guy Douglas 92-7731 capias
>
> talk to re: **Guy Douglas confessed to being involved.**

(D-Ex. 2)(emphasis added). The information contained therein was not disclosed to trial counsel (PC-T. 593-94).

Cox testified that she was unsure as to when or how she came into possession of the information that Douglas had confessed (PC-T. 425-26). However, Cox's file reflects that she was involved in the prosecution of Douglas where he had viciously beaten a pregnant Marcia Baurle as early as May 22, 1992 (*See* D-Exs. 7, 8).[6] Indeed, Cox had an investigative subpoena issued for Marcia to meet with her on August 5, 1992 (PC-T. 430, D-Ex. 5).

[6]At the time of the prosecution of Bogle, Marcia's married name was "Turley". However, she used her maiden name of Baurle because she was intermittently separated from her husband.

As Bogle's trial approached, Cox's file makes clear that she or someone with the State spoke to Marcia and that Marcia had been the source of the information regarding Douglas' confession and involvement in Torres' murder. Just days before Bogle's trial was to begin, local attorney Wayne Timmerman[7] returned a call from Cox (D-Ex. 9). At the evidentiary hearing, notes reflecting a return phone call from Timmerman to Cox were explained: In 1991, Marcia became pregnant with Douglas' baby. Marcia was in fear of Douglas due to her knowledge of his involvement in killing Torres. She decided to place her child for adoption and contacted Timmerman (PC-T. 1026). Though Timmerman did not handle family law matters, he referred Marcia to another attorney, Elizabeth Hapner, with whom he shared office space (PC-T. 5255). However, Marcia confusedly reported that she was represented by Timmerman in the adoption proceedings and she reported that she had told her attorney about her reasons for giving up her baby and what she knew about Douglas' involvement in Torres' killing.[8]

Marcia told Cox that she had spoken to her attorney about Douglas' involvement in killing Torres and Cox attempted to verify the information. Cox did not disclose the information. Cox also attempted to verify the information with Marcia's husband, Gary Turley (*See* D-Ex. 15).

Had Cox disclosed the information Marcia possessed, the defense would have learned that Marcia and Douglas were dating in

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[7]Wayne Timmerman is the same person as the Honorable Wayne S. Timmerman who presided over Bogle's evidentiary hearing.

[8]Hapner recalled that the father may have committed a murder in the Gibsonton area in 1991 (PC-T. 5258).

1991 (PC-T. 491-92). In September 1991, Marcia lived at the Gables Motel and worked at the bar (PC-T. 493-94). Marcia met Bogle on the night of the crime (PC-T. 494). Marcia observed scratches on Bogle's face and forehead, that he had difficulty walking and was wearing a sling (PC-T. 494, 530). Bogle explained that he had been involved in a car accident (PC-T. 494). In the early evening, Marcia, Douglas, Bogle and a girl named "Trish" went to the Red Gables bar for drinks and proceeded to Club 41 (PC-T. 495-96). When the foursome arrived, they played pool for awhile and then Marcia sat at the bar (PC-T. 497). Marcia recalled that later, she and Douglas argued and she decided to leave (PC-T. 498). Marcia, who had been drinking, went out to the parking lot and fell asleep in a car (*Id.*). When she awoke, she entered the bar, had a glass of water, used the restroom and left Club 41 to walk to the motel (PC-T. 499).

While walking back to the motel, Marcia was approached by a police officer who asked for identification (PC-T. 500). Douglas walked by them but denied knowing Marcia (PC-T. 501). The police officer gave Marcia a ride to the motel (*Id.*). Marcia fell asleep but was awakened by Douglas entering the room (PC-T. 502). The next time Marcia woke up, it was daylight and Douglas was coming out of the shower (PC-T. 503). Marcia's sister, Jeanne, also saw Douglas coming out of the bathroom, holding his clothes in his arms (PC-T. 826). Marcia and Douglas argued briefly and he told her to "shut the fuck up bitch." (PC-T. 504).

Later, after learning that Torres had been killed, Douglas told Marcia that Bogle had been arrested, but he [Douglas] did not have to worry because he had been with Marcia all night (PC-

T. 505). Marcia was shocked because he was not with her all night and when she said this to Douglas, "[h]e told me that he was with me all night and I needed to – that I didn't need to say anything other than that or they would be lucky if they found my body." (*Id.*). That same day Marcia moved out of the motel and left her employ (PC-T. 505, 830). She was frightened about what Douglas may do to her if she did not provide him with an alibi and believed that his threat was in relation to Torres' murder (PC-T. 513, 523). Jeanne confirmed that Douglas had told Marcia she should supply an alibi for him and that Marcia was "scared to death" of Douglas based on what happened (PC-T. 827).

Marcia's recollection was hazy as to what else Douglas told her and what she observed on the night of the crime, but she did recall speaking to her sister, her husband, and others about Douglas (PC-T. 506-07). In fact, Jeanne recalled that Marcia had told her that the clothes Douglas held as he was leaving the motel were bloody (PC-T. 827). After Marcia learned that she was pregnant with Douglas' baby, she decided to place the child for adoption because she did not want to have anything to do with Douglas after he had threatened her or to raise a child with such a violent person (PC-T. 513-14).

In 1992, while pregnant, Douglas beat Marcia and told her "to quit running [her] mouth." (PC-T. 518). Marcia assumed that her sister had mentioned that Marcia had told her about what she saw on the night of the crime because Douglas and her sister were together the night before the beating occurred (PC-T. 518-19).

Gary Turley remembered the night of September 12, 1991. He recalled seeing Douglas leaving Club 41, after dark, in his truck

with Torres (PC-T. 1013). They headed north from Club 41 (PC-T. 1014-15). After going into Club 41 to look for Marcia, Turley left and saw Bogle get into another car with a dark-haired, heavy-set female (PC-T. 1016). Turley observed that car head south from Club 41 (PC-T. 1016). When Turley passed the Beverage Barn, he saw what he thought was Douglas' truck in the parking lot (PC-T. 1017). Sometime later, Marcia told Turley that Torres had been killed; Marcia was hysterical because Douglas had threatened her and she was scared (PC-T. 1019).

Patricia Bowmen, whose maiden name was Diaz, was the "Trish" that spent time with Bogle on the night of September 12, 1991 (PC-T. 1143). At this time Bowmen had dark hair, weighed over 200 pounds and was 5 feet 2 inches tall (PC-T. 1144-45). She considered herself heavy-set (PC-T. 1145). Law enforcement wanted to speak to her because it was believed that Bowmen gave Bogle a ride home on the night of the crimes (D-Ex. 55). Bowmen remembered the sequence of events consistently with Marcia (PC-T. 1143-44). Bowmen also testified that she had driven Bogle home from the club in the morning hours of the 13th (PC-T. 1145). At the time, Bogle was staying with Douglas at his trailer (*Id.*). A detective came to see Bowmen the next day and she recalled telling him that she had driven Bogle home (*Id.*).

Bogle also presented evidence that in a sworn deposition, Roger Kelly testified that Torres was drinking and dancing with a man – not Bogle (D-Ex. 24). As Kelly was leaving Club 41, he saw Torres outside standing next to the dumpster arguing back and forth with a man (*Id.*). Kelly maintained that Torres was arguing with Douglas (*Id.*). Bogle was not present during the argument.

Finally, even before the evidence concerning Douglas came to light, Cox was informed that Katie Alfonso, Margaret Torres' sister, had called the victim's advocate to report that there were two people involved in killing Torres (D-Ex. 1). Though Cox believed that this was the type of information she would want to investigate, she did not disclose the information to the defense.

2. Forensic Issues

a. Hair

At trial, Cox presented evidence that a pubic hair that matched Torres had been discovered on Bogle's pants. However, at the evidentiary hearing, Detective Lingo admitted that his trial testimony concerning the storage of evidence and collection of the hair was not accurate (PC-T. 1404). The prosecution failed to reveal that after Crime Scene Technician Ron Cashwell collected Bogle's pants:

> CST Cashwell placed the evidence in the drying shed where they were left to air dry for approximately six (6) hours, when he removed them and placed them in the Evidence Room on September 14, 1991. ...
>
> On September 17, 1991, Detective Larry Lingo checked the pants out of the Evidence Room for investigative purposes. He found the pants to still be wet. Also, on September 17, 1991, CST Don Hunt removed the pants from the Evidence Room and air dried them until September 18, 1991 when he placed them back in the Evidence Room.

(D-Ex. 12). In Cashwell's own written statement he noted: "The items placed in the [drying] shed **are unable to be separated from each other and could contaminate each other and the shed was full of other evidence drying.**" (D-Ex. 12)(emphasis added).

At the hearing, it was also revealed that Lingo was removing evidence from the secure evidence room to conduct "investigation"

(*See* S-Ex. 6; D-Ex. 60). Though Lingo had no training in the collection of evidence and there were crime scene technicians who were specially trained to collect and maintain evidence (PC-T. 1371), he took it upon himself to remove the white pants as well as evidence collected from the victim during the autopsy (*see* D-Ex. 12; S-Ex. 6). During the evidentiary hearing, Lingo could not explain why he had removed the evidence (PC-T. 1375). It was during this "investigation" that Lingo, who had no training in the comparison of hairs, happened to find what he described as a "pubic hair" on Bogle's pants.[9]

Lingo's testimony about what he collected from Bogle's pants was never consistent. At one point he indicated that he happened upon a single hair which he claimed he collected individually (D-Ex. 12); later he said he had collected several hairs. Malone testified that the envelope he received with the hair contained several hairs, fibers, grass and dirt.[10]

Bogle also presented evidence that in 1997, the Department of Justice, Office of the Inspector General, completed an investigation of the FBI Lab which criticized the work of thirteen examiners, including Malone.[11] Bogle's case was

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[9]Lingo admitted that he would not be able to tell the difference between a pubic hair and a hair that originated from a leg, arm, the chest, neck or any other body area (PC-T. 1376, 1406).

[10]Bogle told Lingo that his pants were dirty because he fell in a ditch (PC-T. 1407).

[11]According to the report, Malone was demoted and transferred from the Hairs and Fibers Unit in 1994. The Inspector General also found that Malone had testified falsely and outside his area of expertise in the Hastings matter (*See* Office of Inspector General's Report: The FBI Laboratory, April 1997, p.

submitted for review by Steve Robertson, an independent examiner, who determined that Malone's documentation was insufficient to conclude whether the analysis was done in a scientifically reliable manner (S-Exs. 5, 5A), and that Malone's testimony as to the Q 18 "match" to the victim's pubic hair was inconsistent with Malone's bench notes that indicated a hair in Q 18 "matched" the victim's head hair (S-Ex. 5 and 5A, PC-T. 5196).[12] Robertson also noted that Malone's bench notes were not adequately documented and inconsistent with his report (S-Ex. 5 and 5A).

In addition, at the evidentiary hearing, Dr. Terry Melton, an expert in mitochondrial DNA (mtDNA) analysis, testified that Malone overstated the results of his comparisons (PC-T. 1090).[13] Moreover, since the time of Bogle's trial, independent studies have demonstrated that hair comparison has a high error rate, or false positive rate, generally between 5 - 10 percent (PC-T. 1093; *see also* Def. Exs. 38 and 39). Dr. Melton testified that it is not uncommon for microscopists to determine that hairs "match", but mtDNA testing demonstrates that the hairs do not match (PC-T. 1092-93). And, it is no longer acceptable to

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21).

[12]At the evidentiary hearing, the State attempted to cure the problem by presenting the testimony of Malone that he made a transcription error as to the "K7", instead meaning "K6". This testimony was pure speculation and logically, if a transcription error occurred, it could have just as easily been an error in writing the "PH" for pubic hair rather than "HH" for head hair.

[13]The State objected to Dr. Melton's testimony as to the error rates and unreliability of hair analysis. The circuit court sustained the objection and refused to allow Dr. Melton's testimony, so Bogle proffered her deposition (*See* PC-T. 1104, D-Ex. 40).

characterize microscopic hair comparisons as matching. Today, a confirmatory DNA test is required to characterize a comparison as including an individual as being the donor of the hair (PC-T. 1094).

b. DNA

i. The DNA profile from the blood beneath Torres' fingernails

At the postconviction evidentiary hearing, Bogle presented the results of YSTR DNA testing of the victim's fingernail cuttings. DNA Analyst Huma Nasir testified:

> YSTR testing is a type of testing that is used in forensic case work that is only targeted towards finding male DNA in a sample.

(PC-T. 1771-72). The results of the testing revealed that two male individuals left some genetic material beneath Torres' fingernails on the night she was killed – but neither of those individuals is Bogle (PC-T. 1782, 1837, 1902, 1911-12, 1943,[14] D-Exs. 76, 77). Nasir testified that Torres would have had "to come in direct contact with the individual" to have his DNA beneath her nails (PC-T. 1802, 1817). She believed Torres would have had to rub her hand against him or scratched him (PC-T. 1802). And, after the DNA was deposited "not a lot of cleaning [of Torres' hands] took place" (PC-T. 1803).[15]

ii. RFLP DNA testing in 1991-92

Bogle presented evidence that unbeknownst to him, Detective

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[14]The State's expert, Dr. Martin Tracey, confirmed Nasir's conclusion: "It is not [Bogle's] DNA." (PC-T. 1943).

[15]Dr. Tracey commented that if there had been a positive test for blood, then it would indicate that the DNA was developed from a blood source (PC-T. 1954).

Lingo checked out vital evidence, including the vaginal, anal, and oral swabs obtained from Torres, for a period of four hours after it had been submitted to the evidence section of the sheriff's office (D-Exs. 11, 60 and S-Ex. 6).

Bogle also presented evidence that in 1992, RFLP DNA testing was in its infancy and was not generally accepted (PC-T. 1185-66). The FBI's bench notes and data concerning the DNA testing evidenced several problems with the RFLP testing (*See* D-Ex. 20).[16]

In Bogle's case there was no chain of custody documented and no documentation concerning the integrity of the evidence (*see* D-Ex. 20, PC-T. 1232, 5102). The file does reveal that controls and tests were not run which may have effected the position of the fragments (PC-T. 1180-81). The file also reveals inexplicable difficulties and inconsistencies in the results of the tests (D-Ex. 20). There were artifacts in some of the autoradiographs that suggested the possibility that the samples had mixed (PC-T. 1198, *see also* D-Exs. 20 and 43). And, the fact that no result was produced demonstrated a problem with the testing (PC-T. 1199-200). There was no reproducibility of the result (PC-T. 1207).[17]

In addition, neither Bogle, nor the jury, was made aware that the DNA testing was conducted by an analyst whose name was never revealed until 2008 (PC-T. 1176-77). At the evidentiary hearing, FBI Agent Harold Deadman testified for the first time in

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[16]The file was not disclosed to Bogle (PC-T. 634).

[17]Dr. Libby, a DNA expert, opined that consistency at a single locus with no reproducibility was unreliable (PC-T. 1211).

Bogle's case that he did not conduct the analysis of the vaginal swabs:

> There would be a biologist, physical science technician that would do essentially all of the laboratory work. They would be responsible for extracting the DNA, running through the RFLP procedure.

(PC-T. 1261). Deadman agreed that it was not made clear to Bogle's jury that there was a team analyzing the DNA as opposed to just him (PC-T. 1292).

Deadman also explained that what he characterized as a "match" in 1992 and 1993 only meant that "one could not exclude a particular person" (PC-T. 1252). And, the single probe "match" in Bogle's case was "relatively common" (PC-T. 1267).

While Deadman insisted that there were controls run and procedures followed to avoid contamination (PC-T. 1255-56), he pointed only to the possible control when a mixture of male and female was present and using the female fraction as a control (PC-T. 1257), and the only procedure he could identify was that only one sample was tested at a time (PC-T. 1255). He did not identify any specific control or procedure to avoid contamination in Bogle's case and the file reflects none (*See* D-Ex. 20).[18] Deadman conceded that there was some band shifting, though he did not believe that it made a difference (PC-T. 1251).

iii. STR DNA testing in 2002

As to the most recent DNA testing of the vaginal swab, former FDLE Analyst Patricia Bencivenga testified as to the STR DNA analysis. Notably, when Bencivenga received the swabs they

[18]In fact, on the second run, technician Alice Hill did not run the female fraction (PC-T. 1286, *see* D-Ex. 20).

were not sealed and she had no idea when the swabs were packaged (PC-T. 1578-79). She also had no idea whether the items that came from Bogle, including buccal swabs, blood and clothes had been stored with the unsealed vaginal swabs (PC-T. 1592). If the vaginal swabs had been contaminated by Bogle's DNA due to the way items were stored there would be no way to know (PC-T. 1593). Indeed, STR DNA testing is very sensitive and causes more likelihood that contamination can occur (PC-T. 1593).

The results of combining all of the tips from the swabs (PC-T. 1559), was a mixture (PC-T. 1564). Bencivenga's interpretation of the mixture was subjective (PC-T. 1608, 1612).

The State's expert, Dr. Martin Tracey, testified that while the data was consistent with two donors, "[y]ou could make the argument that there were three and they were undetected . . ." (PC-T. 1939). Furthermore, Dr. Tracey testified that the data was not conclusive evidence that the DNA reflected a male and a female (PC-T. 1940).

Upon interpreting the data, Bencivenga submitted what she believed was the male profile to CODIS and received a hit that matched Bogle (PC-T. 1566-67). Bencivenga also testified that the semen found on Torres' panties was analyzed and she interpreted the mixture as being the DNA profile for one male and one female (PC-T. 1569). She had obtained a profile at only one allele (PC-T. 1569). The one allele on the male profile was consistent with Bogle's (*Id.*).

Elaine Cherry, a custodian of records for the Clerk of Court's evidence section, testified that she had no knowledge as to how the items had been maintained since being admitted at

Bogle's 1992 trial (PC-T. 1520-21).

Detective Lingo testified at the evidentiary hearing that Bogle denied having sex with Torres (PC-T. 1367). However, his notes that were taken contemporaneously in his interview with Bogle include no reference to Bogle denying he had sex with Torres (PC-T. 1421, D-Ex. 62). Lingo's report was not written until nine days after his interview with Bogle (PC-T. 1421).

3. Automobile Accident

Bogle presented evidence that he was involved in an automobile accident on September 6, 1991. The prosecution obtained the accident report which contained information that on September 6, 1991, Bogle and an individual named George Schrader were riding in a car on their way to work when another car ran a red light and slammed into Schrader's vehicle, sending the vehicle head-on into a telephone pole (D-Ex. 13).

Bogle, his mother, and another friend, Mary Schraeder, explained the accident to trial counsel and urged him to investigate the matter and obtain the photos taken of Bogle in the hospital (PC-T. 858, D-Exs. 48, 49).

Bogle, who was not wearing a seat belt, was thrown head first into the windshield of the car and suffered major trauma. He was rushed to Tampa General Hospital. Bogle's records reflect that he sustained lacerations to the head and face (D-Ex. 33, *see also* PC-T. 884). He received sutures for the laceration over his right eye (*Id.*). He suffered "traumatic pneumothorax," a collapsed lung caused by fractured or bruised ribs and an injury to his eye (*Id.*). He complained of pain on his left side. Bogle remained in the hospital for three days (*Id.*).

Mary Schraeder informed the defense investigator that "Brett had a tremendously difficult time walking, sitting, etc. after the accident. Mary saw Brett on the Tuesday before the murder and said that he needed help getting his shirt off because of his injuries." (D-Ex. 50). Bogle's mother also described the injuries her son had suffered during the accident, including the injuries to his head (*See* D-Ex. 51). Photos were available of Bogle shortly after the accident occurred which depicted several facial lacerations (*See* D-Exs. 26, 27).

Dr. Edward Willey testified as to the healing process of abrasions and lacerations (PC-T. 880-81). After reviewing records and photographs, Willey testified that Bogle's account of the accident was consistent with the description of the injuries noted in the records, i.e. injuries to his forehead and right cheek from being thrown into the windshield (PC-T. 884). Based on the photographs from the hospital, Willey would not expect the wounds to Bogle's forehead and face to heal in seven days (PC-T. 886)("Lacerations usually take somewhat longer than that"). The wounds depicted in the photographs taken after Bogle was arrested do not appear "fresh" and they do not look like wounds that were received within three days of the photographs, i.e., the time of the crime, because they were clean and depressed (PC-T. 886). The wounds in Bogle's post arrest photos also appeared in the same general area as was described in the medical records from Bogle's accident (PC-T. 887). And, they did not appear to be "reopened or reinjured" (PC-T. 889).

4. September 1, 1991

Everett Smith testified at Bogle's initial postconviction

hearing. Smith had been interviewed by Bogle's trial investigator and stated: He knew Bogle because they lived at the same motel in September, 1991 (PC-T. 709). On September 1st, he and Bogle picked up Alfonso and Torres and they drove to Manatee County to purchase beer (PC-T. 712-13). From what Smith could tell Alfonso was happy and excited to see Bogle (PC-T. 714). After they picked up the beer, the foursome drove back to the motel where Smith and Bogle lived (PC-T. 714). Other individuals socialized with them (PC-T. 714). Neither Alfonso nor Torres indicated any fear around Bogle (PC-T. 715). Rather, Bogle and Alfonso acted like a couple getting along (PC-T. 716).

In the afternoon, Bogle asked Smith if he would take the girls home (PC-T. 716). Smith drove, Bogle was the passenger, and Alfonso and Torres sat in the backseat (PC-T. 717-18). While in the car, Smith did not hear any arguments or threats (PC-T. 717); he did not hear Bogle call Torres any derogatory names (PC-T. 717). When they arrived at Alfonso's trailer, Alfonso, Torres and Bogle walked into the trailer (PC-T. 718). No one was arguing (PC-T. 718). A few minutes later, Smith heard some arguing from inside the trailer (PC-T. 718-19). As Bogle left the trailer he kicked the screen out of the door (PC-T. 719). Bogle got in the car and the two men left (PC-T. 719).

D. SECOND POSTCONVICTION MOTION

Unbeknownst to Bogle or his counsel, the DOJ and the FBI flagged Bogle's case, for a second time, for review in 2013 to consider whether Agent 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." (*See* R2. 185).

In an August 20, 2013 letter to the Office of the State Attorney for the Thirteenth Judicial Circuit, the DOJ explained that it "determined that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case." (R2. 184). The following errors in Bogle's case were identified:

> 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 other-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; and (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.

(R2. 185). In fact, as to the second type of error, the jury heard five (5) separate statements that exceeded the bounds of science (*See* R2. 188-89, August 1, 2013 Letter from FBI to DOJ). And, at Bogle's resentencing proceeding, the jury heard testimony that exceeded the bounds of science as to all three areas of errors on multiple occasions (R2. 190).

In light of the recently disclosed results from the FBI's review of Bogle's case, Bogle learned that a plethora of documents related to the review that occurred in 1997, in which the DOJ, Office of the Inspector General, criticized the work of

thirteen examiners at the FBI, one of whom was Michael Malone, had been released. Bogle had requested these documents at the time of his evidentiary hearing and had attempted to question Malone and Steve Robertson about the review but was not permitted to do so by the circuit court (PC-T. 1469, 5218-19).

The documents reflect that in more than eighty 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 Bogle's jury. Specifically, Malone was rebuked for testifying to statistically invalid rates of error. And, Malone was criticized for misleading courts and fact finders as to the science behind hair analysis, i.e., that 15 characteristics were needed to make a "match". Malone's comparison and conclusions were not based on any research or literature and were completely fabricated to support his opinions. In Bogle's case, Malone told the jury: "[I]t's my policy or it's the policy of our lab that we have to find at least fifteen of these individual microscopic characteristics in the hair." (T. 312-13; *see also* T. 1304). This statement was false.

Malone was also highly criticized for failing to provide clear notes so that it could be determined whether he performed the hair comparison in an acceptable manner. And, again, in almost eighty percent of the cases reviewed, Malone's testimony was inconsistent with his lab report and/or bench notes; these inconsistencies were not the product of transcription errors. The number of inconsistencies could even be higher, but it was difficult to decipher Malone's notes in some cases. Similarly, critical errors occurred in Bogle's case, one of which Malone

testified was simply a transcription error.

E. THIRD POSTCONVICTION MOTION

As Bogle's counsel prepared for his evidentiary hearing that had been scheduled for October 4, 2017, she spoke to an individual at the Innocence Project (IP) in New York as well as an individual with the National Association of Criminal Defense Lawyers (NACDL). Both IP and NACDL had been instrumental in assisting the DOJ with the 2013 review of testimony concerning hair analysis by FBI Agents in thousands of criminal cases as well as the dissemination of the reports and follow-up to ensure that criminal defendants' attorneys received the information.

On Thursday, September 7, 2017, Bogle's counsel, Linda McDermott, spoke with Chris Fabricant, an attorney at IP. In discussing Bogle's upcoming evidentiary hearing Fabricant asked if McDermott had received the FBI memoranda about Michael Malone because he thought that the memos pre-dated Bogle's trial. Fabricant suggested that McDermott speak with Vanessa Antoun, Senior Resource Counsel with NACDL, because she was very familiar with the memos.

On September 12th, Antoun e-mailed McDermott some documents. The first memo, dated November 15, 1991, indicates that a review of Malone's testimony in a December, 1989 trial had been conducted. Based on the review, it was recommended that Malone be "counseled" as to his "use of numbers in describing the significance of hair associations" and his "use of terminology such as 'perfect match' when describing microscopically associated hairs" (*See* R2. 701). It was also recommended that the chief of the hair and fibers unit discuss the "pitfalls of

overstating results with all examiners" (*Id.*).

According to the memo, Malone was counseled in the summer of 1991, before the crime at issue here had ever occurred. Specifically, the memo identifies problems with Malone's 1989 testimony in an unrelated case, including the fact that he overemphasized his opinion. Indeed, the author of the memo specifically notes that a jury may misinterpret his testimony (R2 702-03). Malone was also instructed "not to quote his experience in such a way that it could be interpreted as a statistic during testimony." (*See* R2. 702).

Importantly, the author of the memo makes clear that Malone was obligated to "present a clear, unbiased, **accurate representation of the strengths and limits of the technique**". (R2. 703)(emphasis added). An example of such testimony was provided.

A second memo, dated December 6, 1991, is a follow-up to the first memorandum and relates to the discussions with all hair and fiber examiners and trainees that occurred in reference to the November, 1991, memo (*See* R2. 704).

A third memo, dated March 7, 1997, and signed by Robert Mellado, once again refers to Malone's inaccuracy in testifying about the significance of hair analysis (*See* R2. 705-06). The memo appears to be the summary of a witness interview that occurred in relation to the investigation of Malone committing perjury in the Alcee Hastings' case. The significance of the memo is two-fold: first, the memo makes clear that examiners were not to be testifying about tests that he or she had not run, which Malone may have done in the Hastings' case, which also occurred

in Bogle's case; and two, the memo again refers to Malone's false and misleading testimony about the significance of hair analysis (*See* R2. 705-06).

Antoun also alerted undersigned to an ongoing United States Senate Judiciary Committee (SJC) inquiry in which, having learned of the various memos, the SJC believed that "the FBI understood the scientific limits of hair microscopy long before 1997" (*See* R2. 707). The SJC noted that the memo established that, at a minimum, the FBI was aware of an error that had been reviewed in the 2013 review as early as 1991. The SJC stated:

> These memos raise concern because they demonstrate that, in 1991, the FBI recognized instances where testimony exceeded the scope of science, which contradicts the FBI's claims it only later developed such an understanding. Moreover, the FBI's corrective actions were apparently ineffective because examiners continued to provide erroneous testimony, including the exact type of testimony cautioned against in the 1991 memos. SSA Malone, in particular was allowed to continue to provide erroneous testimony for another eight years until he retired in 1999.

(*See* R2. 708). In light of the memos, the SJC demanded an explanation and submitted specific inquiries about the memos (*See* R2. 708). The SJC asked why the memos had not previously been located and disclosed (*See* R2 708). The SJC also asked: "Has the FBI taken steps to disclose these memos to parties or victims in past and present cases where the memos should have been produced?" (*See* R2. 709).

SUMMARY OF ARGUMENT

1. Recently discovered evidence demonstrates that Bogle's capital conviction and death sentence are constitutionally unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The

evidence establishes that Bogle's right to due process under the Fourteenth Amendment to the United States Constitution and his rights under the Fifth, Sixth and Eighth Amendments were violated, because the State withheld evidence which was material and exculpatory in nature and/or presented false evidence, or that trial counsel was ineffective in his representation of Bogle.

The conflux of errors in Bogle's case severely prejudiced him. This Court is required to analyze the prejudice of the errors not only individually, but also cumulatively. *See Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011); *State v. Gunsby*, 670 So. 2d 920, 924 (Fla. 1996).

The lower court erroneously failed to grant an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and Bogle's diligence in attempting to unearth the new evidence. This Court should order an evidentiary hearing.

2. Bogle's death sentence violates the Due Process Clause and the Sixth and Eighth Amendments to the United States Constitution.

ARGUMENT

ARGUMENT I

BOGLE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR KNOWINGLY PRESENTED MISLEADING EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE, WHICH UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE TRIAL AND POSTCONVICTION PROCEEDINGS WHICH WERE CONDUCTED WITHOUT THE EVIDENCE PRESENTED.

A. INTRODUCTION

In order to insure a constitutionally adequate adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon the prosecuting attorney. He is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985), *quoting Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995)("the prosecutor's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable"). The prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police". *Kyles*, 514 U.S. at 437; *Strickler v. Greene*, 527 U.S. 263, 280 (1999). And, under *Johnson v. Butterworth*, 713 So. 2d 985, 987 (Fla. 1998), the State has a duty in postconviction proceedings to disclose exculpatory information under *Brady v. Maryland*.

A *Brady* violation is established when:

> The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the

> State, either willfully or inadvertently; and prejudice [ ] ensued.

Strickler, 527 U.S. at 281-82. Prejudice is established where confidence in the reliability of the conviction is undermined as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. The United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." *Kyles*, 514 U.S. at 436; *Young v. State*, 739 So.2d 553, 559 (Fla. 1999). In *Lightbourne v. State*, 742 So. 238, 247-48 (Fla. 1999), this Court, in explaining the analysis to be used when evaluating a successive motion for postconviction relief, reiterated the need for a cumulative analysis:

> In this case the trial court concluded that Carson's recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, **which it had concluded was procedurally barred**, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision.**
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial," in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).**

(Emphasis added)(citations omitted).

Indeed, in deciding whether in fact a new trial is warranted, evidence which either was not presented at trial due to ineffective assistance of counsel or newly discovered evidence within the meaning of *Jones v. State*, 591 So. 2d 911 (Fla. 1991), must be considered cumulatively with evidence that the jury did not hear because either the prosecutor and/or the defense attorney breached their constitutional obligations. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004).

B. DENIAL OF AN EVIDENTIARY HEARING

The law attendant to the granting of an evidentiary hearing in a postconviction proceeding is often stated and well settled: "[u]nder rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000). The rule is the same for a successive postconviction motion, where allegations of previous unavailability of new facts, as well as diligence of the movant, warrant evidentiary development if disputed or if a procedural bar does not "appear[] on the face of the pleadings." *Card v. State*, 652 So. 2d 344, 346 (Fla. 1995). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

As will be demonstrated herein, the circuit court erroneously failed to grant Bogle an evidentiary hearing despite allegations regarding the substance of the new evidence, the constitutional claims based upon the new evidence, and diligence in attempting to unearth the new evidence.

C. BOGLE'S CASE

Bogle previously presented *Brady/Giglio*, ineffective assistance of counsel and newly discovered evidence claims which this Court denied. However, Bogle has now discovered additional favorable information was withheld by the State. When this recently discovered favorable information is evaluated cumulatively with the previously presented favorable information as is required by *Lightbourne*, confidence is undermined in the outcome and a new trial is warranted.

The recently disclosed information establishes what Bogle has maintained throughout his postconviction proceedings: the State failed to disclose and/or trial counsel failed to discover information demonstrating that his jury heard unreliable evidence relating to the microscopic hair analysis. There is no doubt that even in 1991, the year Torres was killed, hair analysis was highly suspect due to high error rates and a lack of uniformity in the comparison itself. Indeed, according to the documents relating to the 1997 review of Malone's work, Malone simply made up the standard of matching fifteen characteristics in order to opine that the comparison hair and known hair matched. The State, both at trial and in postconviction, failed to provide Bogle with the exculpatory information.

In addition, Barry Scheck and Peter Neufeld documented the

problems with hair comparison that was known as far back as the early 1970's. The research conducted demonstrated error rates as high as 67%:

> The weakness of the field is well established. For instance, hairs pulled from the same head might not match one another. The hair examiners cannot agree on a criteria for comparisons. Some people have "featureless" hair that is hard to distinguish. With all the uncertainty about matching criteria, no one has been able to set up data banks for hairs, like the ones for fingerprints. That's also why no one can plausibly claim to know if the characteristics of a particular hair are rare, common, or somewhere in between.
>
> In the early 1970's, the U.S. Law Enforcement Assistance Administration (LEAA) sponsored a proficiency testing program for 240 laboratories that provided evidence in criminal cases. The labs botched many kinds of tests: paint, glass, rubber, fibers. But, by far, the worst results came from hair analysis.
>
> Out of ninety responses for the hair survey, the proportion of labs submitting "unacceptable" responses on a given sample – either by failing to make a match, or making a false match – range from 27.6 to 67.8 percent.
>
> On five different samples, the error rates were 50.0 percent, 27.6 percent, 54.4 percent, 67.8 percent, and 55.6 percent. **In short, there was little difference between flipping a coin and getting a hair analyst to provide reliable results.**

Actual Innocence, Barry Scheck, Peter Neufeld and Jim Dwyer, Doubleday, 2000, pp 162-3 [relying on *Oklahoma v. Durham*, CF 91-4922; *Out of the Blue*, Mark Hansen, ABA Journal, February 1996, "*The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*," Paul Gianelli, Virginia Journal of Social Policy and Law 4:439 (1997)] (emphasis added).

At the evidentiary hearing in 2008, Dr. Terry Melton, an expert in mitochondrial DNA (mtDNA) analysis, testified that

Malone overstated the results of his comparisons (PC-T. 1090).[19] Dr. Melton testified that independent studies have demonstrated that hair comparison has a high error rate, generally between 5-10% (PC-T. 1093; *see also* D-Exs. 38, 39). Dr. Melton testified that it is not uncommon for microscopists to determine that hairs "match", but mtDNA testing demonstrates that hairs do not match (PC-T. 1092-3). And, it is no longer acceptable to characterize microscopic hair comparisons as matching. Today, a confirmatory DNA test is required to include an individual as being the donor of the hair (PC-T. 1094).

The recently disclosed information related to the second review of Bogle's case conclusively refutes the circuit court's finding following Bogle's initial evidentiary hearing that no compelling evidence exists that Malone overstated the results of his analysis in his testimony. Based on the 2013 review by the FBI, much of Malone's testimony was inappropriate because it exceeded the limits of the science (*See* R2. 184-92). Indeed, Malone's testimony regarding the microscopic hair analysis performed in Bogle's case can no longer meet the standard for admissibility. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)("while the court will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general

[19]The State objected to Dr. Melton's testimony as to the error rates and unreliability of hair analysis. The circuit court sustained the objection and refused to allow Dr. Melton's testimony, so Bogle proffered her deposition (*See* PC-T. 1104, D-Ex. 40).

acceptance in the particular field in which it belongs.").[20] *See also Ramirez v. State*, 810 So. 2d 836, 853 (Fla. 2001)("Any doubt as to admissibility under Frye should be resolved in a manner that minimizes the chance of a wrongful conviction, especially in a capital case.").

At trial, according to Malone's testimony, the hair found on Bogle's pants matched a public hair of the victim's. Malone testified:

> Now, I've been doing this for eighteen years and I've looked at hairs from thousands and thousands of people over that time and I've only had three occasions now in eighteen years where I had hairs from two different people that I looked at and I could not tell apart.

(T. 313-14). And, Malone stated: "In the debris from Mr. Bogle's pants, I was able to find one Caucasian pubic hair which microscopically matched the pubic hairs on Margaret Torres." (T. 317-18). Torres had been found, naked, behind Club 41. There is no doubt that Malone's testimony was important to the prosecution's case. Indeed, in her closing argument asking the jury to convict Bogle, the prosecutor told the jury that the FBI was "the greatest crime laboratory in the world" (R. 556-57).

The State violated Bogle's right to due process in presenting shoddy, unreliable and misleading evidence to the jury. The State knew that Malone's testimony was false and misleading, but failed to correct it at the trial or in

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[20]While the Florida Legislature amended the Evidence Code in 2013 to replace the *Frye* test with the test of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court declined to adopt that test to the extent it is procedural. *In re Amends to the Fla. Evid. Code*, 210 So. 3d 1231, 1238-39 (Fla. 2017).

postconviction. The prejudice to Bogle is clear. The hair that "matched" Torres' pubic hair was important to the prosecution's theory that Bogle killed Torres.

D. THE CIRCUIT COURT'S ORDER

In its order denying Bogle's claim, the circuit court found the recent evidence produced by Bogle to be procedurally barred:

> The Court finds Defendant has already raised in his previous postconviction proceeding *Brady*, newly discovered evidence and ineffective assistance of counsel claims relating 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 at 844-45. The Florida Supreme Court further affirmed the court's rulings limiting the cross-examination of Malone and Steve Roberston and Defendant's discovery requests for information regarding errors and false testimony committed by Malone since trial. *See id.* at 840-41.
>
> In the instant claim, Bogle 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 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." 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 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 denied in Defendant's previous postconviction proceeding. Defendant's allegations in claim I are procedurally barred.

(R2. 453-54).

E. ANALYSIS

In *Florida Bar v. Feinberg*, 760 So. 2d 933, 939 (Fla. 2000), this Court stated: "Truth is critical in the operation of our judicial system." Bogle submits that the truth should matter. In accepting that the most recent review "'contains nothing beyond additional review by other examiners that in no way produces any evidence that was not available to be pursued, at the time of Bogle's extensive 3.851 evidentiary hearing'"(R2. 453), the circuit court erred as a matter of fact and law. Indeed, in holding that Bogle's claim is procedurally barred, the circuit court ignored the fact that the DOJ undertook a second review of Bogle's case due to the flaws that accompanied the first review.[21] The initial review, in 1999, was focused solely on an examination of Malone's bench notes, deposition, trial and resentencing testimony. The DOJ, through an independent forensic examiner, determined that there was an inconsistency in Bogle's

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[21]It is certainly worth noting that the DOJ made clear in the August 20, 2013, letter to the State that in federal cases the DOJ is waiving procedural defenses under the circumstances:

> In the event that the defendant seeks post-conviction relief based on the Department's disclosure that microscopic hair comparison laboratory reports or testimony used in this case contained statements that exceeded the limits of science, we provide the following information to make you aware of how we are handling such situations in federal cases. In such cases under 28 U.S.C. § 2255, in the interest of justice, the United States is waiving reliance on the statute of limitations under section 2255(f) and any procedural-default defense in order to permit resolution of legal claims arising from the erroneous presentation of microscopic hair examination laboratory reports or testimony.

(R2. 185-86, DOJ, August 20, 2013 Letter to Rex Road).

case. Specifically, Malone's bench notes were inconsistent with his deposition, trial and resentencing testimony in that his bench notes reflected that he had found a hair "matched" the victim's head hair on Bogle's pants and at his deposition, trial and resentencing Malone testified that the unknown hair "matched" the victim's pubic hair. Certainly such a discrepancy was important to Bogle and the arguments made by the State at his trial. Thus, Bogle raised that issue in his original 3.851 proceedings. However, the initial review did not include whether Malone's testimony about forensic hair analysis was scientifically valid.

Following the initial review, in 2013, a more thorough review of Bogle's case was prompted in part by a series of exonerations of defendants who had been wrongly convicted by virtue of microscopic hair evidence (*See* Spencer S. Hsu, "D.C. Judge Exonerates Santae Tribble in 1978 Murder, Cites Hair Evidence DNA Test Rejected," Washington Post, December 14, 2012). The DOJ's review of the cases involving microscopic hair evidence was also prompted by the National Academy of Sciences' 2009 report, Strengthening Forensic Science in the United States: A Path Forward (available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf). The NAS concluded that "[n]o scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population." *Id.* at 160. That is, no one knows how often the hair of two people will share the same characteristics. Perhaps it is rare, as Malone testified in Bogle's case, but perhaps it is common; no one has ever done the research necessary to find out.

It is thus not surprising that the "matches" found by hair examiners turn out to be wrong a significant fraction of the time. In one study cited by the NAS, of the "matches" found by microscopic observation, 12.5 percent were found in fact to have come from different sources when tested for DNA (*Id.* at 161).

Therefore, the 2013 review was undertaken because:

> [I]n some cases, FBI Laboratory examiners 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. ... **Thus, the purpose of this review is to ensure that FBI Laboratory reports and examiner testimony regarding microscopic hair comparison analysis met accepted scientific standard and to identify those cases in which those standards were not met so that any appropriate remedial action may be taken.**

(R2. 184)(emphasis added). Indeed, the DOJ determined that each of the three errors for which it reviewed Bogle's cases occurred, i.e., Bogle's jury heard testimony that exceeded the limits of science (*See* R2. 191-92).

Thus, contrary to the circuit court's holding, the 2013 review did provide additional evidence that was not available during Bogle's initial postconviction proceedings. Perhaps what is confounding in Bogle's case is that when he attempted to present testimony related to the reliability of Malone's trial and resentening testimony, both Malone and Steve Robertson disputed the allegation that Malone's trial and resentencing testimony exceeded the bounds of science and was not reliable.

Moreover, both the circuit court and this Court credited Malone's testimony in upholding Bogle's conviction. For instance, in denying Bogle's claim as to undisclosed information regarding Guy Douglas, the circuit court's prejudice analysis relied in

part on Malone's "testimony that one of the hairs collected from the pants that Defendant wore on the night of the murder was microscopically consistent with Margaret Torres's pubic hair." (R2. 622).

Further, in denying Bogle's claim as to undisclosed evidence concerning the storage and handling of Bogle's pants by Lingo and Cashwell, the circuit court again relied on Malone's testimony:

> Agent Malone testified that placing evidence in drying rooms is standard procedure for wet evidence and it do[es] not cause contamination unless two items touch one another because hair does not "float through the air." (*See* 11/30/2009 EH, page 135). And after reading Technician Cashwell's reprimand, Agent Malone testified that there is nothing in the report that would cause him to alter his opinion that the hair found on Defendant's pants is a match to Ms. Torres' pubic hair. (*See* 11/30/2009 EH, page 160.)

(R2. 626).

Finally, in denying Bogle's newly discovered evidence claim regarding Marcia Turley and the fingernail scrapings, the circuit court again relied in part on Malone's "testimony that one of the hairs collected from the pants that Defendant wore on the night of the murder was microscopically consistent with Margaret Torres's pubic hair." (R2. 654).

In denying Bogle's challenge, based on the DOJ report, to Malone's testimony at trial, the circuit court accepted Malone's testimony that he made a transcription error:

> The Court finds Agent Malone's testimony extremely persuasive on this matter. The reference in the bench note to a pubic hair only makes sense if he is referring to K6, a pubi hair, as opposed to K7 which is a head hair. The Court finds therefore that Defendant has failed to show that Agent Malone testified falsely at Defendant's trial; consequently, he has failed to show that the State violated *Giglio* in regards to Agent Malone's testimony.

(R2. 657-58).

This Court likewise relied on Malone's testimony in its opinion affirming the denial of postconviction relief:

> 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, 213 So. 3d at 844-45. Further, in finding a lack of prejudice as to Bogle's guilt phase ineffective assistance of counsel claim, this Court relied in part on the determination that "A pubic hair found near the crotch of Bogle's pants matched Torres." *Bogle*, 213 So. 3d at 846.

Though Bogle's expert, Dr. Melton, opined that Malone's testimony was unscientific, the circuit court as well as this Court refused to consider or credit her testimony. *Bogle*, 213 So. 3d at 840. Bogle should not be punished for knowing and attempting to present reliable evidence that the State refused to acknowledge and the courts refused to accept at the time of his initial postconviction proceedings.[22] If the evidence was available at the time of the initial postconviction proceedings, then the State has violated its ethical obligations in presenting false and misleading evidence to the courts.

[22]Indeed, the information disclosed by the DOJ substantiates Dr. Melton's proffered testimony.

Bogle submits that the rulings of the circuit court as well as this Court which relied on the testimony of Malone and the FBI at trial and during the postconviction proceedings must be re-examined in light of the recently discovered exculpatory evidence.[23] Moreover, the new evidence "cannot be excluded merely because the new scientific evidence is contrary to the scientific evidence that the State relied upon in order to secure a conviction at the original trial. *Hildwin v. State*, 141 So. 3d 1178, 1187 (Fla. 2014).

Additionally, the circuit court's reliance on *Duckett v. State*, 918 So. 2d 224 (2005), is misplaced, and inconsistent with the holding that Bogle's claim is procedurally barred. First, Duckett's allegations concerned the 1997 Office of the Inspector General report, not a specific letter or evidence specific to Duckett's case. Therefore, he was asserting that general information about Malone could have been used to impeach him at trial. This Court held that the general information contained in the report could not be considered *Brady* evidence as it had not been compiled at the time of Duckett's trial. In fact, some of the general criticisms of Malone were related to his work in cases that post-dated Duckett's trial. However, this Court has consistently held that specific reports or information from the FBI constitute newly discovered evidence.

[23]For instance, Bogle now possess the exculpatory evidence that was withheld from him at the time of his evidentiary hearing which demonstrates that Malone's explanation as to the inconsistency in his bench notes and testimony was not credible.

In *Wyatt v. State*, 71 So. 3d 86, 99 (Fla. 2011), this Court held that the trigger date for a newly discovered evidence claim relating to unreliable forensic evidence was the date from which a "case-specific" letter discrediting the forensic evidence was provided to the defendant. In *Wyatt*, the forensic area concerned comparative bullet lead analysis (CBLA), and the case-specific letter originated from the FBI due to the Department of Justice's (DOJ), review of prior FBI case work and testimony in cases throughout the country. *Id*. Thus, the recent 2013 review of Bogle's case, and 2014 results constitute newly discovered evidence of *Brady*/*Giglio* violations and cannot be procedurally barred.

Furthermore, the fact that Bogle has consistently asserted that the State and Malone knew his testimony was false and misleading is meaningless without the acknowledgment by the DOJ that Malone's testimony exceeded the limits of science. As such, the issue of whether Malone's testimony was reliable was not thoroughly vetted (R2. 454), because the State took the position, presented testimony and argued that Bogle's allegations had no merit. Only now, armed with the results of the 2013 review does Bogle have the unrebutted and conclusive evidence that Malone's testimony was false and misleading. If Bogle should have known of the evidence earlier, then so should the State. But, if that were the case, then the State presented false and misleading evidence before the courts. And, the circuit court as well as this Court chose to accept that false and misleading evidence.

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under

the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Malone was a representative of the State under any definition: he was an FBI Agent and an expert witness for the State of Florida at both the trial and postconviction proceedings. The DOJ has now acknowledged that Malone presented false evidence. And the principle of *Napue* applies equally to testimony "the prosecution knew, or should have known," to be false. *United States v. Agurs*, 427 U.S. 97, 103 (1976). A government agent, whether a prosecutor or an FBI expert, cannot present evidence willy-nilly, without taking any care to ensure that the evidence is true. Whether false evidence is presented as "a result of negligence or design, it is the responsibility of the prosecutor." *Giglio v. United States*, 405 U.S. 150, 154 (1972). Malone's false testimony was especially insidious because of his status as an expert. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 578, 595 (1993) (citation and internal quotation marks omitted). Jurors can judge the credibility of a lay witness for the prosecution, but not the credibility of an expert. The jurors at Bogles's trial and resentencing could never have expected that a Special Agent of the FBI, a man with 20 years of experience in the Crime Laboratory, would be telling them something that was not true. The jurors were utterly unequipped to suspect that Malone's testimony, so seemingly scientific, was in fact pseudoscientific nonsense.

Finally, while erroneously concluding that Bogle's claim was procedurally barred, the circuit court in its order failed to

conduct any sort of cumulative review. Yet The evidence previously presented by Bogle must be re-evaluated in conjunction with the recently disclosed exculpatory evidence relating to Malone's scientifically unreliable analysis and testimony.[24] Independently and cumulatively, the recently disclosed evidence establishes that a new trial is warranted.

F. CONCLUSION

A trial is supposed to be the crucible by which the factfinder observes the evidence being tested and then draws conclusions. The same can be said of an evidentiary hearing. The "cumulative materiality analysis" required under *Kyles v. Whitley* was designed to provide a framework for determining how reliable the outcome of the trial was when information favorable to the defendant was not included in the crucible known as the trial. The question to be answered is how damaged was the defendant by the exclusion of the favorable evidence from not just the trial proceeding, but also from the defense's preparation for the trial and the choices that an informed defense counsel made at trial. That requires consideration of the new favorable information, what defense counsel would have or could have done with that new information, how his strategies might have changed, and the raw

[24]Bogle also notes that additional evidence impeaching the testimony and credibility of Malone is contained in his third 3.851 motion, which is currently pending in the circuit court. This evidence includes the fact that the Senate Judiciary Committee believed that "the FBI understood the scientific limits of hair microscopy long before 1997"; that the FBI was aware of the errors as early as 1991; yet that the FBI allowed examiners, and in this case Malone, "to continue to provide erroneous testimony for another eight years until he retired in 1999." (*See* R2. 707-08). Bogle again urges this Court to relinquish jurisdiction to the circuit court so that a proper cumulative analysis, rather than a piecemeal review, can be conducted.

testimony and evidence from the original trial; but, not the inferences and conclusions that an appellate court drew from the raw testimony when the countervailing new favorable evidence was unknown. As the United States Supreme Court explained:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

Kyles, 514 U.S. at 453.

The documents provided by the DOJ are directly on point and support the allegations raised in Bogle's initial Rule 3.851 proceedings – that the jury heard false and misleading testimony concerning the hair analysis that occurred. Indeed, in a June 19, 2013 letter to the Innocence Project from the FBI, the following "inappropriate statements" were identified as being made by Malone at Bogle's trial:

> X 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 science.
>
> X 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 exceeded the limits of the science. This type of testimony exceeds the limits of science.
>
> X 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 exceeded the limits of science.

(R2. 191).

The recently disclosed evidence would have rendered Agent Malone's testimony inadmissible under *Frye*; or, if admissible, weakened it to the point of being correctly discounted to irrelevance. So in evaluating the cumulative impact, Agent Malone's testimony as well as all testimony regarding the hair, would not have been heard by the jury. Thus, without Malone's hair comparison testimony, and with the jury entitled to reject the testimony of the Alfonso's, Jeffrey Trapp and Agent Deadman in light of the testimony from Marcia Turley, Jeanie Baurle, Patricia Bowman, Gary Turley, Everett Smith, Mary Shrader, Dola Bogle, Dr. Edward Willey, Dr. Randall Libby, Huma Nasir, Dr. Martin Tracey and the other witnesses Bogle presented, there can be no confidence that it would have returned a verdict finding Bogle guilty beyond a reasonable doubt and/or recommended a sentence of death.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS UNDER *HURST v. FLORIDA*.

The Sixth Amendment right enunciated in *Hurst v. Florida*, 136 S.Ct. 616 (2016) and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* held that "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had

been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst v. Florida*, 136 S.Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622.

On remand, this Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016).

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2017), this Court determined that *Hurst v. Florida* and *Hurst v. State* constituted a change in Florida law that was to be applied retroactively to Mosley and required the court to grant postconviction relief, vacate Mosley's death sentence and remand for a resentencing. As this Court observed in *Mosley*: "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State." *Id.* at 1281.

However, the same day that this Court decided *Mosley*, it

also decided *Asay v. State*, 210 So. 3d 1 (Fla. 2016). This Court in *Mosley* noted that *Asay* had not extended the benefit of the change in the law created by *Hurst v. Florida* to Asay. *See Asay*, 210 So. 3d at 11.

This Court's determination that *Hurst v. Florida* is partially retroactive does not comport with uniformity or fairness. Indeed, the logic of *Griffith v. Kentucky*, 479 U.S. 314, 327-28 (1987), is applicable:

> Justice POWELL has pointed out that it "hardly comports with the ideal of 'administration of justice with an even hand,' " when "one chance beneficiary-the lucky individual whose case was chosen as the occasion for announcing the new principle-enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine." *Hankerson v. North Carolina*, 432 U.S. 233, 247, 97 S.Ct. 2339, 2347, 53 L.Ed.2d 306 (1977)(opinion concurring in judgment), *quoting Desist v. United States*, 394 U.S., at 255, 89 S.Ct., at 1037 (Douglas, J., dissenting). *See also Michigan v. Payne*, 412 U.S. 47, 60, 93 S.Ct. 1966, 1973, 36 L.Ed.2d 736 (1973) (MARSHALL, J., dissenting) ("Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment"). **The fact that the new rule may constitute a clear break with the past has no bearing on the "actual inequity that results" when only one of many similarly situated defendants receives the benefit of the new rule**. *United States v. Johnson*, 457 U.S., at 556, n. 16, 102 S.Ct., at 2590, n. 16 (emphasis omitted).
>
> We therefore hold that 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.

(Emphasis added). "[S]elective application of new rules violates the principle of treating similarly situated defendants the same." *Id*. at 323. While Bogle's death sentence was final when *Hurst v. Florida* issued, numerous other capital defendants' death sentences had been final, including Hurst's, when good fortune

and good timing meant that at the moment that *Hurst v. Florida* issued, those defendants were free of the shackles of finality.[25]

In addition, following *Asay* and *Mosley*, this Court has refused to determine whether capital defendants, like Bogle, can show that their death sentences violate fundamental fairness. In Bogle's case, his jury considered the aggravating factor that the murder had been committed in the course of a sexual battery or an attempt to commit a sexual battery. But, Bogle was not charged with sexual battery and thus, the jury did not make a unanimous finding that he was guilty of such. Further, Bogle contested the aggravating factor, making it even more unclear as to how the jury considered the aggravator in its non-unanimous decision to recommend death.

And, during voir dire, Bogle's jury was repeatedly told that the judge was the sentencer. The jury's role was merely to return an advisory recommendation by a majority vote. At the penalty phase, the prosecutor continuously referred to the jury's recommendation to the trial court. Bogle's sentence of death violates the principles of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and fundamental fairness.

Moreover, in *Hurst v. State*, this Court noted that "[i]n requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to

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[25]In *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), this Court noted the Eighth Amendment required extra weight to be given to "individual fairness because of the possible imposition of a penalty as unredeeming as death." In a footnote, this Court wrote: "It bears mention that the constitutionality of Florida's capital sentencing procedures, s 921.141, Florida Statutes (1979), is **contingent upon this Court's role of reviewing each case to ensure uniformity in the imposition of the death penalty.**" *Id.* at 926 n.7 (emphasis added).

be imposed, we are cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. *Hurst v. State* specifically noted that "the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty." *Id.* at 59. The new Florida law enhances and promotes the reliability of death sentences that juries unanimously authorize. Implicit in the holding that unanimity promotes reliable death sentences is the acknowledgment that non-unanimous death sentences are less reliable. Clearly, uniformity and fairness require that Bogle be given the benefit of *Hurst v. Florida* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . ." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

In addition, the United States Supreme Court has previously addressed situations where the death penalty is imposed arbitrarily and capriciously, as is the case here. In *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), the Supreme Court found that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *see also Furman*, 408 U.S. at 239-40. Because of the recognition that "the penalty of death is qualitatively different from a sentence of imprisonment, however long * * * there is a corresponding difference in the need for

reliability" in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(finding there is a "qualitative difference" between death and other penalties requiring "a greater degree of reliability when the death sentence is imposed"); *Gregg*, 428 U.S. at 187–88 (stating that "death is different in kind" and as a punishment is "unique in its severity and irrevocability"); *Furman*, 408 U.S. at 238 (Brennan, J., concurring)("Death is a unique punishment in the United States.").

Following the United States Supreme Court's decision in *Hurst v. Florida*, this Court's decisions in *Asay* and *Mosley* have opened the door to arbitrariness infecting Florida's death penalty system in violation of the Eighth Amendment. Relief is required.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT UNDER *HURST v. STATE* AND SHOULD BE VACATED.

In *Hurst v. State*, 202 So. 3d at 61, this Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed". This unanimity requirement was not derived from *Hurst v. Florida* itself nor the Sixth Amendment, but from the Florida Constitution and from the Eighth Amendment. In light of the ruling in *Hurst v. State*, Bogle's death sentence stands in violation of both the Florida Constitution and the Eighth Amendment.

In *Mosley*, 209 So. 3d at 1273-74, this Court observed that

in *Hurst v. State*, "**we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, the jury's recommendation for a sentence of death must be unanimous.**" (Emphasis added). The unanimity requirement arose when the mandate of *Hurst v. Florida* intersected with Florida law: "We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense." 202 So. 3d at 44. Thus, *Hurst v. State* was broader in scope than *Hurst v. Florida.* This was because *Hurst v. Florida* meant the statutory facts necessary to authorize a death sentence were elements of capital murder. In turn, this meant that the Florida Constitution requirement that the jury must unanimously find the elements of a crime offense was applicable:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

Id. at 53-54. This Court acknowledged that the unanimity requirement had not been found by the United States Supreme Court to be mandated by the Sixth Amendment, but that it arose from the Florida Constitution. *See Hurst v. State*, 202 So. 3d at 57. This Court then explained the benefit to the administration of justice that its holding would provide would mean more reliable death

sentences:

> In requiring jury unanimity in these findings and in its final recommendation if death is to be imposed, we are cognizant of significant benefits that will further the administration of justice. Supreme Court Justice Anthony Kennedy, while a judge on the Ninth Circuit Court of Appeals, noted the salutary benefits of the unanimity requirement on jury deliberations as follows:
>
> > The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which **gives particular significance and conclusiveness to the jury's verdict.**
>
> *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir.1978). That court further noted that "**[b]oth the defendant and society can place special confidence in a unanimous verdict.**" *Id.* Comparing the unanimous jury requirement to the requirement for proof beyond a reasonable doubt, the Fifth Circuit Court of Appeals stated, "**the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' "** *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir.1977).

202 So. 3d at 58 (emphasis added). Thus, the ruling that the Florida Constitution required juror unanimity when returning a death recommendation was bottomed on enhanced reliability and confidence in the result. *Id.* at 59.

This Court in *Hurst v. State* then alternatively found that a unanimous jury's death recommendation was also required under the Eighth Amendment.

> In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.

Hurst v. State, 202 So. 3d at 61.

The Eighth Amendment holding in *Hurst v. State* turned upon both 1) a finding of a consensus reflecting the evolving standards of decency that now precluded the execution of a defendant without a jury's unanimous death recommendation, and 2) the enhanced reliability that would result from no longer allowing a jury's death recommendation to be returned without juror unanimity.

What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards that mark the progress of a maturing society." *Atkins*, 536 U.S. at 311-12 (internal quotation marks omitted). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' *Furman*, 408 U.S. at 382 (Burger, C. J., dissenting)." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty phase jury has voted unanimously in favor of the imposition of death. The United States Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally

permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth Amendment.

Bogle is within the protected class. At his initial penalty phase, five jurors voted in favor of the imposition of a life sentence.[26] Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment. His death sentence must accordingly be vacated.

Hurst v. State must be applied retroactively to Bogle. When a juror in a capital proceeding has voted against recommending death, the defendant is within a class that society's evolving standards of decency has concluded to be ineligible for a death sentence.

Moreover, the purpose of the ruling in *Hurst v. State* was to enhance the reliability of a death recommendation. Enhancement of reliability also warrants retroactive application of *Hurst v. State* and *Perry v. State* to Bogle. *See Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)("The greatly expanded writ of habeas corpus seems at the present time to serve two principal functions. [Citations] First, it seeks to assure

[26]At his resentencing proceeding, two jurors voted in favor of the imposition of a life sentence.

that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. **It follows from this that all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas**.")(Emphasis added).[27]

Furthermore, the retroactivity analysis of new law under the Eighth Amendment is different than the analysis under the Sixth Amendment. In *Montgomery v. Louisiana*, 136 S.Ct. 718, 731 (2016), the Supreme Court wrote:

> A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.

Accordingly, a new substantive rule under the Eighth Amendment must be applied retroactively:

> A substantive rule, in contrast, forbids "criminal punishment of certain primary conduct" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S., at 330, 109 S.Ct. 2934; *see also Schriro, supra*, at 353, 124 S.Ct. 2519 (A substantive rule "alters the range of conduct or the class of persons that the law punishes"). Under this standard, and for the reasons explained below, *Miller* announced a substantive rule that is retroactive in cases on collateral review.

Montgomery, 136 S.Ct. at 732.

Under *Hurst v. State*, a death sentence may not be imposed on

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[27]*See United States v. Johnson*, 457 U.S. 537, 548 (1982)("We now agree with Justice Harlan that "'[r]etroactivity' must be rethought," *Desist v. United States*, 394 U.S. 244, at 258, 89 S.Ct., at 1038 (dissenting opinion). We therefore examine the circumstances of this case to determine whether it presents a retroactivity question clearly controlled by past precedents, and if not, whether application of the Harlan approach would resolve the retroactivity issue presented in a principled and equitable manner.").

the class of defendants whose jury did not unanimously vote in favor of a death recommendation. As to those within that class of defendants, *Hurst v. State* must be applied retroactively. Since Bogle is within that class of defendants, he must be accorded the retroactive benefit of *Hurst v. State*. Relief is required.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING BOGLE'S CLAIM THAT POSTCONVICTION DEFENDANTS SENTENCED PURSUANT TO FLORIDA STATUTE §921.141 WERE NOT CONVICTED OF CAPITAL MURDER SUBJECTING THEM TO THE DEATH PENALTY BECAUSE THE JURY DID NOT UNANIMOUSLY FIND ALL OF THE ELEMENTS REQUIRED TO CONVICT OF CAPITAL MURDER.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court identified the facts or elements necessary to increase the authorized punishment to the death penalty, a matter that is clearly substantive. "[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne v. United States*, 133 S.Ct. 2151, 2160 (2013). "Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." *Id.* at 2161. A court decision identifying the elements of a statutorily defined criminal offense constitutes substantive law that dates back to the enactment of the statute. *Bousley v. United States*, 523 U.S. 614, 625 (1998)(Stevens, J., concurring in part and dissenting in part)("This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. It merely explained what § 924(c) had meant ever since the statute was enacted. The fact

that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).”). “A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction.” *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994)(emphasis added).

As explained in *Hurst v. State*, this Court held that the statutorily defined facts necessary to increase the range of punishment to include death were elements to be proven by the State “**to essentially convict a defendant of capital murder**.” *Id.* at 53-54 (emphasis added). The elements of capital first degree murder include: 1) the presence of aggravating factors as statutorily defined, 2) a finding of fact that sufficient aggravating factors exist to justify a death sentence, and 3) a finding that the aggravating factors outweigh any mitigating factors. *See Id.* at 53 (“As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, ‘The death penalty may be imposed only where **sufficient aggravating circumstances** exist that **outweigh** mitigating circumstances.’ *Id.* at 313 (emphasis added)(quoting § 921.141(3), Fla. Stat. (1985)).”).

Indeed, on March 13, 2017, the Florida Legislature confirmed this Court’s statutory construction when Chapter 2017-1 of the Laws of Florida was enacted. As such, under *Fiore v. White*, 531 U.S. 225 (2001), the elements of capital first degree murder

identified in *Hurst v. State* and confirmed in Chapter 2017-1 as substantive law date to the statutory enactment. *See State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

And, the United States Supreme Court has held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact** necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). *See Patterson v. New York*, 432 U.S. 197, 215 (1977)("a State must prove every ingredient of an offense beyond a reasonable doubt, and [ ] it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979)(since the jury may have read the instruction as relieving the State of proving an element beyond a reasonable doubt, defendant was denied "his right to the due process of law").

The sufficiency of the aggravators and whether they outweigh the mitigators were both identified in *Hurst v. State* as elements necessary "**to essentially convict a defendant of capital murder**." *Hurst v. State*, 202 So. 3d at 53-54 (emphasis added). Yet, in Bogle's case, neither was found to have been proven beyond a reasonable doubt. Relief is required.

CONCLUSION

In light of the foregoing arguments, Bogle requests that this Court reverse the lower court, vacate Bogle's conviction and death sentence and grant other relief, including a relinquishment of jurisdiction for a cumulative analysis with Bogle's third postconviction motion, as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by electronic transmission to Lisa Martin, Assistant Attorney General, on July 16, 2018.

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CERTIFICATION OF TYPE SIZE AND STYLE

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