Filing # 78624827 E-Filed 09/28/2018 06:04:30 PM

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
McCLAIN & McDERMOTT, P.A.
20301 Grande Oak Blvd.
Suite 118-61
Estero, FL 33928
(850)322-2172
lindammcdermott@msn.com

COUNSEL FOR APPELLANT

RECEIVED, 09/28/2018 06:08:29 PM, Clerk, Supreme Court

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES. ii

PRELIMINARY MATTER 1

ARGUMENT IN REPLY 4

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 4

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* 14

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 17

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 19

CONCLUSION. 22

CERTIFICATE OF SERVICE. 22

CERTIFICATION OF TYPE SIZE AND STYLE. 23

TABLE OF AUTHORITIES

Page

Arab Termite and Pest Control of Florida, Inc. V. Jenkins
409 So. 2d 1039 (Fla. 1982) 16

Armstrong v. State
211 So. 3d 864 (Fla. 2017) 16

Calloway v. State
210 So. 3d 1160 (Fla. 2017) 16

Card v. Jones
219 So. 3d 47 (Fla. 2017) 19

Cleveland Bd. of Ed. v. Loudermill
470 U.S. 532 (1985) 4

Coleman v. Miller
307 U.S. 433 (1939) 15

Commonwealth v. Chmiel
173 A.3d 617 (2017) 7, 8, 9, 10

Commonwealth v. Perrot
2016 WL 380123 (Mass. Sup. Ct. Jan. 26, 2016) 10

Fiore v. White
531 U.S. 225 (2001). 20, 21, 22

Fla. Dept. of Transp. v. Juliano
801 So. 2d 101 (Fla. 2001) 6, 7

Ford v. Wainwright
477 U.S. 399 (1986) 4

Hall v. Florida
134 S.Ct. 1986 (2014) 3, 15

Huff v. State
622 So. 2d 982 (Fla. 1993) 14

Hurst v. Florida
136 S.Ct. 616 (2016). 3, 14

Hurst v. State
202 So. 3d 40 (Fla. 2016). 17, 18, 19, 21, 22

Johnson v. State
205 So. 3d 1285 (Fla. 2016) 16

Kyles v. Whitley
514 U.S. 437 (1995). 12, 13

Long v. State
183 So. 2d 342 (Fla. 2016) 7, 10, 11

Mullane v. Central Hanover Bank & Trust Co.
339 U.S. 306 (1950) 4

Mordenti v. State
711 So. 2d 30 (Fla. 1998) 14

Napue v. Illinois
360 U.S. 264 (1959). 7

Nat'l Aeronautics and Space Admin. v. Nelson
532 U.S. 134 (2011) 15

Ring v. Arizona
536 U.S. 584 (2002) 14

State v. Simpson
554 So. 2d 506 (Fla. 1989) 15

State St. Bank & Trust Co. v. Badra
765 So. 2d 251 (Fla. 4th Dist. Ct. App. 2000) 5

Thomson v. Dept. of Environmental Reg.
511 So. 2d 989 (Fla. 1987) 5

Wyatt v. State
71 So. 3d 86 (Fla. 2011). 12

PRELIMINARY MATTER

On August 10, 2018, the State moved to supplement the record with Bogle's motion for DNA testing and the results of that testing. Over Bogle's objection, filed on August 24, 2018, this Court granted the State's motion. See September 7, 2018 Order, *Bogle v. State*, No. SC17-2151.

Bogle herein renews his objection to the supplementation of the record on the basis that the information contained therein has never been subjected to an adversarial testing. Indeed, in the circuit court below, the State similarly attempted to rely on the mtDNA results to argue that they "do not exonerate Mr. Bogle in any way." (PC-T2. 9). Bogle objected on the basis that he had no opportunity to challenge the evidence, and the circuit court agreed with his position:

> Just on the mechanics, I would tend to agree that I can't just allow the State to introduce a report as an exhibit without giving the defense a meaningful chance to challenge it or do whatever they wish to do, so – however, I have zero interest in replowing ground that's already been established in the previous 3.851.

(PC-T2. 11).

Bogle submits that had the information in question been subjected to an adversarial testing, it would have been established that the results of such testing are highly suspect. Indeed, there was a problem with the slide that FBI Agent Michael Malone had purportedly analyzed in 1991 because the slide that was submitted for analysis in 2014 appeared entirely different from the one that Malone described in his testimony at trial. As the microscopists from Microtrace observed when the slides were reviewed before being sent to Dr. Terry Melton for mtDNA testing:

Examination of Q18 slides

Regarding the hairs in the debris recovered from the suspect' pants (Q18) Malone states:

> "I was able to find one Caucasian pubic hair which microscopically matched the pubic hairs of Margaret Torres."

When asked "were there any other hairs submitted to you in that exhibit that were of sufficient condition for you to be able to do a comparison?" Malone replies:

> "No, there were other hair fragments in the debris, but they were all so small, all I can say is that they are Caucasian, but there [*sic*] were absolutely of no value."

Based on this description, we were expecting the sample to consist of multiple small hair fragments with a single pubic hair representing an obvious outlier.

Two slides with hairs originating from Q18 were submitted to our laboratory for examination (Figure 1). The presence of Malone's initials (*i.e.*, "MPM") on these slides suggests that they are the exact same slides examined by him.

A total of nineteen human hairs (designated A through S at our laboratory for identification purposes) were located. All of these hairs possess roots and many of them are complete hairs in that they also possess a naturally tapered, or rounded, distal tip (*i.e.*, they are not fragments). Furthermore, there is not one long hair and several small fragments on the slides. Table 1 and Chart 1 demonstrate this fact and show the approximate lengths of each individual hair. Most of the hairs are between ~ 20 and 30 mm in length, with one (hair P) being slightly shorter and four (hairs E, H, L, and R) being longer.

In addition, we determined that most of these specimens were either pubic hairs or other hairs of secondary sex origin. The other pubic hairs, besides the one Malone discussed, are suitable for comparison purposes. **In summary, Malone' description of these hairs during his testimony does not accurately reflect their actual physical characteristics.** Lastly, his statement that "all I can say is that they are Caucasian" directly contradicts his previous testimony where he opines that he can determine somatic origin, forcible or natural removal, distal end morphology, *etc.* to a "very high degree of accuracy" from his preliminary examination with a stereomicroscope.

> **Summary and Conclusions**
>
> A number of documents were reviewed regarding the hair evidence in this case. **Numerous issues including misleading and incorrect testimony have been identified and described.**
>
> **Additionally, Malone's testimony regarding the hairs recovered from Q18 is inconsistent with the actual macroscopic and microscopic properties of the hairs submitted to our laboratory.**

(App. A, p. 5-6)(footnotes omitted)(emphasis added).

There is no explanation in the record or otherwise as to what Malone was examining in 1991, but it could not have been the slides marked Q18. Perhaps Malone made another transcription error and was in fact comparing two slides of samples that had both been obtained from the victim. Again, the answer is unknown because there was no adversarial testing.

Moreover, the results of the testing itself indicate only that "the victim and her maternal relatives cannot be excluded as the contributor of the questioned hair." (SPC-R at 863). Shortly before the time of the crime, Bogle had been dating and living with the victim's sister, Katie Alfonso. Thus, even to the extent that the testing may have been accurate, there is a significant possibility that the hair belonged to Bogle's girlfriend. Again, however, no adversarial testing was conducted.

Bogle submits that permitting the State to rely on a report that was not in the record and that Bogle had no opportunity about which to present evidence or challenge, violates his right to due process. The touchstone of due process is notice and reasonable opportunity to be heard. "Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134

S.Ct. 1986, 2001 (2014). The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)(Powell, J., concurring).

Based on the foregoing, Bogle respectfully submits that this Court reconsider its September 7, 2018 Order granting the State's motion to supplement the record.

ARGUMENT IN REPLY

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.

As an initial matter, Bogle notes that the United States Department of Justice (DOJ) has taken the position that in the "interest of justice", it is "waiving reliance on the statute of limitations for collateral attack on the convictions and any procedural-default defenses in order to permit a resolution on the merits of any legal claims arising from erroneous statements in laboratory reports or testimony." (App. B). Moreover, the DOJ has specifically conceded that "the government will not dispute that the erroneous statements should be treated as false evidence

and that knowledge of the falsity should be imputed to the prosecution. This will allow the parties to litigate the effect of the false evidence on the conviction in light of the remaining evidence in the case." (App. B).

Conversely, the State in Bogle's case has refused to adhere to the policy of the DOJ. Rather, the State has raised numerous procedural bar defenses and has also disputed the notion that exculpatory information was withheld. First, according to the State, Bogle is not entitled to relitigate matters that have already been decided adversely to him (AB at 14). The State asserts that since Bogle's claim has been litigated previously and has been resolved against him, it is barred by the doctrine of *res judicata* (AB at 17).

The State's assertion here is based on a flawed understanding of the applicable law. *Res judicata* applies "only to the facts and conditions as they existed at the time the judgment was rendered, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment." *State St. Bank & Trust Co. v. Badra*, 765 So. 2d 251, 253 (Fla. 4th Dist. Ct. App. 2000). In other words, *res judicata* will apply only if Bogle's most recent postconviction motion was not supported by new facts, changed conditions, or additional submissions by the applicant. *See Thomson v. Dept. of Environmental Reg.*, 511 So. 2d 989, 991 (Fla. 1987).

Of course, as set forth in his initial brief, Bogle's postconviction motion was based on facts, conditions and submissions that emerged subsequent to his previous proceedings.

The evidence at issue includes the fact that 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). Numerous errors were ultimately identified in 2013 with regard to the microscopic hair comparison analysis in Bogle's case (R2. 184-85, 188-90). Thus, contrary to the State's assertion, the 2013 review clearly provided additional evidence that was not available during Bogle's initial postconviction proceedings, and therefore it is not barred by the doctrine of *res judicata*.

Relying on *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101 (Fla. 2001), the State also claims that Bogle's issue is barred by the law of the case doctrine, which bars reconsideration of those legal issues that were actually considered and decided in a former appeal (AB at 17). According to the State, the law of the case doctrine applies regardless of whether a party employs different arguments or variations to raise the same claim (AB at 18).

Bogle submits that the State's argument again misconstrues the applicable law. In *Juliano*, this Court explained that in accordance with the law of the case doctrine, "[A] trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case." 801 So. 2d at 106. However, as Bogle's most recent postconviction motion indicates, the critical facts upon which his claim is based have changed. Further, these facts

directly implicate the prior rulings of the circuit court as well as this Court, and they establish that Bogle's conviction was "obtained through use of false evidence, known to be such by representatives of the State . . .". *Napue v. Illinois*, 360 U.S. 264, 269 (1959).[1]

Additionally, the State asserts that Bogle's claim is procedurally barred as successive (AB at 18). The State relies on *Long v. State*, 183 So. 2d 342 (Fla. 2016), for the proposition that the evidence provided in the 2013 OIG report concerning FBI examiner Malone's questionable methods of forensic testing was available long before the report issued and was therefore untimely (AB at 19).

The State's arguments are similar to those that were raised and rejected by the Pennsylvania Supreme Court in *Commonwealth v. Chmiel*, 173 A.3d 617 (2017). There, the defendant, David Chmiel, who had attacked the microscopic hair analysis in a previous proceeding, filed a petition in 2015 based on newly discovered evidence: That the FBI on April 20, 2015 issued a press release admitting, for the first time, that testimony by FBI analysts regarding microscopic hair analysis in criminal trials was erroneous in the vast majority of cases. *Chmiel*, 173 A.3d at 619. The lower court dismissed Chmiel's petition as untimely on the basis that:

---

[1]The State also ignores this Court's proclamation in *Juliano* that "even as to those issues actually decided, the law of the case doctrine . . . also provides that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" *Id.* at 106 (Citation omitted).

> [T]he information contained within the FBI press release was available in the public domain prior to 2015, and that Chmiel could have discovered it through the exercise of due diligence more than sixty days prior to filing the PCRA petition on June 18, 2015. In particular, the PCRA court relied upon an article from the Washington Post dated April 16, 2012, reporting that the DOJ had begun to review internally numerous cases after reports that sloppy work by FBI forensic examiners were producing unreliable hair comparison evidence at trials. PCRA Court Opinion at 28-29. The article reported that the DOJ had disclosed the results of the review to the defendants in fewer than half of approximately "250-plus questioned cases" included in the review. *Id*. at 29. On July 10, 2012, the Washington Post confirmed that the DOJ and FBI had launched a review of thousands of criminal cases that included microscopic hair examination by the FBI. On July 29, 2014, the Washington Post reported that the DOJ and the FBI were in the midst of their internal review, that most of the cases under review included flawed forensic testimony from the FBI, and that the DOJ had begun to notify affected defendants. *Id*. at 30-31.

Id. at 624.

On appeal, the Pennsylvania Supreme Court reversed the lower court's decision, finding that it was the FBI's concession, and not the suspected unreliability of the forensic technique, that constituted newly discovered evidence:

> There are two newly discovered facts upon which Chmiel's underlying claim is predicated, both of which were made public for the first time in the Washington Post article and the FBI press release. First, the FBI publicly admitted that the testimony and statements provided by its analysts about microscopic hair comparison analysis were erroneous in the vast majority of cases. The FBI's revelation reverberated throughout the country, marking a "watershed in one of the country's largest forensic scandals," see Appendix B at 1, precisely because it constituted a public admission by the government agency that had propounded the widespread use of such scientifically flawed testimony. **The revelation was the first time the FBI acknowledged that its microscopic hair analysts committed widespread, systemic error by grossly exaggerating the significance of their data in criminal trials.** The Washington Post article acknowledged the novelty of the FBI's disclosures: "While unnamed federal officials previously acknowledged widespread problems, the FBI until now has withheld comment because findings might

> not be representative." See Appendix B at 2. Second, the FBI press release included the revelation that the FBI had trained many state and local analysts to provide the same scientifically flawed opinions in state criminal trials.
>
> With these newly discovered, material facts, the FBI press release indicates that Surma's trial testimony may have exceeded the limits of science and overstated to the jury the significance of the microscopic hair analysis. Surma used microscopic hair analysis in an attempt to link Chmiel to the crime. **The FBI now has publicly repudiated the use of microscopic hair analysis to "link a criminal defendant to a crime.**" See Appendix C at 1. The FBI's repudiation and disclosure about its role in training state and local forensic examiners satisfies Section 9545(b)(1)(ii), and entitles Chmiel to a merits determination of his underlying claim.[7]
>
> Contrary to the PCRA court's opinion and the dissenting opinion by Justice Mundy, see Dissenting Opinion at 632-33, the fact that the FBI was internally reviewing the accuracy of microscopic hair analysis or testimony is not the newly discovered fact upon which Chmiel's claim is based. **Rather, the newly discovered facts are the FBI's admissions, as the proponent of microscopic hair analysis, that its examiners gave flawed and scientifically unsupportable testimony, and spread its flawed methodology to state and local analysts.** Although the existence of the FBI's internal investigation was known, the press release marked the first public admission by the FBI regarding its conclusions about testimony premised upon microscopic hair analysis and the dissemination of such scientifically flawed language to state and local analysts.

Chmiel, 173 A.3d at 625-26 (emphasis added) (footnote omitted).

The Pennsylvania Supreme Court's analysis in *Chmiel* is equally applicable to Bogle's case. As in *Chmiel*, the initial review in Bogle's case did not include whether Malone's testimony about forensic hair analysis was scientifically valid. 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 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.

Further, as in *Chmiel*, the second review in Bogle's case concerned "the FBI's admissions, as the proponent of microscopic hair analysis, that its examiners gave flawed and scientifically unsupportable testimony, and spread its flawed methodology to state and local analysts." *Chmiel*, 173 A.3d at 626. Indeed, the DOJ determined that in Bogle's case, the jury heard numerous statements which exceeded the bounds of science (*See* R2. 188-90). Thus, as in *Chmiel*, and contrary to the State's assertion, the 2013 revelations contained critical evidence that was not acknowledged at the time of Bogle's initial postconviction proceedings. *See also Commonwealth v. Perrot*, 2016 WL 380123 *25 (Mass. Sup. Ct. Jan. 26, 2016) ("It is now accepted that a forensic hair examiner may not offer an opinion that it would be reare to find another human being having the same hair characteristics as the defendant's hair of the victim's hair's characteristics. This substantive limitation on a forensic exeminer's authority to articulate what amounts to a statement of the comparison's statistical significance **failed to achieve general acceptance in the 1980's or 1990's.**")(Emphasis added).

Moreover, the State's reliance on this Court's decision in *Long* is misplaced. There, the defendant failed to previously raise an issue concerning Malone's suspect testimony despite

having knowledge of such. As this Court explained:

> The record reflects that on December 20, 2000, General Counsel J. Michael Hays of the State Attorney's Office for the Thirteenth Judicial Circuit sent the 1997 OIG Report to Long by certified mail while Long was incarcerated. The 1997 OIG Report discusses Malone's malfeasance wherein Malone was criticized about his court testimony in an unrelated case.
>
> The record also shows a letter, which was dated December 19, 2000, from Assistant State Attorney Sharon Vollrath from the State Attorney's Office for the Thirteenth Judicial Circuit, addressed to Long's former postconviction counsel, Byron Hileman. The letter included the ICR reports and Malone's testing results of the hair and fiber evidence that were collected in Long's cases. The ICR reports indicate that Malone did not perform his testing in a scientifically acceptable manner in Long's cases, including Malone's failure to: (1) test all items he claimed to have tested; (2) provide adequate data to substantiate his testing and conclusions; and (3) provide or maintain any documentation for his conclusions. The ICR reports specifically revealed that Malone's data related to comparisons of the fibers was marginal and incomplete and that he also made findings bearing no basis to support his conclusions, such as color matches. Lastly, the independent analyst concluded that Malone used vague and scientifically unacceptable terms in his reports and that the contemporaneous notes made during testing contained blacked out sections and abbreviations and terms that could not be interpreted.

Long, 183 So. 3d at 346. Despite having knowledge of Malone's malfeasance in 2000, Long did not raise an issue concerning him until 2014, after he received letters from the Department of Justice in 2013 criticizing Malone's testimony in his case. *Id.* at 344. On that basis, the Court determined that "because Long failed to timely file this motion after he was first notified as to the problems with Malone and his inadequate forensic work, we find that the postconviction court's summary denial was proper." *Id.* at 347.

Unlike in *Long*, Bogle presented evidence in his initial postconviction proceedings concerning Malone's testimony. Indeed,

Bogle presented the aforementioned 1997 report from the Department of Justice. And, Bogle proffered the testimony of Dr. Terry Melton, an expert in mitochondrial DNA (mtDNA) analysis, that Malone overstated the results of his comparisons (PC-T. 1090).

Subsequently, Bogle included the most recent evidence concerning Malone in a successive postconviction motion within one year of learning of that evidence. Thus, as in *Wyatt v. State*, 71 So.3d 86, 99 (Fla. 2011), Bogle's claim, predicated upon a case-specific letter from the FBI discrediting Malone's testimony, is not procedurally barred as it was timely raised.

As to the merits, the State asserts that there is no prejudice, relying on the "key pieces" of evidence against Bogle at trial as well as the non-record mitochondrial DNA testing (AB at 23, 26, 29). The evidence relied upon by the State includes the following: Bogle physically assaulted and threatened the victim; testimony that in the early morning hours of the night of the murder Bogle (who earlier appeared clean and uninjured) now appeared dirty, his crotch was wet, and he had scratches on his forehead; the evening following the murder Bogle appeared to have fresh scratches on his face; hair from the pants was consistent with the victim's pubic hair; and the DNA profile from the semen present on the victim's vaginal swab likely came from Bogle (AB at 26).

The State's reliance on a selective set of evidence, much of which has been shown to be unreliable, overlooks the correct prejudice analysis. Indeed, in *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995), the United States Supreme Court made clear that

materiality and prejudice were not established by conducting "a sufficiency of evidence test". The Court held:

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. **The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict.** One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id. (Emphasis added).

Here, the State has ignored extensive testimony and evidence, including YSTR DNA evidence that two male individuals left some genetic material beneath Torres' fingernails on the night she was killed – but neither of those individuals was Bogle; evidence that Guy Douglas was involved in the victim's murder; evidence that Malone's testimony regarding the hair was false and misleading; Bogle's medical records, which include the descriptions and diagrams of facial injuries from the car accident a week before the crime; medical testimony from Dr. Willey who testified that based on the photographs from the hospital, he would not expect the wounds to Bogle's forehead and face to heal in seven days; evidence demonstrating the flaws in the RFLP DNA testing; Patricia Bowmen's testimony that she had driven Bogle home from the club in the morning hours of the 13th; and Everett Smith's testimony, which completely disproves much of Alfonso's testimony about the "break-in" on September 1, 1991.

Contrary to the State's assertion, Bogle submits that the recently discovered evidence establishes that his right to due

process was violated as 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. Relief is warranted.

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*.

In opposition to Bogle's claim for relief, the State asserts that he previously litigated this issue in a state habeas petition, thus it is barred by the law of the case doctrine (AB at 32).

The State's argument here ignores the fact that the issue raised by Bogle in his state habeas petition was that his death sentence violated the Sixth Amendment pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). By the time this Court denied Bogle's state habeas petition on February 9, 2017, *Hurst v. Florida*, 134 S.Ct. 1986, 2001 (2014), had been decided, and Bogle had filed a successive postconviction motion in the circuit court addressing this issue.

Yet, despite the fact that Bogle's *Hurst* issue was pending before the circuit court, this Court reconfigured Bogle's *Ring* issue and addressed *Hurst v. Florida*. This Court did not request briefing in Bogle's case as to the issue as it had done in other cases or notify him that the Court would consider the issue.

To rely on this Court's denial of Bogle's *Ring* claim as procedurally barring consideration of his *Hurst* argument, would deny Bogle his right to due process and an opportunity to be heard. *See Huff v. State*, 622 So. 2d 982 (Fla. 1993); *Mordenti v.*

State, 711 So. 2d 30 (Fla. 1998). In *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014), the United States Supreme Court held: "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." Furthermore, as explained by the United States Supreme Court:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (opinion for the court by Scalia, J.). In this case, petitioners did not ask us to hold that there is no constitutional right to informational privacy, and respondents and their amici thus understandably refrained from addressing that issue in detail. It is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential amici had little notice that the matter might be decided.

Nat'l Aeronautics and Space Admin. v. Nelson, 532 U.S. 134, 147 n.10 (2011).

This Court has also supported the basic tenet that appellate courts should not address an issue that was not briefed or argued.[2] *See, e.g., State v. Simpson*, 554 So. 2d 506, 510 n.5 (Fla. 1989)("After the relevant events of this case occurred, the legislature has changed the standard of proof from clear and convincing to a preponderance of the evidence. Ch. 87-110, Laws of Florida. The parties have not briefed this issue and we thus

---

[2]Arguably, this basic precept of appellate review stems from Article III Section 2's Case-or-Controversy Clause, as issuing an opinion on issues that were not briefed or argued appears advisory and is certainly not a "concrete, living contest between adversaries." *See, e.g., Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

do not address any matter associated with the enactment of chapter 87-110."); *Arab Termite and Pest Control of Florida, Inc. V. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982)("The parties have not briefed [whether the trial court's decision was affirmatively supported by the record or by the findings in the judge's order]. We therefore remand the case to the district court to prove the appropriate appellate review.").

In addition to its assertion of a procedural bar, the State claims that the unanimous verdict of the jury establishing Bogle's guilt of his prior violent felony aggravating factor was sufficient to meet the Sixth Amendment's fact-finding requirement (AB at 36). However, as the State is well aware, this Court has rejected the argument that a prior conviction insulates a death sentence from *Hurst* error, and this Court has on numerous occasions determined that the prior conviction of a capital or violent felony did not render the error harmless. In *Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016), for example, this Court rejected "the State's contention that Johnson's contemporaneous convictions for other violent felonies insulate Johnson's death sentences from *Ring* and *Hurst v. Florida*." *See also Calloway v. State*, 210 So. 3d 1160 (Fla. 2017) (Remanding for new penalty phase proceeding based on *Hurst* error despite the presence of prior conviction of a capital felony and during the course of a kidapping aggravating circumstances); *Armstrong v. State*, 211 So. 3d 864 (Fla. 2017) (Remanding for new penalty phase proceeding based on *Hurst* error despite the presence of prior conviction of a capital felony and during the course of a kidnapping aggravating circumstances).

Contrary to the State's assertion, Bogle submits that this issue is properly before the Court and that relief is warranted.

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.

The State in its brief asserts that the United States Supreme Court has never held that the Eighth Amendment requires a unanimous jury recommendation, thus rendering the claim meritless (AB at 41).

The State's argument ignores the fact that this Court in *Hurst v. State* specifically found that a unanimous jury's death recommendation was required under the Eighth Amendment:

> We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst v. State, 202 So. 3d at 44. As this Court explained, "the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death." *Id*. at 59.

This Court in *Hurst* further explained that the Eighth Amendment requires an individualized sentencing in death penalty cases, one that avoids arbitrariness:

> That foundational precept is the principle that death is different.[15] This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders.[16] Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that

> "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in *Gregg*." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.
>
> As we hold in this case, the unanimous finding of the aggravating factors and the fact they are sufficient to impose death, as well as the unanimous finding that they outweigh the mitigating circumstances, all serve to help narrow the class of murderers subject to capital punishment. However, the further requirement that a jury must unanimously recommend death in order to make a death sentence possible serves that narrowing function required by the Eighth Amendment even more significantly, and expresses the values of the community as they currently relate to imposition of death as a penalty.

Id. at 59-60 (footnotes omitted). And this Court concluded that the evolving standards of decency mandate a unanimous jury recommendation:

> In failing to require a unanimous recommendation for death as a predicate for possible imposition of the ultimate penalty, Florida has been a clear outlier. Of the states that have retained the death penalty, Florida is one of only three that does not require a unanimous jury recommendation for death.[17] Additionally, federal law requires the jury's recommendation for death in a capital case to be unanimous. See 18 U.S.C. § 3593(e); Fed. R.Crim.P. 31(a). The Supreme Court reiterated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (abrogated on other grounds in *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242)). The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put

> to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances. By requiring unanimity in a recommendation of death in order for death to be considered and imposed, Florida will achieve the important goal of bringing its capital sentencing laws into harmony with the direction of society reflected in all these states and with federal law.

Id. at 61-62 (footnote omitted).

Contrary to the State's argument, Bogle submits that his death sentence violates the Eighth Amendment under *Hurst v. State* and should be vacated.

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.

According to the State, Bogle's claim is procedurally barred and meritless (AB at 44). The State asserts that no substantive change has occurred, and that since the legislature did not express an intent for the statute to be retroactive, it is not retroactive to cases which were final prior to enactment of the new statute (AB at 44-45).

Bogle disagrees with the State's assertions. It is clear that the Florida Legislature intended the revised § 921.141 to govern in any cases in which a death sentence is vacated and remanded for a new penalty phase. While the proceeding may carry the label "penalty phase," in actuality the proceeding will be to determine whether the defendant is guilty of capital first degree murder. The revised statute will govern in homicide cases committed well before its enactment. *See Card v. Jones*, 219 So.

3d 47 (Fla. 2017). Implicated by this is the Due Process Clause and *Fiore v. White*, 531 U.S. 225, 226 (2001). There, the Supreme Court noted:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

Before resolving the issue, the Supreme Court asked the Pennsylvania Supreme Court to explain the basis for one of its decisions regarding the elements of the statutorily defined criminal offense for which Fiore had been convicted.[3] Was the decision construing the criminal statute **a new interpretation** or was it **a straightforward reading of the statute**? *Fiore v. White*, 531 U.S. at 226 (emphasis added). The Pennsylvania Supreme Court explained that its earlier "ruling merely clarified the plain language of the statute." *Id.* at 228. This meant that the ruling dated back to the statute's enactment. It was not a new interpretation of the statute, just a statement of the statute's plain meaning and so retroactivity was not at issue. *Id.* at 228 (because the Pennsylvania Supreme Court's statement of the

[3]Fiore was convicted of operating a hazardous waste facility without a permit. While Fiore had a permit, the State had "argued that Fiore had deviated so dramatically from the permit's terms that he nonetheless had violated the statute." 531 U.S. at 227. On the State's theory, Fiore was convicted. After Fiore's unsuccessful appeals had concluded, the Pennsylvania Supreme Court in a different case held: "[t]he statute made it unlawful to operate a facility without a permit; one who deviated from his permit's terms was not a person without a permit; hence, a person who deviated from his permit's terms did not violate the statute." *Id.* at 227. After Fiore unsuccessfully challenged his conviction in state court collateral proceedings based on the Due Process Clause, he sought federal habeas relief. "The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone's case, had announced a new rule of law and thus was inapplicable to Fiore's already final conviction." *Id.* at 227.

statute's plain meaning "was not new law, this case presents no issue of retroactivity."). The statute's plain meaning dated to the day of its enactment.

In Fiore's case, this meant one element of the criminal offense had not been presented and found proven beyond a reasonable doubt by his jury. The Supreme Court held the Due Process Clause was violated and collateral relief was warranted:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that **the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.**

Id. at 228-29 (emphasis added). Because Fiore had not been found guilty of an essential element, his conviction was not constitutionally valid.

Just as occurred in *Fiore*, this Court in *Hurst v. State* looked at the plain language in the statute and saw the statutorily necessary facts to convict of capital first degree murder were plainly stated:

> 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.

Hurst v. State, 202 So. 3d at 53-54 (emphasis added). With the enactment of Chapter 2017-1, the decision in *Hurst v. State* was confirmed. Accordingly, these "elements" are now recognized as having always been there. The "elements" were there when the statute was enacted in 1972. In the decision discussed in *Fiore*, the Pennsylvania Supreme Court used the plain meaning of the statute. Thus, the decision had not established a new rule; it

merely identified the substantive law set forth in the statute. This is what *Hurst v. State* did as confirmed by the enactment of Chapter 2017-1. The result must be the same as in *Fiore*. Without a jury finding each element of capital first degree murder 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 Reply Brief of Appellant has been furnished by electronic transmission to Lisa Martin, Assistant Attorney General, on September 28, 2018.

/s/. Linda McDermott
LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, Florida 33334
(850) 322-2171
lindammcdermott@msn.com

COUNSEL FOR MR. BOGLE

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Reply Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

/s/. Linda McDermott
LINDA McDERMOTT