

IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC15-2149

DEATH WARRANT SIGNED

EXECUTION SCHEDULED

January 7, 2016 at 6:00 p.m.

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

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FLORIDA SUPREME COURT

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PRELIMINARY STATEMENT

Appellant, Oscar Ray Bolin, appeals the trial court's order denying his successive amended motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851 Fla. R. Crim. P. 3.851. Citations to the record on appeal will be referred to by "SPCR" followed by the appropriate volume and page number (SPCR V__:__).

The direct appeal record consisted of 20 volumes ("DAR"), and 1 supplemental volume ("DAR SV"), and citations to the trial record will be referred to by the appropriate direct appeal volume number followed by the page number (DAR V__:__).

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on the appeal from the denial of Bolin's successive motion to vacate. The claims raised in this successive motion were properly denied as procedurally barred or meritless as a matter of established Florida law. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

In 1986, Oscar Ray Bolin committed three brutal murders in the Tampa Bay area. Bolin was convicted and sentenced to death in two of these cases, the instant Pasco County case involving victim Teri Lynn Matthews, see Bolin v. Sate, 869 So. 2d 1196 (Fla. 2004), and a case in Hillsborough County involving victim Stephanie Collins, see Bolin v. State, 117 So. 3d 728 (Fla. 2013). Although Bolin had been sentenced to death in the third case involving victim Natalie Holley, his case was reversed by this Court and he was eventually convicted of second degree murder. See Bolin v. State, 796 So. 2d 511 (Fla. 2001) (reversing death sentence in murder of Natalie Holley); Bolin v. State, 166 So. 3d 778 (Fla. 2d DCA 2014) (table) (per curiam affirmance of Bolin's conviction and sentence for second degree murder).

The facts surrounding Bolin's murder in the instant case involving victim Teri Lynn Matthews were recited in this Court's opinion on direct appeal as follows:

Appellant Oscar Ray Bolin, Jr. is again before this Court on direct appeal of his conviction and sentence of death for the December 1986 murder of Teri Lynn Mathews [sic]. In 1991, a Pasco County grand jury returned an indictment charging Bolin with first-degree murder. In 1992, Bolin was tried and convicted for the murder. The trial judge followed the jury's recommendation and sentenced Bolin to death. On appeal, this Court reversed Bolin's conviction because improper evidence was admitted at trial. *See Bolin v.*

State, 650 So.2d 19 (Fla. 1995) (concluding that trial court erred in finding waiver of spousal privilege based on defendant's deposition of his ex-wife). On remand, Bolin was again tried, convicted, and sentenced to death. On appeal, this Court reversed a second time, based upon an abuse of discretion by the trial court for denying Bolin's motion for individual voir dire of prospective jurors on the issue of pretrial publicity. See *Bolin v. State*, 736 So.2d 1160 (Fla. 1999). The second retrial commenced on October 15, 2001. Bolin was again convicted and sentenced to death.

Evidence presented at Bolin's 2001 trial included the following. Mathews' body was discovered on December 5, 1986, near the side of a road in rural Pasco County. The body was found wrapped in a sheet imprinted with a St. Joseph's Hospital logo. The body had multiple head injuries, was shoeless, and was wet, although it had not rained recently. The victim's car keys were found close to the body. Evidence collected from the scene included nylon pantyhose and a pair of white pants. There was a single set of truck tire tracks leading to the body. The victim's car was found the next day by Mathews' boyfriend, Gary McClelland, who was worried about her disappearance and attempted to trace her steps after she left work the previous day. The victim's red Honda was found parked at the Land O' Lakes Post Office, with its headlights still on. The victim's mail was found scattered on the ground, and her purse was found undisturbed on the seat inside her car.

Bolin's half-brother, Phillip, testified that he was awakened by Bolin on the night of December 4, 1986. Bolin appeared to be nervous and told Phillip that he needed Phillip's help. The two walked outside, and then Phillip heard a moaning sound, which he thought could have been a wounded dog. Instead, he saw a sheet-wrapped body, and Bolin told him that the girl was shot near the Land O' Lakes Post Office. Bolin then walked over and straddled the body with his feet, raised a wooden stick with a metal end, and hit the body several times. Phillip said that he turned away because he was scared to watch, but compared the sound

to hitting a pillow with a stick. Bolin next turned on a water hose and sprayed the body. Bolin demanded that Phillip help him load the body onto the back of a black Ford tow truck, and Phillip helped by picking up the body by the ankles. Phillip testified that he noticed there were no shoes on the body and that the girl was wearing pantyhose. Phillip refused Bolin's offer of money to go with him to dispose of the body, so Bolin went alone and returned twenty to thirty minutes later. He continued talking to Phillip about the girl, stating that she had been shot in a drug deal.

At school the next day, Phillip talked with his friend, Danny Ferns, about what happened the night before and took Danny to where the body had been. Danny testified at trial, to corroborate Phillip's account of the murder, that there were blood stains on the ground at the site and that the grass in the area was disturbed. The State presented other corroborating evidence, which included the testimony of Rosie Kahles Neal. At the time of the murder, Neal co-owned with her now-deceased husband Kahles and Kahles, Inc., the business that employed Bolin as a tow truck driver. She testified that the truck Bolin was driving on the night of the murder was not returned that night, and she thought the truck had been stolen by Bolin because he could not be located and it was the first call he had handled by himself. Neal testified that Bolin was late coming to work the next morning, was wearing the same clothes as he had the day before, and had a foul smell. She further testified that Bolin played with and carried a knife and got excited when the story of the missing girl, Mathews, was reported on the news. Her testimony also corroborated the murder weapon, as she testified that she gave Bolin a "tire buddy" on the night of the murder. The tire buddy was a two-foot-long wooden club, which was drilled out and filled with lead.

Michelle Steen also offered corroborating testimony. Michelle Steen was married to Bolin's cousin, David Steen. In 1987, while Bolin visited their home, he volunteered that he had killed and beaten a girl in Florida and put a hose down her

throat, and that Phillip had watched him do it.

The State then offered the perpetuated videotaped testimony of Cheryl Coby, Bolin's ex-wife, who had died after the first trial. She had been a severe diabetic, was hospitalized numerous times in 1986, often brought home hospital towels and sheets from St. Joseph's Hospital, and identified the sheet that had been wrapped around Mathews' body as a hospital sheet resembling the ones she brought home. Cheryl Coby had a post office box at the Land O' Lakes Post Office, and Bolin picked up her social security checks there when she was in the hospital.

The State also offered DNA testimony indicating that Bolin could have been the source of the semen found in a stain on Mathews' pants. Federal Bureau of Investigation forensic serology expert John R. Brown testified that he could not eliminate Bolin as the contributor of the semen stain but could eliminate Gary McClelland, Mathews' boyfriend, as the source of the stain. David Walsh, a molecular biologist, extracted DNA from the stain on the pants and found that he could exclude both the victim and McClelland as the donors of the stain on the pants. Walsh found that five of the six bands of DNA detected in the stain matched five of the six bands from Bolin's DNA. Walsh was not able to visualize one band because of the small amount of DNA remaining on the pants. Dr. Christopher Basten, an expert in population genetic frequency, testified that Bolin was 2100 times more likely to be the source of the semen than a random, unrelated person.

Bolin was convicted of first-degree murder as charged in the indictment. Following the conviction, but prior to the beginning of the penalty phase, Bolin informed the court that he did not want to have a jury advisory proceeding, put on mitigation evidence, or question witnesses. The trial judge held an on-the-record colloquy with Bolin; the trial judge made a finding that Bolin's waiver was knowing, voluntary and intelligent; and the penalty phase proceeded without a jury. The State presented aggravating evidence through three witnesses with regard to aggravating

circumstances. The Court stated that the defense could present whatever evidence in mitigation that the defense wanted to present at a *Spencer* [FN1] hearing, which was thereafter scheduled.

FN1. *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

The *Spencer* hearing was held on December 14, 2001, and again defense counsel told the court that Bolin instructed it not to call any witnesses or present any evidence. The prosecutor suggested that pursuant to *Muhammad v. State*, 782 So.2d 343 (Fla. 2001), the court should obtain a presentence investigation to look for mitigation and review prior testimony in prior trials regarding mitigation. The court questioned Bolin about his decision, and Bolin declared his desire to waive presentation of penalty-phase evidence, stating, "I've read *Muhammad* three times. I understand the philosophy behind *Muhammad*, and I understand what counsel has told me. I've discussed it with them. I made a free and voluntary decision." At the sentencing hearing on December 28, 2001, Bolin was once again sentenced to death for the murder of Mathews. The court followed the *Muhammad* guidelines and found three aggravating factors, [FN2] one statutory mitigating factor, [FN3] and twelve nonstatutory mitigating factors. [FN4] The court found that the three aggravators outweighed all of the mitigators combined.

FN2. The aggravating factors found by the trial court were: (1) Bolin was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (great weight); (2) the capital felony was committed while Bolin was engaged in the kidnapping of the victim from the post office or defendant intended to commit a sexual battery (great weight); and (3) the capital felony was heinous, atrocious, or cruel (great weight).

FN3. The court found the statutory mitigator that the capacity of Bolin to appreciate the criminality of his conduct was substantially impaired because of brain damage, but the court

gave this mitigator little weight.

FN4. The court found twelve nonstatutory mitigators: (1) Bolin had a somewhat difficult childhood (some weight); (2) he had a sporadic and minimal educational experience (little weight); (3) he received improper care during childhood (little weight); (4) he was under stress at the time of the murder because of his wife being pregnant and frequently ill (slight weight); (5) Bolin was twenty-four years of age at the time he committed the murder; (6) he was respectful to other parties in this case (little weight); (7) he saved another life by rescuing a drowning person (some weight); (8) he was employed at the time of the offense (slight weight); (9) he received no adverse disciplinary reports from prison (some weight); (10) he had used alcohol and drugs as a minor, but did not have a dependency problem (slight weight); (11) he had some evidence of minor brain damage or mental illness (little weight); and (12) he had a medical history that included multiple suicide attempts (slight weight).

Bolin v. State, 869 So. 2d 1196, 1197-1200 (Fla. 2004).

In concluding that sufficient evidence existed to support Bolin's murder conviction, this Court stated:

Upon a thorough review of the record, substantial evidence exists to support Bolin's conviction. There is substantial testimony in the record of Bolin's half-brother, Phillip, concerning Bolin's activities on the night of the murder. Both Bolin and the victim had post office boxes at the Land O' Lakes Post Office. Mathews' [sic] car was found the next morning at the post office, with its headlights still on and her mail on the ground. Bolin picked up his wife's social security check on the night of the murder from that post office. The victim's body was found wrapped in a sheet from a hospital in which Bolin's then wife, Cheryl Coby, had been hospitalized and from which Coby testified she had brought home sheets like the one

wrapped around the victim's body. Bolin failed to return his employer's tow truck to the business on the night of the murder. The victim's body revealed trauma wounds to the victim's head that were consistent with the tire buddy given to Bolin, as corroborated by Phillip Bolin's eyewitness portrayal of the beating of what Phillip testified Bolin told him was a girl's body wrapped in a sheet. Phillip also corroborated that the body was shoeless but that the girl was wearing pantyhose. Bolin's semen was found on the victim's pants, as determined by DNA testing which revealed that Bolin was 2100 times more likely to be the source of the semen than a random, unrelated person. Based upon this evidence and the other evidence in the record, we conclude that the evidence is sufficient to support Bolin's first-degree murder conviction.

Id. at 1204-05.

After his conviction became final following the denial of certiorari review, see Bolin v. Florida, 531 U.S. 859 (2004), Bolin sought postconviction relief. The trial court conducted an evidentiary hearing on Bolin's postconviction claims and denied his motion. This Court affirmed the denial of postconviction relief.¹ Bolin v. State, 3 So. 3d 1091 (Fla. 2009).

During his initial postconviction proceedings in 2005, Bolin filed a motion for DNA testing pursuant to Florida Rule of Criminal Procedure 3.853 seeking STR DNA testing on items which

¹ Bolin also unsuccessfully sought habeas corpus relief in federal court. Bolin v. Secretary, Fla. Dept. of Corr., No. 8:10-cv-1571-T-27EAJ, 2013 WL 3327873 (M.D. Fla. July 1, 2013) (denying habeas petition); Bolin v. Secretary, Fla. Dept. of Corr., No. 13-13539-P (11th Cir. Sept. 20, 2013) (denying certificate of appealability).

had previously been tested using older DNA technology. The trial court granted Bolin's request and all of the requested items were tested. On November 15, 2013, the court issued an order after Bolin's counsel informed the court that, because the DNA results were not exculpatory and did not exclude Bolin as the source of the biological evidence, Bolin would not be pursuing any further relief based on the DNA testing.

On September 26, 2014, Bolin filed a successive motion for postconviction relief raising three claims:

CLAIM I: NEWLY DISCOVERED EVIDENCE OF THE CONFESSION OF STEVEN KASLER.

CLAIM II: NEWLY DISCOVERED EVIDENCE OF THE PRIOR BAD ACTS OF FBI AGENT MICHAEL MALONE, MALONE'S HANDLING OF EVIDENCE THAT WAS USED AGAINST MR. BOLIN, AND THE PROBABLE TAMPERING THAT OCCURRED DURING MALONE'S HANDLING OF THE EVIDENCE.

CLAIM III: THE STATE'S FAILURE TO DISCLOSE INFORMATION REGARDING MALONE'S MISCONDUCT AND THE INVESTIGATION INTO HIS WORK VIOLATED THE STATE'S DUTY TO DISCLOSE FAVORABLE, MATERIAL EVIDENCE PURSUANT TO BRADY V. MARYLAND.

(SPCR V1:1-25). On December 15, 2014, the trial court issued an order summarily denying claims II and III of Bolin's motion relating to FBI agent Malone and allowed Bolin leave to amend his remaining claim regarding inmate Steven Kasler.² (SPCR

² Shortly before the case management conference, Bolin filed a second motion for postconviction DNA testing in this case and requested that Steven Kasler's known DNA profile be compared to

V3:531-36). Bolin amended Claim I regarding Kasler and added a fourth claim alleging a Brady³ violation based on the State's alleged failure to disclose information regarding inmate Kasler. (SPCR V4:738-54). On August 24, 2015, the court conducted an evidentiary hearing on Bolin's claim regarding Kasler's confession. (SPCR V13:2445-556).⁴

At the evidentiary hearing, Bolin attempted to present evidence from Ohio inmate Steven Crane regarding his conversations with Steven Kasler, but Crane refused to testify. (SPCR V13:2453-70). Bolin then presented evidence from one of his current collateral attorneys, Bjorn Brunvand. (SPCR V13:2471-511). Brunvand testified that he became aware of Kasler's confession after receiving correspondence from inmate Steven Crane around January, 2014. (SPCR V13:2472, 2477). In September, 2014, Brunvand spoke with Kasler on the phone and Brunvand noted that Kasler provided some details about where the

the identified DNA obtained from the crime scene. The State objected to this request and the trial court denied Bolin's motion. Bolin appealed this ruling, and this Court affirmed the lower court's ruling. Bolin v. State, SC15-213 (Sept. 18, 2015). However, the State subsequently agreed to allow the DNA comparisons.

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

⁴ For unknown reasons, the Pasco County Clerk's Office "sealed" this hearing transcript, as well as other documents from the record on appeal. The State is unaware of any court ruling sealing any records during the instant postconviction proceedings.

murder of Teri Lynn Matthews happened. (SPCR V13:2473). Kasler told Bolin's counsel that the murder occurred in Land O'Lakes by a post office, the victim's car was left on, and her purse was left behind. (SPCR V13:2473).

On cross-examination, Brunvand acknowledged that the information given by Kasler regarding the Matthews' murder simply involved basic facts reported in newspapers and court opinions. (SPCR V13:2503). Brunvand testified that his office attempted to corroborate Kasler's claims, but he could not recall obtaining any corroborating evidence. (SPCR V13:2501-02).

Brunvand further noted that Kasler was a "problematic" witness because he had confessed to a number of murders and recanted his confessions. (SPCR V13:2499-500; see also SPCR V2:253-54). Through his communications with Kasler, Brunvand learned that Kasler had confessed to a murder in Ohio (which Kasler later stated was a false confession) and pled no contest to the murder. (SPCR V13:2498-500). Kasler had previously been convicted in Louisiana and was sentenced to 99-years to life, and Kasler did not want to serve his time in Angola Prison in Louisiana so, in order to avoid serving time in Angola, Kasler confessed to murders in other states. (SPCR V13:2478-2483, 2490-91, 2499-500). Kasler eventually became upset when he learned that he would only serve 20 years in Ohio and was then scheduled

to return to Angola. (SPCR V13:2500).

In email correspondence with Brunvand, Kasler gave specific details of other murders he allegedly committed, and claimed that he "killed Teri Lynn Matthews." (SPCR V13:2482-83). In one of his emails to Brunvand, Kasler stated that he and a friend named Albert Eugene "Petey" Holmes Jr. were driving around trolling for nurses when they went to St. Joseph's Hospital and Petey stole a sheet. Kasler claimed that is where the sheet came from which was used to wrap the body of Teri Lynn Matthews. (SPCR V13:2508-09; V14:2678-79).

In rebuttal, the State presented evidence from Kenneth Karnig, an individual who has run a crime memorabilia website and blog since 1992. (SPCR V13:2513-15). Karnig testified that he was familiar with Bolin's case involving victim Teri Lynn Matthews from reading about it in the newspapers and watching television shows. (SPCR V13:2516). In 2013, inmate Steven Kasler contacted Karnig and they began communicating and exchanging information on murder cases via phone calls, letters, and one video visit. (SPCR V13:2517-18). Kasler told Karnig that he "had nothing to do with" the murder of Teri Lynn Matthews and had "written a false confession about it." (SPCR V13:2518). In a May 28, 2014, letter to Karnig, Kasler admitted that he falsely confessed to the Matthews' murder. (SPCR V13:2518-19). Kasler

told Karnig that he was making numerous written false confessions to murders because another crime memorabilia dealer named Jeremy Tod Bohannon was putting Kasler up to it. (SPCR V13:2522-23). Karnig also testified that Kasler requested information from him on Bolin's case and confirmed that Kasler had access in prison to Lexis/Nexis. (SPCR V13:2526).

Additionally, pursuant to Bolin's request under Florida Rule of Criminal Procedure 3.853, see note 2 supra, the State introduced into evidence the results from the additional DNA comparisons conducted on Kasler's DNA profile. The report established that Steven Kasler's DNA was excluded as a contributor to any of the male DNA profiles associated with the victim's murder. (SPCR V14:2702-12).

On October 22, 2015, the court issued a final order denying Bolin's amended successive postconviction motion. (SPCR V5:941-49). On October 30, 2015, Governor Rick Scott signed Bolin's death warrant and the execution is scheduled for January 7, 2016, at 6:00 p.m. After the signing of the death warrant, Bolin filed a motion for rehearing from the trial court's order denying his amended successive postconviction motion. (SPCR V8:1471-1485). In his motion for rehearing, Bolin improperly requested that the court consider inadmissible evidence from

unrelated cases as the sole basis for rehearing. (SPCR V8:1486-1563).

Following the signing of the death warrant, Bolin also filed a new claim challenging the constitutionality of the Governor's death warrant selection process. Bolin added this claim as "Claim V" to his amended successive motion which had already been denied, but was pending on rehearing. The State argued below that Bolin could not "amend" his successive postconviction motion at this time pursuant to Florida Rule of Criminal Procedure 3.851(f)(4), as the court had already denied the amended successive motion following an evidentiary hearing. Thus, the State asserted that Bolin's claim challenging the Governor's warrant selection process should have been considered as a stand-alone claim in a *second* successive postconviction motion filed pursuant to Rule 3.851(h)(5).

On November 20, 2015, the trial court issued a single order denying Bolin's motion for rehearing and noting that Bolin's allegations in his motion for rehearing were improperly raised and should be dismissed. (SPCR V13:2400-43). However, in the interests of "clarity and judicial economy," the trial court considered the claims as if they were raised in a second successive postconviction motion. In denying all relief, the court re-addressed the previously-denied four claims raised in

Bolin's amended successive postconviction motion, and further addressed and denied Bolin's new claim challenging the Governor's warrant selection process.

This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly denied Bolin's successive amended motion for postconviction relief. As to Bolin's newly discovered evidence claim based on a confession from Ohio inmate Steven Kasler, the State submits that the lower court erred when ruling that Kasler's uncorroborated confession would have been admissible at retrial as a statement against penal interest. Nevertheless, the court properly concluded that, even if admissible, Kasler's confession was not of such a nature that it would probably produce an acquittal on retrial. Contrary to Bolin's assertions, the postconviction court conducted a cumulative assessment of all the admissible evidence when denying his claim.

The trial court properly summarily denied Bolin's alleged newly discovered evidence claim relating to FBI Agent Michael Malone. Bolin's claim regarding Malone was not "newly discovered evidence" as Bolin and his counsel had known of this information regarding Malone for years. Thus, the court properly found that his claim was procedurally barred. Additionally, the court addressed the merits of Bolin's claim and correctly noted that Bolin's allegations of Malone tampering with or altering evidence were completely conclusory and unsupported. As Malone was not involved in any of the forensic serological testing in

this case and never testified at Bolin's trial, the trial court properly concluded that Bolin's speculative allegations regarding Malone would probably not produce an acquittal on retrial.

The record in this case clearly supports the trial court's summary denial of Bolin's two Brady claims based on allegations that the State failed to disclose information regarding Kasler, and failed to disclose information regarding FBI Agent Malone. The record refutes that the State failed to disclose this information and further conclusively refutes any finding of materiality.

Following the signing of the death warrant in this case, Bolin raised an additional claim challenging the constitutionality of the Governor's warrant selection process. The postconviction court properly summarily denied this claim as procedurally barred and without merit. As Bolin has failed to establish that he is entitled to any postconviction relief on his successive motion, this Court should affirm the lower court's denial of relief and deny Bolin's request for a stay of execution.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY FOUND THAT EVIDENCE OF AN UNCORROBORATED CONFESSION FROM AN OHIO INMATE DID NOT SUBSTANTIALLY UNDERMINE CONFIDENCE IN THE OUTCOME OF THE PRIOR PROCEEDINGS.

In his amended successive postconviction motion, Bolin alleged that an Ohio inmate named Steven Kasler recently confessed to murdering Teri Lynn Matthews. The trial court granted an evidentiary hearing on this newly discovered evidence claim. At the hearing, Bolin presented brief testimony from one of his attorneys, Bjorn Brunvand, regarding his communications with Kasler. Brunvand testified that Kasler claimed to have killed Matthews, but Kasler was only able to provide generic, readily-available facts about the murder. Kasler claimed that the murder occurred in Land O'Lakes by a post office, the victim's car was left on, and her purse was left behind. Brunvand further acknowledged that Kasler was a "problematic" witness because he had given a number of confessions to various murders and then recanted.

In rebuttal, the State presented evidence from a crime memorabilia dealer, Kenneth Karnig, who testified that he communicated with Kasler and Kasler admitted that he had nothing to do with the Matthews' murder and had falsely confessed to

committing the murder.⁵ Karnig, like Brunvand, was also aware that Kasler had given numerous false confessions. Karnig further testified that Kasler had requested information from him on Bolin's case and knew that Kasler had access to Lexis/Nexis in prison.

After hearing this evidence, the trial court issued a detailed order denying Bolin's newly discovered evidence claim. In addressing Bolin's claim, the trial court first considered and rejected the State's argument that Kasler's confession would be inadmissible at any retrial as a statement against penal interest under Florida Statutes, section 90.804(2)(c) because the statements were not corroborated. The court proceeded to analyze Bolin's claim under the Jones newly discovered evidence standard and found that, even if Kasler's statements were admissible, this evidence was not of a nature that it would probably produce an acquittal or a sentence other than death. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (stating that in order for a defendant to obtain a new trial based on newly discovered evidence, a defendant must meet two

⁵ Appellant argues in his brief at page 61 that the timeline of Karnig's accounts "does not make sense" because Karnig stated that Kasler told him in May, 2014 that he had falsely confessed to the Matthews' murder, and Kasler had not confessed to Bolin's attorney until a telephone call in September, 2014. Bolin ignores the fact that Kasler had confessed to the murder well before May, 2014; to both Steven Crane and to Bolin's wife.

requirements: (1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence must substantially undermine confidence in the outcome of the prior proceedings, or stated another way, must be of such nature that it would probably produce an acquittal on retrial).

When reviewing a circuit court's decision as to a newly discovered evidence claim following an evidentiary hearing, this Court accepts the lower court's findings on questions of fact, credibility of witnesses, and weight of evidence if based upon competent, substantial evidence. Waterhouse v. State, 82 So. 3d 84, 101 (Fla. 2012); see also Rogers v. State, 783 So. 2d 980, 1003-04 (Fla. 2001) (reiterating "this Court will not substitute its own judgment for that of the trial court on question of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court"). This Court reviews the postconviction court's application of the law to the facts *de novo*. Brooks v. State, 175 So. 3d 204, 231 (Fla. 2015).

Here, the State first submits that the lower court erred as a matter of law when finding that Kasler's hearsay statements

would be admissible at retrial as a statement against penal interest. Florida Statutes, section 90.804(2)(c) governing hearsay statements when the declarant is unavailable⁶ provides:

A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. **A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.**

Fla. Stat., § 90.804(2)(c) (2014). As a review of the court's order indicates, the court was "tempted" to rule that Kasler's statements were uncorroborated and lacking credibility and thus, inadmissible. (SPCR V5:945). The court stated that, if he found Kasler's statements inadmissible, Bolin could not establish the second prong of the Jones analysis and his claim could be denied. (SPCR V5:945); see also Williamson v. State, 961 So. 2d 229, 234-35 (Fla. 2007) (finding that inadmissible hearsay cannot satisfy the newly discovered evidence standard as the court must only consider newly discovered evidence which would be admissible at retrial). However, the court misinterpreted decisions from this Court and ruled that it was not his role to

⁶ Kasler was unavailable as he committed suicide prior to the evidentiary hearing.

determine whether corroborating circumstances exist which showed the trustworthiness of Kasler's statements before ruling on whether the statements were admissible.

In finding Kasler's statements admissible, the lower court erroneously interpreted this Court's recent decision in Bearden v. State, 161 So. 3d 1257 (Fla. 2015), which did not involve section 90.804(2)(c), but rather, addressed the trial court's ruling that an *in-court* witness lacked credibility and could not testify to an out-of-court statement against penal interest made by a third party. Id. at 1263-67. This Court found that the trial judge erred in excluding this evidence from the jury at the defendant's murder trial because the court improperly focused on the credibility of the in-court witness as opposed to focusing on the reliability of the hearsay statements. Id. at 1264. This Court noted that "[t]he judge, as gatekeeper, decides only whether evidence exists and is admissible. Once the evidence is admitted, the jury decides whether it is credible. See Carpenter v. State, 785 So. 2d 1182, 1203 (Fla. 2001)." Id. at 1263.

The postconviction court in the instant case recognized that Bearden did not involve section 90.804(2)(c), so the court also looked to the Carpenter decision cited in this Court's Bearden opinion. In Carpenter, the defendant sought to introduce

testimony from two inmate witnesses that his co-defendant, Pailing, admitted to committing the murder and burning the victim's body.⁷ The trial court excluded the testimony from the two inmate witnesses because Pailing's testimony did not explicitly state that Carpenter was not involved in the murder. This court noted that in this regard, the trial court erred in excluding the evidence because "while Pailing's statements did not totally exonerate Carpenter, such statements could bolster Carpenter's theory regarding his reduced degree of culpability." Id. at 1203. This Court also found that the trial court erred in excluding the testimony of the two inmate witnesses because the trial court improperly questioned the credibility of the two in-court witnesses. Furthermore, this Court found that Pailing's statements were corroborated by other evidence presented at trial and were therefore admissible under section 90.804(2)(c).

In finding that Kasler's statements would be admissible at retrial, the lower court erroneously concluded that he could not consider the credibility of Kasler's statements when making a determination as to the admissibility of the statements under section 90.804(2)(c). To the contrary, this Court's decisions in Bearden and Carpenter do not prohibit the trial judge from

⁷ Pailing was unavailable to testify due to his Fifth Amendment right not to incriminate himself. Carpenter, 785 So. 2d at 1202.

analyzing the unavailable declarant's statements for "corroborating circumstances [which] show the trustworthiness of the statement." Rather, this Court's decisions make clear that it is the trial court's role as gatekeeper to determine whether the hearsay statements would be admissible and that analysis necessitates a review of the unavailable declarant's statements to determine whether they are trustworthy. Bearden, 161 So. 3d at 1263; Sims v. State, 754 So. 2d 657, 661-62 (Fla. 2000) (holding that trial court did not err in excluding evidence under section 90.804(2)(c) as the statements were not "sufficiently corroborated by any other evidence and thus lack the indicia of trustworthiness to be admitted as substantive evidence"); Lightbourne v. State, 644 So. 2d 54, 57 (Fla. 1994) (finding that trial court did not err in excluding evidence under section 90.804(2)(c) as it lacked the necessary indicia of reliability).

In the instant case, there are no corroborating circumstances establishing the trustworthiness of Kasler's statements that he killed Teri Lynn Matthews. In fact, as the evidence from the hearing establishes, Kasler's confession is completely *untrustworthy*. The testimony and documents admitted into evidence show a pattern by Kasler of giving false confessions to numerous murder cases; including the instant

case. When confessing to Bolin's counsel, Kasler presented a few generic facts, all of which were widely reported in the media and court opinions which Kasler had access to in prison. Bolin's counsel was aware that Kasler had given false confessions in other cases and, after investigating Kasler's claim, Bolin's counsel testified that he was unable to find any corroborating evidence. In contrast to Kasler's statements to Bolin's counsel, Kasler admitted to Kenneth Karnig that he falsely confessed and had "nothing to do" with Matthews' murder. Furthermore, the evidence from Bolin's trial and the recent postconviction DNA results exclude Kasler's involvement in the murder.⁸

The trial judge recognized that Kasler's statements were untrustworthy when he stated, "[t]he Court finds that, unlike the many specific corroborated facts found in Carpenter, in the instant case, the limited information provided by Kasler, in confessing to the murder of Teri Lynn Matthews, is insufficiently specific and lacks the 'particularized guarantees

⁸ As will be discussed in more detail infra, contrary to Bolin's assertions, the lower court properly considered *all* available evidence when analyzing Bolin's newly discovered evidence claim, see Johnston v. State, 27 So. 3d 11 (Fla. 2010), including the STR DNA results obtained in 2013 which failed to exclude Bolin as a potential donor to the DNA recovered from the victim, and the 2015 DNA comparisons excluding Kasler from any of the DNA profiles.

of trustworthiness,' that seem to be required under § 90.804(2)(c)." (SPCR V5:944). Nevertheless, the court, apparently in an abundance of caution, decided to analyze Bolin's claim as if Kasler's statements were admissible.

In conducting this analysis, the court correctly found that Kasler's statements were not of such a nature as to entitle Bolin to relief under the Jones newly discovered evidence standard. Bolin repeatedly cites to this Court's opinions in Swafford v. State, 125 So. 3d 760 (Fla. 2013), and Hildwin v. State, 141 So. 3d 1178 (Fla. 2014), and erroneously asserts that the court failed to conduct a cumulative analysis of his newly discovered evidence claim. To the contrary, the court considered *all* of the admissible evidence when addressing Bolin's claim.

While Bolin repeatedly asserts that the postconviction court and this Court are required to review the "sprawling" record and wealth of evidence developed over the nearly 15 years since his conviction, the reality is there is a dearth of "new" admissible evidence developed since Bolin's conviction in 2001.⁹ The newly discovered evidence in this case consists of the following:

⁹ Bolin's original postconviction proceedings involved two issues: Danny Ferns' identification of blood on the ground where Philip Bolin stated that he witnessed Bolin murder Matthews, and trial counsel's failure to call Bolin's father as a witness. See Bolin v. State, 3 So. 3d 1091 (Fla. 2009).

Recent STR DNA results excluding Kasler, but failing to exclude Bolin;

Kasler's confession to Bolin's attorney;

Evidence that Kasler falsely confessed to this, and numerous other, murders; and

Inadmissible evidence from Bolin's unrelated murder cases.¹⁰

As previously set forth, although the evidence involving Kasler is inadmissible, the lower court considered this evidence as well as the recent inculpatory DNA evidence when analyzing Bolin's newly discovered evidence claim. See Johnston v. State, 27 So. 3d 11 (Fla. 2010) (holding that trial court must consider all admissible evidence when considering newly discovered evidence claim, even new inculpatory DNA evidence). Clearly, as the trial court found, even if Kasler's statements were admissible, Kasler's confession was unreliable and would be insufficient to entitle Bolin to relief as it fails to negate the ample and overwhelming evidence implicating Bolin in the instant murder. As this Court has previously noted, the evidence implicating Bolin includes the eyewitness testimony of Bolin's step-brother, Phillip Bolin, describing Appellant beating the

¹⁰ As will be argued in more detail infra, Bolin's attempt to have the lower court and this Court consider evidence from Bolin's unrelated murder cases is improper and cannot be considered in any cumulative analysis as it would clearly be inadmissible at retrial.

victim with a tire buddy while she was wrapped in a St. Joseph's Hospital sheet (which had been obtained from Bolin's wife), and then turning on the hose and pouring water over her.¹¹ The tow truck Bolin was driving, the tire buddy used in the beating,¹² and the tire tracks found at the scene were all incriminating evidence linking Bolin to the murder. Additionally, the victim was kidnapped from the post office where Bolin's wife maintained a mail box.¹³ The State also presented evidence that Bolin confessed to his cousin's wife, Michelle Steen, and stated that he had killed and beaten a girl in Florida and put a hose down her throat, and that Phillip Bolin had watched him do it. See Bolin v. State, 869 So. 2d 1196, 1197-99 (Fla. 2004) (summarizing the overwhelming evidence against Bolin).

Finally, in addition to this evidence, the lower court also

¹¹ Phillip Bolin's friend, Danny Ferns, corroborated Phillip Bolin's account of the murder and testified that Phillip was shaking, very upset, and crying on the bus in December of 1986. Ferns went back to the property with Phillip and saw blood stains on the ground. (DAR V15:869-878).

¹² The owners of the towing business provided incriminating evidence against Bolin including the fact that he disappeared with their tow truck the day of the murder, and returned late to work the following day wearing the same clothes and smelling foul.

¹³ While she was in St. Joseph's Hospital, Bolin brought his wife her Social Security check on December 5, 1986, after having forgotten on the previous day. (DAR V16:970-74). This fact placed Bolin at the Land O'Lakes post office on the night of Matthews' abduction and murder in order to pick up his wife's check.

noted the incriminating DNA evidence; both the evidence introduced at Bolin's trial indicating that Bolin was 2100 times more likely to be the source of the semen found on the victim's pants than a random, unrelated person, as well as the recent STR DNA evidence obtained during Bolin's postconviction proceedings which excluded Kasler, but failed to exclude Bolin. The court even considered the fact that, according to Kasler, another individual named Albert Eugene "Petey" Holmes raped the victim while Kasler killed her. The court correctly noted that despite Bolin's counsel being aware of Kasler's claims regarding Holmes, Bolin never presented any evidence regarding this individual and did not even establish that such a person actually existed. (SPCR V5:947). Given all this evidence and the credibility issues surrounding Kasler, the court properly concluded that Kasler's statements, even if admitted at retrial, would probably not produce an acquittal or a sentence other than death. As Bolin has failed to show that the court erred in this ruling, this Court should affirm the denial of relief. See Reed v. State, 116 So. 3d 260, 264-65 (Fla. 2013) (affirming denial of newly discovered evidence claim of another inmate's confession to the murder as evidence did not negate ample evidence against defendant).

ALLEGATIONS IN APPELLANT'S IMPROPER MOTION FOR REHEARING

The trial court denied Appellant's amended successive motion on October 22, 2015. A week later, Governor Scott signed a death warrant in Bolin's case. On November 3, 2015, Bolin filed a motion for rehearing, and on the Kasler claim, Bolin asked that the court reconsider its ruling based on evidence which had allegedly "recently surfaced" from an individual named Teri Ippolito. According to Bolin's motion, Ippolito claimed that an unidentified man (who was not Bolin) attempted to lure her into a vehicle in the same shopping center parking lot that victim Stephanie Collins was abducted from one day later in 1986. Bolin further included allegations concerning his unrelated murder case involving victim Natalie Holley, but did not even attempt to categorize this as "newly discovered" evidence as Bolin's current counsel represented Bolin at the trial in the Holley case, and was present for the 2011 deposition of Robert Anton which was attached to his motion for rehearing.¹⁴

¹⁴ Bolin was precluded from introducing evidence in the Holley case regarding his theory that another person named Edwin Keagle committed the murder as the trial court in that case ruled that the hearsay testimony from Robert Anton and Stephen Witschi lacked reliable corroborating circumstances and was inadmissible under section 90.804(2)(c). This ruling was affirmed on appeal in a per curiam opinion. Bolin v. State, 166 So. 3d 778 (Fla. 2d DCA 2014) (table).

As the State argued below, Bolin's allegations were improper for a motion for rehearing under rule 3.851(f)(7) as his argument was not based on an issue of fact or law which the court allegedly overlooked. See Fla. R. Crim. P. 3.851(f)(7) ("A motion for rehearing shall be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling."). The trial court agreed that Bolin's motion was improper and "should be dismissed," but *sua sponte*, and erroneously, decided to address the allegations in the motion as if they were raised in a successive postconviction motion. (SPCR V13:2401-02).

First, the State would note that, had Bolin raised the alleged "newly discovered evidence" claim regarding Ippolito in a successive postconviction motion, the State would have argued that the claim was time barred as Bolin, or his counsel, knew or should have known about Ippolito years before the instant motion.¹⁵ According to Bolin's allegations, Ippolito spoke with law enforcement officers and "an investigator" and provided a sketch of the man who attempted to lure her into a car. At the public records hearing held in this case following the signing

¹⁵ Obviously, Bolin's allegations regarding the Holley case were also time barred as he was aware of, and actually litigated, those issues at the time of the 2012 Holley trial.

of the warrant, Bolin's counsel conceded that a report detailing Ippolito's allegations were at the repository and that Ippolito had spoken with an investigator named Sonny Fernandez who was working for Bolin's defense counsel, Mark Ober, at the time.¹⁶ (SPCR V10:1882-83). Given that this information had been available for years and was likely known by Bolin's trial counsel and investigator at the time of the Collins' trial, the information from Ippolito is not "newly discovered" evidence.

While the trial court erroneously considered the Ippolito allegations in its order, the court nevertheless properly concluded that any evidence from Ippolito would not entitle Bolin to relief as the evidence would not be admissible at any retrial or penalty phase in the instant case. (SPCR V13:2403-05). This Court has previously held that any evidence from Bolin's other murder cases was inadmissible as Williams¹⁷ rule evidence in the instant murder case. See Bolin v. State, 650 So. 2d 19, 21 (Fla. 1995) (reversing Bolin's conviction in this case based on the improper admission of the evidence from Bolin's spouse and noting that on remand, the trial court should not

¹⁶ Presumably, any information at the repository pertaining to Ippolito was under Bolin's other, unrelated postconviction capital murder case involving victim Stephanie Collins, as Ippolito's information is *only* potentially relevant to that case.

¹⁷ Williams v. State, 110 So. 2d 654 (Fla. 1959).

allow into evidence any testimony regarding Bolin's murders of Natalie Holley and Stephanie Collins as these crimes were not sufficiently similar to be admissible as Williams rule evidence). Because the State was precluded from using evidence from the Holley and Collins murders in the instant case, Bolin would likewise be prohibited from introducing any evidence from these cases as reverse-Williams rule evidence. See generally McDuffie v. State, 970 So. 2d 312, 324 (Fla. 2007) (noting that the standard for the admissibility of reverse-Williams rule evidence is the same standard as used when the State offers Williams rule evidence).

The trial court further properly concluded that any evidence attempting to cast doubt on Bolin's culpability for the three murders would be inadmissible at the penalty phase. The law is well established that Bolin would not be permitted to introduce lingering doubt evidence in the penalty phase. See England v. State, 940 So. 2d 389, 405-06 (Fla. 2006) (defendant cannot introduce reverse-Williams rule evidence in penalty phase to show that his participation was relatively minor when the sole purpose of the evidence is to show residual or lingering doubt of his innocence); Duest v. State, 855 So. 2d 33, 40 (Fla. 2003) (stating that "a defendant has no right to present evidence of lingering doubt").

Finally, the court properly found that, even assuming Ippolito's evidence was admissible at retrial, it would not probably produce an acquittal or a sentence other than death. (SPCR V13:2405). As the court noted, "the fact that Ms. Ippolito's alleged testimony suggests that there may be an alternative suspect in the murder of Stephanie Collins is not relevant to this case because it occurred at a different time, in a different location and to a different victim." (SPCR V13:2405). The court further found that Bolin's claim that the unidentified person who attempted to abduct Ippolito was perhaps affiliated with Steven Kasler was "sheer speculation." (SPCR V13:2405). In conclusion, although the court erred in considering the Ippolito claim improperly raised in Bolin's motion for rehearing, the court nevertheless properly concluded that his claim was without merit. Accordingly, this Court should affirm the lower court's ruling.

ISSUE II

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED BOLIN'S ALLEGED NEWLY DISCOVERED EVIDENCE CLAIM REGARDING FBI AGENT MICHAEL MALONE.

In his successive postconviction motion filed in 2014, Bolin's counsel alleged that he had recently become aware of the United States Justice Department's investigation into FBI hair and fiber analyst Michael Malone, and speculated that serological testing in this case may have been possessed and prepared by Malone. Counsel alleged that this claim was timely because he only recently received this "case specific" information by the Department of Justice. (SPCR V1:8-18).

In its response to Bolin's motion, the State noted that this claim was not based on "newly discovered evidence" because Bolin and his counsel were likely aware of this evidence as early as 1997 following the release of the Office of Inspector General's (OIG) report and widespread media coverage regarding this report. Furthermore, as evidenced by attachments to Bolin's motion, Bolin's counsel in the instant case was clearly aware of the allegations against FBI Agent Malone at the time of Bolin's *original* postconviction proceedings in 2004 as documents discussing the OIG report and Malone's work in Bolin's cases

were provided to Bolin's counsel at that time.¹⁸ (SPCR V2:221-24; 237-42). Finally, the State attached transcripts from Bolin's 2006 trial in Hillsborough County in the Stephanie Collins case, as well as from his 2012 trial in the case involving victim Natalie Holley, indicating that both Bolin and his counsel were well aware of the issues regarding the OIG report and Malone at that time.¹⁹ (SPCR V2-3:260-407).

After conducting a case management conference, the postconviction court issued an order summarily denying Bolin's newly discovered evidence claim and found that the claim was untimely as counsel was aware of this information as far back as 2006. The court further ruled that Bolin's allegations that Malone may have tampered with evidence in this case were completely conclusory and without support. Given the fact that the record establishes that Malone did not conduct any serological testing in this case or testify at Bolin's trial,

¹⁸ The public records consisted of correspondence in 1998-99 between the Department of Justice and the State Attorney's Office regarding Malone's forensic testing of hair and fibers in the instant case and the fact that the State did not intend to introduce any evidence from Malone at Bolin's upcoming 2001 trial. (SPCR V2:221-24).

¹⁹ Notably, a review of the motion and attachments (including a deposition from Dr. Frederic Whitehurst) filed by Bolin's current counsel in the Natalie Holley murder case establishes that Bolin has been aware of the issues surrounding Michael Malone for years. (SPCR V2-3:288-363).

the court also found that any alleged newly discovered evidence would probably not produce an acquittal on retrial.

The State submits that the record clearly supports the lower court's finding that Bolin's claim in his successive motion was untimely as Bolin and his counsel were aware of this information since 2006, if not earlier. This Court has previously held that the summary denial of a newly discovered evidence claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record. Lukehart v. State, 103 So. 3d 134, 136 (Fla. 2012). Here, the trial court properly concluded that the motion, files, and records conclusively established that Bolin was not entitled to relief. Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review. Id.

In order for a successive motion to be timely, rule 3.851(d)(2) requires a threshold showing that the claim is either based on a new fundamental right that has been held to be retroactive or **the facts upon which it is based were unknown to the movant or the movant's attorney and could not have been discovered by the exercise of due diligence.** Fla. R. Crim. P. 3.851(d)(2) (emphasis added). Furthermore, to be considered

timely, the motion must be filed within one year of the date upon which the claim became discoverable through due diligence. Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008). In the instant case, the postconviction court properly found that Bolin's claim was untimely.

Bolin alleges that his claim was timely because Bolin's prior collateral counsel received a "case-specific" letter, dated September 27, 2013, from the Department of Justice informing counsel of the OIG report issued in 1997 regarding FBI laboratory examiners, including Michael Malone. The letter stated, in part:

Our records show that you are currently counsel of record for, or previously represented, Oscar Ray Bolin. The work of one or more of the 13 criticized examiners is believed to have been involved in the criminal prosecution of Oscar Ray Bolin, in the case(s) identified in the attachment. In particular we believe that FBI Examiner Michael Malone performed laboratory work for the government in this case. . . .

It is possible that the defense previously received notice of the OIG Report from the prosecutor's office responsible for the prosecution at issue, or that counsel or the defendant otherwise became aware of the criticisms, as they were widely known and the subject of many media reports. However, in an abundance of caution, we are bringing the OIG Report to your attention.

(SPCR V1:36) (emphasis added).

As the Justice Department letter stated, this information was provided to collateral counsel in an abundance of caution,

but the letter also noted that Bolin or his counsel may have become aware of this information regarding the OIG report as it was widely known and the subject of many media reports. Here, the record conclusively establishes that **both** Bolin and his counsel were aware of the OIG report and Malone's involvement in his case. As Bolin conceded in his motion, the documents attached to his successive motion were obtained from the repository after the State Attorney's Office complied with Bolin's public records request during his *original* postconviction proceedings in June, 2004. Additionally, the State attached a transcript from Bolin's prior trial on October 31, 2006, in Hillsborough County in the Stephanie Collins case where Bolin's trial counsel discussed Malone's involvement during his opening statement before the jury, and again at a bench conference, and attempted to introduce evidence regarding the 1997 OIG report. (SPCR V2:261-86). Similarly, Bolin's current collateral counsel filed a motion seeking to exclude hair, fiber and/or DNA evidence in 2012 in Bolin's non-capital murder case involving victim Natalie Holley based on Malone's involvement in Bolin's case and the OIG report. (SPCR V2:288-363).

In Wyatt v. State, 71 So. 3d 86, 97 (Fla. 2011), this Court addressed a newly discovered evidence claim based on comparative

bullet lead analysis (CBLA), and found that the FBI's 2008 case-specific letter to Wyatt's counsel was "newly discovered" evidence despite the fact that this general information had previously been reported in a 2004 report issued by the National Research Counsel (NRC), and in a press release issued by the FBI in 2005. This Court rejected the lower court's finding that the NRC report and the FBI press release indicating that the FBI was discontinuing its use of CBLA put counsel on notice that the agent's testimony in Wyatt's case exceeded the limits of science and could not be supported by the FBI. Id. at 98-99.

Unlike the facts in Wyatt, Bolin and his counsel have been aware of FBI agent Malone's limited involvement in the instant case and the OIG complaints regarding Malone for over a decade. The letter received by Bolin's counsel in 2013 from the Department of Justice simply notified counsel of the 1997 OIG report and the fact that Malone had been involved in Bolin's cases. The record conclusively established that Bolin and his counsel were aware of this information for years prior to bringing the instant successive postconviction claim. Furthermore, unlike the witness involved in Wyatt, Malone never testified at Bolin's trial.

Because the record and files clearly show that both Bolin and his counsel have been aware of the "case-specific"

information regarding Malone for well over a year, the postconviction court properly found that Bolin's claim was untimely and summarily denied the claim. See Glock v. Moore, 776 So. 2d 243, 250-51 (Fla. 2001) (stating that defendant could not establish that racial profiling claim was based on newly discovered evidence because the issue had been known for years as evidenced by reported caselaw); Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008).

Additionally, the postconviction court properly found that, even if this claim were timely, Bolin could not establish that the OIG report and Malone's involvement was evidence of such a nature that it would probably produce an acquittal on retrial under the Jones newly discovered evidence standard. Bolin's claims were based entirely on wild speculation that Malone may have tampered with or contaminated physical evidence in this case which was the subject of serological testing by *other* FBI analysts. As the postconviction court noted, Bolin's claims were "completely conclusory." (SPCR V3:534). This Court has previously found that "[p]ostconviction relief cannot be based on speculation or possibility." Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000)

At Bolin's 2001 trial, the State introduced evidence from FBI agent Robert Hall that he received a pair of slacks from

victim Teri Lynn Matthews in late 1986 or early 1987, as well as vaginal swabs containing DNA.²⁰ (DAR V16:1067, 1085). Agent Hall conducted the analysis on the slacks and vaginal swabs. (DAR V16:1069). Agent Hall found semen stains on the pants and type A blood group substances in those stains which meant that a blood type A or type AB secretor left that material.²¹ (DAR V16:1069, 1073-78). Agent Hall did not perform any DNA testing on the victim's slacks, but cuttings from the slacks were sent to Cellmark Laboratories for testing. (DAR V16:1084).

On cross-examination of Hall, defense counsel began to ask the witness questions relating to hair and fiber testing which was referenced in the six-page FBI report discussing the forensic testing in this case. (DAR V16:1107-08). Agent Hall indicated that he did not perform the hair analysis even though it was mentioned in the report. (V16:1107-08). As Bolin noted in his postconviction motion, FBI agent Michael Malone was a hair and fiber analyst who examined hair and fibers in the Matthews' and Collins' cases, but was not utilized at the instant trial

²⁰ In his pretrial deposition, agent Hall stated that he received the items for testing from Michael Malone or someone working with him. (DAR V2:370).

²¹ The State presented evidence from another FBI agent, John Brown, that Bolin was an AB secretor. Bolin's defense counsel waived any chain of custody argument regarding this evidence. (DAR V15-16:959-65, 1056-60).

because the State was precluded from introducing Williams rule evidence from the Collins' case.²²

At trial, the State also presented DNA testimony from molecular biologist David Walsh from Cellmark Laboratories. (DAR V16:1150-55). The witness testified that semen stains from cuttings off the victim's slacks were combined together into one extract and a "very, very small amount" of degraded DNA was found. (DAR V16: 1155-56). The witness performed RFLP DNA testing and determined that the victim's boyfriend could be excluded from the semen stain. (DAR V16:1158-59). After receiving Bolin's blood sample in 1990, the witness was able to determine that the five bands detected on the semen stain matched five of the six bands from the known blood sample of Bolin.²³ (DAR V16:1159-66).

Robin Cotton, forensic laboratory director at Cellmark Diagnostics, supervised the work of David Walsh in 1989-90. Cotton concluded that Bolin could not be excluded as a possible DNA donor from the semen stain. Bolin has six bands, the stain

²² Malone was only responsible for examining two unknown head hairs found in the body bag at the autopsy and for comparing fiber evidence linking Bolin to the Matthews and Collins murder. (SPCR V13:2418-42). As Malone testified at his deposition, and as the record reflects, other agents from the FBI conducted the serological examinations.

²³ Because of the small amount of DNA on the semen stain, only five bands were visible.

has five which are completely consistent with Bolin's five bands. The most likely explanation for the missing band is that there was not much DNA obtained from the stain which is not an unusual circumstance. (DAR V17:1194-1200).

Dr. Christopher Basten, an expert in the field of population genetic frequency, testified that the databases were prepared by Cellmark. He testified that in his opinion concerning the population genetic frequency in this case that the evidence is 2100 times more likely that Bolin is the source than if it is some random unrelated person. (DAR V17:1214-23).

In finding that the alleged newly discovered evidence regarding Malone would probably not produce an acquittal on retrial, the postconviction court properly noted that Bolin's claims were "completely speculative" that Malone may have tampered or contaminated evidence. As Bolin's counsel conceded at the case management conference, there was no actual evidence that any contamination occurred in this case. Furthermore, the court noted that Agent Malone did not perform any of the serological testing in this case and did not even testify at Bolin's trial. Clearly, Bolin's speculative and conclusory claims were insufficient to justify relief under Jones. See Simmons v. State, 105 So. 3d 475, 498-99 (Fla. 2012) (rejecting defendant's claim that FDLE analyst's DNA testing could have

been tainted because another FDLE analyst, who resigned after allegedly falsifying information on a proficiency test, had previously handled the evidence as defendant's claim "had no basis in fact and is mere speculation").

Like the situation in Simmons, Bolin simply speculated that the forensic testing performed by FBI agents John Brown and Robert Hall, and the subsequent DNA testing from Cellmark Laboratories, was suspect because Malone *may* have handled the victim's slacks and Bolin's blood sample when they were sent to the FBI. Such speculation is insufficient to meet the Jones standard of newly discovered evidence especially when the evidence surrounding Malone's work would not have been admissible in this case. See Trepal v. State, 846 So. 2d 405, 424 (Fla. 2003) (stating that newly discovered evidence must be admissible and the OIG report would be inadmissible hearsay), receded from on other grounds, Guzman v. State, 868 So. 2d 498 (Fla. 2003).

Even if the OIG report evidence regarding Malone was admissible, the court found that it was not of such a nature that it would probably produce an acquittal on retrial. As this Court stated when affirming the summary denial of a similar newly discovered evidence claim based on the OIG report, "even if this Court were to conclude that the newly discovered

evidence vitiates the DNA results, this is not the only piece of evidence connecting [the defendant] to the murder. Nothing presented calls into question the wealth of other circumstantial evidence supporting the conviction.” Rogers v. State, 957 So. 2d 538, 553 (Fla. 2007); see also Duckett v. State, 148 So. 3d 1163, 1167-69 (Fla. 2014) (affirming summary denial of newly discovered evidence claim of OIG report because hair evidence which Malone testified to at trial was “by no means the only evidence supporting” the defendant’s conviction). As previously discussed in Issue I, supra, even discounting the serological evidence performed in this case (which is unnecessary because the OIG report does not call it into question), there is overwhelming evidence establishing Bolin’s guilt. Accordingly, because the record conclusively establishes that Bolin was not entitled to relief on his procedurally barred newly discovered evidence claim, this Court should affirm the postconviction court’s summary denial of this claim.

ALLEGATIONS IN APPELLANT’S IMPROPER MOTION FOR REHEARING

As the State noted in Issue I, supra, Bolin filed a motion for rehearing after Governor Scott signed his death warrant and improperly requested that the court consider evidence which was not properly before the court. As to this issue, Bolin requested that the court consider a recent transcript of testimony from

retired FBI agent Frederic Whitehurst from the 2015 postconviction evidentiary hearing in Bolin's Hillsborough County case involving victim Stephanie Collins, and asserted that, if he had been granted an evidentiary hearing, he would have presented similar evidence from Whitehurst. (SPCR V8:1479-84). The State responded that Bolin's motion seeking a rehearing of the trial court's order summarily denying this claim was untimely under Florida Rule of Criminal Procedure 3.851(f)(7),²⁴ and improperly requested that the court consider evidence which was not properly before the court. (SPCR V9:1757-60).

In denying Bolin's motion for rehearing, the postconviction court once again found that Bolin's claim was not based on newly discovered evidence and, after addressing the transcript from Dr. Whitehurst's testimony in the Collins' postconviction case, found that Bolin was not entitled to relief. Although the court should not have addressed the merits of Whitehurst's testimony from Bolin's unrelated postconviction case, the court nevertheless properly found that Whitehurst's proposed testimony "is completely speculative, conclusory, and inadmissible." (SPCR V13:2407). Not surprisingly, Appellant fails to note that, after

²⁴ Under rule 3.851(f)(7), a defendant has fifteen (15) days to file a motion for rehearing from "the rendition of the trial court's order." The trial court summarily denied this claim on December 15, 2014, and Bolin did not file his motion for rehearing until November 3, 2015.

conducting an evidentiary hearing on Bolin's initial postconviction motion and reviewing Dr. Whitehurst's testimony, the Hillsborough County postconviction court found that Dr. Whitehurst's testimony was not credible and that Bolin's allegations that Malone altered, tampered, or substituted evidence in Collins' case were "unsubstantiated, speculative, and conclusory." Bolin v. State, Case No. 90-CF-11833 (Hillsborough County), "Final Order Denying Claims I, III, IV, V, and VI of Defendant's Motion to Vacate and Set Aside Judgment and Sentence of Death" at 21 (currently on appeal - SC15-2165).

In the instant case, the court further noted that Whitehurst's general opinion testimony that Malone's forensic testing is unreliable would not be relevant or admissible in any retrial as, unlike in the Collins' case, Malone did not conduct any serological testing in the instant case. Finally, the court noted that nothing had changed since the court's summary denial of this claim in 2014 in that Bolin failed to provide any credible allegations or evidence that the serological testing in this case was unreliable. (SPCR V13:2407-08). Clearly, although not required to address the merits of Bolin's claim based on Whitehurst's testimony in an unrelated case, the record supports the postconviction court's denial of this claim.

ISSUE III

THE RECORD SUPPORTS THE POSTCONVICTION COURT'S SUMMARY DENIAL OF BOLIN'S CLAIM THAT THE STATE VIOLATED BRADY V. MARYLAND, 373 U.S. 83 (1963), BY FAILING TO TIMELY DISCLOSE INFORMATION REGARDING KASLER'S CONFESSION.

In his successive postconviction motion, Bolin raised a newly discovered evidence claim regarding a confession by an Ohio inmate named Steven Kasler. Subsequently, the court allowed Bolin the opportunity to amend his motion and include a claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to timely disclose documents obtained from the Florida Department of Law Enforcement relating to Kasler and another inmate, Steven Crane. (SPCR V3:521-30). The court ultimately summarily denied Bolin's claim.²⁵ (SPCR V5:948-49).

The State submits that the record supports the court's summary denial of this claim. In order to establish a Brady violation, a defendant must establish three elements: (1) the evidence at issue was favorable to the defendant, because it was either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice. Johnson v. State, 921 So. 2d 490 (Fla. 2005). Under the Brady standard of materiality, the undisclosed evidence is

²⁵ Because Bolin's claim was summarily denied, this Court's review is *de novo*. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667 (1985).

In this case, Bolin alleged in his successive postconviction motion that an Ohio inmate named Steven Crane told Appellant's wife, Rosalie Bolin,²⁶ in March, 2014, that another inmate, Steven Kasler had confessed to murdering Teri Lynn Matthews. At a case management conference held on November 20, 2014, Bolin's counsel placed on the record that the parties had recently learned that Crane and Kasler had contacted Florida law enforcement officials at some time and that this information had not been turned over to the defense. (SOCR V3:494-95). After learning of this information, the State discovered and immediately turned over a large packet of documents obtained from the Florida Department of Law Enforcement (FDLE) indicating that FDLE had investigated Crane's allegations based on correspondence first obtained from the Office of the Attorney General. (SPCR V4-5:770-857).

Although Bolin alleges that the State became aware of

²⁶ The State would note that Rosalie Bolin also serves as an investigator for Bolin's defense legal team.

Crane's allegations in 2013, the record reflects that on January 27, 2014, the Office of the Attorney General notified the Commissioner of FDLE of correspondence from Steven Crane²⁷ wherein Crane "claims to have information that will exonerate an unnamed Florida Death Row inmate." (SPCR V4:770-73). On March 10, 2014, FDLE issued an Investigative Report indicating that its investigation of Crane revealed that "it appeared Crane was providing information relating to murders which were committed by Oscar Ray Bolin." (SPCR V4:775-76). After FDLE agents investigated Crane's information, it was determined that it was not credible as "the information cited by Crane was readily available on the internet." FDLE agents contacted investigators at Crane's Ohio prison, who interviewed Crane and determined that Crane "did not have any information regarding a Florida death row inmate," and Crane informed investigators "that he believed his former cellmate at the London Correctional Institute, Steven Kasler, had often talked about committing a murder in Florida, but never provided the name of the victim." (SPCR V4:775).

In late-March, early April of 2014, the Office of the

²⁷ The correspondence reflected a handwritten date of October 10, 2013, but there was never any allegations or evidence as to when the letter was actually received by the Office of the Attorney General.

Attorney General received and forwarded additional correspondence from Crane to FDLE. (SPCR V4-5:778-857). On May 15, 2014, FDLE issued an Investigative Report based on Crane's 52-page typed and handwritten correspondence. (SPCR V5:859-60). As FDLE noted, the majority of the correspondence consisted of "unstructured tangent ramblings," but investigators noted that Crane provided "minimal information" on four cases, including that Kasler claimed to have murdered the "Mathews girl" in Land-O-Lakes, Florida sometime in the 1980s or 1990s.

As noted, this packet of information was turned over to Bolin's counsel prior to the case management conference on November 20, 2014. However, Bolin claims that the State violated Brady by failing to timely disclose this information, because hypothetically, had counsel known of this information earlier, counsel could have presented evidence from Kasler before he committed suicide. Bolin's claim of prejudice based on the alleged "untimely" disclosure is disingenuous considering the fact that Bolin and his counsel were aware of this information at the same time as the State (March, 2014), but counsel for Bolin waited until September, 2014, to file his motion. Clearly, Bolin cannot complain of prejudice when he was responsible for the delay.

It is undisputed that Bolin and his counsel became aware of

Kasler's confession in March, 2014, when Crane contacted Bolin's wife/investigator and informed her of Kasler's confession. (SPCR V1:5). While the Office of the Attorney General obtained vague correspondence regarding an unnamed defendant on death row from Crane, and forwarded this information to FDLE at the end of January, 2014, it was not until March, 2014, that this information was linked to Bolin's case via FDLE's investigation. Thus, both the State and Bolin became aware of this information at the same time. It is well settled that there can be no Brady violation "where the information is equally accessible to the defense and the prosecution." Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993); see also Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000) (holding that a Brady claim "cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant"); Downs v. State, 740 So. 2d 506 (Fla. 1999) (stating that trial court did not err in denying Brady claim where the record established that trial counsel was aware of the substance of the evidence, despite not having all the relevant documentation).

In addition to failing to establish that the State "suppressed" favorable evidence, Bolin also failed to establish that the evidence was material. As discussed in Issue I, supra,

the evidence from Kasler would not be admissible at trial as a statement against penal interest. Furthermore, as the trial court noted, even if admissible, when considered "within the context of the entire record," the evidence does not undermine confidence in the verdict. As the record in this case conclusively refutes any Brady violation, the trial court properly summarily denied his claim.

ISSUE IV

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED BOLIN'S CLAIM THAT THE STATE VIOLATED BRADY BY FAILING TO DISCLOSE EVIDENCE REGARDING FBI AGENT MICHAEL MALONE.

In his successive postconviction motion filed in September, 2014, Bolin alleged that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose the Department of Justice's investigation into FBI agent Michael Malone's work. Bolin attached to his motion correspondence he obtained **in 2004** between the State Attorney's Office and the United States Department of Justice discussing the OIG report and Agent Malone's involvement in forensic testing in Bolin's cases.²⁸ In an October, 1999 response to a request from the Justice Department seeking information on whether Malone's forensic work was utilized by the prosecution or defense at Bolin's prior trial in the Matthews' case, the State responded that "[s]ince Agent Malone's testimony related to evidence of similar crimes committed against other victims and this evidence has been ruled inadmissible, Malone will not be a witness in the upcoming trial. Because there is no current conviction, and since Malone's testimony will not be a factor if a conviction is

²⁸ As previously noted in Issue II, this claim is untimely and procedurally barred as Bolin obtained this information in 2004 as a result of public records litigation during his original postconviction proceedings.

obtained on retrial, the answers requested by the case review form are inapplicable.” (SPCR V2:224).

As previously noted, in order to establish a Brady violation, a defendant must establish three elements: (1) the evidence at issue was favorable to the defendant, because it was either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice. Johnson v. State, 921 So. 2d 490 (Fla. 2005). In the instant case, the trial court summarily denied Bolin’s Brady claim as the record conclusively refuted his allegations and failed to explain his delay in bringing this claim for over a decade. (SPCR V3:534-36).

As the court noted, Bolin failed to offer any explanation for his failure to timely present this claim after having obtained the documents in 2004 detailing the State’s response to the Department of Justice. Because this claim could have easily been raised during Bolin’s original postconviction proceedings over a decade ago, his attempt to raise them immediately before his scheduled execution are unavailing. As the instant claim is procedurally barred, this Court should affirm the court’s summary denial of this claim.

Even assuming Bolin had timely presented this claim, the record conclusively refutes his allegation that the State

violated Brady by failing to disclose favorable evidence. The evidence of correspondence between the Department of Justice and the State Attorney's Office concerning FBI agent Malone's limited involvement in this case would not have been admissible as the evidence was not impeaching evidence for the other FBI witnesses who actually testified at Bolin's trial.²⁹ See Trepal v. State, 846 So. 2d 405, 424 (Fla. 2003) (stating that the OIG report is inadmissible hearsay); Walton v. State, 3 So. 3d 1000, 1009 (Fla. 2009) (stating that defendant could not show prejudice which undermined confidence in the verdict or sentence based on the State withholding evidence that a witness was a state agent when the witness did not testify at his guilt or penalty phase).

Furthermore, even if Bolin could show that the evidence was favorable as impeaching evidence, and that the State suppressed the evidence, the record refutes any finding of materiality. As previously discussed, the State presented overwhelming evidence of Bolin's guilt and there is no reasonable probability of a different result had defense counsel known of the correspondence

²⁹ As previously discussed, FBI agent John Brown testified regarding blood testing performed on the vials of Bolin's blood sent to him in 1990. FBI agent John Hall testified regarding his examination of the semen stains on the victim's slacks and vaginal swabs. None of these examiners have ever been mentioned in any of the OIG reports.

or the information contained in the OIG report. Assuming *arguendo* that Bolin's trial counsel could have introduced evidence regarding the findings of the OIG when questioning the State's serological witnesses, there is no reasonable probability of a different result. Unlike the STR DNA evidence currently available, the evidence presented at Bolin's 2001 trial was not nearly as inculpatory. As this Court noted:

The State also offered DNA testimony indicating that *Bolin could have been* the source of the semen found in a stain on Mathews' pants. Federal Bureau of Investigation forensic serology expert John R. Brown testified that he could not eliminate Bolin as the contributor of the semen stain but could eliminate Gary McClelland, Mathews' boyfriend, as the source of the stain. David Walsh, a molecular biologist, extracted DNA from the stain on the pants and found that he could exclude both the victim and McClelland as the donors of the stain on the pants. Walsh found that five of the six bands of DNA detected in the stain matched five of the six bands from Bolin's DNA. Walsh was not able to visualize one band because of the small amount of DNA remaining on the pants. Dr. Christopher Basten, an expert in population genetic frequency, testified that Bolin was 2100 times more likely to be the source of the semen than a random, unrelated person.

Bolin v. State, 869 So. 2d at 1199 (emphasis added). As previously discussed, nothing in the OIG report affected the other significant evidence of Bolin's guilt. Accordingly, because the record clearly establishes that Bolin could not meet his burden under Brady, this Court should affirm the lower court's summary denial of the instant claim. See also Buenoano

v. State, 708 So. 2d 941, 948-51 (Fla. 1998) (rejecting Brady claim regarding OIG report because FBI analyst did not testify at defendant's trial and there was no reasonable probability that the results of the proceedings would have been different had the evidence been disclosed to the defense).

ISSUE V

BOLIN'S CHALLENGE TO THE GOVERNOR'S WARRANT SELECTION PROCESS IS PROCEDURALLY BARRED AND WITHOUT MERIT.

On October 30, 2015, Governor Rick Scott signed a death warrant in the instant case. Bolin thereafter raised a claim in his amended successive postconviction motion challenging the Governor's discretion in signing a death warrant. As the lower court properly ruled when summarily denying the claim, Bolin's claim is procedurally barred and without merit. Because Bolin's claim was summarily denied, review is *de novo*. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

Pursuant to Florida Rule of Criminal Procedure 3.851(d)(2), a claim raised in a successive motion is untimely and subject to summary denial unless the defendant can establish one of two exceptions - newly discovered evidence or a fundamental constitutional right that has been held to be retroactive. See Fla. R. Crim. P. 3.851(d)(2). To be considered timely filed as newly discovered evidence, the motion must be filed within one year of the date upon which the claim became discoverable through due diligence. Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008). Furthermore, claims which either were or could have been raised on appeal or in prior postconviction proceedings are not properly raised in a successive motion. See King v. State, 597 So. 2d 780, 782 (Fla. 1992) (holding that claims were barred

because they could have been, should have been, or were raised in a prior proceeding).

Bolin alleged that his "warrant selection" claim was timely because the triggering event was the Governor's decision to sign a death warrant in his case. However, as the trial court properly found, if Bolin believed that the procedure surrounding the Governor's issuance of a death warrant was unconstitutional because it vested considerable discretion in the Governor's selection process, he could have raised this claim on direct appeal, or in a prior motion for postconviction relief. (SPCR V13:2408-09); see also Reaves v. State, 826 So. 2d 932, 936 (Fla. 2002) (noting that challenges to the constitutionality of Florida's capital sentencing statute are procedurally barred from review in a motion for postconviction relief where they were either raised on direct appeal or should have been raised on direct appeal). Florida Statutes, section 922 has always provided the Governor exclusive discretion in signing death warrants. See Goode v. Wainwright, 448 So. 2d 999, 1001 (Fla. 1984) ("When the death warrant is issued by the governor, the execution of the death sentence can be stayed only by the governor or 'incident to an appeal.'") (citing § 922.06, Fla. Stat. (1983)). Bolin's instant claim has certainly been filed well beyond the one-year time period for motions for

postconviction relief provided for by Rule 3.851. Accordingly, the postconviction court properly summarily denied the claim as time barred. See Mann v. State, 112 So. 3d 1158, 1162-63 (Fla. 2013) (affirming trial court's decision summarily denying defendant's claim challenging the Governor's death warrant selection process as untimely).

In addition to properly finding that Bolin's claim was procedurally barred, the lower court also correctly found that Bolin's claim was without merit. It is well settled in Florida that the signing of a death warrant is a decision which belongs exclusively to the Governor as set forth in Florida Statutes, section 922.052. As this Court has repeatedly noted, it is not the judiciary's prerogative to second-guess the application of this executive function. See Abdool v. Bondi, 141 So. 3d 529 (Fla. 2014) (rejecting numerous constitutional challenges to Florida Statutes, section 922.052 governing the issuance of death warrants and finding that the statute does not unconstitutionally infringe on the Governor's clemency power and unfettered discretion in issuing death warrants following a defendant's completion of his direct appeal and initial postconviction proceedings in state court, and habeas corpus proceeding and appeal therefrom in federal court); Muhammad v. State, 132 So. 3d 176, 199-200 (Fla. 2013) (rejecting

constitutional challenge to Governor's sole authority to issue death warrants and noting "it is not this Court's prerogative to inquire into the basis on which the Governor signed any individual death warrant, we cannot presume that signing Muhammad's death warrant was prompted by the [Timely Justice] Act or by the letter sent by the Supreme Court Clerk to the Governor, which contained a list of many names other than Muhammad's"); Marek v. State, 14 So. 3d 985, 998 (Fla. 2009) (rejecting claim that the Governor's authority to sign death warrants is unconstitutional because it does not provide sufficient due process to the condemned inmate); Gore v. State, 91 So. 3d 769, 780 (Fla. 2012) ("As recently as last year, we rejected claims that because of the Governor's absolute discretion to sign death warrants, thereby deciding who lives and who dies, the death penalty structure of Florida violates the United States Constitution.") (citations omitted); Carroll v. State, 114 So. 3d 883, 887-88 (Fla. 2013) (rejecting defendant's constitutional challenge that the Governor's power to select which death row prisoner for whom he will sign a death warrant is arbitrary and without standards); Mann v. State, 112 So. 3d 1158, 1162-63 (Fla. 2013); Ferguson v. State, 101 So. 3d 362, 366 (Fla. 2012).

This Court reaffirmed the considerable discretion of the executive branch in signing death warrants in Valle v. State, 70 So. 3d 530, 551-52 (Fla. 2011):

Next, Valle asserts that Florida's death penalty structure violates the Eighth and Fourteenth Amendments because by being able to sign a death warrant, the Governor has the absolute discretion to decide who lives and who dies. This, Valle contends, is contrary to the Eighth Amendment requirement that there be a principled way to distinguish between who is executed and who is not. In Marek v. State, 8 So. 3d 1123, 1129-30 (Fla. 2009), we rejected a similar constitutional challenge to Florida's clemency process and declined to "second-guess" the application of the exclusive executive function of clemency. While our decision in Marek was pending, Marek filed another successive postconviction motion, specifically contending that the manner in which the Governor determined that a death warrant should be signed was arbitrary and capricious. This Court affirmed the denial of relief, explaining in more detail:

Marek argues that Florida's clemency process, particularly the Governor's authority to sign warrants, is unconstitutional because it does not provide sufficient due process to the condemned inmate. He asserts that public records documenting that the Governor reviewed Marek's case in September 2008 without input from Marek demonstrate that he was denied due process. Marek contends that because he did not obtain the public records until April 27, 2009, he could not have raised this claim in a prior proceeding. However, Marek did raise this claim in his second successive postconviction proceeding. In that proceeding, Marek analogized the Governor's decision to sign his death warrant to a lottery and contended that Florida's clemency process was one-sided, arbitrary, and standardless. This Court rejected Marek's challenges as meritless. The current claim raises the same legal challenge this Court previously considered.

Marek v. State, 14 So. 3d 985, 998 (Fla.) (emphasis added) (citation omitted) (citing Marek, 8 So. 3d at 1129-30), cert. denied, --- U.S. ----, 130 S. Ct. 40, 174 L. Ed. 2d 625 (2009).

In essence, Valle raises a claim similar to Marek's and is asking this Court to second-guess the Governor's decision in determining *when* to sign Valle's death warrant because other inmates were also eligible for a death warrant. However, this Court has always proceeded very carefully in addressing such a claim since it triggers separation of powers concerns. See, e.g., Johnston, 27 So. 3d at 26 ("[W]e decline to depart from the Court's precedent, based on the doctrine of separation of powers, in which we have held that it is not our prerogative to second-guess the executive on matters of clemency in capital cases."); In re Advisory Opinion of the Governor, 334 So. 2d 561, 562-63 (Fla. 1976) ("This Court has always viewed the pardon powers expressed in the Constitution as being peculiarly within the domain of the executive branch of government."). Here, Valle has not provided any reason for this Court to depart from its precedents, and we therefore affirm the circuit court's denial of relief.

As the foregoing illustrates, Bolin's claim challenging the constitutionality of the Governor's discretion in signing death warrants is without merit as a matter of well-established law. Here, Bolin's case is ripe for a warrant and it should not come as a surprise to either Bolin or his counsel since his direct appeal, initial state postconviction proceedings, and federal habeas corpus litigation have been complete since 2013.

Citing to Carroll, Valle, and Marek, Bolin acknowledges in his brief that this Court has repeatedly rejected his Eighth

Amendment claim that the Governor's warrant selection process is unconstitutional, but attempts to distinguish his case by arguing that his case is different because he had pending successive postconviction litigation at the time of the signing of the death warrant. Bolin's attempt to distinguish his case because of his "pending litigation" is misplaced as this Court addressed and rejected this same claim in Marek when the defendant had pending litigation at the time of the signing of his death warrant. In Marek, the defendant's second successive postconviction motion was pending in circuit court when the Governor signed his death warrant. Marek v. State, 8 So. 3d 1123, 1126 (Fla. 2009) ("On April 20, 2009, while Marek's second successive motion was pending in the circuit court, Governor Charlie Crist signed Marek's death warrant."). In Marek's second successive postconviction motion, he claimed that Florida's capital sentencing scheme was arbitrary and capricious because of the Governor's clemency process and "analogized the Governor's decision to sign his death warrant to a lottery." Id. at 1127-30; Marek v. State, 14 So. 3d 985, 998 (Fla. 2009). The circuit court summarily denied the claim, and this Court affirmed. Marek, 8 So. 3d at 1127-30. Following the signing of his death warrant, Marek filed a third and fourth successive postconviction motion and again raised constitutional challenges

to the Governor's authority to sign death warrants. These claims were again rejected by this Court. Marek v. State, 14 So. 3d 985, 998 (Fla. 2009). Similarly, in other cases, death warrants have been signed while litigation was ongoing. See Muhammad v. State, 132 So.3d 176, 199-200 (Fla. 2013) (defendant had pending litigation in a separate capital murder case which had been utilized as an aggravating circumstance in his death warrant case);³⁰ Johnson v. State, 44 So. 3d 51, 56-57 (Fla. 2010) ("While the present appeal was pending in this Court, the Governor . . . signed a second death warrant for Johnson"); Diaz v. State, 945 So. 2d 1136, 1142 (Fla. 2006) ("During the pendency of Diaz's postconviction proceedings at the trial court, Governor Jeb Bush signed a death warrant setting Diaz's execution for December 13, 2006.").

Bolin further claims that the Governor's warrant selection process violates his state and federal constitutional rights to due process, but this argument has also been rejected by this Court. As this Court noted in Abdool:

The Petitioners next allege that section 922.052 violates due process, equal protection, and the Eighth Amendment ban on cruel and unusual punishment. To assess whether a violation of due process has

³⁰ The fact that the defendant had pending litigation is not apparent from this Court's opinion, but is set forth in the defendant's Initial Brief. See Initial Brief of Appellant, Muhammad v. State, SC13-2105 at 108-11.

occurred, we must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Econ. Dev. Corp. of Dade Cnty., Inc. v. Stierheim, 782 F.2d 952, 953-54 (11th Cir. 1986). Absent such a deprivation, there can be no denial of due process. Id. Due process is a flexible concept and requires only that the proceeding be essentially fair. See Carillon Cmty. Residential v. Seminole Cnty., 45 So. 3d 7, 9 (Fla. 5th DCA 2010) (citing Gilbert v. Homar, 520 U.S. 924, 930, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997)). The extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved. Id. As a result, there is no single test which applies to determine whether the requirements of procedural due process have been met. Id. Courts instead consider the individualized facts of each case to determine whether the defendant has been accorded the process which the state and federal constitutions demand. Id.

Abdool v. Bondi, 141 So. 3d 529, 544 (Fla. 2014). Both this Court and the United States Supreme Court have recognized that due process protection is greatly reduced following a conviction and that only reasonable access to the courts is required. Kokal v. State, 901 So. 2d 766, 778 (Fla. 2005) (stating that "all that due process requires is that the defendant be provided meaningful access to the judicial process"); State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 408 (Fla. 1998); Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) (postconviction relief procedures are constitutional if they "compor[t] with fundamental fairness"); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). "[W]hen a State chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the

exact form such assistance must assume.'" District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52, 69 (2009) (quoting Finley, 481 U.S. at 559).

In his brief, Bolin asserts that his due process rights are violated because he has not been able to "fully litigate" his successive postconviction claims currently pending before this Court. However, Bolin has fully litigated his claims in the circuit court and the State is confident that this Court will fairly and fully consider his claims on appeal. As this Court noted in Abdool, the Governor only signs a death warrant after a defendant has finished his direct appeal, initial state postconviction proceedings, federal habeas proceedings and appeal, and after the Governor completes his executive clemency process. Abdool, 141 So. 3d at 544. It cannot be said that Bolin's due process rights have been violated when he has been afforded this lengthy process with due process protection throughout.

Bolin also briefly argues that the warrant selection process violates due process on its face because it affords no explanation for a defendant's selection and permits no avenue for a defendant to challenge the enforcement of the warrant. As noted in Abdool, when considering a facial challenge, the court "consider[s] only the text of the statute, not its application

to a particular set of circumstances.” Abdool, 141 So. 3d at 545. This Court examined section 922.052 governing the issuance of a death warrant and rejected the facial constitutional due process challenge. Id. As Bolin has failed to show why this Court should depart from this precedent, the State submits that this Court should affirm the lower court’s summary denial of Bolin’s due process claims.

Lastly, Bolin alleges that the Governor’s “ultimate and unchecked power to decide who will be executed violates the separation of powers doctrine because it encroaches on the function and powers of the Judicial Branch.” Initial Brief at 86. Bolin concedes that this Court has rejected this claim in a number of cases, see Abdool, 141 So. 3d at 538; Carroll, 114 So. 3d 887-88; Valle, 70 So. 3d at 551-52, but again attempts to distinguish his case based on his pending litigation. As previously argued, Bolin’s attempt to distinguish his case is unavailing.

In sum, because the law is well settled that Bolin’s constitutional challenges to the Governor’s discretion in signing a death warrant are procedurally barred and without merit, this Court should affirm the summary denial of this claim.

RESPONSE IN OPPOSITION TO REQUEST FOR STAY

On pages 10-14 of his brief, Bolin argues that he should receive a stay of his execution because this Court is incapable of reviewing his claims under the current schedule. Bolin simply repeats the same arguments contained in his Motion to Modify Briefing Schedule and Request for Oral Argument which this Court has already denied. Because Bolin has failed to present any substantial grounds for relief, this Court should deny his request for a stay of execution.

A stay of execution is equitable relief and Bolin has not come close to meeting his burden of establishing entitlement to such relief. As both this Court and the United States Supreme Court have held, a defendant must show that he has presented substantial grounds for relief from his conviction and sentence in order to be entitled to a stay. See Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998); Delo v. Stokes, 495 U.S. 320, 321 (1990); Barefoot v. Estelle, 463 U.S. 880, 895 (1983); Bowersox v. Williams, 517 U.S. 345 (1996). Bolin has not presented any substantial grounds for relief and indeed, has presented no viable grounds for relief in state court. As such, any request for stay should be denied.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Bolin's amended successive motion for postconviction relief and deny his request for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of December, 2015, a true and correct copy of the foregoing has been furnished electronically to the Clerk of the Florida Supreme Court at **warrant@flcourts.org**; and to Bjorn E. Brunvand, Esquire and Jervis Wise, Esquire, 615 Turner Street, Clearwater, Florida 33756, **bjorn@acquitter.com, jervis@acquitter.com**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Stephen D. Ake _____
COUNSEL FOR APPELLEE