APPELLANT'S INITIAL BRIEF

CASE NO. SC15-2149

THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

OSCAR RAY BOLIN, JR.,

Appellant

v.

STATE OF FLORIDA,

Appellee

On Appeal From:
THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
LOWER TRIBUNAL CASE NO. CRC91-00521CFAWS

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REQUEST FOR ORAL ARGUMENT

Mr. Bolin urges the Court to grant oral argument in this case. Oral argument will be necessary to allow the parties to adequately present, and the Court to thoroughly consider, the significant issues raised by the denial of Mr. Bolin's post-conviction newly discovered evidence and *Brady* claims. As described in more detail below, Florida Supreme Court precedent obligates this Court to conduct not only an evaluation of Mr. Bolin's newly discovered evidence and *Brady* claims in their own right, but also to review those matters in light the totality of the evidence that has been presented and uncovered during Mr. Bolin's nearly two decades of post-conviction proceedings. Given the magnitude of the record, the weight of the issues to be considered, and the fact that this is a capital case with an impending execution date, Mr. Bolin respectfully requests the opportunity for his counsel to orally address the Court.

REQUEST FOR A STAY OF EXECUTION

A stay of execution should be granted pending resolution of this litigation. If the truncated warrant briefing schedule remains in place, it will be extraordinarily difficult for this Court to review Mr. Bolin's newly discovered evidence claims consistent with the demanding totality-of-the-evidence standard required by the Court's decisions in *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), and *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). Under *Swafford* and *Hildwin*, this Court is required to evaluate Mr. Bolin's claims in the context of *all* of the evidence presented at trial, as well as *all* of the evidence uncovered during post-conviction proceedings over the nearly 20 years since Mr. Bolin's conviction and sentencing. Moreover, because the circuit court failed to recognize the controlling law of *Swafford* and *Hildwin*, and thus did not perform the required cumulative assessment of all of the evidence adduced at Mr. Bolin's trial, sentencing, and post-conviction proceedings, this Court will be required to either remand for the circuit court to conduct that analysis, or perform the analysis in the first instance.

A. *Swafford* and *Hildwin*

In *Swafford*, this Court held that, in evaluating post-conviction claims based on newly discovered evidence, courts must consider the *cumulative* effect of *all* of the evidence that would be admissible at a retrial. The following year, in *Hildwin*, this Court reaffirmed the cumulative analysis holding in *Swafford*. Moreover, the

Court held, in evaluating the impact of newly discovered evidence on the "total picture" and "all of the circumstances of the case," courts cannot turn a blind eye when the defendant's newly discovered evidence undermines a central pillar of the theory that the State made center-stage at trial. *See Hildwin*, 141 So. 3d at 1181, 1183-92.

The cumulative analysis called for under *Swafford* and *Hildwin* must, thereby, include *all* of the evidence that was presented at the trial, and *all* evidence uncovered during post-conviction proceedings, including any evidence that was previously excluded as procedurally barred, as well as any evidence underlying previously-presented claims under *Brady v. Maryland*, 373 U.S. 83 (1963). Courts must also consider the materiality and relevance of the evidence, and any inconsistencies in the newly discovered evidence. *See* 125 So. 3d at 767-68, 777-78.

The cumulative, probabilistic assessment required under *Swafford*, *Hildwin*, and related cases calls for a stay of Mr. Bolin's January 7, 2016 execution date. Without a stay, this Court will be required to review the sprawling record and evidence in Mr. Bolin's case—nearly 20 years in the making—in less than three weeks after briefing and oral argument is completed, not counting the upcoming holidays. Moreover, because the circuit court failed to conduct the required comprehensive review under *Swafford* and *Hildwin*, this Court must perform that

review in the first instance. Mr. Bolin therefore respectfully requests that this Court grant a stay of his execution date so that his claims can be thoroughly and fairly evaluated.

B. A Stay is Consistent with Supreme Court Law and Rule 3.851 Commentary

Both Current United States Supreme Court precedent and the commentary to Florida Rule of Criminal Procedure 3.851 support Mr. Bolin's request that the Court permit oral argument and enter a stay of execution in this case.

The United States Supreme Court has endorsed a perspective consistent with Mr. Bolin's request for a stay in the context of the federal habeas corpus statute, which is a framework more restrictive than Florida's post-conviction scheme. The Supreme Court held that where a claim that was not available earlier—and therefore could not be presented earlier—is presented in a second petition, that petition should not be treated as a "successive" petition; rather, the petitioner's claims, evidence, and argument should be reviewed in a manner consistent with the review afforded in first petition cases. *See Panetti v. Quarterman*, 551 U.S. 930 (2007). In such circumstances, the petition should be treated in the manner an initial petition would be treated, without the truncated timing and review associated with petitions after the first round of collateral litigation. Mr. Bolin's case is in that posture, as the Circuit Court has found that this litigation is founded on a claim, and supporting evidence, that was not available to him earlier in time

and which, therefore, could not be presented until the current post-conviction proceeding.

With respect to Rule 3.851, the Court Commentary to the 1993 adoption of the Rule sets forth:

> [I]t is important to emphasize that the governor agrees that absent the circumstances where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will be issued during the initial round of federal and state review, providing that counsel for death penalty defendants is proceeding in a timely diligent manner. This Court agrees that the initial round of post-conviction proceedings should proceed in a deliberate but timely manner without the pressure of a pending death warrant.

FLA. R. CRIM. P. 3.851 cmt., 1993 Adoption. Although Mr. Bolin's Rule 3.851 motion underlying the instant appeal is not his first such motion, it is the first motion on the new and previously unavailable evidence, *i.e.*, it is, in the Supreme Court's view, a "first motion" for purposes of the current newly discovered evidence claim, which could not have been raised earlier. As noted, the circuit court has found that the new evidence of the third-party confession at issue in this appeal was not previously available. Thus, this is the first round of litigation concerning the evidence that another inmate confessed to the murder for which Mr. Bolin was convicted.

Counsel know only one other instance in Florida where an evidentiary hearing was conducted on a newly discovered evidence claim and a death warrant was signed after the evidentiary hearing had been conducted, but before this

Court's appellate review was completed. That instance was the case of Paul Beasley Johnson. There, this Court stayed Mr. Johnson's execution, conducted oral argument and plenary, careful review, and ultimately vacated the death sentence, holding that it was infected by constitutional error. *See Johnson v. State*, 44 So. 3d 51 (Fla. 2010). Like Mr. Johnson's case, where this Court entered a stay and conducted full review, Mr. Bolin's case should also be afforded untruncated review, oral argument, and a stay of execution to effectuate such careful review without the exigencies created by the death warrant.

Given the circumstances in Mr. Bolin's case — in which an evidentiary hearing has been conducted, and a determination made that the petition is predicated upon previously unavailable evidence that is newly discovered — this Court's commentary to the adoption of Rule 3.851 should apply. Mr. Bolin's appeal, therefore, "should proceed in a deliberate but timely manner without the pressure of a pending death warrant." FLA. R. CRIM. P. 3.851 cmt., 1993 Adoption.

STATEMENT OF THE ISSUES

I. Whether the circuit court erred in denying the Appellant's newly discovered evidence claim arising from the confession of an Ohio inmate when the court found the confession to be admissible, but held that the confession would not produce an acquittal on retrial and, in so holding, failed to consider the cumulative effect of all other newly discovered evidence that has surfaced in this case?

II. Whether the circuit court erred in summarily denying the Appellant's newly discovered evidence claim that set forth evidence of bad acts and misconduct by former FBI forensic analyst Michael Malone?

III. Whether the circuit court erred in summarily denying the Appellant's *Brady v. Maryland* claim that was based on the State's failure to timely disclose documents it had received concerning the fact that the Ohio inmate confessed to having committed the murder for with the Appellant was convicted this case?

IV. Whether the circuit court erred in summarily denying the Appellant's *Brady* claim arising from the State's failure to disclose evidence of the bad acts and misconduct of former FBI forensic analyst Michael Malone?

V. Whether the arbitrary and capricious method by which death warrants are issued in Florida is unconstitutional?

STATEMENT OF THE CASE AND FACTS

A. Facts and Course of Proceedings

Oscar Ray Bolin Jr. is currently incarcerated under an impending sentence of death imposed in the instant case by the Sixth Judicial Circuit of Florida, in and for Pasco County. (R. 27-34.) Mr. Bolin was charged in this case with the murder of Teri Lynn Matthews. (R. 1.) The Governor signed a death warrant on October 30, 2015. (R. 1287-88.) Execution is scheduled for January 7, 2015.

Mr. Bolin was found guilty following jury trial before the Honorable Craig C. Villanti on October 24, 2001. (R. 1.) Following phase one of the trial, Mr. Bolin waived his right to a penalty phase jury and waived his right to the presentation of mitigating evidence. (R. 1-2.) The Court went on to find three aggravating factors, one statutory mitigating factor, and twelve non-statutory mitigating factors. (R. 2.) It then imposed the sentence of death. (R. 27-34.)

Following conviction and sentencing, Mr. Bolin filed a direct appeal of his conviction and sentence to this Court. *Bolin v. State*, 869 So. 2d 1196 (Fla. 2004). The direct appeal raised the following issues: "(1) whether the trial court erred in denying Bolin's challenges for cause, (2) whether the court abused its discretion by replacing juror Cox, who had chronic emphysema, with an alternate juror, (3) whether the court erred by allowing expert DNA testimony that there was a "match" in the bands of the semen and blood samples, (4) whether Bolin was

entitled to a new trial because the record did not reflect whether the prospective jurors were sworn prior to voir dire, and (5) whether the court erred by accepting Bolin's waiver of a penalty phase jury recommendation." *Bolin v. State*, 41 So. 3d 151, 154 (Fla. 2010) *referencing Bolin*, *supra*, 869 So. 2d 1196. In addition to those issues, the Court *sua sponte* reviewed the sufficiency of the evidence underlying the conviction and conducted a *sua sponte* proportionality review of the death sentence. *Bolin*, 869 So. 2d at 1204-05. The Court denied relief on each of the issues and affirmed with a written opinion on February 5, 2004. *Id*. In reviewing the sufficiency of the evidence issue, the Court summarized the evidence submitted against Mr. Bolin as follows:

> Evidence presented at Bolin's 2001 trial included the following. [Victim] 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.

Id. at 1198-99.[1]

Mr. Bolin then filed a timely petition for a writ of certiorari in the Supreme Court of the United States. *Bolin v. Florida*, 543 U.S. 882, 125 S.Ct 102 (2004). *Id.*

[1] Counsel is quoting the summary of facts above because the documents included in the summary record on appeal in the instant case do not discuss the underlying facts of the case in any detail.

On October 3, 2005, Mr. Bolin, filed a motion for post-conviction relief in the circuit court, setting forth seven grounds for relief: 1) ineffective assistance of counsel in failing to object to the testimony of Danny Ferns, 2) ineffective assistance of counsel in failing to call Mr. Bolin's father to rebut the testimony of Ferns, 3) ineffective assistance of counsel in failing to impeach Michelle Steen, 4) ineffective assistance of counsel in failing to call a witness who would have testified that Steen admitted to having fabricated her testimony,[2] 5) ineffective assistance of counsel in misadvising Mr. Bolin with regards to waiving his right to testify, 6) cumulative error as a result of the claims set forth in the motion, and 7) a due process issue arising from Mr. Bolin being forced under the rules of procedure to file his motion prior to receiving documents he had requested from the FBI. *See Bolin*, 41 So. 3d at 154-55. The circuit court went on to conduct an evidentiary hearing, but ultimately denied the motion on all grounds in a written order issued on September 18, 2008. Mr. Bolin then appealed the denial of post-conviction relief to this Court, which affirmed in a written opinion issued on July 1, 2010. *Bolin v. State*, 41 So. 3d 151 (Fla. 2010).

Mr. Bolin, thereafter, filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. *Bolin v. Sec., Fla. Dept. of Corrections*, No. 8:10–cv–1571–T–27EAJ, 2013 WL 3327873 (M.D. Fla.,

[2] Mr. Bolin later dropped the two issues relating to Michelle Steen.

Jul. 1, 2013). The district court denied the habeas petition as untimely, but went on to address the merits of the two claims set forth in the habeas petition, which were: 1) failure to object to the testimony of witness Danny Ferns who claimed to have seen blood on the ground in the area where Mr. Bolin's half-brother alleged that Mr. Bolin had asked him to help clean up and move the body and 2) the failure to call Mr. Bolin's father as a witness to testify in contravention of the claims made by Ferns and Mr. Bolin's half-brother. *Id.* The district court denied relief on both issues in an order entered on July 1, 2103. *Id.* In the order, the court also declined to issue a certificate of appealability. *Id.* Mr. Bolin, thereafter, filed an application for a certificate of appealability in the United States Court of Appeals for the Eleventh Circuit, which the court denied on September 20, 2013. *Bolin v. Sec., Fla. Dept. of Corrections*, No. 13-13539-P (11th Cir. 2013) (unpublished opinion).

The Post-Conviction Proceedings Underlying this Appeal

On September 26, 2014, Mr. Bolin filed in the circuit court a successive motion to vacate and set aside the judgment and sentence of death based on newly discovered evidence. (R. 1-25.) The motion raised the following issues: I) "Newly Discovered Evidence of the Confession of Steven Kasler," 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," and 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*." (R. 1-25.)

Facts Underlying the Michael Malone Issues

The crux of two Michael Malone[3] related newly discovered evidence issues began to surface on January 14, 2014 when the U.S. Department of Justice contacted the undersigned by email and forwarded a correspondence that it had sent to predecessor counsel on September 27, 2013. (R. 10-11.) The email stated as follows:

[3] Michael Malone was a hair and fiber analyst with the FBI in the late 1980s and early 1990s during the investigation of the Matthews homicide. (R. 9.) Malone's primary significance to the State in the instant case was to link the scene of the Matthews homicide to the scene of another homicide Mr. Bolin was alleged to have committed – the Stephanie Collins case. (R. 9-10.) When the instant case proceeded to the trial at bar, the State was precluded from presenting evidence of the Collins case. (R. 9-10.) Malone's purported fiber match between the two scenes was not, therefore, admitted into evidence because it did not independently link to Mr. Bolin in any way. (R. 9-10.) Nevertheless, while Malone was a hair and fibers analyst, the State submitted essentially all of the physical evidence that was collected in this case directly to Malone. (R. 10-12, 39-41, 206-17.) Malone also apparently prepared at least some, and perhaps all, of the physical evidence that would undergo serological and DNA testing. (R. 12, 40-42.) Malone also conducted hair comparisons of hairs found at the scenes of several cases in which Mr. Bolin was a purported suspect, including the instant case and the Stephanie Collins case. (R. 36-53, 213-17.) In conducting those analyses, Malone studied known hair samples from Mr. Bolin. (R. 36-53, 213-17.) In regards to the instant case, Malone compared those samples to two hairs that were collected from the victim's hand in the instant case. (R. 40-45.) Tellingly, those hairs did not match Mr. Bolin. (R. 40-45.) Moreover, one of those two hairs was of a mixed racial profile, which clearly would not have originated from Mr. Bolin. (R. 42.)

> By email dated January 14, 2014 (attached), this Office notified you and attached our correspondence of 9-27-13 with your predecessor as defense counsel in this case, Mr. Norgard, in which we notified him of the 1997 report of the Department of Justice Inspector General that identified the work of 13 FBI Laboratory examiners whose work may have failed to meet professional standards. We would like to further inform you that in 1999, the prosecutor advised the 1996 FBI Laboratory Task Force that Malone's work had not been material to the verdict in either the Matthews case, the Collins case, or the Holley case. As a result, the analysis conducted by Malone was not later the subject of an Independent Scientific Review. Please do not hesitate to contact me if you have further questions. Please confirm your receipt of this email.

(R. 11.) Attached to the correspondence sent to predecessor counsel were several FBI reports prepared in the course of its work in the instant case. (R. 36-53.) One such report was dated February 11, 1987 and originated from "1 - Mr. Malone." (R. 39-44.) That report acknowledged the receipt of essentially all of the physical evidence that had been collected in the case, including the evidence submitted to the FBI for serological testing. (R. 39-44.) Another attached FBI report was dated August 10, 1990 and also originated from "1 – Mr. Malone." (R. 50-51.) That report documented testing performed on two hair samples referenced in the February 11, 1987 report were compared with hair samples of Mr. Bolin and were found to be dissimilar to and could not be associated with Mr. Bolin. (R. 50-51.) The report also stated that "the blood sample of Oscar Ray Bolin submitted in the above-mentioned Collins case was submitted to Cellmark Diagnostics in Germantown Maryland on August 3, 1990 for a DNA analysis." (R. 50-51.) Mr.

Bolin later asserted that the report thereby indicated that Malone handled the evidence that was sent to Cellmark for serological testing and that he may have even prepared the evidence that was sent to Cellmark. (R. 12.)

Later, on July 30, 2014, the U.S. Department of Justice again contacted counsel regarding the Malone matter in an email that stated:

> By letter to previous defense counsel dated September 27, 2013 and email to you dated January 14, 2014 (attached), this Office notified defendant Oscar Ray Bolin of the 1997 Office of the Inspector General (OIG) Report that identified 13 criticized FBI Laboratory examiners whose work may have failed to meet professional standards. In particular, we believe that FBI Laboratory Examiner Michael Malone performed laboratory work for the government in this case. As you are aware, in 1996, following allegations of improper practices by certain FBI Laboratory examiners, the United States Department of Justice established a Task Force to ensure that no defendant's right to a fair trial was jeopardized by the questioned performance of a criticized FBI Laboratory examiner. Beginning in 2012, OIG undertook a review of the work of the 1996 FBI Laboratory Task Force, evaluating its effectiveness in ensuring that defendants potentially affected by faulty FBI Lab analysis or testimony were notified of the Lab deficiencies identified by OIG in their 1997 Report on the subject. In July 2014, OIG issued its findings in a report entitled, "An Assessment of the 1996 Department Task Force Review of the FBI Laboratory" (Assessment). The Assessment can be found online at http://www.justice.gov/oig/reports/2014/e1404.pdf. Because the Assessment addresses the work of FBI Laboratory Examiner Malone in greater detail, we want to bring that report to your attention as well.
>
> Additionally, one of the cases highlighted in Chapter Four of the Assessment is *United States v. Donald Gates*, a 1982 case prosecuted out of the District of Columbia in which Malone testified. It has come to our attention that in January 2014, Malone's deposition was taken

> in *Donald Gates v. District of Columbia*, Civil Action No. 1:2011-CV-00040, a civil matter related to the *Gates* prosecution.

(R. 13, 57.) Thereafter, in July 2014, the Office of the Inspector General ("OIG") issued a comprehensive 138 page report concerning its investigation into certain FBI analysts, including Michael Malone. (R. 59-204). An entire chapter of that 2014 Report was dedicated to Malone. (R. 111-121). The OIG summarized the subject of the 2014 Report as follows:

> This is the third review by the Office of the Inspector General (OIG) since 1997 related to alleged irregularities by the Federal Bureau of Investigation (FBI) Laboratory (Lab). The first two OIG reports focused on alleged FBI Lab deficiencies, the conduct of individuals brought to our attention by a whistleblower, and remedial actions the FBI took in response to our recommendations. This report addresses how the Criminal Division Task Force (Task Force), created by the Department in 1996 and whose mission was redefined in 1997, managed the identification, review, and follow-up of cases involving the use of scientifically unsupportable analysis and overstated testimony by FBI Lab examiners in criminal prosecutions. We analyzed the Task Force's review of cases involving 13 FBI examiners the Task Force determined had been criticized in the 1997 OIG report. We included in our review a close examination of cases handled by 1 of the 13 examiners, Michael Malone, the Lab's Hairs and Fibers Unit examiner whose conduct was particularly problematic.

(R. 60.) The OIG generally summarized its findings with regards to former agent Michael Malone as:

> Second, we concluded that the Department should have directed the Task Force to review all cases involving Michael Malone, the FBI Lab examiner whose misconduct was identified in the OIG's 1997 report and who was known by the Task Force as early as 1999 to be consistently problematic. Malone's faulty analysis and scientifically

> unsupportable testimony contributed to the conviction of an innocent defendant (Gates), who was exonerated 27 years later, and the reversal of at least five other defendants' convictions because of Malone's unreliable analysis and testimony. Malone retired from the FBI in 1999, but we learned, and the FBI confirmed, in May 2014 that Malone had been performing background investigations as an active contract employee of the FBI since 2002. After we brought Malone's contract employment to the attention of the FBI and the Department, the FBI reported that, effective June 17, 2014, Malone's association with the FBI was terminated.

(R. 61.) It went on to find, with regards to prior investigations into examiners to include Malone, "[i]n our view, the Department fell short of the Task Force's articulated mission to ensure that defendants' rights were not jeopardized by the conduct of any of the 13 examiners when it excluded categories of cases from the Task Force's review." (R. 62.)

Later, in its chapter dedicated to Malone, the Report noted "We determined that the independent scientists deemed approximately 96 percent of the Malone cases to be problematic in one or more areas..." (R. 114.) It went on to find "The scientists concluded in 94 percent (47 of 50) of the cases that either the appropriate forensic tests were not conducted or it was impossible to determine whether Malone conducted the appropriate tests." (R. 115.) The Report also found, "in the same percentage of cases, the scientists concluded that the results Malone described in his lab reports were not supported by his bench notes." (R. 115.)

Mr. Bolin went on to set forth his two post-conviction claims regarding the newly discovered Michael Malone evidence. (R. 8-23.) In support of his claims,

Mr. Bolin attached the correspondences set forth above, as well as the 2014 OIG Report. (R. 36-257)

Mr. Bolin's motion further set out that, at trial, the State's case rested largely on serological testing that was performed on a small semen stain that was found on the pants of the victim. (R. 8.) During trial, he pointed out, the State admitted evidence of testing performed on the semen sample. (R. 8.) In the semen stain, FBI analysts found "A" and "H" blood types. (R. 8.) Accordingly, the State presented testimony at trial that the stain would have originated from a "secretor", as opposed to a "non-secretor," and a person who had an A or AB blood type. (R. 8.) The State further submitted evidence that Mr. Bolin was an AB blood type secretor and that he could not therefore be eliminated as the source of the semen. (R. 8.)

In addition, the State also presented evidence that, later in the investigation of the case, the FBI also detected DNA in the semen stain. (R. 8-9.) The FBI, thereafter, later submitted the semen stain DNA, along with a DNA sample from Mr. Bolin, to the Cellmark Diagnostics laboratory for DNA comparison analysis. (R. 8-9) At trial, the State presented testimony that five of the six bands of DNA from the semen stain purportedly matched five of the six bands of the Bolin DNA sample. (R. 8-9.) Testimony later established that, in the course of the DNA testing, the samples were fully consumed. (R. 9.) The State presented no evidence,

however, of the chain of custody under which the physical evidence at issue was handled while in the possession of the FBI. (R. 9.)

Mr. Bolin, correspondingly, sought an evidentiary hearing to allow him to present evidence to establish that Michael Malone, as the lead analyst assigned to his case, handled all of the physical evidence that underwent serological and DNA testing. (R. 15, 18.) Mr. Bolin further sought an opportunity to establish at an evidentiary hearing that, based on Malone documented bad acts and misconduct, any evidence Malone handled is unreliable. (R. 15, 18.)

The court went on, however, to summarily deny the Malone-related grounds in a non-final order entered on December 15, 2014. (R. 531-36.) In denying relief on the Malone claims, the court found that the issues were conclusive and speculative at that point. (R. 533-34.) In so reasoning, the court noted that the defense was not able to present any evidence of actual tampering of evidence on the part of Malone. (R. 533-34.) Mr. Bolin, on the other hand, had requested an evidentiary on the Malone issues in hopes of being able to present such evidence. (R. 15, 18, 539-43, 549, 1479-84.)

The circuit court also found that the Malone issues were untimely because the prior Bolin defense team had known of issues regarding Malone for several years now. (R. 533-34.) Mr. Bolin's claim, however, had relied on recent correspondence he had received from the Department of Justice regarding the

Malone issues, as well as on a U.S. Office of the Inspector General Report, issued in July, 2014, which criticized prior investigations into Malone and which reached new and additional conclusions regarding Malone's tainted work with the FBI. (R. 8-22.)

Later, after the circuit court had issued its final order denying relief on all issues, Mr. Bolin moved for rehearing and pointed out that the Thirteenth Judicial Circuit had recently conducted an evidentiary hearing on Mr. Bolin's Malone-related claims in a Rule 3.851 motion filed in the Stephanie Collins case.[4] (R. 1471-1563.) At that hearing, Mr. Bolin called as a witness, Dr. Frederic Whitehurst, a former FBI forensic analyst who became known as a whistleblower and the catalyst for Inspector General investigations that spanned more than 20 years. (R. 1299-1363.) Mr. Bolin attached a transcript of Dr. Whitehurst's testimony to the motion for rehearing. (R. 1479.) In the Collins hearing, Dr. Whitehurst testified at length to his history with the FBI and his more than 20 year investigation into Michael Malone and the affect that Malone's work has had on criminal cases. (R. 1299-1363.) Mr. Bolin also admitted into evidence at the hearing a redacted copy of the 2014 OIG Report. (R. 1313-24.) Dr. Whitehurst went on to testify to the parallel findings reached by his own investigation and by

[4] As this Court is aware, Mr. Bolin was charged with and convicted of two murders that occurred close in time to the instant case. Case No. 90-CF-011832 (13th Jud. Cir., Hills. Co.) (victim Natalie Holley); Case No. 90-CF-11833 (13th Jud. Cir., Hills. Co.) (victim Stephanie Collins).

the OIG in the 2014 Report. (R. 1334-1338.) He summarized those findings as: "the DOJ agrees that Michael Malone committed some very egregious acts, which makes anything that he did suspect, and which makes evidence that he had in hand suspect." (R. 1353.)

With regards to work performed in relation to Mr. Bolin's case, Dr. Whitehurst described the method by which slides were created for forensic testing within the FBI laboratory, including within the hair and fiber unit where Malone worked. (R. 1326-28.) In reviewing reports issued by the FBI in regards to testing performed in the instant case, Dr. Whitehurst was able to testify that Malone had been the principal FBI analyst in the instant case and that he likely created slides and performed various forensic testing that was of issue in the case. (R. 1329-33, 1355-56.) Those reports, likewise, show that Malone likely handled every piece of evidence that was submitted to the FBI in regards to that case. (R. 1329-33.)

Given his background and expertise, and pursuant to the investigation that he had conducted into Malone for the preceding two decades, Dr. Whitehurst opined that any testing conducted by Malone is not reliable and has no credibility at the current time. (R. 1334.) Likewise, Dr. Whitehurst testified that independent testing or review of Malone's work is insufficient to render the result of any testing reliable because the problem would still remain that Malone had handled the evidence that was the subject of the subsequent testing. (R. 1335, 1352-53.) As Dr.

Whitehurst testified, with regard to any evidence that Malone touched, "[f]urther analysis doesn't matter… it's useless." (R. 1336.)

In his motion for rehearing, Mr. Bolin sought an evidentiary hearing at which he could present the 2014 OIG Report and the testimony of Dr. Whitehurst. (R. 1479-84.) The circuit court again denied that motion. (R. 2400-15.) The court also again found the Malone issues to be time-barred and declined to permit an evidentiary hearing on the issues. (R. 2405-08.) In so holding, the court stated that Dr. Whitehurst's proposed testimony would be "completely speculative, conclusory, and inadmissible." (R. 2407.)

Facts Underlying Kasler Confession Issues

In March 2014, as the Michael Malone issues were coming to fruition, an Ohio Department of Corrections inmate named Stephen Crane, contacted Mr. Bolin's wife and informed her that another Ohio inmate by the name of Steven Kasler had confessed to committing the murder of Teri Matthews. (R. 5.) Kasler, moreover, was serving sentences in Ohio for two other murder convictions, as well as for several other violent offenses. (R. 5-.)

The following month, Kasler himself contacted Mr. Bolin's wife. (R. 6.) On September 19, 2014, a prearranged legal call was conducted with Steven Kasler. (R. 6.) Kasler confessed to having committed the murder of Teri Matthews and provided details of the offense. (R. 6.) Kasler confirmed that he would testify to

having committed the Teri Matthews homicide. (R. 6.) Kasler further stated that he would testify that Mr. Bolin had nothing to do with the homicide. (R. 6.)

Mr. Bolin went on to assert in his post-conviction motion that Kasler's confession to the Matthews homicide was newly discovered evidence that was of such nature that it would probably produce an acquittal on retrial and which weakened the State's case against Mr. Bolin to such an extent that it gives rise to a reasonable doubt as to Mr. Bolin's culpability. (R. 6-7.) The motion further set out that Mr. Bolin had no way of knowing that Kasler was the perpetrator of the Matthews homicide until Kasler came forward on his accord. (R. 6.)

On November 13, 2014, the circuit court conducted a case management conference on the motion. (R. 449-88.) At the conclusion of the hearing, the court scheduled an evidentiary hearing to be held on December 10, 2014 as to the Kasler issue. (R. 483-87.) Shortly after the case management conference, the parties learned that Kasler had just recently committed suicide. (R. 579-81.) In light of Kasler's death, the court cancelled the evidentiary hearing and struck Claim I of Mr. Bolin's motion with leave to amend the Claim. (R. 531-36.) The Court also granted leave for Mr. Bolin to add an additional *Brady*-related claim that tied back to the Kasler issue. (R. 531-36.) Mr. Bolin, thereafter amended his claim of the newly discovered evidence of Kasler's confession to establish that the Kasler confession could be admitted as a statement against penal interest through inmate

Stephen Crane and counsel Bjorn Brunvand, both of whom Kasler had confessed to. (R. 738-54.) Mr. Bolin also went on to include his *Brady* claim regarding the failure to timely disclose the Crane-Kasler letters to the defense.[5] (R. 738-54.)

The circuit court conducted an evidentiary hearing on the two Kasler-related grounds for relief on August 24, 2015. (R. 1057-1168.) At the hearing, counsel Bjorn Brunvand testified as set forth above that, he scheduled a conference call with Kasler in September, 2014 after learning of Kasler's confession . (R. 1085.) Upon making the call, Kasler confessed to having committed the murder of Ms. Matthews. (R. 1085.) Kasler stated, consistent with the facts of the case, that he abducted Ms. Matthews from her vehicle at a post office in Land O'Lakes. (R. 1086.) He further stated, consistent with the facts of the case, that he had left her car running and left her purse behind. (R. 1086.) Kasler went on to state that he was willing to testify in the instant case and would confess to having murdered Teri Matthews. (R. 1117-18.)[6] Kasler later stated in his emails to Mr. Brunvand

[5] On December 9, 2014, Mr. Bolin filed a motion for post-conviction DNA testing pursuant to Florida Rule of Criminal Procedure 3.853. (R. 516-20.) The motion requested DNA testing of a DNA sample of Steven Kasler against the already tested DNA evidence obtained from the Matthews homicide scene. (R. 516-20.) The circuit court summarily denied that motion and Mr. Bolin took an appeal to this Court. (R. 725-28, 736.) While the appeal was pending, the State agreed to have the testing of Kasler's DNA conducted.

[6] That same day, counsel also had a conversation with Stephen Crane, who corroborated Kasler's confession as having been consistent with confessions Kasler made to him. (R. 1089.)

that the reason he did not confess to the murder earlier was because he did not want to end up on death row. (R. 1121.)

In emails that Kasler sent to counsel through an Ohio DOC email system, Kasler further discussed having committed the murder with an individual named Albert Eugene Holmes, who went by the name of Petey. (R. 1109, 1119.) Kasler discussed that he and Petey abducted the victim in a pick-up truck, Petey had sex with her, and that he, Kasler, then stabbed and beat her to death. (R. 1122.) In that email, he further described that he and Petey trolled around the St. Joseph's Hospital looking for nurses after having killed the victim. (R. 1109.) He further stated that they had wrapped Ms. Matthew's body in a sheet from that hospital at some point. (R. 1119.)

Kasler was, himself, serving a life sentence in Ohio for murder. (R. 1092.) He was also serving a sentence of 99 years to Life out of Louisiana. (R. 1091-92.) Aside from those cases, Kasler had also confessed to two other murders that were committed under circumstances very similar to those of the instant case. (R. 1149-52.) Those murders were also committed relatively close in time to the instant homicide. (R. 1151.) In one such case, involving victim Theresa Butler, Kasler confessed to having abducted the victim, a young woman, from her car on the side of the road. (R. 1149.) An arrest warrant had been issued for Kasler in connection with that homicide, and remained in effect until his death. (R. 1149.) In the other

similar case, involving another young adult female victim Pamela Mitchell, Kasler confessed to having abducted the victim from a Krystal Burger and later murdering her. (R. 1150.)

In his conversations with counsel, Kasler further stated that he has never had any contact with Mr. Bolin or his wife and that neither of them had anything to do with his decision to come forward and confess to the murder. (R. 1087.) The State presented no evidence to rebut that assertion.

Following Mr. Brunvand's testimony at the evidentiary hearing regarding Kasler's confession, the State called witness Ken Karnig. (R. 1127.) Karnig is a "crime memorabilia" dealer, which he described as someone who puts up for sale artwork, photographs, and letters from "infamous" criminals. (R. 1127.) Karnig claimed to have had a relationship with Kasler beginning sometime in 2013. (R. 1127.) He alleged that he and Kasler communicated by mail and telephone. (R. 1127.) Kasler claimed to have told him in a letter written in May, 2014, four months prior to Kasler's confession to Mr. Brunvand, that he had falsely confessed to having murdered Teri Lynn Matthews. (R. 1129.) Karnig further claimed to have discussed that letter with Kasler over the phone. (R. 1132-33.) The State submitted a copy of that letter into evidence, but presented no evidence to authenticate it as having been written by or sent by Kasler, aside from the testimony of Karnig, who alleged that he had received the letter from Kasler's

prison's address and purportedly recognized the handwriting as having been Kasler's. (R. 1133-35.) Karnig went on to allege that, in his follow-up conversations with Kasler, Kasler claimed to have falsely confessed to the instant murder because another murder memorabilia dealer, Jeremy Tod Bohannon, had simply asked him to do so. (R. 1135-56.) According to Karnig, Kasler also allegedly falsely confessed to having committed several other murders, including the "West Memphis Three" case, simply because Bohannon had asked him to. (R. 1144.) The State presented no recordings from any phone calls that Kasler may have allegedly made between Karnig and/or Bohannon, despite the fact that any such phone calls would have been recorded at the Ohio DOC facility where Kasler was housed. (R. 1140, 1148.)

On cross-examination, Karnig first claimed to have never talked to Bohannon about Kasler alleged false confessions. (R. 1145.) He later claimed, on the other hand, that Bohannon had told him in 2012 that he was having Kasler write false confessions. (R. 1146-47.) Karnig, however, had testified on direct that he had not had contact with Kasler until 2013 and made no mention of having allegedly known of the Bohannon-Kasler false confession conspiracy prior to that time. When pressed for details, Karnig could not say where this conversation with Bohannon took place, nor could he even say whether it took place over the phone

or via messaging. (R. 1148.) Karnig also was not able to say why Bohannon would have allegedly put Kasler up to making false confessions. (R. 1147.)

Karnig went on to testify that he had previously had a relationship with Mr. Bolin many years ago during the pendency of this case. (R. 1152.) Mr. Bolin ceased contact with Karnig, however, shortly after he met his now-wife. (R. 1152.) Karnig, more recently, had been prohibited from visiting inmates at Florida's death row as a result of complaints lodged by Mr. and Mrs. Bolin. (R. 1151-52.) Prior to that time, Karnig testified that he regularly visited two inmates on death row in the course of his work as a "murder memorabilia" dealer. (R. 1152-53.) Though Karnig claimed that being barred from death row did not hurt his business, he conceded that he was not happy with Mrs. Bolin about having gotten him precluded from visiting inmates on death row. (R. 1153-54.)

On October 19, 2015, the circuit court entered a final order denying the motion for post-conviction relief. (R. 941-50.) In its order, the court held that the Kasler confession qualified as newly discovered evidence and found that it would be admissible at a retrial as a statement against penal interest. (R. 942-45.) In denying the two Kasler-related grounds, however, the court reasoned that the Kasler confession was not evidence of magnitude that it would probably produce an acquittal or a sentence other than death if admitted at a retrial. (R. 945-49.) In so holding, the court did not consider the potential effect of the Kasler evidence in

light of other newly discovered evidence that might be admitted at a retrial, including the Malone-related evidence. (R. 945-49.)

The Post-Warrant Proceedings

On October 30, 2015, before the time for filing a motion for rehearing had passed, the Governor signed the death warrant for Mr. Bolin. (R. 1287-88.) On November 3, 2015, Mr. Bolin filed a timely motion for rehearing in the circuit court, setting forth points of law that the circuit court had overlooked with regard to both the Kasler and Malone claims, as well as newly discovered facts that pertained to the Kasler claims. (R. 1471-86.) As to the new facts, Mr. Bolin set forth that on October, 31, 2015, a witness named Teri Ippolitto read an article about Mr. Bolin's death warrant having been signed and sent an email to a fellow attorney, stating:

> My name is Teri Ippolito and I would like to make sure you are aware of my testimony about a man who tried to abduct me the day before Stefanie Collins was abducted. I worked in the same shopping center Stefanie was abducted from. It was not Oscar Ray Bolin who tried to get me in his car. Please call me at [redacted]

(R. 1475-79, 1486). That attorney forwarded Ms. Ippolitto's email to Mr. Bolin's counsel, who later spoke with Ms. Ippolitto. (R. 1476.) Ms. Ippolitto stated that she was working as an optician at a business located in the same shopping center as Stephanie Collins (the victim in the Thirteen Judicial Circuit case that is also pending on collateral appeal). (R. 1476.) Ms. Ippolitto was also acquainted with

Ms. Collins. (R. 1476.) On the day before Ms. Collins' abduction, an individual of dark complexion, possibly Hispanic or Middle-Eastern ethnicity, and approximately 35 years-old, approached her and attempted to lure her into his vehicle. (R. 1476.) Ms. Ippolitto retreated to a nearby store. (R. 1476.) The individual in the car parked outside the business and waited for Ms. Ippolitto to leave. (R. 1476.) At that point, the man again attempted to lure Ms. Ippolitto into his vehicle. (R. 1476.) Ms. Ippolitto was able to get back to her place of employment, where she reported the incident to her manager. (R. 1476.) The next day, she learned of Ms. Collins' disappearance and believed the man responsible was the same man who attempted to abduct her the day prior. (R. 1476.) Ms. Ippolitto stated that she was approximately the same age and had an appearance very similar to that of Ms. Collins at that time. (R. 1476.) Ms. Ippolitto stated that she spoke with law enforcement sometime thereafter and gave them a description and a sketch of the man who tried to abduct her. (R. 1476.) She also later spoke with an investigator who she learned passed away shortly after speaking with her. (R. 1476.)

Mr. Bolin asserted in his motion for rehearing that, aside from pointing to Mr. Bolin's innocence in the Collins case, the newly discovered testimony of Ms. Ippolitto adds additional corroboration to the Kasler confession. (R. 1475-79.) Mr. Bolin thereby pointed out that, in addition to the other existing corroboration, Ms.

Ippolitto's account now gave credibility to the account of the accomplice Petey having been a perpetrator who acted with Kasler. (R. 1476.) Petey, Mr. Bolin argued, could have very well been the same person who tried to abduct Ms. Ippolitto. (R. 1476.)

Mr. Bolin further asserted in his motion for rehearing that the Ippolitto evidence also dovetailed into evidence located prior to the most recent Natalie Holley trial that suggested that a perpetrator named Edwin Keagle carried out the Holley homicide. (R. 1477.) In that case, prior to trial, evidence surfaced that Keagle, who was then residing in Elmira, New York, had confessed to two other individuals, Steven Witschi and Robert Anton, that he was the perpetrator of the Holley offense. (R. 1476-77.) Additionally, counsel discovered tangible evidence to corroborate Keagle's confession that he was the perpetrator of the homicide, including, but not limited to, the facts that Keagle, Anton, and Witschi were acquainted with Ms. Holley and that Anton, on the night of the Holley homicide, had seen Keagle bloody and wearing shoes similar to the shoes that the perpetrator of the offense wore. (R. 1477-78.) Steven Witschi and Robert Anton went on to give sworn depositions recounting Keagle's confessions. (R. 1477-78.) Keagle, himself, was later subpoenaed to testify in the Holley case, but invoked his Fifth Amendment privilege. (R. 1478.) The trial court in the Holley case, however, ultimately ruled that the testimony of Witschi and Anton was inadmissible at trial.

(R. 1478.) Mr. Bolin asserted that the Witschi and Anton testimony would now be relevant in the instant case because it pointed to another perpetrator having now committed all of the three cases alleged against Mr. Bolin. (R. 1478-79.) Mr. Bolin further asserted that, even if the Witschi and Anton testimony might not be admitted at phase one of a retrial, it would at least be admissible at a potential phase two as evidence relevant to the defendant's purported role in the allegd offenses. (R. 1479.)

While the motion for rehearing remained pending, Mr. Bolin also filed a successive motion to vacate his death sentence pursuant to Rule 3.851(h)(5). (R. 2155-80.) That motion set forth a fifth[7] claim for relief, that "[t]he Current Death Warrant Selection and Signing Procedure Results in the Arbitrary and Capricious Implementation of the Death Penalty in Violation of the Eighth and Fourteenth Amendments, Deprives Defendants of Due Process, and Violates the Separation of Powers Doctrine." (R. 2163-78.)

On November 20, 2015, the circuit court entered an order summarily denying Mr. Bolin's motion for rehearing and his successive motion to vacate. (R. 2400-16.) In its order, the court reaffirmed its previous denials of relief and further denied Mr. Bolin's claim as to the unconstitutionality of the death warrant

[7] In order to avoid any confusion if and when the motion should be appealed, Mr. Bolin reasserted the original four claims of his successive Rule 3.851 motion, which were then still pending on rehearing in the circuit court, and asserted the additional Rule 3.851(h)(5) claim as a Claim V.

selection process. (R. 2400-16.) As to the Kasler claim, the court again declined to conduct a cumulative analysis of the potential effect of the newly discovered evidence as a whole. (R. 2403-06.) As to the newly raised Issue V, the court relied on precedent of this Court, which Mr. Bolin acknowledged in his motion, in holding that the death warrant selection process is not unconstitutional. (R. 2408-13.) Mr. Bolin then filed a timely notice of appeal on November 23, 2015. (R. 2443-44.)

B. Standards of Review

As to Issue I, when reviewing a post-conviction claim where the trial court has conducted an evidentiary hearing, this Court affords deference to the trial court's findings of fact, but reviews the trial court's legal conclusions *de novo*. *Kormondy v. State*, 983 So. 2d 418, 428 (Fla. 2007).

As to Issue II, when the lower court denies a Rule 3.851 motion with a hearing, this Court accepts "the movant's factual allegations as true, and [] will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim or that there is no issue of material fact to be determined." *Long v. State*, 118 So. 3d 798, 806 (Fla. 2013) *citing Amendments to Fla. Rules of Crim. Proc. 3.851, 3.852 & 3.993*, 772 So. 2d 488, 491 n. 2 (Fla. 2000). "However, to the extent there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, [this Court]

will presume that an evidentiary hearing is required." *Id.* "In other words, '[this Court] must examine each claim to determine if it is legally sufficient, and, if so, determine whether or not the claim is refuted by the record.'" *Id. quoting Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001).

As to Issue III, this Court has held that a mixed standard of review is applicable to *Brady*-related claims, which present mixed questions of law and fact. *Johnson v. State*, 921 So. 2d 490, 507 (Fla. 2005). Any factual findings made by the trial court are entitled to due deference. *Id.* Questions of law or the applications of the facts to law, however, are reviewed *de novo*. *Id.*

As to the related *Brady* claim set forth in Issue IV, however, the circuit court denied relief on that constitutional issue without conducting an evidentiary hearing. When, in such instances, the lower court has denied an evidentiary hearing, the facts alleged by the Appellant must be accepted as true for purposes of determining, on appeal, whether the Appellant is entitled to an evidentiary hearing to present evidence in support of his claim. *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989).

As to Issue V, this Court reviews constitutional issues *de novo*. *Henry v. State*, 134 So. 3d 938, 946 (2014).

SUMMARY OF THE ARGUMENT

Mr. Bolin is entitled to a new trial based on newly discovered evidence under the standard articulated by this Court in *Swafford* and *Hildwin*, which requires consideration of Mr. Bolin's newly discovered evidence in the context of *all* evidence that was presented at his trial, as well as *all* evidence that has been uncovered during post-conviction proceedings over the last twenty years. Because the circuit court failed to analyze Mr. Bolin's newly discovered evidence claims under the required *Swafford* and *Hildwin* standard, this Court should either remand to the circuit court to conduct such review, or conduct the full *Swafford* and *Hildwin* analysis in the first instance. In either case, a stay of execution is appropriate and necessary to allow sufficient time to review Mr. Bolin's newly discovered evidence claims in the context of the whole record—which includes all of the evidence presented during Mr. Bolin's trial, as well as all evidence uncovered over the nearly two decades since his conviction and sentencing. Because Mr. Bolin's execution is scheduled for just one month from now, a stay is necessary for the thorough review required by *Swafford* and *Hildwin*.

On the merits, the circuit court's denial of Mr. Bolin's newly discovered evidence and *Brady* claims was sufficiently flawed so as to call for a remand to that court for further proceedings, including an evidentiary hearing and a new analysis under the controlling precedent that the circuit court overlooked. Mr.

Bolin presented two categories of newly discovered evidence: (1) newly discovered evidence that another individual, Steven Kasler, had confessed to the murder at issue and (2) newly discovered evidence that FBI Special Agent Michael Malone, who has been widely discredited for evidence tampering and providing false testimony in numerous cases nationwide, mishandled serological evidence in Mr. Bolin's case. The circuit court's wholesale rejection of both categories of Mr. Bolin's newly discovered evidence was flawed in multiple respects. First, the court erred in its evaluation of the potential admissibility at a retrial of some of Mr. Bolin's newly discovered evidence. Second, and most troubling, after the court found that the Kasler evidence would be admissible at a retrial, the court failed to apply—or even cite—the controlling law pertaining to the analysis of the weight of newly discovered evidence claims set down by this Court in *Swafford* and *Hildwin*.

With respect to Malone's misconduct, Mr. Bolin presented evidence of the State's withholding of critical evidence of Malone's pervasive and systematic mishandling of evidence in numerous criminal cases nationwide. That misconduct was chronicled in the Inspector General's 2014 Report, which called into question the reliability of any evidence Malone handled during his time with the FBI. Under the circumstances, Mr. Bolin was clearly entitled to an evidentiary hearing on his Malone-related newly-discovered evidence claim.

The circuit court's errors with respect to Mr. Bolin's newly discovered evidence claims also flowed directly to, and fatally compromised, its equally flawed analysis of Mr. Bolin's *Brady* claims. With respect to the Kasler confession, Mr. Bolin presented evidence that the State had received documentation of the confession in 2013, but did not turn it over to the defense until after Kasler committed suicide in 2014. The failure to disclose Kasler's confession was not only a violation of *Brady*, but also resulted in Mr. Bolin's inability to raise a newly discovered evidence claim, based on the confession, in time for Kasler to testify while he was still alive. Similarly, the State's failure to disclose evidence of the investigation into Malone and its correspondence with the DOJ regarding Malone's work on the instant case further violated the State's duties under *Brady*.

Finally, the circuit erred in denying Mr. Bolin's constitutional claim that the standardless procedure by which cases are selected for the issuance of a death warrant in Florida violates the Eighth and Fourteenth Amendments, the Due Process Clause, and the separation of powers doctrine.

ARGUMENT AND CITATIONS TO AUTHORITY

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DENYING THE APPELLANT'S NEWLY DISCOVERED EVIDENCE CLAIM OF THE RECENT CONFESSION OF OHIO INMATE STEVEN KASLER TO HAVING COMMITTED THE MURDER AT ISSUE

Oscar Ray Bolin established in his motion for post-conviction relief that Ohio inmate Steven Kasler recently confessed to having committed the murder for which Mr. Bolin was convicted. Kasler, moreover, provided details of the murder that corroborated his confession. Kasler, furthermore, had committed other murders under circumstances similar to the circumstances of the instant case. While the circuit court properly held that Kasler's confession would be admissible at a retrial, it erred in concluding that the admission of Kasler's confession could not have changed the outcome of the case. In reaching that conclusion, the circuit court not only failed to afford proper weight to the Kasler confession, but it also failed to consider the Kasler evidence in light of other newly discovered evidence that could be admitted at a retrial. Under this Court's recent holding in *Swafford v. State, cited infra*, after the circuit court found that that evidence of Kasler's confession was admissible, the court was obligated to consider that evidence not merely in isolation, but in context with the *cumulative* effect of *all* of the evidence that would be admissible at a retrial. The court's cumulative analysis was required to include *all* of the evidence that was presented at the original trial, and *all* of the

evidence uncovered during post-conviction proceedings, including any evidence that was previously excluded as procedurally barred, as well as any evidence underlying previously-presented *Brady* claims. The circuit court failed to conduct such analysis, and failed to even cite *Swafford*. Given those facts, the circuit court erred as a matter of law in denying relief on the instant issue. Mr. Bolin, consequently, asks this Court to review this issue *de novo* and to ultimately reverse the trial court's denial of relief. *See supra* Statement of the Case at B.

Because the circuit court did not conduct the full panoply of review required by this Court's decisions in *Swafford* and *Hildwin*, this Court has the authority to remand the matter for the circuit court to conduct such review. In the alternative, this Court may conduct the *Swafford* and *Hildwin* analysis in the first instance, which will require a comprehensive review of the entire record. In either case, a stay of execution is appropriate and necessary to allow sufficient time to review Mr. Bolin's newly discovered evidence claims in the context of the whole record—which includes all of the evidence presented during Mr. Bolin's trial, as well as all evidence uncovered over the nearly two decades since his conviction and sentencing. Because Mr. Bolin's execution is scheduled for just one month from now, a stay is necessary for the thorough review required by *Swafford* and *Hildwin*.

A. The Admissibility of Kasler's Confession as a Statement Against Penal Interest

The circuit court properly found that Mr. Bolin established the admissibility of Kasler's confession as a statement against his penal interest. This Court has held that the test for admissibility under statement against his penal interest hearsay exception is (1) whether the declarant is unavailable, and if so (2) whether the statements are relevant, (3) whether the statements tend to inculpate the declarant and exculpate the defendant, and (4) whether the statements are corroborated." *Masaka v. State*, 4 So. 3d 1274, 1279 (Fla. 2d DCA 2009) *citing Voorhees v. State*, 699 So. 2d 602, 613 (Fla. 1997).

As to the first prong of the admissibility test, Kasler is undoubtedly unavailable based on his untimely death. As to the second prong, Kasler's confession is certainly relevant as it implicates him as the perpetrator of the murder at issue. Similarly, as to the third admissibility prong, Kasler's confession directly implicated Kasler, the declarant, as the perpetrator of the homicide. Kasler's statements, furthermore, exonerate Mr. Bolin from having had any involvement whatsoever in the offense. As Kasler stated, he has never even met or spoken to Mr. Bolin and in no way suggested that Mr. Bolin had any involvement in the murder.

Finally, as to the fourth admissibility prong, given the applicable law, Kasler's confession was sufficiently corroborated to be admissible under the statement against penal interest. *See Bearden v. State*, 161 So. 3d 1257, 1266 (Fla. 2015) (discussing the corroboration determination and noting that the corroborating evidence necessary to lay the foundation for admissibility can be as simple as the defendant's own statement being consistent with the proffered out-of-court statement). For one, Kasler's description of his abduction of Ms. Matthews was consistent with the crime scene evidence. As further corroboration, Kasler has been convicted of other first-degree murders and clearly has the propensity to kill. More importantly, Kasler also admitted to at least two other murders that were committed close in time to the instant case, and under very similar circumstances. Kasler admitted to murdering both Theresa Butler and Pamela Mitchell, both of whom were young woman similar to Ms. Matthews, both of whom were abducted under circumstances very similar to Ms. Matthews' abduction, and both of whom were murdered around the same time as Ms. Matthews.

Finally, additional corroboration of Kasler's confession can be found in the fact that Kasler was well-aware that his confession to the instant homicide could result in a death sentence and relocation to Florida's death row. Under the circumstances, Kasler's confession to Mr. Brunvand over a recorded phone line, was tantamount to a direct confession to law enforcement and thereby lent the

statement "particular guarantees of trustworthiness." *See generally Masaka*, 4 So. 3d at 1282 (calling for the trial court to "consider the circumstances surrounding the making of the statement itself, including the language used and the setting in which the statement was made, to determine whether those circumstances tend to show that the statements are trustworthy"). Given the foregoing, and pursuant to the authorities set forth above, Kasler's confession was sufficiently corroborated for admission into evidence as a statement against penal interest pursuant to Florida Statutes Section 90.804(2)(c).

B. The Circuit Court Failed to Properly Weight the Effect of the Kasler Confession in Conjunction with the Other Available Newly Discovered Evidence that Could Be Admitted at a Retrial

In making the statement against penal interest admissibility determination, "[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." *Bearden*, 161 So. 3d at 1263 *citing Carpenter v. State*, 785 So. 2d 1182, 1203 (Fla. 2001). A marked distinction, thereby, exists between the corroboration determination, which is for the Court, and the credibility determination, which is for the jury. Mr. Bolin recognizes, however, that in the context of a post-conviction claim, the Court also is tasked with deciding whether the newly discovered evidence at issue if "of such nature that it would probably produce an

acquittal on retrial." *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. Jun. 26, 2014) *quoting Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). The Court does not need to find that Kasler, as a confessor, was credible, but must only find that the newly discovered evidence weakens the State's case against Mr. Bolin to such an extent that it gives rise to a reasonable doubt as to Mr. Bolin's culpability. *Id. citing Jones*, 709 So. 2d at 526.

As the circuit court recognized, if Mr. Bolin is retried in this case, Kasler's confession will be admissible as a statement against penal interest. The inquiry into the weight and potential effect of the newly discovered Kasler evidence does not, however, end there. In making its determination, the court was also bound to consider the weight and potential effect of the newly discovered Kasler evidence in conjunction with the combined the weight and potential effect of any other newly discovered evidence that might be admitted in a retrial, even if that evidence might have been procedurally barred from making up a post-conviction claim for relief. *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Swafford v. State*, 125 So. 3d 760 (Fla. 2013); *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014).

In *Swafford*, this Court held that, in evaluating post-conviction claims based on newly discovered evidence, courts must consider the *cumulative* effect of *all* of the evidence that would be admissible at a retrial. "In determining the impact of newly discovered evidence," the *Swafford* Court ruled, courts "must conduct a

cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case.'" *Swafford*, 125 So. 3d at 776 *quoting Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999). Courts must also consider the materiality and relevance of the evidence, and any inconsistencies in the newly discovered evidence. *See Id.* at 767-68, 777-78.

In *Hildwin*, which followed shortly after *Swafford*, this Court reaffirmed the cumulative analysis holding of *Swafford*. Moreover, the Court held, in evaluating the impact of newly discovered evidence on the "total picture" and "all of the circumstances of the case," courts cannot turn a blind eye when the defendant's newly discovered evidence undermines a central pillar of the theory that the State made center-stage at trial, even if it appears possible that the State could have convicted the defendant if it had decided to pursue a different theory and did not use the evidence that was later discredited by the defendant's newly discovered evidence. *See Hildwin*, 141 So. 3d at 1181, 1183-92.

In concluding that the newly discovered evidence of Kasler's confession would probably not produce a different result in a retrial, the court failed to discharge its duty under *Swafford* because it relied almost exclusively on the trial evidence presented against Mr. Bolin. Indeed, the court's "total picture" analysis consisted of little more than a six-paragraph block quote from this Court's opinion on direct appeal. To the extent that it appears as though the circuit court did

consider evidence uncovered after Mr. Bolin's trial in assessing the "total picture" of his case, its consideration was both scant and selective. In a single sentence, the court stated that, "[i]n addition to the evidence presented at Defendant's last trial, since that time additional DNA testing has been done showing that Steven Kasler was excluded as the source of the DNA on Matthews, but that Bolin was not excluded." The court then recognized, however, that such DNA results were entirely consistent with Kasler's confession, in which he indicated that he had killed Matthews, but that his accomplice, Petey Holmes, had been the only person who raped her. The circuit court made no mention of, and utterly failed to consider, any of the other evidence uncovered in Mr. Bolin's post-conviction proceedings over the years.

Even if the circuit court's cursory review of the "total picture" of Mr. Bolin's case were sufficient under *Swafford*, the court still contravened *Hildwin* with its conclusory ruling that Mr. Bolin would have been convicted notwithstanding Kasler's confession. In *Hildwin*, this Court emphasized that, in evaluating the impact of newly discovered evidence on the "total picture" and "all of the circumstances of the case," courts cannot turn a blind eye when the defendant's newly discovered evidence undermines a central pillar of the theory that the State made center-stage at trial. Here, Kasler's confession undermines the central pillar of the State's case that Mr. Bolin was the sole perpetrator of the rape

and murder of Matthews. Accordingly, it was not enough for the circuit court to speculate that the State would have been able to convict Mr. Bolin even without Kasler's confession. The circuit court was required to consider the Kasler evidence in conjunction with the other available evidence that could be presented at a retrial and without regard for any potential changes in State strategy. It entirely failed to do so in this case.

C. The Kasler Confession Would Result in a Not Guilty Verdict if Admitted at a Retrial, Particular When Considered in Light of the Other Available Newly Discovered Evidence

With Kasler's confession admitted into evidence at a retrial, along with the plethora of other newly discovered evidence that has surfaced in this case, there exists a reasonable probability that the jury will have reasonable doubt as to Mr. Bolin's guilt and will render a verdict of not guilty in a retrial.

As to the evidence that would be presented against Mr. Bolin at a retrial, the State's case in the prior trial rested largely on the testimony of family witnesses who had motivation to fabricate testimony, including Mr. Bolin's ex-wife, who had both personal and financial incentives to fabricate her testimony. The one purported eyewitness against Mr. Bolin was his half-brother, who repeatedly recanted his allegations against Mr. Bolin over the many years that have passed since the homicide occurred. The half-brother's credibility was, moreover, highly

in question during the prior trials. The physical evidence presented against Mr. Bolin was, furthermore, limited and of questionable reliability. The DNA evidence submitted against him established only a partial profile match and merely showed that Mr. Bolin "*could* have been the source of the semen found in a stain on [the victim's] pants." *Bolin v. State*, 869 So. 2d 1196, 1199 (Fla. 2004). Likewise, the population geneticist who testified in Mr. Bolin's trial opined that Mr. Bolin was 2100 times more likely to be the source of the semen than a random, unrelated person. *Id.* While 2100 times more likely may seem to be rather conclusive to a layperson, that frequency is not particularly high for purposes of a DNA match. What's more, any such forensic evidence was likely handled by former FBI agent Michael Malone. For the reasons set forth in the section to follow, the reliability of any forensic testing performed on evidence Malone handled is now highly suspect. Under the totality of the circumstances, the evidence against Mr. Bolin was far from "overwhelming." The admission of evidence of a detailed confession from a convicted murderer such as Kasler would certainly leave a jury with reasonable doubt as to Mr. Bolin's purported guilt.

Furthermore, as discussed above, in addition to the Kasler evidence, Mr. Bolin now has available to him critical newly discovered evidence that calls into question the reliability of all evidence that was submitted to the FBI forensic laboratory for testing, including the serological and DNA evidence that was

admitted at trial. Notwithstanding the question of whether the newly discovered Malone evidence was procedurally barred in the post-conviction proceedings, that evidence would certainly be admissible at a retrial. "Relevant evidence is evidence tending to prove or disprove a material fact." FLA. STAT. § 90.401. "Relevance is not determined by conclusiveness of inference; it is enough that it may tend even slightly to elucidate the inquiry." *New v. State*, 211 So. 2d 35, 36 (Fla. 2d DCA 1968) *citing Astrachan v. State*, 28 So. 2d 874, 845 (Fla. 1947); *Cannon v. State*, 107 So. 360, 363 (Fla. 1926); *Mobley v. State*, 26 So. 732, 733 (Fla. 1899). "Furthermore, it is sufficient that its relevance appear upon consideration with other evidence in the case." *Id. citing Parrish v. State*, 105 So. 130, 133-134 (Fla. 1925); *Thompson v. State*, 50 So. 507, 509 (Fla. 1909). Given that Mr. Bolin could establish that Malone handled, as the lead analyst in his case, essentially all of the evidence that was submitted to the FBI for forensic testing, the relevant portions of the 2014 OIG Report and the testimony of Dr. Whitehurst concerning Malone would undoubtedly be admissible at a retrial. As Mr. Bolin establishes in the section to follow, that evidence would be game-changing at a retrial because it would call into doubt the reliability of all of the scientific evidence that the State would present against Mr. Bolin. Taken together, the Kasler and Malone newly discovered evidence is "of such nature that it would probably produce an acquittal on retrial" and would certainly weaken[] the State's case against Mr. Bolin to such

an extent that it gives rise to a reasonable doubt as to Mr. Bolin's culpability. *Hildwin*, 141 So. 3d at 1184; *Jones*, 709 So. 2d at 526.

In addition to the Malone evidence, other newly discovered evidence has surfaced in recent years that point to Mr. Bolin's innocence in the other two murder cases alleged against him. That evidence, in turn, ties back to the instant case and would be admissible at a retrial. The most pertinent of that new evidence is the statement of Terri Ippolito, the new witness who came forward after the circuit court's October 2015 decision, and stated that she would testify that, on the day before Stephanie Collins[8] was abducted from the parking lot of a Tampa shopping center, a dark-complexioned man tried to lure Ippolito from the same parking lot. Aside from pointing to Mr. Bolin's innocence in the Collins case, the testimony of Ms. Ippolitto adds additional corroboration to the Kasler confession. Compounding on the corroboration set forth above, Ms. Ippolitto's account now gives credibility to the account of the accomplice Petey having been a perpetrator who acted with Kasler. Petey may well have been the same person who attempted to abduct Ms. Ippolitto close in time and under circumstances similar to those of the instant case. Ippolitto's account also points to the conclusion that if, in fact, the Matthews, Collins, and Holley cases were all connected, Mr. Bolin was not the perpetrator of those homicides.

[8] The victim in the Thirteenth Judicial Circuit case that is also pending on collateral appeal.

As Mr. Bolin set out in his motion for rehearing, Ms. Ippolitto's testimony also now opened the door for the admission of the evidence located prior to the most recent Natalie Holley trial that suggested that a perpetrator named Edwin Keagle carried out the Holley homicide. As to the Holley case, Steven Witschi and Robert Anton would be available to testify that Keagle was the perpetrator of the Holley offense. Despite the facts that the testimony of Witschi and Anton was not admitted in the Holley case and that evidence of the Holley case was not admitted in the instant case, the Witschi and Anton evidence lends additional corroboration to the Kasler confession, particularly in light of Ms. Ippolitto's account. While Anton and Witschi's testimony does not bear on the Matthews homicide, it does point to Mr. Bolin not having been the perpetrator of the three homicides alleged against him. The Anton and Witschi testimony, moreover, is only a small piece of the newly discovered evidence pie. The Kasler and Malone evidence would be significant enough to warrant a new trial on either of their own accounts. The addition of the Ippolitto, Anton, and Witschi testimony simply adds to the pot. The combination of the Kasler and Malone evidence, along with the addition of the Ippolitto, Anton, and/or Witschi testimony, simply magnifies the potential exonerating effect of the newly discovered evidence as a whole.

D. Neither the Lack of a DNA Match Between Kasler's DNA Sample and the Semen Sample From the Victim's Pants nor Ken Karnig's Testimony Would Affect the Exonerating Weight of the Kasler Confession

The fact that Kasler's DNA did not prove to be a match to the sample taken from the victim's clothing does not render Kasler's confession incredible. On the contrary, Kasler stated that his accomplice had sex with the victim before her death. Because the accomplice has not yet come forward, we are unable to test his DNA against the DNA taken from the victim's clothing. Given the substance of Kasler's confession to having acted with the accomplice Petey (who had sex with the victim), logic dictates that the DNA left at the scene would belong to Petey rather than to Kasler. Moreover, as discussed above, Mr. Bolin's DNA profile was only a partial match to the DNA found at the scene. Furthermore, Mr. Bolin established, with respect to Claim II of his original motion, that former FBI agent Michael Malone likely handled the samples from Mr. Bolin that were used in the DNA testing in this case. Given's Malone's documented acts of misconduct, the reliability of any testing conducted on evidence Malone handled must now be heavily scrutinized. Were this case to proceed to retrial, Mr. Bolin would present evidence of the Malone connection and the unreliability of any forensic testing conducted on evidence Malone handled. As a result, the significance of the partial DNA match would be severely diminished in the jury's eyes. Kasler's confession

to having acted with the accomplice Petey, who had sex the victim and likely deposited the semen stain from which DNA was recovered, would, in turn, remain highly plausible to the jury.

Furthermore, assuming that Karnig's testimony was admitted as rebuttal evidence in a retrial, it would not diminish the determinative weight of the Kasler confession. For one, Karnig's story makes little sense. Without being able to provide any further details, Karnig claims that Kasler simply fabricated his confession because a rival "murder memorabilia" dealer told him to do so. Karnig is not able supply any purported reason why Kasler would have falsely confessed to a murder that resulted in a death sentence to another man.

Similarly, the timeline of Karnig's claims do not match up. Most importantly, Karnig claims that Kasler's recantation occurred in May 2014, yet Karnig's confession to Mr. Brunvand occurred in September 2014. The alleged recantation thereby would have preceded the confession. In addition, Karnig claimed to have begun his communications with Kasler in 2013. As to any communications he had with Bohannon, on the other hand, Karnig first testified that he had *not* discussed the alleged false confession with Bohannon, but then went on to testify that in 2012 (before Karnig begins communicating with Kasler) Bohannon purportedly told him that he was putting Kasler up to making false confessions. The timeline of Karnig's accounts simply does not make sense.

What's more, the State presented absolutely no evidence to corroborate Karnig's allegation, despite the fact that it should have been very easy to do so, if Karnig's claims were true. For one, aside from Karnig's own speculative opinion, no evidence was submitted to authenticate the writing that Karnig attributed to Kasler as having actually been the writing of Kasler. More critically, the State presented no recorded phone calls between Kasler and either Karnig or Jeremy Bohannon, nor did it present any writings made between Kasler and Bohannon. If, in fact, Bohannon had put Kasler up to falsely confessing, he would have had to have communicated with Kasler through some sort of monitored communication – prison mail, prison email, or over a recorded prison phone. As a result, any communication between Kasler and Bohannon regarding this alleged conspiracy would be memorialized. The State, however, presented no such evidence to corroborate its false confession theory.

Under the circumstances, a reasonable trier of fact would certainly have doubt as to 1) whether, if Kasler did make the alleged statements to Karnig as Karnig claims, Kasler was lying to Karnig or 2) whether Karnig made the whole story up. Karnig certainly had motive to fabricate his testimony regarding Kasler's alleged recantation. As Karnig admitted, the Bolins' complaints about him have resulted in the DOC prohibiting him from visiting inmates at Florida's death rows. While Karnig claims that that prohibition did not hurt his business, that assertion

defies logic since Karnig's business relies on his ability to foster relationships with inmates and obtain their "memorabilia." Likewise, to Karnig, as a "murder memorabilia" dealer, Mr. Bolin and any Bolin "memorabilia" Karnig has, is much more valuable so long as Mr. Bolin is on death row. If Mr. Bolin is exonerated, he will no longer be one of "infamous" criminals Karnig's business deals in. Likewise, if Mr. Bolin is released from custody, his "artwork, photographs, and letters" would no longer be restricted from disbursement, as they are currently by the Department of Corrections. Karnig's current inventory of Bolin "memorabilia" would thereby become worthless. Based both on his animosity towards the Bolins and his financial stake in Mr. Bolin's status as an "infamous" criminal, Karnig certainly had reason to fabricate his testimony.

In the end, given the totality of the newly discovered evidence, the new evidence weakens the State's case against Mr. Bolin to such an extent that it gives rise to a reasonable doubt as to Mr. Bolin's culpability. The fact remains, however, that the circuit court failed to consider the newly discovered Kasler evidence in light of the other newly discovered evidence that would be available to Mr. Bolin at a retrial. Likewise, and perhaps more importantly, the circuit court failed to conduct an evidentiary hearing to allow Mr. Bolin to develop of record of the various other newly discovered evidence cataloged above, including the OIG Report and investigation of Malone, the testimony of Dr. Whitehurst concerning

unreliability of any evidence Malone handled, the Terri Ippolitto evidence, and the confessions of another third-party in the Natalie Holley case. As a result, the circuit court failed to properly analyze the weight and potential effect of the newly discovered evidence as a whole and, likewise, left this Court without a record upon which to conduct its own cumulative analysis.

II. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. BOLIN'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF THE PRIOR BAD ACTS OF FBI AGENT MICHAEL MALONE AND THE PROBABLE TAMPERING THAT OCCURRED DURING MALONE'S HANDLING OF THE PHYSICAL EVIDENCE THAT WAS TESTED IN THIS CASE

The circuit court erred in failing to conduct an evidentiary hearing on Mr. Bolin's newly discovered evidence claim regarding the misconduct of Michael Malone and the unreliability of the evidence Malone handled. On the procedural side of the analysis, the circuit court erred as a matter of law in concluding that the new evidence regarding Malone's misconduct was not "newly discovered" for purposes of post-conviction review. As set forth below, this Court's precedent establishes that Mr. Bolin's newly discovered evidence claim was timely because it was filed within one year after receiving case specific correspondence from the Department of Justice (DOJ) regarding Malone's work in Mr. Bolin's cases. Furthermore, during the pendency of that one-year limitation period, the Office of the Inspector General (OIG) issued a comprehensive report that detailed specific

acts of misconduct carried out by Malone and which called into question the reliability of evidence Malone handled during his time with the FBI. As to the merits of the Malone newly-discovered evidence claim, the record before the circuit court certainly did not conclusively refute Mr. Bolin's entitlement to relief on the instant issue. On the contrary, given the scant level of evidence presented against Mr. Bolin, coupled with the magnitude and extent of Malone prior bad acts, the newly discovered evidence at issue weakens the State's case to such an extent that it gives rise to a reasonable doubt as to Mr. Bolin's culpability.

A. Mr. Bolin's Claim was Timely Filed

Mr. Bolin's Malone-related newly discovered evidence claim was timely because it was filed within one-year after he received a case-specific letter from the FBI/DOJ concerning Malone's potential misconduct in Mr. Bolin's cases. Furthermore, during the year that followed the receipt of that letter, the OIG issued its comprehensive 2014 Report that documented specific acts of misconduct by Malone and, for the first time, called into question the reliability of any evidence Malone handled. Both the case specific FBI letter and the 2014 OIG Report and findings constituted newly discovered evidence that was unknown to Mr. Bolin and his counsel and could not have been ascertained with the exercise of due diligence prior to the issuance of Mr. Bolin's case-specific FBI/DOJ letter.

In *Wyatt v. State*, 71 So. 3d 86 (2011), this Court addressed a procedural issue that was almost identical to the procedural issue at bar. In *Wyatt*, the defendant had been convicted of murder and sentenced to death in 1991. *Wyatt*, 71 So. 3d at 93. In 2008, the defendant received a case specific letter from the FBI informing him that "an FBI agent testified regarding [comparative bullet lead analysis ("CBLA")] in a manner that exceeded the limits of the science and could not be supported by the agency." *Id.* at 95. In response to that letter, the defendant asserted a related post-conviction claim several months later. *Id.* Evidence was later presented that the National Research Council issued a report in 2004 that have "undermined the scientific reliability of the correlation" that the FBI agent at issue drew at trial. *Id.* at 98. In addition, in 2005, the FBI "issued a press release announcing that the agency was discontinuing its use of CBLA." *Id.* The circuit court went on to conduct an evidentiary hearing on the issue, but ultimately denied relief, finding that the claim stemming from the 2008 letter did not constitute newly discovered evidence and was time-barred. *Id.* at 96, 98. The circuit court reasoned that the one-year post-conviction time-clock began running when the NRC issued its report in 2004. *Id.* at 98. When this Court reviewed the case on appeal, the Court noted that the 2008 case-specific letter was based on the FBI's own review of testimony that its agent gave in that specific case. *Id.* at 99. It thereby distinguished the 2008 letter from the 2004 report and 2005 press release,

which were more general and "were only prospective in nature." *Id.* The Court consequently held that "a newly discovered evidence claim predicated upon a case-specific letter from the FBI discrediting the CBLA testimony offered at trial is not procedurally barred if timely raised." *Id.* The receipt of the letter was, accordingly, the event that triggers the newly discovered evidence post-conviction time-clock. *See also* *Smith v. State*, 75 So. 3d 205 (Fla. 2011) (reaching the same holding).

As in *Wyatt*, the receipt of the case-specific FBI/DOJ letter was the catalyst that began the one-year time-clock running on Mr. Bolin's Malone-related newly discovered evidence claim. Contrary to the circuit court's reasoning, Mr. Bolin and his predecessor counsel were not and could not have been aware of the instant issue despite the fact that they were aware of ongoing investigations into Malone's background. Consistent with the scenario at issue in *Wyatt*, the 2013 and 2014 case-specific correspondence that Mr. Bolin received were based on the DOJ's own review of testimony that Malone gave in Mr. Bolin's specific cases. As with the prior CBLA report and press-release at issue in *Wyatt*, any prior reports and findings issued regarding Malone had not been specific to Mr. Bolin's cases.

Furthermore, prior OIG investigations into Malone did not go nearly as far as the 2014 OIG Report would go with regard to specific acts of misconduct attributed to Malone. Unlike prior reports issued by the OIG regarding Malone and related matters, the 2014 OIG Report called into question the reliability of any

evidence that Michael Malone handled during his time with the FBI. That evidence includes essentially all of the physical evidence that was admitted against Mr. Bolin in the instant case. The problems that the 2014 Report found include, but are not limited to, the following:

> a) that Malone "repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials;"
>
> b) that "independent scientists deemed approximately 96 percent of the Malone cases to be problematic in one or more areas;"
>
> c) that "in 94 percent (47 of 50) of the cases [independently reviewed] that either the appropriate forensic tests were not conducted or it was impossible to determine whether Malone conducted the appropriate tests;"
>
> d) that also in 94% of cases, "the scientists concluded that the results Malone described in his lab reports were not supported by his bench notes;"
>
> e) that "Malone's faulty analysis and scientifically unsupportable testimony contributed to the conviction of an innocent defendant (Gates), who was exonerated 27 years later, and the reversal of at least five other defendants' convictions because of Malone's unreliable analysis and testimony;"
>
> e) that, despite his prior acts, Malone continued to work for the FBI on a contract basis until June 17, 2014, just prior to the issuance of the Report, when the FBI terminated its association with him.

None of the foregoing facts were available to Mr. Bolin at the time of the trial in the instant case. On the contrary, a 1997 OIG Report into the same matters failed to find any acts of misconduct committed by Malone that would have borne on the reliability of Malone's work in the instant case or in any other such cases. The

2014 Report, on the other hand, directly contradicted that position and heavily criticized the findings of and investigation underlying the 1997 Report.

Furthermore, echoing the findings of the 2014, OIG Report, Dr. Whitehurst testified in the Collins hearing that any testing conducted by Malone is not reliable and has no credibility. More importantly, he testified, any subsequent testing performed on evidence Malone handled is largely meaningless because we have no way of knowing if Malone mishandled or tampered with the evidence. As Dr. Whitehurst opined, "[f]urther analysis doesn't matter… it's useless."

The evidence that called into question the reliability of evidence handled by Michael Malone did not surface until 2014. Likewise, the case specific analysis of Malone's work in relation to Mr. Bolin's specific cases did not surface until 2013 when the DOJ issued case-specific correspondence to Mr. Bolin. As a result, consistent with *Wyatt*, Mr. Bolin's newly discovered evidence claim regarding the Michael Malone investigations was timely filed.

B. The Record did not Conclusively Refute the Merits of the Instant Issue

In light of Mr. Bolin's newly discovered evidence regarding Malone's misconduct, an evidentiary hearing was necessary. The need for an evidentiary hearing is underscored by the fact that the Thirteenth Judicial Circuit Court recently held an evidentiary hearing in the Collins case on the same very issue. During that hearing, the Collins court accepted into evidence the bulk of the 2014

OIG Report and took the testimony of Dr. Whitehurst concerning Malone's connection to Mr. Bolin's cases and the unreliability of any Malone-handled evidence. The circuit court in this case, however, declined to hold a similar hearing with respect to Malone's handling of evidence in the Matthews case, despite being made aware of the impactful evidence presented at the Thirteenth Circuit's hearing. Instead, the court reached the merits of Mr. Bolin's newly discovered evidence claim without the benefit of any further record development.

Mr. Bolin established in the circuit court that, were an evidentiary hearing conducted in the instant case, Dr. Whitehurst would similarly testify that any evidence handled by Malone is unreliable, has no credibility and, ultimately, is useless. Just as he had done in the Collins case, Dr. Whitehurst could establish, through review of FBI testing reports, that Malone was the lead examiner in the cases against Mr. Bolin and either tested or handled all evidence that would be forensically tested and used against Mr. Bolin. Furthermore, as set forth above, Dr. Whitehurst testified that the 2014 OIG Report reached conclusions consistent with his own and which the earlier DOJ/OIG investigations had not reached. More importantly, the 2014 Report directly criticized the prior DOJ/OIG investigations into Malone that would have been in existence during the prior trial in this case.

Given the significance of the serological and DNA evidence to the State's case, coupled with the magnitude and extent of Malone prior bad acts, the newly

discovered evidence at issue is "of such nature that it would probably produce an acquittal on retrial." *Hildwin*, 141 So. 3d at 1184 *quoting Jones*, 709 So. 2d at 521. Likewise, the newly discovered evidence weakens the State's case against Mr. Bolin to such an extent that it gives rise to a reasonable doubt as to Mr. Bolin's culpability. *Id. citing Jones*, 709 So. 2d at 526.

As set forth in the preceding section, the State's evidence against Mr. Bolin was very far from being overwhelming. The physical evidence, furthermore, was a major segment of the State's case. Had the relevant findings of the 2014 OIG Report and the testimony of Dr. Whitehurst been available to Mr. Bolin at trial, the jury would have had reasonable doubt as to the accuracy and reliability of the scientific testing that was performed in this case. In light of the scant other evidence that the State presented, there exists a reasonable probability that the result of Mr. Bolin's trial would have been different had the 2014 OIG report been available at the time of trial. Under the circumstances, the record certainly did not conclusively refute Mr. Bolin's entitlement to relief on this issue. In the end, because the circuit court chose not to conduct an evidentiary hearing on the Malone issues, this Court has no viable record on which to review whether there exists a reasonable probability that the result of Mr. Bolin's trial would have been different had the newly discovered Malone-related evidence been available. What's more, as discussed above, this Court similarly has no record upon which to

conduct the cumulative *Swafford* analysis of the Kasler-newly discovered evidence in conjunction with the newly discovered Malone evidence. On both accounts, the circuit court erred in summarily denying relief on the instant issue.

III. THE *BRADY v. MARYLAND* ERROR STEMMING FROM THE STATE'S FAILURE TO TIMELY DISCLOSE EVIDENCE IT HAD RECEIVED REGARDING THE KASLER CONFESSION

As Mr. Bolin set out in his pleadings in the lower court, on or about November 20, 2014, the State Attorney's Office provided Mr. Bolin's counsel with documents it had just received from the FDLE which contained correspondence from Stephen Crane to the FDLE and Attorney General's Office from sometime in 2013. In those letters, Crane informed the State that Kasler had confessed to having committed the murder of "the Matthews girl" in Florida. The package of documents received from Crane also included several letters authored by Kasler himself detailing the past unsolved or falsely solved murders he had committed. Mr. Brunvand testified to his office having received those documents in the wake of Kasler's death. (R. 1100-01.) As Mr. Bolin set out in his amended successive Rule 3.851 motion, the State had never previously provided those documents to Mr. Bolin prior to that time, nor had the State otherwise informed Mr. Bolin of the Kasler confession on its own accord.

While the packet of documents at issue was relatively large and somewhat convoluted, it unquestionably stated that Steven Kasler had confessed to the having

killed the "Matthews girl" in Florida. Under the circumstances, the timing of Kasler's suicide substantially prejudiced Mr. Bolin's ability to develop the newly discovered evidence claim regarding the Kasler confession. But for the State's failure to provide the Crane letters to Mr. Bolin or to otherwise alert Mr. Bolin of the fact that Kasler had confessed to having committed the Matthews murder, Mr. Bolin could have raised the Kasler newly discovered evidence issue as early as 2013. The circuit court initially had scheduled an evidentiary hearing on Mr. Bolin's original Kasler claim to be held approximately three months after the initial motion had been filed. Kasler's suicide, of course, derailed the scheduling of the evidentiary hearing. Given that timeline, however, it stands to reason that, had Mr. Bolin been aware of the Kasler confession in 2013 and correspondingly been able to file the Kasler claim shortly thereafter, the circuit court would have seemingly scheduled an evidentiary hearing to be conducted no later than the spring of 2014. As such, Kasler would have still been alive and Mr. Bolin, in turn, could have presented Kasler himself as a witness at an evidentiary hearing. Given the State's failure to disclose the Crane-Kasler information after receiving in in 2013, Mr. Bolin has not lost that opportunity forever.

A. The *Brady* Standard

Given the foregoing, the State's failure to timely disclose the Crane-Kasler letters resulted in *Brady* error. Under *Brady v. Maryland*, the State has a duty in

criminal cases to disclose to a defendant all evidence materially favorable to the defense. *Brady*, 373 U.S. 83 (1963). To establish a violation of *Brady*, a defendant needs to show: "(1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." *Hurst v. State*, 18 So. 3d 975, 988 (Fla. 2009).

In proving the most critical prong of the *Brady* test, the materiality prong, the defendant must only show a "reasonable probability" that, had the withheld evidence been disclosed, the result of the proceeding would have been different. *Id.* This Court has, therefore, held that, under *Brady*:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal; instead, the proper inquiry is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Way v. State, 760 So. 2d 903, 914 (Fla. 2000) (internal citations omitted).

In addition, a prosecutor, in complying with *Brady*, "has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 910 *quoting Strickler v. Greene*, 527 U.S. 263 (1999). The duty to disclose evidence under *Brady*, thereby, extends even to evidence that is known only to the police and that the prosecutor may be unaware of. *Hurst*, 18 So. 3d at 988.

B. The Instant Case

In the instant case, the State's failure to disclose the letters in question satisfied all three prongs of the *Brady* test. First, the evidence was certainly favorable to Mr. Bolin because it discussed another person having confessed to the murder for which Mr. Bolin was convicted. Indeed, it is hard to imagine a more favorable piece of evidence. As to the second prong of the *Brady* test, the State clearly withheld the letters in question. Whether the suppression of those reports was willful, or more likely, inadvertent, the fact remains that the State did not disclose those reports until the year after receiving them and only after Kasler killed himself. Moreover, while this State Attorney's Office may not have had copies of those letters as early as 2013, agents of the State, *i.e.*, the Attorney General's Office and/or the FDLE, did.

Turning to the third prong of the *Brady* analysis, the letters in question were material. As Mr. Bolin established in the preceding section, the admission of evidence of Kasler's confession would likely result in a not guilty verdict if Mr. Bolin were retried in this case. The letters from Crane were the first piece of evidence any of the parties received documenting the Kasler confession. Had Mr. Bolin been aware of those letters within a reasonable time after the State received them, he could have initiated his newly discovered evidence claim in time to take actual testimony from Kasler. Because, however, the State failed to disclose those

letters, Mr. Bolin can never take Kasler's testimony and must now rely on hearsay admitted as statements against penal interest.

Based on the foregoing, the State's willful or inadvertent failure to disclose the Crane-Kasler letters constituted a *Brady* violation that deprived Mr. Bolin of his right to due process as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. The circuit court, in turn, erred as a matter of law in denying Mr. Bolin relief on this issue.

IV. THE *BRADY v. MARYLAND* ERROR STEMMING FROM THE STATE'S FAILURE TO DISCLOSE EVIDENCE REGARDING MALONE'S MISCONDUCT AND THE INVESTIGATION INTO HIS WORK

The 2014 OIG Report and the testimony of Dr. Whitehurst confirmed the fact that, in the years prior to 2002 or 2003, the DOJ's Brady Task Force set out to contact all prosecutors in cases in which Malone had performed work in order to determine if Malone's analyses had been material to specific defendants' convictions. Likewise, as Mr. Bolin set out in his motion to vacate, the January 2014 email he received from the DOJ to counsel regarding the Malone matter stated that the DOJ had contacted the State in 1999. In response, the State surmised to the DOJ that Malone's work had not been material to the verdict in *any* of Mr. Bolin's three cases. Despite the fact that the State clearly had knowledge of the ongoing investigation of Malone, the State did not disclose to Mr. Bolin a) evidence of the ongoing DOJ investigation against Malone, b) evidence of the fact

that Malone apparently handled the evidence that was submitted for forensic testing, or c) evidence of the communications between the DOJ and the State. However, as the 2014 OIG Report clearly demonstrates, the allegations of misconduct against Malone involved scores of negligent and intentional acts of misconduct that brought about the presentation of false evidence and led to false convictions in numerous criminal cases. Likewise, the suspected acts of misconduct were seemingly known to the State, or at least to its agents, many years before it was ever revealed to Mr. Bolin.

Compounding on the *Brady* standard discussed in preceding section, the State's failure to disclose the letters in question satisfied all three prongs of the *Brady* test. First, the evidence was certainly favorable to Mr. Bolin because it called into question the reliability of all of the forensic testing performed in this case. As to the second prong of the *Brady* test, the State clearly withheld the DOJ communications in question. The suppression of those reports would appear to have been willful, but, at the very least, would have been inadvertent. Turning to the third prong of the *Brady* analysis, the DOJ communications were material. While the 2014 Report and its findings were not available at the time of the prior trial, the fact that the DOJ had contacted the State in an investigation of Malone long after the issuance of the 1997 report was a material fact that could have reasonably changed the outcome of Mr. Bolin's trial, direct appeal, or initial post-

conviction proceedings. Had Mr. Bolin been aware of and been able to present evidence to show that the OIG and DOJ were still questioning Malone's work in the years surrounding Mr. Bolin's trial, he could have demonstrated the unreliability of any evidence that Malone handled during his tenure with the FBI, including all of the forensically tested evidence that was admitted at the instant trial.

Based on the foregoing, the State's willful or inadvertent failure to disclose the DOJ communications regarding Malone constituted a *Brady* violation that deprived Mr. Bolin of his right to due process as guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, as with the preceding issue, the circuit court erred as a matter of law in summarily denying the instant issue.

V. THE CURRENT DEATH WARRANT SELECTION AND SIGNING PROCEDURE RESULTS IN THE ARBITRARY AND CAPRICIOUS IMPLEMENTATION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, THE DUE PROCESS CLAUSE, AND THE SEPARATION OF POWERS DOCTRINE

Under Florida's capital punishment scheme, the Governor has unfettered discretion to decide when and against whom a death warrant will be issued. As it stands, no protocol exists for the Office of the Governor to decide when and in which cases to execute a death warrant. The Governor, furthermore, is not

required to supply the public or the condemned defendant with any reasons as to why he chose a particular defendant to die. Given those facts, the death warrant execution process in Florida is arbitrary and capricious and in violation of the Eighth Amendment, the state and federal Due Process Clauses, and the separation of powers doctrine.

As of October 6, 2015, 150 individuals on Florida's death row are "warrant ready." [9] For reasons unknown, the Governor selected Mr. Bolin for execution out of those 150 individuals despite the facts that the four claims set forth herein are still pending litigation before this Court. The fact that Florida's death penalty scheme affords the Governor with blanket, unquestionable authority to choose who lives and who dies among those 150 "warrant ready" individuals on death row violates the Eighth Amendment, the right to due process, and the separation of powers doctrine.

A. The Eighth Amendment

When the Supreme Court struck down the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), a consistent holding among the five justices voting

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[9] *See* http://www.floridasupremecourt.org/clerk/timely_justice_act/WarrantReadyGovLtr_100615_Final.pdf. Attached as Exhibit E. The 150 persons calculation comes from a quarterly report that the Clerk of the Florida Supreme Court is required to prepare to the Governor under the Timely Justice Act of 2013. The October 6, 2015 report actually includes 151 names, but one of those names is Jerry Correll, who was executed after the issuance of that report.

in the majority was that any capital sentencing system that results in the arbitrary and capricious imposition of death sentences violates the Eighth and Fourteenth Amendments. In his *Furman* concurrence, Justice Brennan, for instance, wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 857-860 (1969).

Furman, 408 U.S. at 274 (Brennan, J., concurring) (footnote omitted). Justice Stewart similarly held:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. *See McLaughlin v. Florida*, 379 U.S. 184, 85 S. Ct. 283, 13 L.Ed.2d 222. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

Furman, 408 U.S. at 309-10 (Stewart, J., concurring)(footnotes omitted); *See also Furman*, 408 U.S. at 253 (Douglas, J., concurring) (…"we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man.); *Furman*, 408 U.S. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"). Justice Marshall went many steps further than his fellow concurring justices by tracing the long history of capital punishment and condemning the capital punishment system on many fronts. In doing so, however, he noted the discriminatory nature by which the death penalty was being imposed. *Furman*, 408 U.S. at 365-66 (Marshall, J., concurring).

Consistent with *Furman*, Florida's lack of any tangible death warrant issuance protocol violates Mr. Bolin's Eighth Amendment right to be free from the arbitrary and capricious execution of his sentence. In the end, it remains a mystery why Mr. Bolin was chosen to be executed over the 149 other "warrant ready" defendants. One must, however, forgo logic and reason to come up with any legitimate reason why Mr. Bolin's case would be chosen over the plethora of cases that are many years older than Mr. Bolin's and which, more importantly, have not

had active litigation for many years. As this case clearly demonstrates, the lack of protocol governing the death warrant selection process results in the arbitrary and capricious implementation of the death penalty.

Mr. Bolin recognizes that this Court has rejected the conclusion that the lack of death warrant selection protocol violates the Eighth Amendment. *See Carroll v. State*, 114 So. 3d 883, 887-89 (2013); *Valle v. State*, 70 So. 3d 530, 551 (Fla. 2011); *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009). What sets the instant case apart, however, is the fact that Mr. Bolin still had actively pending post-conviction claims and had just recently come off of an evidentiary hearing on two such claims when the Governor signed his warrant. *See and compare Johnson v. Sec., Fla. Dept. of Corrections*, 2009 WL 3486024, No. 8:09-cv-2065-T-27TGW (granting a stay of execution in case in which the defendant still had post-conviction litigation pending in state court; defendant in that case had also raised a challenge to the arbitrary and capricious death warrant selection process)

B. The Due Process Violations

In addition to violating the Eighth and Fourteenth Amendment proscriptions against cruel and unusual punishment, the lack of death warrant selection protocol violates the state and federal constitutional rights to due process. Mr. Bolin, like any defendant in a criminal case, has a due process right to fully litigate his post-conviction claims. To be sure, Mr. Bolin previously filed and appealed to this

Court an initial Rule 3.851 motion. However, as set forth previously, the four preceding claims set forth in this currently pending action arose subsequent to the litigation of that initial motion and gave rise to successive Rule 3.851(e)(2) claims. The mere fact that those claims arose after the initial Rule 3.851 motion does not, however, diminish the merits of the claims and certainly does not obviate Mr. Bolin's due process right to fully litigate those claims in the respective courts. By allowing for the Governor to attempt to execute Mr. Bolin before he has had a full and fair opportunity to litigate the claims, the current death warrant selection protocol violates the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[10]

Notwithstanding the death warrant protocol as applied in the instant case, the death warrant selection process violates due process on its face because it affords

[10] In addressing the due process requirements applicable to capital clemency proceedings, the United States Supreme Court recognized that a lesser standard of due process care attached in a clemency proceeding, but nevertheless found that some degree of due process protection must still be afforded. *Ohio Adult Parole Board v. Woodard*, 523 U.S. 272 (1998). In so holding, the Court recognized that, even though a capital defendant has been sentenced, he or she still "maintains a residual life interest in not being summarily executed by prison guards." *Id.* at 281. The *Woodard* case that led to that holding did not, however, involve a defendant who had not had a full opportunity to litigate post-conviction claims, but rather, a defendant who merely sought clemency relief. As discussed above, this Court has declined to find a violation of due process arising from the death warrant selection process. *See Marek*, 14 So. 3d at 998. Mr. Bolin, again, points out that his case is distinguishable based on the active litigation he had pending at the time the death warrant issued.

condemned defendants no explanation whatsoever for their selection to die and, likewise, permits no avenue for a defendant to challenge an arbitrary and capricious enforcement of a death warrant. As Justice Stevens found in a partial concurring opinion:

> …death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida,* 430 U.S. 349, 357–358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (citations omitted) (plurality opinion). Those considerations apply with special force to the final stage of the decisional process that precedes an official deprivation of life.

Ohio Adult Parole Board v. Woodard, 523 U.S. 272, 293-94 (1998) (Stevens, J., concurring in part, dissenting in part). Because the current death warrant protocol affords no due process protections whatsoever, it is unconstitutional on its face.

C. Separation of Powers

Article 2, Section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." FLA. CONST. Art. 2, § 3. "Purely judicial functions must [therefore] remain within the judicial branch." *Bentley v. State ex rel. Rogers*, 389 So. 2d 992, 994 (Fla. 4th DCA 1981). Article

V, section 2(a), of the Florida Constitution, vests the Florida Supreme Court with rule making authority and "the exclusive authority to adopt rules of judicial practice and procedure for actions filed in this State." *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014) *citing Floating Docks, Inc. v. Auto–Owners Ins. Co.*, 82 So. 3d 73, 78 (Fla. 2012). "Generally, the Legislature is empowered to enact substantive law while [the Florida Supreme Court] has the authority to enact procedural law." *Id.*

This Court strictly applies the separation of powers doctrine and has explained that "this doctrine 'encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.'" *Whiley v. Scott*, 79 So. 3d 702, 708 (Fla. 2011) *quoting Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). The court has, thereby, held:

> The separation of powers doctrine is founded on mutual respect of each of the three branches for the constitutional prerogatives and powers of the other branches. *Just as we would object to the intrusion of the executive or legislative branches into this Court's authority to promulgate rules of court procedures* or to discipline parties before the courts as in contempt proceedings, we must be equally careful to respect the constitutional authority of the other branches. Courts should be loath to intrude on the powers and prerogatives of the other branches of government and, when necessary to do so, should limit the intrusion to that necessary to the exercise of the judicial power.

Id. at 709 *quoting Orr v. Trask*, 464 So. 2d 131, 135 (Fla. 1985) (emphasis added) (internal citations omitted).

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. The prejudice to capital defendants from the encroachment of the Governor's Office into a judicial function is further exacerbated by the fact that the Executive Branch includes the Office of the Attorney General - the very entity that has been seeking to uphold and carry out the death sentences. As such, when the power to schedule executions is given to the Governor, over the courts, the neutrality of the Judicial Branch is supplanted by the clear state-bias of the Executive Branch. When a person's due process right to life is on the line, such bias cannot infiltrate the decision to carry out a death sentence, particularly when the defendant has active litigation pending in which the Attorney General's Office is participating. The current death warrant protocol, thereby, violates the separation of powers doctrine.

Mr. Bolin recognizes that this Court has upheld the current death warrant protocol as not being in violation of separation of powers. *Abdool*, 141 So. 3d at 538; *Carroll*, 114 So. 3d at 887-88; *Valle*, 70 So. 3d at 551-52. As discussed above, however, the circumstances of the instant case, wherein the Governor has signed a death warrant while viable post-conviction claims are still being litigated in the courts, demonstrates the unconstitutionality of the current protocol and

illustrates the need for the Judicial Branch to bear the authority to schedule executions.

CONCLUSION

Based on the foregoing, Mr. Bolin respectfully requests that this Honorable Court stay the death warrant, permit oral argument, review this matter under *Swafford* and *Hildwin* and/or remand to the circuit court for such review initially, order an evidentiary hearing, reverse the circuit court's denial of post-conviction relief, and remand to the circuit court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to the Office of the Attorney General at capapp@myfloridalegal.com; by email to the Office of the State Attorney at smacks@co.pinellas.fl.us; and by email to warrant@flcourts.org, on this 7th day of December, 2015.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief is formatted in compliance with Florida Rule of Appellate Procedure 9.210 (2015), with the exception of that fact that it exceeds the applicable page limitation. Counsel is filing, contemporaneous with this Brief a motion for leave to exceed the page limitation.

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