APPELLANT'S REPLY 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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ARGUMENTS IN RESPONSE AND REBUTTAL

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

The State's brief disregards Mr. Bolin's entitlement to plenary review of his newly discovered evidence and *Brady* claims within the context of the "total picture" of his case, as required by this Court's decisions in *Swafford v. State*, 125 So. 3d 760 (Fla. 2013), and *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). As an initial matter, the State's brief asserts that because "[t]he claims raised in [Mr. Bolin's] successive motion were properly denied as procedurally barred or meritless as a matter of established Florida law," summary affirmance by this Court is appropriate. S.B. at viii. The State fails to recognize, however, that Mr. Bolin's motion was not procedurally barred—rather, the circuit court determined that the motion warranted an evidentiary hearing and thereafter ruled that Mr. Bolin had indeed uncovered newly discovered evidence. It is therefore improper for the State to dismiss Mr. Bolin's motion as a procedurally barred, successive filing that can be rejected without exacting appellate review. Mr. Bolin brought his newly discovered evidence claim to the circuit court's attention consistent with the requirements of Florida law. Accordingly, the established law of this Court under *Swafford* and *Hildwin* is clear: Mr. Bolin is entitled to plenary review of the new evidence within the context of *all*

admissible evidence that has come to light over the course of the *entire* history of this case.

A. The Circuit Court Failed to Conduct the Cumulative Analysis Required under *Swafford* and *Hildwin*

Contrary to Mr. Bolin lengthy argument on the matter, in its answer brief, the State summarily argues that the circuit court conducted a cumulative analysis of Mr. Bolin's Kasler-based newly discovered evidence, but provides no record citations or additional argument in support of that position. Answer Brief at 25. The record simply does not support the State's assertion. At no point during the circuit's court's analysis of the Kasler claim in its final order does the court address any of the other newly discovered evidence that could be admitted at a retrial alongside the Kasler confession. Likewise, nowhere in that order does the circuit court cite to *Swafford* and *Hildwin*, state that it has made a cumulative analysis, nor otherwise say anything to suggest that the court has conducted the cumulative analysis required under *Swafford* and *Hildwin*. Similarly, in its order denying Mr. Bolin's motion for rehearing, the court again declined to conduct a cumulative error analysis even after Mr. Bolin specifically pointed out the *Swafford* and *Hildwin* requirements at a case management conference. Instead, the order on motion for rehearing simply addressed the Terri Ippolitto evidence by itself. At no point did the circuit court ever

conduct the cumulative analysis of the newly discovered evidence that *Swafford* and *Hildwin* require.

The State's answer brief ignores the clear import of *Swafford* and *Hildwin*, citing the cases only a single time in more than 70 pages of text, and misconstruing this Court's obligation under those controlling precedents to (1) ensure that the circuit court conducted a comprehensive review of *all* admissible evidence uncovered since Mr. Bolin was first brought to trial, and (2) conduct an independent comprehensive review of the *all* such evidence on appeal. The State says, dismissively, that "[w]hile Bolin repeatedly asserts that the postconviction court and this Court are required to review the 'sprawling' record and wealth of evidence developed over the nearly 15 years since his conviction, the reality is there is a dearth of 'new' admissible evidence developed since Bolin's conviction in 2001." *See* S.B. 25. The State then lists what it considers to be all of the "newly discovered evidence in this case" since 2001. The State fails to recognize, however, that the scope of review required by *Swafford* and *Hildwin* is not confined to merely all of the *new* evidence that has been uncovered since Mr. Bolin's conviction, but also includes *all* of the evidence adduced during his trial, sentencing, and *every other stage of this case*. *See Swafford*, 125 So. 3d at 778. The State makes no concerted attempt to catalogue the entirety of the evidence that would be admissible during Mr. Bolin's retrial and analyze the potential impact of his newly discovered evidence within that

context, nor does it attempt to characterize the circuit court as having performed that demanding task itself.[1] Instead, adopting the faulty analytical lens employed by the circuit court, the State says merely that Mr. Bolin's newly discovered evidence "was unreliable and would be insufficient to entitle Bolin to relief as it fails to negate the ample and overwhelming evidence implicating Bolin in the instant murder." As explained in detail in Mr. Bolin's initial brief, that is not the standard this Court recognized under *Swafford* and *Hildwin*. Moreover, the Supreme Court of the United States has emphasized that, in the specific context of *Brady* claims, the constitutional importance of reviewing the impact of new evidence on the whole case cumulatively, and not piecemeal. *See Kyles v. Whitley*, 514 U.S. 419, 422 (1995).

B. Contrary to the State's Position, the Circuit Court Properly Found that the Kasler Confession Would be Admissible at a Retrial

As Mr. Bolin established in his initial brief, and as the circuit court recognized in its post-conviction order, Kasler's confession would be admissible at a retrial under the statement against penal exception to the rule against hearsay. *See* FLA. STAT. § 90.804(2)(c). The State argues, however, that the Kasler confession was not

[1] At page 26 of the answer brief, the State makes a short and wholly incomplete list of the newly discovered evidence that it believes to exist. That fails to even recognize the plethora of Malone related evidence or the Ippolitto evidence, let alone the other potentially admissible evidence such as the Keagle-related evidence.

sufficiently corroborated for admission under that exception and that the circuit court misinterpreted recent holdings from this Court in determining that the confession was admissible. On the contrary, the circuit court analyzed this Court's holdings in *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015) and *Carpenter v. State*, 785 So. 2d 1182 (Fla. 2001) relatively thoroughly and then went on to conduct a proper and detailed analysis of the corroboration surrounding Kasler's confession.

With regards to *Bearden* and *Carpenter*, the State alleges that the circuit court erred when it reasoned that "the Supreme Court of Florida, in *Bearden* [], has made is abundantly clear that this court is not to consider credibility in determining the *admissibility* of a declarant's out-of-court statements and, further, that this corroboration requirement for hearsay statements against penal interest is not pa particularly high requirement." R. 950 (emphasis in original). As the circuit court recognized, this Court could hardly have made its holding any clearer when it stated in *Bearden*, "[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). The State apparently suggests that the circuit court should not have adhered to *Bearden* because it involved the due process exception to hearsay recognized in *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, (1973), rather than the statutory statement against penal interest exception. However, both the *Chambers*

framework and the statement against penal interest exception carry the same requirement that the out-of-court statement be sufficiently corroborated. Moreover, in deciding *Bearden,* this Court adhered to its holding in *Carpenter v. State*, which involved the statement against penal interest exception. The circuit court, just the same, analyzed the instant issue pursuant to *Carpenter* as well as *Bearden*. Certainly, under the circumstances, the circuit court did not err as a matter of law, but, just the opposite, followed this Court's precedent to the letter of the law in determining that Kasler's confession would be admissible at a retrial.

As to the actual level of corroboration surrounding Kasler's confession, the circuit court properly found that the confession was sufficiently corroborated for admission as a statement against penal interest. In *Bearden*, the Court directed "[c]orroborative evidence is admissible 'to strengthen a witness' testimony by evidence of matters showing its consistency and reasonableness and tending to indicate that the facts probably were as stated by the witness.'" *Bearden v. State*, 161 So. 3d 1257, 1266 (Fla. 2015) *quoting Chaachou v. Chaachou*, 73 So. 2d 830, 837 (Fla. 1954). The Court further found "[c]orroborating evidence is defined as '[e]vidence that differs from but strengthens or confirms what other evidence shows (esp. that which needs support).'" *Bearden*, 161 So. 3d at 1266 *quoting* Black's Law Dictionary 674 (10th ed. 2014). Likewise, the Court noted that the United States Supreme Court has "described the corroboration factor as requiring 'some other

evidence in the case.'" *Bearden*, 161 So. 3d at 1266 *quoting Chambers v. Mississippi*, 410 U.S. 284, 300 (1973). Given those requirements, the Court recognized in *Bearden* 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. *Id.*

As the circuit court properly found, Kasler's confession is sufficiently corroborated to be admissible under the statement against penal interest. Perhaps most importantly, Kasler's description of his abduction of Ms. Matthews was consistent with the crime scene evidence. While the State argues that Kasler could have learned some or all of that information from investigating this case, that argument goes to the weight, rather than the admissibility of the evidence. To be sure, a vast record of facts and evidence exist in print and on the internet with regard to this case. That fact does not, however, diminish the corroborative effect of the details Kasler provided. More importantly, the consideration of that fact as a reason for finding the confession to be inadmissible would violate this Court's directive in *Bearden*, as discussed above. Furthermore, as Mr. Bolin set out in his initial brief, Kasler did provide further details of the murder that would not have been found in any published accounts of the case, such as the fact that he acted with the accomplice, Albert Eugene "Petey" Holmes and that Petey has sex with the victim prior to Kasler

having killed her. The State simply dismisses that account because it is not consistent with the State's theory of the case.

Aside from the details of the crime scene, Mr. Bolin established in his initial brief that additional factors corroborate Kasler's confession, such as the facts that Kasler committed other murders under circumstances similar to the instant case and that Kasler gave his confession over a recorded phone line with full knowledge that his confession could result in a death sentence and relocation to Florida's death row. The State would seemingly impose some insurmountable burden of establishing an unreachable level of corroboration on Mr. Bolin. This Court's precedent simply does not support the State's position.

C. The State's Allegations Regarding Mr. Bolin's Motion for Rehearing in the Lower Court

The State argued extensively in its answer brief that the circuit court could not consider the Terri Ippolitto evidence because it did not qualify as newly discovered evidence and could not be raised in a motion for rehearing. While the State makes a thorough and well written analysis of its position, the State's argument misses the point. The question of whether the Terri Ippolitto evidence qualifies as newly discovered evidence for post-conviction purposes is immaterial to the issue at hand. Mr. Bolin did not seek to raise the Ippolitto evidence as a newly discovered evidence claim. Instead, Mr. Bolin brought the Ippolitto evidence to the circuit court's

attention because it gave further corroboration and weight to the Kasler confession since the person who attempted to abduct Ms. Ippolitto could very well have been the yet to be identified accomplice Kasler worked with. The Ippolitto evidence was, furthermore, one more piece of evidence that the circuit court was required to consider under the *Swafford-Hildwin* cumulative analysis. As Mr. Bolin has exhaustively pointed out, pursuant to *Swafford* and *Hildwin*, once the door to a potential new trial was opened with the ruling on the admissibility of the Kasler evidence, the lower court was required to consider the impact of all other new evidence that might be admitted at a new trial. The fact that the Ippolitto evidence might be procedurally barred from consideration as a stand-alone post-conviction claim has no bearing on the evidence's admissibility at a retrial.

As Mr. Bolin established in his initial brief, the Terri Ippolitto evidence would be admissible at a retrial given its relevance and likely connection to the Kasler confession. The State, in its answer brief, argues that the Ippolitto evidence would not be admissible as reverse *Williams* Rule evidence in a retrial given this Court's previous holding against the admission of *Williams* Rule evidence at trial in the respective cases against Mr. Bolin. In light of the Kasler confession to having worked with an accomplice, however, the Ippolitto evidence would not be reverse *Williams* rule evidence. The Ippolitto evidence would be relevant and admissible to establishing the identity of the accomplice whom Kasler acted with in the instant

case. The Collins murder took place close in time and place and under circumstances similar to the instant case. The person who attempted to abduct Ms. Ippolitto may very well have been the person whom Kasler acted with. To be sure, the State certainly thinks that both cases were committed by the same perpetrator. At a new trial, the trial court would have discretion to limit the evidence from the Collins homicide that might be admitted in the instant case. Ms. Ippolitto's potential abduction by someone other than Mr. Bolin and who might well have been Kasler's accomplice would be relevant and admissible at retrial notwithstanding the admission of any evidence of the Collins homicide.

For the many reasons set forth above, the State's brief fails to grapple with perhaps the most pressing *Swafford* and *Hildwin* issue raised by this appeal: the proper procedure by which this Court reviews the denial of newly discovered evidence claims, in the context of an expedited death warrant briefing schedule, where the circuit court determined that newly discovered evidence was uncovered but failed to analyze the new evidence in the context of the "total picture" of the case. Mr. Bolin submits that such a situation requires a remand to the circuit court to conduct the *Swafford* and *Hildwin* analysis, and a stay of execution pending the outcome of the circuit court's decision. In the alternative, at a minimum, this Court should ensure compliance with *Swafford* and *Hildwin* by conducting the comprehensive review of Mr. Bolin's case in the first instance, and permitting oral

argument so that Mr. Bolin's counsel can address the court orally on these matters. In that instance, a stay of execution is still warranted because of the magnitude of the Court's task—not only evaluating Mr. Bolin's newly discovered evidence, but also placing the new evidence within the context of his *entire* case, including *all* evidence from *all* stages of the proceedings that would be admissible (thus, requiring a separate admissibility analyses) at a retrial. Mr. Bolin submits that such a comprehensive review cannot fairly occur in the three weeks before his scheduled execution. The State's brief utterly fails to address this issue or explain the necessity of executing Mr. Bolin before a thorough and comprehensive review of the record can occur.

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

A. Mr. Bolin's Claim was Timely Filed

Mr. Bolin set forth in his initial brief that his Malone-related newly discovered evidence claim was timely filed pursuant to this Court's decision in *Wyatt v. State*, 71 So. 3d 86 (2011), because it was filed within one year after he received case-specific correspondence from the Department of Justice concerning the Malone

matter. The State attempts to distinguish *Wyatt* by arguing that "unlike the facts in *Wyatt*, Bolin and his counsel have been aware of FBI agent Malon's limited involvement in the instant case and the OIG complaints regarding Malone for over a decade." Answer Brief at 39. However, just as in the instant case, the *Wyatt* defendant and/or his counsel had also been aware of or could have been aware of the matter at issue in that case four to five years before the defendant received his case-specific letter from the FBI. *See id* at 98-99 (discussing information that surfaced in 2004 and 2005 regarding the FBI's use of the comparative bullet lead analysis ("CBLA"), while the defendant received a case-specific letter from the FBI in 2008). 98. As in *Wyatt*, the case-specific correspondence that Mr. Bolin received from the DOJ was newly discovered evidence and Mr. Bolin filed his post-conviction claim within one year thereafter.

The State's answer brief also but ignores the distinction between the 2014 OIG Report and the reports that preceded it. Instead, the State lumps all of the two-decade long investigation into Malone and other FBI analysts into one area of evidence. In reality, the 2014 OIG Report both heavily criticized the investigations and reports that preceded it and also the findings reached by the OIG in the 2014 Report were not contained within the 1997 Report and were not available to Mr. Bolin at the time of the trial. The 1997 OIG Report, which the State has often relied upon in arguing that the instant issue is not newly discovered, did not recognize

make any clear findings of misconduct on the part of Malone and did not call into question the reliability of any evidence he handled. The 2014 Report, on the other hand, did. To be sure, when the defense utilized the 1997 OIG Report in the Stephanie Collins trial, the State highlighted the fact that the 1997 OIG report did not include anything that could call into question Malone's work on the case. Therefore, aside from the case-specific DOJ letter that triggered a newly discovered evidence time-clock, the 2014 OIG Report constitutes newly discovered evidence that was not available to Mr. Bolin or counsel at the time of trial and which made clear findings of misconduct on the part of Malone and called into question the reliability of any evidence he handled.

B. The Admissibility and Weight of the Newly Discovered Malone-Related Evidence

Malone was the lead FBI analyst on this case and handled most, if not all, of the evidence that was tested by the FBI and Cellmark Laboratories. The newly discovered Malone evidence, including the 2014 OIG Report and the testimony of Dr. Whitehurst, would thereby be admissible at a retrial for purposes of challenging the reliability and weight of the scientific evidence that the State would admit against Mr. Bolin. As to the OIG Report, the report itself would be admissible, subject to hearsay within hearsay redactions, as a public report pursuant to Florida Statutes

section 90.803(8).[2] Clearly, given the requirements of that exception, the OIG Report would be a report of a public agency, "setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report." FLA. STAT. § 90.803(8). Similarly, given his background, experience as an FBI analyst, and investigation into the Malone issue, Dr. Whitehurst's testimony would be admissible to challenge the reliability of both the FBI testing procedures and of any evidence that Malone handled. Indeed, in the *Simmons* case, on which the State relies in support of its weight of the evidence argument, the defendant raised a post-conviction claim based on similar newly surfaced evidence concerning a DNA analyst and this Court did not find that such evidence would have been inadmissible. *Simmons v. State*, 105 So. 3d 475, 498-99 (Fla. 2012).

Contrary to the State's position in its answer brief concerning the weight of the Malone evidence, the admission of the newly discovered Malone evidence would substantially diminish the State's physical evidence against Mr. Bolin at a retrial. Again, the State relies on this Court's opinion in *Simmons v. State* in support of its argument that the Malone evidence would not result in a different outcome at retrial.

[2] The State cites to *Trepal v. State*, 846 So. 2d 405 (Fla. 2003) in support of its argument that the 2014 OIG Report would be inadmissible. *Trepal* did not, however, address the 2014 Report, as it was decided 11 years prior to the report's issuance, nor did it address the public report hearsay exception.

In *Simmons*, an FDLE DNA analyst altered computer data for a DNA proficiency test, failed to report it, and later resigned after superiors learned of his misconduct. *Id.* At 497-98. From there, other FDLE analysts were able to retest all relevant evidence that the examiner in question had tested. *Id.* At 498. In sharp contrast to the newly discovered Malone evidence at issue in this case, the one series of misconduct at issue in *Simmons* pales in comparison to the record of misconduct carried out by Malone. More critically, while the evidence at issue in *Simmons* could be retested for reliability, the physical evidence at issue in this case cannot feasibly be retested as Mr. Bolin established in his initial brief.

Furthermore, in *Simmons*, no other newly discovered evidence had been held admissible so as to trigger the *Swafford-Hildwin* cumulative analysis. As set forth above, the impact of the Malone evidence must be considered in conjunction with the impact of the Kasler evidence, as well as any other evidence that could be admitted at retrial. The State, like the circuit court, has still failed to conduct that cumulative analysis of the new evidence. Even if one has reservations as to whether the Malone evidence would produce a different result by itself at a new trial, a consideration of the Malone evidence in conjunction with the Kasler evidence clearly must undermine 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. More critically to the

instant appeal, is the fact that the circuit court did not even consider the cumulative effect of the both the Malone and Kasler evidence being admitted at a retrial.

As Mr. Bolin set forth in his initial brief, in light of the questionable level of other evidence that the State presented against Mr. Bolin, there exists a reasonable probability that the result of Mr. Bolin's trial would have been different had the Malone and Kasler evidence been in existence at the time of trial. Under the circumstances, the record certainly did not conclusively refute Mr. Bolin's entitlement to relief on this issue.

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

The State erroneously argues in its answer brief both Mr. Bolin and the State were aware of the Kasler confession at the same time and that Mr. Bolin cannot be prejudiced as a result of the State's failure to timely disclose the Kasler confession because he could have brought his claim earlier. The facts and the record simply do not support the State's position. As the State acknowledged, the Office of the Attorney General received evidence of the Kasler confession in January, 2014. It then claims that the FDLE did not, thereafter, receive that information until March. The State seemingly takes the position that it did not need to disclose the Kasler information prior to March, 2014. Such a position would, however, be contrary to

Way v. State, 760 So. 2d 903, 910 (Fla. 2000) and *quoting Strickler v. Greene*, 527 U.S. 263 (1999), which extend the *Brady* obligation to agents of the State.

From there, the State seemingly dismisses its *Brady* obligation by stating that it found the Kasler confession to not be credible and by noting that Mr. Bolin learned of Kasler on his own accord. In deciding the "credibility" of the Kasler evidence, the State improperly acted as judge and jury in deciding the relevance of the Kasler confession without ever informing Mr. Bolin of the evidence's existence. As Mr. Bolin established in his initial brief, he had a due process right under *Brady* to learn of that evidence, potentially evidence as potentially exculpatory as a third-party confession. The State's failure to disclose that evidence is troubling to say the least.

In addition, the State's cursory assumption that Mr. Bolin himself could have brought his Kasler claim earlier and in time for an evidentiary hearing before Kasler's death is misplaced. Mr. Bolin had to research and investigate the claim on his own, all the while unaware that the State was also investigating the same matter. For all the State knew, Mr. Bolin also had no knowledge of the Kasler evidence. Yet, the State made no effort to disclose the Kasler evidence to Mr. Bolin. The State clearly violated its duty under *Brady* and Mr. Bolin suffered prejudice as a result thereof.

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

Mr. Bolin relies on the arguments and authorities set forth in his initial brief in response and rebuttal to the State's arguments as to Claim IV.

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

Mr. Bolin also relies on the arguments and authorities set forth in his initial brief in response and rebuttal to the State's arguments as to Claim V.

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 14th 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).

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