DOCKET NO. 17-6329

IN THE SUPREME COURT OF THE UNITED STATES

BRETT A. BOGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1. Whether the Florida Supreme Court's fact-based determinations that counsel was not ineffective, on multiple claims, should be reviewed where the court used the correct legal analysis to reach its conclusion?

2. Whether the Florida Supreme Court's fact-based determinations that no relief was warranted pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and/or *Giglio v. United States*, 405 U.S. 150, 153 (1972), should be reviewed where the court used the correct legal analysis to reach its conclusion?

3. Whether the Florida Supreme Court's determination that no relief was warranted, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and/or *Giglio v. United States*, 405 U.S. 150 (1972), should be reviewed, where the defense had no pretrial right to inspect the grand jury testimony under Florida law?

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CITATION TO OPINION BELOW

The published opinion of the Florida Supreme Court appears as *Bogle v. State*, 213 So. 3d 833 (Fla. 2017).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent acknowledges that section 1257 sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited in the Petitioner's brief, the following is relevant:

Florida Statute section 905.27: "Testimony not to be disclosed; exceptions".

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
> (b) Determining whether the witness is guilty of perjury; or
> (c) Furthering justice.
> (2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney of the court in which such criminal case is pending, and by the prosecuting attorney to his or her assistants, legal associates, and employees, and to the defendant and the defendant's attorney, and by the latter to his or her legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and

employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.

(3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to communicate to his or her attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.

(4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.083, or by fine not exceeding $5,000, or both.

(5) A violation of this section shall constitute criminal contempt of court.

STATEMENT OF THE CASE

Petitioner, Brett A. Bogle, was convicted of first-degree murder, and sentenced to death. The following facts are drawn from the Florida Supreme Court's opinion affirming Bogle's direct appeal:

> Margaret Torres (the victim) was the sister of Katie Alfonso and stayed at Alfonso's house four or five nights a week. In June 1991, Bogle met Alfonso and shortly thereafter he moved in with Alfonso and the victim. Bogle and the victim did not get along and Alfonso eventually asked Bogle to move out. The following week, Bogle, Alfonso, the victim, and another person went out together and things seemed to be going better. During the outing, however, Bogle and the victim began to argue again. Subsequently, Alfonso and the victim refused to allow Bogle into Alfonso's house. Bogle then broke through the screen door of Alfonso's house, grabbed Alfonso's neck to push her out of the way, grabbed the victim's arm to remove the telephone from her hand as she tried to call 911, pulled the telephones out of the kitchen and bedroom, and took clothing from the house. As he left the house, Bogle told the victim that she would not live to tell about it if she called the police and pressed charges. In response to the victim's uncompleted call to 911, a deputy sheriff arrived shortly after Bogle left. The deputy referred the matter to the state attorney's office. Several days later, Bogle called Alfonso and again threatened the victim, stating that, if the victim pressed charges, she would not live to tell about it.
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> About two weeks later, Bogle called Alfonso to ask if he could come over to her house. The victim was out for the evening. When Alfonso told Bogle that he could not come over, he became furious and hung up. Later that night, Bogle and the victim ran into each other at a bar called Club 41. Witnesses saw them talking briefly. Witnesses also noticed that Bogle was clean and had no noticeable injuries of any kind when he arrived at Club 41. The victim left Club 41 at about 1 a.m.; Bogle left approximately five minutes later. About forty-five minutes after that, Bogle approached a car outside Club 41 and asked for a ride. At that time, his forehead was scratched, his clothes were dirty, and his crotch was wet.
>
> The next day, the victim's nude and badly beaten body was found outside an establishment located next to Club 41. Her head had been crushed with a piece of cement, and she had died of blows to the head. Additionally, she had semen in her vagina and trauma to her anus consistent with sexual activity that was likely inflicted before death. The DNA extracted from the semen was consistent with Bogle's DNA (12.5% of Caucasian males could have contributed the semen), and a pubic hair found on the crotch area of Bogle's pants matched the victim's.

> Bogle put on no evidence in his defense. The jury found him guilty of burglary of Alfonso's home with force, retaliation against the victim as a witness to that burglary, and first-degree murder of the victim. A penalty phase proceeding was held on the first-degree murder conviction, and the jury recommended death by a seven-to-five vote. The trial judge, however, granted a new penalty phase proceeding after determining that improper rebuttal evidence had been presented by the State.
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> At the second penalty phase proceeding, the State presented the same evidence it relied on in the guilt phase. Bogle put on eight witnesses who testified that Bogle had been subjected to physical and mental abuse as a child, had used drugs at his father's urging from the time he was five or six years old, was under the influence of alcohol at the time of the murder, had a personality disorder and suffered from some mental disturbance at the time of the murder, was kind to others, and had been injured in an automobile accident a week before the murder. The jury recommended death by a ten-to-two vote. The trial judge subsequently sentenced Bogle to death, finding four aggravating circumstances: (1) previous conviction of a violent felony (burglary with force on Alfonso and the victim two weeks before the murder); (2) the murder was committed while engaged in the commission of a sexual battery; (3) the murder was committed for the purpose of avoiding arrest; and (4) the murder was heinous, atrocious, or cruel (HAC). In mitigation, the trial judge gave some weight to the statutory factor of impaired capacity but stated that substantial impairment had not been proven; gave substantial weight to Bogle's family background; little weight to his alcohol and drug abuse; gave some weight to his good conduct during trial; gave some, but not a great deal, of weight to his kindness to others; and gave no weight to his involvement in an automobile accident. Bogle also received consecutive sentences of life in prison for the burglary-with-assault-or-battery conviction and five years in prison for the retaliation-against-a-witness conviction.

Bogle v. State, 655 So. 2d 1103, 1105–06 (Fla. 1995).

Postconviction Proceedings

Bogle's postconviction motion was filed on or about March 14, 1997. Relief was denied on October 25, 2011. Bogle filed a notice of appeal of the denial of his postconviction motion to the Florida Supreme Court on December 12, 2011. Bogle's challenge to the FBI testing of the hair retrieved from Bogle's pants was on appeal before the Florida Supreme Court in Case No. SC11-2403. Defendant Bogle filed a successive motion in the postconviction court on or about January

23, 2014, once again seeking review of the FBI testing of a hair sample found on the Defendant's pants. At the February 13, 2014 status hearing, the postconviction court entered a written order granting the DNA testing which, in 2015, showed that the victim's mitochondrial DNA matched that of the hair recovered from Bogle's clothing.

The Florida Supreme Court issued its opinion February 9, 2017, affirming the denial of postconviction relief and denying Defendant's petition for writ of habeas corpus. Concerning the ineffective assistance of guilt phase counsel, the Florida Supreme Court found that, even if there had been deficiency, no prejudice could be shown:

> Bogle claims that his trial counsel failed to investigate his September 6, 1991, car accident. Specifically, Bogle asserts that trial counsel was deficient in failing to review medical records and photographs, speak with anyone who observed Bogle between the accident and the murder, retain an expert, and present evidence that he was physically incapable of committing the murder. The trial court denied this claim, observing that Bogle failed to provide any evidence at the evidentiary hearing that the car accident injury rendered him physically incapable of committing the murder.
>
> At trial, no witnesses testified to observing any injuries on Bogle before he left Club 41 except Phillip Alfonso who saw a scar on Bogle's right side which Bogle claimed was from an accident. At the evidentiary hearing, Mary McFarland, who married Bogle on death row, testified that Bogle had injuries to his face a day before the murder and opined that there was no way Bogle was capable of committing the acts as alleged. Bogle's mother testified that the car accident punctured Bogle's lung, that he had a tube in his side, he had broken some of his ribs, his face was "all messed up ... [on h]is forehead," and he was sore. She believed that she informed Bogle's trial counsel of photographs taken of Bogle at the hospital. Bogle's prior postconviction counsel obtained photographs pertaining to Bogle's car accident from Bogle's civil lawyer. Bogle's trial counsel did not recall possessing Bogle's hospital photographs. Dr. Edward Willey, a forensic pathologist, testified at the evidentiary hearing that the lacerations Bogle sustained from the car accident most likely would not have healed completely within ten days. However, on cross-examination, Dr. Willey could not exclude the possibility that a preexisting laceration reopened on the day of the murder.
>
> Even if guilt phase counsel was deficient in failing to effectively show that some of Bogle's scratches originated from his accident, we conclude that Bogle has not

demonstrated prejudice. Bogle had motive to kill Torres and had threatened her life. Bogle's DNA was consistent with DNA found in the victim's vagina. A pubic hair found near the crotch of Bogle's pants matched Torres. Bogle has not established that counsel's showing his scratches were sustained in a car accident would have undermined confidence in the outcome of his case. Therefore, counsel's failure to make such a showing was not prejudicial, and we deny relief on this claim.

Bogle also claims his guilt phase counsel was deficient for failing to present Everett Smith's testimony relating to events on September 1, 1991. According to Bogle, Smith's testimony would have undermined motive for Bogle to kill Torres. In denying this claim, the trial court found that Smith's testimony would have had little substantive or impeachment value. At the evidentiary hearing, Smith testified that neither Katie Alfonso nor Torres expressed any fear while being around Bogle, even when he was violent, and described a September 1, 1991, incident demonstrating this lack of fear. We find that Smith's testimony would not have undermined Bogle's motive to kill Torres and conclude that trial counsel was not deficient for failing to present Smith's testimony at trial.

Bogle additionally claims that trial counsel was deficient for failing to present the deposition of Roger Kelly, who passed away before trial. Bogle asserts that Kelly's deposition establishes that on the night in question, Torres was dancing with a man other than Bogle and arguing with Guy Douglas. The trial court denied this claim, finding that the deposition could not legally be introduced as substantive evidence. We agree. Because Kelly's deposition was not admissible as substantive evidence, we deny Bogle's claim that his trial counsel was deficient in this regard. *See State v. Contreras*, 979 So. 2d 896, 911 (Fla. 2008) ("[A] deposition that is taken pursuant to rule 3.220 is only admissible for purposes of impeachment and not as substantive evidence.") (*citing Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992)). Moreover, the deposition was not admissible as substantive evidence under *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Bogle also claims that his trial counsel was deficient in failing to demonstrate that the hair comparison in this case was unreliable and flawed, failing to acquire Agent Michael Malone's bench notes, and failing to retain an expert. At trial, Malone concluded as follows:

In the debris reported as being from Mr. Bogle's pants, I was able to find one Caucasian pubic hair which microscopically matched the pubic hairs of Margaret Torres. In other words, it was microscopically indistinguishable from her's [sic] and, therefore, I concluded this one pubic hair from the pants was consistent with coming from Margaret Torres.

Malone acknowledged, on cross-examination, that the pubic hair was naturally removed, that there was no way to determine how long the hair had been removed,

and that hair comparisons do not constitute a basis for absolute personal identification.

At the evidentiary hearing, Bogle proffered the deposition of mitochondrial DNA expert Dr. Terry Melton who criticized Malone for using potentially misleading words and making conclusions without conducting DNA testing on the sample. Dr. Melton did not state whether she would have been available to testify at Bogle's trial, nor did she know whether, at that time, labs were conducting mitochondrial DNA testing on hairs for criminal defense attorneys. The evidentiary hearing also revealed that studies relating to mitochondrial DNA and the proficiency of hair microscopic analysis were unavailable at that time. The trial court did not give Dr. Melton's testimony great weight.

Steven Robertson, an expert in the field of hair analysis and comparison, concluded at the evidentiary hearing that Malone's trial testimony matching Torres's pubic hair and the hair from Bogle's pants was not inconsistent with his lab report, but was inconsistent with Malone's bench notes. Robertson determined that Malone testified "fairly" and within the bounds of his expertise. We conclude that Bogle has not demonstrated that the defense's failure to obtain Malone's bench notes was outside the broad range of reasonably competent performance under prevailing professional standards at the time of trial. *See Long v. State*, 118 So. 3d 798 (Fla. 2013). In addition, Bogle failed to present evidence that a mitochondrial DNA expert, such as Dr. Melton, or a microscopic hair analysis expert, would have been available to testify at trial, or in the preparation thereof. Accordingly, we deny relief on this claim.

Bogle next claims that his trial counsel was deficient in failing to request a *Frye* hearing to challenge the DNA evidence and show that the F.B.I. did not follow accepted testing procedures. A *Frye* hearing determines whether an expert's scientific opinion is admissible. *Zack v. State*, 911 So. 2d 1190, 1197 (Fla. 2005). To be admissible, an expert opinion must be based on techniques that have been generally accepted by the relevant scientific community and found to be reliable. *Id*. (*citing Frye*, 293 F. at 1014). However, Frye is only utilized where the science at issue is new or novel. *Id*. at 1198. In denying this claim, the trial court determined that Bogle failed to show that the RFLP DNA evidence would have been inadmissible at trial had counsel requested a Frye hearing.

At the evidentiary hearing, Dr. Randell Libby, an expert in human molecular genetics and forensics DNA analysis, testified that RFLP was not generally accepted in 1992; instead, RFLP was reviewed on a case-by-case basis. Although Dr. Libby maintained that there were inconsistencies in Bogle's case which raise a concern about the possibility of contamination or something else producing an inconsistent result, Dr. Libby could not identify any problems with the chain of custody, nor did he have direct knowledge of improper evidence storage causing

> degradation of evidence. Dr. Libby could not recall any previous case where he testified and the evidence was ruled inadmissible. Dr. Libby said he would have testified at a Frye hearing in this kind of case in 1991 and 1992.
>
> Dr. Deadman opined at the evidentiary hearing that F.B.I. procedures employed in 1991 and 1992 for RFLP DNA examinations produced "very reliable" results and that F.B.I. lab procedures in RFLP DNA analysis in this case were generally accepted in the relevant scientific community. Dr. Martin Tracey, an expert in population genetics and DNA analysis, saw no indication of contamination, having reviewed Dr. Deadman's RFLP analysis in this case. Based on our review of the record, we conclude that Bogle has not demonstrated that trial counsel was deficient for failing to request a Frye hearing. Therefore, we affirm the trial court's denial of relief.
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> In his final claim of ineffective assistance of guilt phase counsel, Bogle contends that his trial counsel was deficient in failing to impeach Phillip and Tammy Alphonso and Jeffrey Trapp. The Alphonsos did not testify at the evidentiary hearing. As noted above, Bogle has not established that Trapp's community control condition was still in effect on the night of the murder. We therefore deny relief, concluding that Bogle has not demonstrated that his trial counsel was deficient.

Bogle, 213 So. 3d at 845-48. Concerning the *Brady* and *Giglio* claims, the Florida Supreme Court denied relief because the evidence in question, even if improperly withheld by the prosecution, lacked materiality. It denied Bogle's claims thusly:

> Bogle contends that the trial court erred in denying his *Brady* and *Giglio* claims. This Court, in *Franqui v. State*, 59 So. 3d 82 (Fla. 2011), articulated the standard of review for *Brady* and claims as follows:
>
> > *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. To demonstrate a *Brady* violation, the defendant has the burden 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. To meet the materiality prong of *Brady*, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." "... [M]ateriality under *Brady* requires a probability sufficient to undermine confidence in the outcome." [For t]he materiality inquiry ... ["]the question 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.' " "It

> is the net effect of the evidence that must be assessed." "Although reviewing courts must give deference to the trial court's findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review."
>
> In order to prove a *Giglio* violation, "a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. The State must then "prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." Under the harmless error test, the State must prove " 'there is no reasonable possibility that the error contributed to the conviction.' "
>
> Both *Giglio* and *Brady* claims present mixed questions of law and fact. Thus, as to findings of fact, [the Court] defer[s] to the lower court's findings if they are supported by competent, substantial evidence. "[T]his Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." We review the trial court's application of the law to the facts de novo.
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> *Franqui*, 59 So. 3d at 101–02 (citations omitted).

A. Information Regarding an Accomplice

First, the trial court found that Bogle failed to show that the State possessed and failed to disclose information regarding Guy Douglas that was favorable to the defense. The record reveals a handwritten note composed by prosecutor Karen Cox which states: "talk to re: Guy Douglas confessed to being involved." Above the statement was the name "Marcia Baurle" and "Guy Douglas 92–7731 Capias." We conclude that Bogle met his burden of showing under *Brady* that this note is favorable, exculpatory evidence that was suppressed by the State. At the evidentiary hearing, Cox had no recollection of a witness telling her at trial that Douglas was involved in the murder. Cox interpreted the note to mean that she was supposed to talk to somebody about whether or not Douglas confessed. Cox believed that the information was probably not provided by Marcia Turley; Cox did not recall speaking with Turley. Cox testified that had any other person confessed to the murder, she would have immediately turned it over to the defense.

Turley testified at the evidentiary hearing that when Douglas told her Bogle was brought in for questioning relating to Torres's murder, Douglas told Turley he was not worried because he was with her on the night in question. When Turley refuted

his assertion, Douglas told her she did not need to say anything other than he was with her all night or they would be lucky to find Turley's body. Jeanne Bratton, Turley's sister, testified that subsequent to the murder, Turley told Bratton that Douglas's clothes were bloody. The trial court found Bratton to have little credibility.

The record also reveals an interoffice memorandum dated October 7, 1991, in which an employee of victim assistance for the State Attorney's Office wrote to Cox regarding the *Bogle* case:

> Katie Alfonso called today stating (she is sister of Vic) she spoke with a person named Andy, who was at bar with Bret[t] and a person named Guy, anyway seems Andy is telling people 2 were involved, Brett and Guy left the bar together.

At the evidentiary hearing, Cox had no recollection of what led her to believe that "Andy" was involved in the murder. Katie Alfonso testified at the evidentiary hearing that she did not recall speaking to "Andy," and that no one with first-hand knowledge told her two people were involved. Alfonso recalled a rumor circulating which suggested more than one person was involved because the crime was "so horrible." She further testified that she could have related the rumor to the memo's author. Bogle's trial counsel did not recall the memo.

We conclude that Bogle has demonstrated under *Brady* that the message from Alfonso regarding "Andy" is favorable, exculpatory evidence that was suppressed by the State. We observe that Bogle has not shown in postconviction any additional evidence pertaining to "Andy." As to Cox's handwritten note, Bogle's trial counsel believed that Douglas murdered Torres, and the defense investigated Douglas.

The trial court found that the disclosure of Cox's handwritten note and the memorandum relating a rumor of multiple persons involved in the murder do not create a reasonable probability that the result of the proceeding would have been different. We agree. We find that the evidence offered against Bogle at trial was strong: Bogle threatened Torres's life if she called the police concerning Bogle's breaking into Alfonso's house about 11 days before Torres's murder; Bogle repeated his threat several days later; Bogle left Club 41 in clean clothes about five minutes after Torres left on the night of the murder; Bogle was seen in dirty clothes with his crotch wet approximately forty-five minutes later; and the DNA extracted from the semen in Torres's vagina was consistent with Bogle's DNA. We conclude that the note and memorandum, which were suppressed by the State, were not material because there is not a reasonable probability that, had the note and memo been disclosed to the defense, the result of the proceeding would have been different. In other words, there is no probability sufficient to undermine our confidence in the

outcome. Accordingly, we deny this *Brady* claim as it relates to the note and memorandum.

As an additional *Brady* claim, Bogle refers to another handwritten note which references Bogle and provides for Gary Turley to be "brought over." Cox and Detective Larry Lingo both acknowledged at the evidentiary hearing that they wrote parts of the note. Gary Turley, Marcia Turley's husband, testified at the evidentiary hearing that he observed Douglas driving Torres away from Club 41 on the night of the murder. Mr. Turley stated that he later saw Douglas's truck parked at the Beverage Castle without any occupants. He also acknowledged a prior statement in which he admitted that the truck he saw parked at the establishment might not have belonged to Douglas. He also testified that after the murder, his wife told him about Douglas's threatening her to provide him an alibi. The trial court found that Mr. Turley—who is serving a life sentence, has thirty-three felony convictions, and admitted to disliking Douglas—lacked credibility. We conclude that Bogle is not entitled to relief on this *Brady* claim.

B. Grand Jury Testimony

Bogle asserts another *Brady* violation regarding the State's failure to disclose the grand jury testimony to the defense. In denying this claim, the trial court found that any impeachment value would have been minor. Because "there is no pretrial right to inspect grand jury testimony," a *Brady* violation has not been demonstrated. *Brookings v. State*, 495 So. 2d 135, 137 (Fla. 1986).

C. Jeffrey Tapp

Bogle also claims a *Brady* violation based on the State's failure to disclose State witness Jeffrey Trapp's criminal record and that Trapp admitted to violating his probation without consequences from the State. At Bogle's trial, Trapp testified that he was at the Red Gables Bar on the night of the murder, which his probation forbade as a condition of community control. We find that no *Brady* violation has been established because we agree with the trial court that Bogle has not shown that Trapp's probation conditions were in effect on the night in question.

D. Agent Malone

Bogle also contends that the State violated *Brady* by failing to furnish F.B.I. Agent Malone's bench notes to the defense. The trial court found that the notes were insufficient to undermine confidence in the proceedings and were unlikely to produce an acquittal on retrial because the notes have "minimal" value to the defense. At trial, Malone, an expert in hair and fibers, testified that one Caucasian pubic hair (Q–18) recovered from the debris of Bogle's pants was microscopically indistinguishable from Torres's pubic hair (K–6). This finding was consistent with Malone's report and confirmed by an examiner. Malone's bench notes, however, stated that Q–18 equaled K–7, which referred to Torres's head hair sample. Malone testified at the evidentiary hearing that this was a transcription error: his bench notes

should have said that Q–18 equaled K–6. We find that no *Brady* violation has been demonstrated because Bogle has failed to establish that trial counsel attempted to obtain and the State suppressed Malone's notes. *See Peede v. State*, 955 So. 2d 480, 497 (Fla. 2007) (finding no *Brady* violation where the defense could have obtained the information in question with reasonable diligence).

E. Testimony Regarding Bogle's Pants in Evidence

Bogle asserts in his next *Brady* claim that the State suppressed the fact that Bogle's pants were placed in a drying shed after Detective Lingo's collection of the pubic hair and that Detective Lingo removed evidence from the evidence room to conduct an investigation. Bogle relies on a Hillsborough County Sheriff's Office disciplinary report stating that Ronald Cashwell, a Crime Scene Technician, "placed damp clothing into Evidence without first ascertaining that the articles were sufficiently dried." A written request for discipline noted that Cashwell:

> should have taken extreme caution to ensure that the pants were dry since crucial evidence could have been obtained and used to assist in the prosecution of the suspect. Instead, the pants could have become molded and the evidence severely damaged or destroyed.

In detailing the events, Cashwell made a written statement that "[t]he items placed in the shed are unable to be separate[d] from each other and could contaminate each other and the shed was full of other evidence drying."

At trial, F.B.I. Agent Malone was asked whether anyone else came "into contact with the pants from the time that they were put into property until the time that you took them out to collect this evidence." Malone answered, "No, they were sealed when I checked them out." Malone was not asked whether anyone else came into contact with the pants throughout the whole time they were in evidence. Thus, the disciplinary report, which indicates that a Crime Scene Technician removed the pants from the evidence room after Malone collected the hairs, is consistent with Malone's trial testimony.

Bogle has not shown that the State suppressed evidence of contamination. The disciplinary report and Cashwell's statement on which Bogle relies do not show that any evidence was actually contaminated but convey that the evidence could have been contaminated or destroyed. Malone testified at the evidentiary hearing that he found no evidence of contamination on the hairs retrieved from Bogle's pants and that the disciplinary report did not cause him to change his opinion of the match. Even if Bogle met the first two prongs of *Brady*, showing favorable evidence and suppression, the materiality prong has not been satisfied. Accordingly, we find that Bogle has failed to establish a *Brady* violation.

> Bogle additionally claims that prosecutor Cox violated *Giglio* because she knew Detective Lingo's testimony about the pants was false and misleading. The trial court denied this claim, finding the testimony unclear but not false. The trial court reasoned that there was no evidence presented that anyone touched the pants between the time they were sealed and placed in the evidence room until the pants were examined by Detective Lingo. Because we agree that Detective Lingo did not testify falsely, we deny this *Giglio* claim.
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> **F. DNA Analysis**
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> Bogle also claims that Dr. Harold Deadman's trial testimony that he conducted restriction fragment length polymorphism (RFLP) DNA analysis in this case was false, violating *Giglio*. We agree with the trial court's conclusion that Dr. Deadman's testimony that he was "a supervisor" in the unit indicated that multiple people were involved in the DNA analysis and was not false or misleading. Therefore, we deny this *Giglio* claim.
>
> Bogle also asserts a *Brady* claim because the defense did not receive a copy of the FBI file concerning the RFLP DNA testing. Bogle maintains that the file could have been used to challenge Dr. Deadman's credibility, the DNA analysis, and the investigation. The trial court found the value of the impeachment evidence disclosed in Dr. Deadman's file minimal and concluded that Bogle failed to demonstrate that the result of the proceeding would have been different had Dr. Deadman's file been disclosed. After carefully reviewing the record, we conclude that even if the FBI file was suppressed and favorable to the defense, the materiality prong under *Brady* has not been met. Therefore, we affirm the trial court's denial of relief on this claim.
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> **G. Bogle's Injuries**
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> Bogle raises a final *Giglio* claim alleging that prosecutor Cox knowingly argued falsely that the lacerations on Bogle's face could only be from the struggle with Torres because Cox was aware of Bogle's car accident. We agree with the trial court that the prosecutor argued reasonable inferences in light of the evidence presented. We therefore deny relief on this *Giglio* claim.

Bogle, 213 So. 3d at 841-45 (footnotes omitted). The mandate issued May 1, 2017. *Bogle v. State*, 213 So. 3d 833 (Fla. 2017).

REASONS FOR DENYING THE WRIT

Petitioner Bogle's conviction and resulting death sentence for the brutal murder of Margaret Torres became final following certiorari review in 1995. *Bogle v. State*, 655 So. 2d 1103 (Fla.), *cert denied*, 516 U.S. 978 (1995). His conviction and resulting death sentence have withstood more than twenty years of challenges since that time. Petitioner now seeks certiorari review of the Florida Supreme Court's decision denying postconviction relief. In the first issue, Bogle argues that trial counsel failed to present exculpatory evidence to rebut the State's evidence during the guilt phase of his trial, resulting in prejudice; and, in the second issue, it is asserted that the State committed *Brady*/*Giglio* violations by withholding evidence and presenting false testimony.

Rule 10 of this Court's rules states, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *See also Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (citations omitted) ("error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.") "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "[C]ertiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" *City and County of San Francisco, California v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (citations ommitted). Indeed, this Court has long held, "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). Thus, in the absence of a conflict between decisions of this Court or other circuit courts,

certiorari review is not warranted. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (denying certiorari review in the absence of a conflict).

There is no conflict among the state courts of last resort or the federal circuit courts on the issues presented in the instant petition and no unsettled question of federal law. Although the failure to meet the considerations in Rule 10 is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987). The law is well settled that this Court does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984). This Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *see also Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction).

While Bogle suggests conflict between the lower court and this Court, no conflict exists. Moreover, Bogle's claim amounts to little more than a dispute over the correctness of the state court's ruling. Here, the crux of Petitioner's argument rests on his contention that the Florida Supreme Court erred in its fact-based determinations, which goes to the very heart of Rule 10 and what this Court stated in *Tolan*. To resolve Petitioner's question, this Court would have to engage in the very "error correction" analysis that this Court stated was against its principle function.

Nevertheless, Petitioner's contention is without merit, and the Florida Supreme Court

correctly affirmed the denial of the motion for postconviction relief. Thus, Petitioner has failed to demonstrate a compelling reason for this Court to exercise its certiorari jurisdiction in this case. Accordingly, certiorari review should be denied.

I

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S FACT-BASED DETERMINATIONS THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN HIS REPRESENTATION OF PETITIONER DURING THE GUILT PHASE OF HIS TRIAL.

In an attempt to make fact-based determinations on routine ineffective assistance of counsel claims attractive for this Court to review, Petitioner argues that the Florida Supreme Court used the incorrect prejudice standard in its ineffective assistance analysis. Bogle cites this Court's decisions in *Banks v. Dretke*, 540 U.S. 668 (2004), and *Kyles v. Whitley*, 514 U.S. 419 (1995), to assert that the Florida Supreme Court should have used a "cumulative error" analysis. This Court should not be persuaded as neither *Banks* nor *Kyles* identify a cumulative error analysis as the proper analysis for cases which have both ineffective assistance of counsel claims and *Brady* claims. The only discussion in *Banks* of cumulative error was where this Court recounted the Fifth Circuit's opinion noting that the Magistrate addressed the issues cumulatively when they were presented separately:

> In addition, the Fifth Circuit observed, the Magistrate Judge had relied on the cumulative effect of *Brady* error and the ineffectiveness of Banks's counsel at the penalty phase. App. to Pet. for Cert. A44. Banks himself, however, had not urged that position; he had argued *Brady* and ineffective assistance of counsel discretely, not cumulatively.

Banks, 540 U.S. at 688-89. At no point did this Court state that the claims should have been merged in argument or analysis. Even less persuasive than *Banks* is *Kyles*, which not only fails to proclaim cumulative error as the correct standard when ineffective counsel claims are asserted in

conjunction with *Brady* claims, *Kyles* does not even address ineffective assistance of counsel claims. *Kyles* explains that for *Brady* claims, the reviewing court should not look to the sufficiency of the evidence to determine materiality; rather, the court should make the determination based on 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." *Kyles v. Whitley*, 514 U.S. at 435.[1] Ineffective assistance of counsel jurisprudence is well established, and there is no justification to look to *Brady* "materiality" jurisprudence to elucidate what constitutes prejudice when determining trial counsel's effectiveness. Most importantly, before this Court can consider whether certiorari jurisdiction should be exercised in this case, it must determine whether any jurisdiction exists. A review of the relevant proceedings below reveals that this argument, in the context of ineffective assistance of counsel claims, was not presented to the Florida Supreme Court, and therefore this Court lacks jurisdiction to consider the question presented in the petition. This Court does not have jurisdiction to review constitutional issues which were not fairly presented to and considered by the lower court. *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983); *Webb v. Webb*, 451 U.S. 493, 496-97 (1981).

The prejudice analysis on Petitioner's ineffective assistance of counsel claims is determined by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The Florida Supreme Court correctly, and in compliance with current precedent from this Court, found that Petitioner failed to demonstrate prejudice as required by *Strickland*. Petitioner now argues that his claim should not be subjected to the *Strickland* prejudice analysis and prejudice should instead be

[1] As discussed in the second issue, the Florida Supreme Court utilized the correct legal standard for the *Brady/Giglio* claims.

based on cumulative error, even though a cumulative error argument concerning ineffective assistance of counsel claims was not made to either the postconviction court or the Florida Supreme Court. The type of alleged attorney ineffectiveness raised by Petitioner is very well-settled and falls squarely under the parameters of *Strickland*. *Strickland* requires a defendant to demonstrate both that his counsel was deficient and that he was prejudiced by the deficiency. *Id*. at 687. In order to show that "counsel's assistance was so defective as to require reversal of a conviction," a defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id*. A defendant must also "show that the deficient performance prejudiced the defense" by demonstrating that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

Here, the Florida Supreme Court applied *Strickland* to Petitioner's claims and held that Petitioner was not entitled to relief because he failed to show that trial counsel was deficient, and, even if he had been deficient, Bogle failed to demonstrate prejudice. In the first sub-claim, the Florida Supreme Court found that even if trial counsel was said to be deficient in failing to investigate Bogle's car accident, no prejudice could be shown: "Bogle had motive to kill Torres and had threatened her life. Bogle's DNA was consistent with DNA found in the victim's vagina. A pubic hair found near the crotch of Bogle's pants matched Torres. Bogle has not established that counsel's showing his scratches were sustained in a car accident would have undermined confidence in the outcome of his case." *Bogle*, 213 So. 3d at 846. In the second sub-claim, the Florida Supreme Court found that trial counsel had not been deficient for failing to present Everett Smith's testimony relating to events on September 1, 1991 because "Smith's testimony would not

have undermined Bogle's motive to kill Torres". *Bogle*, 213 So. 3d at 846. In the third sub-claim, the Florida Supreme Court found that trial counsel had not been deficient for failing to present the deposition of Roger Kelly because "the deposition could not legally be introduced as substantive evidence." *Bogle*, 213 So. 3d at 847. In the fourth sub-claim, the Florida Supreme Court found that trial counsel had not been deficient for failing to demonstrate that the hair comparison in this case was unreliable and flawed, failing to acquire Agent Michael Malone's bench notes, and failing to retain an expert. The court's analysis was as follows:

> At trial, Malone concluded as follows:
>
> > In the debris reported as being from Mr. Bogle's pants, I was able to find one Caucasian pubic hair which microscopically matched the pubic hairs of Margaret Torres. In other words, it was microscopically indistinguishable from her's [sic] and, therefore, I concluded this one pubic hair from the pants was consistent with coming from Margaret Torres.
> >
> > Malone acknowledged, on cross-examination, that the pubic hair was naturally removed, that there was no way to determine how long the hair had been removed, and that hair comparisons do not constitute a basis for absolute personal identification.
> >
> > At the evidentiary hearing, Bogle proffered the deposition of mitochondrial DNA expert Dr. Terry Melton who criticized Malone for using potentially misleading words and making conclusions without conducting DNA testing on the sample. Dr. Melton did not state whether she would have been available to testify at Bogle's trial, nor did she know whether, at that time, labs were conducting mitochondrial DNA testing on hairs for criminal defense attorneys. The evidentiary hearing also revealed that studies relating to mitochondrial DNA and the proficiency of hair microscopic analysis were unavailable at that time. The trial court did not give Dr. Melton's testimony great weight.
> >
> > Steven Robertson, an expert in the field of hair analysis and comparison, concluded at the evidentiary hearing that Malone's trial testimony matching Torres's pubic hair and the hair from Bogle's pants was not inconsistent with his lab report, but was inconsistent with Malone's bench notes. Robertson determined that Malone testified "fairly" and within the bounds of his expertise. We conclude that Bogle has not demonstrated that the defense's

> failure to obtain Malone's bench notes was outside the broad range of reasonably competent performance under prevailing professional standards at the time of trial. *See Long v. State*, 118 So. 3d 798 (Fla. 2013). In addition, Bogle failed to present evidence that a mitochondrial DNA expert, such as Dr. Melton, or a microscopic hair analysis expert, would have been available to testify at trial, or in the preparation thereof. Accordingly, we deny relief on this claim.

Bogle, 213 So. 3d at 847. In the fifth sub-claim, Bogle claims that trial counsel was ineffective for failing to request a *Frye*[2] hearing to challenge the DNA evidence and show that the F.B.I. did not follow accepted testing procedures. The court's analysis was as follows:

> A *Frye* hearing determines whether an expert's scientific opinion is admissible. *Zack v. State*, 911 So. 2d 1190, 1197 (Fla. 2005). To be admissible, an expert opinion must be based on techniques that have been generally accepted by the relevant scientific community and found to be reliable. *Id*. (*citing Frye*, 293 F. at 1014). However, *Frye* is only utilized where the science at issue is new or novel. *Id*. at 1198. In denying this claim, the trial court determined that Bogle failed to show that the RFLP DNA evidence would have been inadmissible at trial had counsel requested a *Frye* hearing.
>
> At the evidentiary hearing, Dr. Randell Libby, an expert in human molecular genetics and forensics DNA analysis, testified that RFLP was not generally accepted in 1992; instead, RFLP was reviewed on a case-by-case basis. Although Dr. Libby maintained that there were inconsistencies in Bogle's case which raise a concern about the possibility of contamination or something else producing an inconsistent result, Dr. Libby could not identify any problems with the chain of custody, nor did he have direct knowledge of improper evidence storage causing degradation of evidence. Dr. Libby could not recall any previous case where he testified and the evidence was ruled inadmissible. Dr. Libby said he would have testified at a *Frye* hearing in this kind of case in 1991 and 1992.
>
> Dr. Deadman opined at the evidentiary hearing that F.B.I. procedures employed in 1991 and 1992 for RFLP DNA examinations produced "very reliable" results and that F.B.I. lab procedures in RFLP DNA analysis in this case were generally accepted in the relevant scientific community. Dr. Martin Tracey, an expert in population genetics and DNA analysis, saw no indication of contamination, having reviewed Dr. Deadman's RFLP analysis in this case. Based on our review of the record, we conclude that Bogle has not demonstrated that trial counsel was deficient

[2] *Frye v. United States*, 293 F. 1013 (1923).

> for failing to request a *Frye* hearing. Therefore, we affirm the trial court's denial of relief.

Bogle, 213 So. 3d at 847-48. In his sixth and final claim of ineffective assistance of guilt phase counsel, the Florida Supreme Court found that trial counsel had not been deficient in failing to impeach Phillip and Tammy Alphonso and Jeffrey Trapp because the Alphonsos did not testify at the evidentiary hearing and Bogle has not established that Trapp's community control condition was still in effect on the night of the murder. *Bogle*, 213 So. 3d at 848. Since Petitioner failed to present sufficient evidence to support his claim at the evidentiary hearing, no relief was due.

Here, the Florida Supreme Court applied *Strickland* to Petitioner's claims and held that Petitioner failed to show that trial counsel was deficient, and, even if he had been deficient, Bogle failed to demonstrate prejudice. The *Strickland* standard was the proper standard for the Florida Supreme Court to apply and they did not apply this standard in a way that is contradictory to the precedent from this Court.

II

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FLORIDA SUPREME COURT'S DENIAL OF RELIEF ON BOGLE'S CLAIMS PURSUANT TO *BRADY V. MARYLAND*, 373 U.S. 83 (1963), AND *GIGLIO V. UNITED STATES*, 405 U.S. 150 (1972).

Even if this Court undertook a factual review, it would only confirm that the state court below properly denied relief in this case. The Florida Supreme Court used the correct standard in analyzing the *Brady* and *Giglio* claims:

> *Brady* requires the State to disclose material information within its possession or control that is favorable to the defense. To demonstrate a *Brady* violation, the defendant has the burden 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. To meet the materiality prong of *Brady*, the defendant must demonstrate "a reasonable

> probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." "... [M]ateriality under *Brady* requires a probability sufficient to undermine confidence in the outcome." [For t]he materiality inquiry ... ["]the question 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.' " "It is the net effect of the evidence that must be assessed." "Although reviewing courts must give deference to the trial court's findings of historical fact, the ultimate question of whether evidence was material resulting in a due process violation is a mixed question of law and fact subject to independent appellate review."
>
> In order to prove a *Giglio* violation, "a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." If the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. The State must then "prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." Under the harmless error test, the State must prove " 'there is no reasonable possibility that the error contributed to the conviction.' "
>
> Both *Giglio* and *Brady* claims present mixed questions of law and fact. Thus, as to findings of fact, [the Court] defer[s] to the lower court's findings if they are supported by competent, substantial evidence. "[T]his Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." We review the trial court's application of the law to the facts de novo.

Bogle, 213 So. 3d 841-42.

Bogle asserts that the legal analysis conducted by the Florida Supreme Court below was an incorrect application of this Court's precedent in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The state court's denial of relief is a correct application of this Court's precedent and Bogle's argument reveals only his disagreement with Florida's application of this Court's rulings regarding *Brady*/*Giglio* trial errors. Bogle's disagreement with the Florida Supreme Court's decision does not identify any true error in the legal standard applied or any unsettled or conflicting legal principles which need to be addressed by this Court. To the contrary, his argument is that the Florida Supreme Court either misinterpreted

or overlooked certain facts in assessing the validity of Bogle's *Brady* and *Giglio* claims. Bogle's argument is plainly fact-bound rather than a question of legal doctrine. If this Court were to undertake certiorari review, resolution of Bogle's assorted claims would require this Court to correct the lower court's allegedly erroneous factual determinations rather than address a question of broad significance. As such, Bogle's claim is inappropriate for certiorari review.

In the instant petition, Bogle argues that the Florida Supreme Court wrongly decided every *Brady*/*Giglio* claim before the court. Amongst the sweeping conclusory arguments, Bogle lists a multitude of minutiae that he believes the Florida Supreme Court "ignored" or "overlooked" in each of the seven sub-claims: "Information Regarding an Accomplice," "Grand Jury Testimony," "Jeffrey Trapp," "Agent Malone," "Testimony Regarding Bogle's Pants in Evidence," DNA Analysis," and "Bogle's Injuries". The Florida Supreme Court examined the record before it, considered legal arguments, and made its determinations. That the Florida Supreme Court did not agree with Bogle as to the import of various facts and evidence does not in any way equate to that information not being considered in the analysis. No reviewing court writes an opinion giving a specified weight to each line of testimony or piece of evidence admitted at trial. Furthermore, certiorari does not lie to require a state court to explain its reasons for denying relief. As this Court has recognized, "requiring state courts to clarify their decisions to the satisfaction of this Court" is both "unsatisfactory and intrusive." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). In reviewing the claims before it, the Florida Supreme Court utilized the correct legal standards when making determinations that were contrary to Bogle's position; however, the court's unwillingness to adopt Bogle's legal analysis for its own is simply not a sufficient basis to grant certiorari review.

a. The Florida Supreme Court's fact-based determinations that no relief was warranted pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and/or *Giglio v. United States*, 405 U.S. 150, 153 (1972), should not be reviewed where the court used the correct legal analysis to reach its conclusion.

In Bogle's first sub-claim "Information Regarding an Accomplice", the Florida Supreme Court agreed with the trial court's finding that, "the disclosure of Cox's handwritten note and the memorandum relating a rumor of multiple persons involved in the murder do not create a reasonable probability that the result of the proceeding would have been different":

> We find that the evidence offered against Bogle at trial was strong: Bogle threatened Torres's life if she called the police concerning Bogle's breaking into Alfonso's house about 11 days before Torres's murder; Bogle repeated his threat several days later; Bogle left Club 41 in clean clothes about five minutes after Torres left on the night of the murder; Bogle was seen in dirty clothes with his crotch wet approximately forty-five minutes later; and the DNA extracted from the semen in Torres's vagina was consistent with Bogle's DNA. We conclude that the note and memorandum, which were suppressed by the State, were not material because there is not a reasonable probability that, had the note and memo been disclosed to the defense, the result of the proceeding would have been different. In other words, there is no probability sufficient to undermine our confidence in the outcome. Accordingly, we deny this *Brady* claim as it relates to the note and memorandum.

Bogle, 213 So. 3d at 842-43. Additionally, the defense's alleged perpetrator and supposed confessor, Guy Douglas, "was excluded in postconviction as the source of the foreign DNA profile from the vaginal swabs and excluded as a contributor to the mixed DNA profile obtained from Torres's underwear". *Bogle*, 213 So. 3d at 851.

In Bogle's third[3] sub-claim "Jeffrey Trapp", the Florida Supreme Court determined that the State did not commit a *Brady* violation for failing to disclose Jeffrey Trapp's criminal record and admission to a violation of probation because there was no credible evidence to establish that

[3] Bogle's second sub-claim, "Grand Jury Testimony" is addressed in sub-section (b).

Trapp's probation conditions were in effect when he was in the bar on the night of the murder. *Bogle*, 213 So. 3d at 843-44. In Bogle's fourth sub-claim "Agent Malone", the Florida Supreme Court determined that no relief was warranted on the claim that the State violated *Brady* for failing to furnish F.B.I. Agent Malone's bench notes to Bogle's defense team:

> Bogle also contends that the State violated *Brady* by failing to furnish F.B.I. Agent Malone's bench notes to the defense. The trial court found that the notes were insufficient to undermine confidence in the proceedings and were unlikely to produce an acquittal on retrial because the notes have "minimal" value to the defense. At trial, Malone, an expert in hair and fibers, testified that one Caucasian pubic hair (Q–18) recovered from the debris of Bogle's pants was microscopically indistinguishable from Torres's pubic hair (K–6). This finding was consistent with Malone's report and confirmed by an examiner. Malone's bench notes, however, stated that Q–18 equaled K–7, which referred to Torres's head hair sample. Malone testified at the evidentiary hearing that this was a transcription error: his bench notes should have said that Q–18 equaled K–6. We find that no *Brady* violation has been demonstrated because Bogle has failed to establish that trial counsel attempted to obtain and the State suppressed Malone's notes. *See Peede v. State*, 955 So. 2d 480, 497 (Fla. 2007) (finding no *Brady* violation where the defense could have obtained the information in question with reasonable diligence).

Bogle, 213 So. 3d at 844. The Florida Supreme Court correctly found that Malone's bench notes were unlikely to produce an acquittal on retrial. This is especially true since the existence of Bogle's semen in the victim's vagina renders the hair fiber comparison superfluous and immaterial. The Court said the following:

> At all thirteen areas tested, Bogle's DNA profile matched the DNA of the major male contributor on the vaginal swabs. The frequency of the occurrence of that profile is approximately 1 in 45 quadrillion Caucasians, one in 8.1 quintillion African–Americans, and 1 in 81 quadrillion Southeastern Hispanics. After conducting DNA testing on Torres's underwear, Bencivenga found a profile of a mixture at one area: one of Torres and one consistent with Bogle's profile. Guy Douglas was excluded in postconviction as the source of the foreign DNA profile from the vaginal swabs and excluded as a contributor to the mixed DNA profile obtained from Torres's underwear.
>
> The trial court found that because the prosecution's evidence that Torres was murdered during a sexual assault was "very strong," evidence that Bogle's DNA

> profile was the sole match to the semen found on the vaginal swabs and her underwear was "highly relevant and highly prejudicial." We conclude that it is significant that Bogle's DNA profile matched the DNA of the major male contributor on the vaginal swabs from Torres. We note that Detective Lingo testified that Bogle denied having sex with Torres in his interview on or about September 14, 1991. Bogle, therefore, has not demonstrated that he is entitled to relief on his claim of newly discovered evidence.

Bogle, 213 So. 3d at 851 (emphasis supplied). There is no doubt that with the evidence available for a retrial, the potential value of the bench notes and the concerns with the hair analysis testimony would not produce an acquittal. [4]

In Bogle's fifth sub-claim "Testimony Regarding Bogle's Pants in Evidence", the Florida Supreme Court found that it had not been shown that the State suppressed evidence of contamination because there was no evidence of actual contamination; rather there was just a disciplinary report that stated the technician's acts "could have" resulted in contamination. *Bogle*, 213 So. 3d at 844. To the contrary, Agent Malone testified that there was no evidence of contamination on the hairs that he examined. *Bogle*, 213 So. 3d at 844. Therefore, the Florida Supreme Court determined that "[e]ven if Bogle met the first two prongs of *Brady*, showing favorable evidence and suppression, the materiality prong has not been satisfied. Accordingly, we find that Bogle has failed to establish a *Brady* violation." *Bogle*, 213 So. 3d at 844-45. The related *Giglio* claim was also denied because the Florida Supreme Court found that the witness did not testify falsely concerning the chain of evidence of the pants. *Bogle*, 213 So. 3d at 845.

In Bogle's sixth sub-claim "DNA Analysis", the Florida Supreme Court found that the

[4] Bogle's prejudice claim is far weaker than he lets on. The Florida Supreme Court, in case number SC17-2151, is currently reviewing the trial court's denial of relief after mitochondrial DNA testing confirmed that the pubic hair found on Bogle's pants was consistent with the victim's pubic hair, a determination which effectively renders the prejudice claim moot.

State did not commit a *Giglio* violation in presenting Dr. Harold Deadman's testimony that he conducted the DNA analysis in the case. Since Dr. Deadman testified that he was the supervisor in the unit in which multiple people were involved in this DNA analysis, the Florida Supreme Court correctly determined that his testimony was neither false nor misleading. *Bogle*, 213 So. 3d at 845. As for the *Brady v*iolation alleged as to Dr. Deadman's F.B.I. file on the DNA testing, the Florida Supreme Court determined that, because the file's impeachment value was so minimal, even if the file had been suppressed, the materiality prong of *Brady* could not be met. *Bogle,* 213 So. 3d at 845.

In Bogle's seventh sub-claim "Bogle's Injuries", the Florida Supreme Court found that the State did not commit a *Giglio* violation for arguing that the scratches on Bogle's face resulted from the struggle with the victim. *Bogle*, 213 So. 3d at 845. The Florida Supreme Court determined that the comments were a fair statement based on the evidence presented at trial. Therefore, those comments could not satisfy the false or misleading prong of *Giglio*.

The Florida Supreme Court's fact-based determinations that the State did not commit any *Brady* or *Giglio* violations were decided based on the correct legal standard, and do not conflict with established legal precedent. Petitioner has failed to show a compelling reason for this Court to review this issue.

b. The Florida Supreme Court's *Brady* determination should not be reviewed where the defense had no pretrial right to inspect the grand jury testimony under Florida law.

In Bogle's second sub-claim "Grand Jury Testimony", the Florida Supreme Court restated an established legal principle, that there is no pretrial right to inspect grand jury testimony, in its denial of the claim that the State committed a *Brady* violation based on the grand jury testimony:

> Bogle asserts another *Brady* violation regarding the State's failure to disclose the grand jury testimony to the defense. In denying this claim, the trial court found that any impeachment value would have been minor. Because "there is no pretrial right to inspect grand jury testimony," a *Brady* violation has not been demonstrated. *Brookings v. State*, 495 So. 2d 135, 137 (Fla. 1986).

Bogle, 213 So. 3d at 844. Bogle makes the unsupported statement that "[a]n evidentiary rule or case cannot shelter exculpatory information from disclosure". Petition, at 34-35. However, this Court has already rejected that argument. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), this Court upheld a federal rule of criminal procedure, which allows the presiding judge to decide whether grand jury testimony would be disclosed to the defense. This Court explained the reason to protect the sanctity of grand jury proceedings,

> Petitioners argue, however, that the trial judge's discretion under Rule 6(e) must be exercised in accordance with the rationale of Jencks; namely, upon a showing on cross-examination that a trial witness testified before the grand jury—and nothing more—the defense has a 'right' to the delivery to it of the witness' grand jury testimony.
>
> This conclusion, however, runs counter to 'a long-established policy' of secrecy, *United States v. Procter & Gamble*, supra, 356 U.S. at page 681, 78 S. Ct. at page 986, older than our Nation itself. The reasons therefor are manifold, id., 356 U.S. at page 682, 78 S. Ct. at page 986, and are compelling when viewed in the light of the history and modus operandi of the grand jury. Its establishment in the Constitution 'as the sole method for preferring charges in serious criminal cases' indeed 'shows the high place it (holds) as an instrument of justice.' *Costello v. United States*, 1956, 350 U.S. 359, 362, 76 S. Ct. 406, 408, 100 L. Ed. 397. Ever since this action by the Fathers, the American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.' Ibid. Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. *Id.*, 350 U.S. at pages 362, 363, 76 S. Ct. at pages 408, 409. To make public any part of its proceedings would inevitably detract from its efficacy. Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business

> reprisal might haunt both the grand juror and the witness. And this 'go slow' sign would continue as realistically at the time of trial as theretofore.

Pittsburgh at 399-400. Similar to the federal rule of procedure at issue in *Pittsburgh Plate Glass Co.*, in Florida, the rules of evidence specifically proscribe a state attorney from disclosing the contents of a grand jury proceeding, including witness testimony, except by court order. Section 905.27, Florida Statutes. Since there was no court order issued in this case, the State was not permitted to disclose the testimony. Other than the failure to accept the established law, Petitioner fails to provide a reason to review this claim. Finally, as this Court has long recognized, jurisdiction does not lie to review decisions from state courts that rest on adequate and independent state law grounds. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds"). Since the Florida Supreme Court's decision rested on a state evidentiary rule, that was independent of federal constitutional law, this Court should not review that decision. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

CONCLUSION

For the foregoing reasons, the Court should DENY the petition for certiorari review of the decision of the Florida Supreme Court entered below.

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been submitted using the Electronic Filing System. I further certify that a copy has been sent electronically and by U.S. mail to Linda McDermott, 20301 Grande Oak Boulevard, Suite 118-61, Estero, Florida 33928, **lindammcdermott@msn.com**, on this 13th day of December, 2017. All parties required to be served have been served.

/s/ Candance M. Sabella
COUNSEL FOR RESPONDENT