DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

BRETT A. BOGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether the prosecution violates *Giglio v. United States*, 405 U.S. 150 (1972) and/or *Brady v. Maryland*, 373 U.S. 83 (1963), if the prosecution presents false and misleading evidence relating to microscopic hair analysis that exceeds the bounds of science at trial and/or in a postconviction proceeding?

2. Whether the prosecution violates *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to reveal information at trial or in postconviction that demonstrates impeachment of an FBI Analyst and the limitations of microscopic hair analysis that was used to convict and sentence a defendant to death?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

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BRETT A. BOGLE,

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Brett Bogle respectfully petitions this Court for a writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINION BELOW

The Florida Supreme Court's decision appears as *Bogle v. State*, 288 So. 3d 1065 (Fla. 2019). *See* Attachment A. The Florida Supreme Court denied Mr. Bogle's motion for rehearing on February 11, 2020. *See* Attachment B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. Section 1257. The Florida Supreme Court entered its opinion on December 19, 2019, and rehearing was denied on February 11, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROCEDURAL HISTORY

On October 2, 1991, Brett Bogle was indicted for First Degree Murder; burglary of a dwelling with assault or battery; retaliation against a witness; and robbery (R. 24-6). After a jury trial, the court entered a judgment of acquittal as to the robbery (R. 181). Bogle was found guilty as to the remaining charges (R. 179-80). The jury recommended death by a vote of 7 to 5 (R. 182). However, on December 22, 1992, the trial court granted a motion for new trial as to the penalty phase (R. 217).

On February 8, 1993, a second penalty phase commenced. The jury recommended death by a vote of 10 to 2 (R. 234). On February 15, 1993, Bogle was sentenced to death (R. 261-7). On direct appeal, the Florida Supreme Court affirmed Bogle's convictions and sentences. *Bogle v. State*, 655 So. 2d 1103 (Fla. 1995).

Bogle filed a series of state postconviction motions, pursuant to Florida Rule of Criminal Procedure 3.851.

An evidentiary hearing commenced on June 9-13, 2008. On October 25, 2011, the court denied Bogle's 3.851 motion. The Florida Supreme Court affirmed the denial of his claims. *See Bogle v. State*, 213 So. 3d 833 (Fla. 2017).

While Bogle's appeal was pending, on September 7, 2013, Bogle received information from the United States Department of Justice (DOJ). The information related to the FBI's review of Agent Michael Malone's testimony at both Bogle's trial and resentencing proceeding. According to the FBI, Bogle's jury repeatedly heard testimony that "exceeded the bounds of science".

Based on the information disclosed by the DOJ, Bogle's counsel also learned that documents surrounding a 1997 initial investigation and review of Malone had been disclosed to journalists pursuant to a FOIA request. Bogle was able to gain access to the documents in October, 2013.

On January 23, 2014, Bogle filed a second Rule 3.851 motion based upon the 2013 DOJ review and the documents he obtained relating to the initial DOJ review (R2. 159-92). The state circuit court ultimately held Bogle's motion in abeyance pending his appeal to this Court.

Bogle subsequently amended his second postconviction motion on December 20, 2016 and May 19, 2017, with claims related to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016) (R2. 283-326; 338-415).

On September 25, 2017, the circuit court summarily denied Bogle's second Rule 3.851 motion (R2. 448-676). Bogle filed a

motion for rehearing, which was denied by the circuit court on November 9, 2017 (R2. 734-35).

On December 19, 2019, the Florida Supreme Court affirmed the denial of relief. *Bogle v. State*, 288 So. 3d 1065 (Fla. 2019).

FACTS RELEVANT TO QUESTIONS PRESENTED

A. THE TRIAL

On September 13, 1991, Robert Wolf noticed a body behind the Beverage Barn (T. 193). The Beverage Barn was located next to Club 41 (T. 196).

Dr. Vernon Adams was called to the scene. He told the jury that:

> The body was in a grassy area . . . There were articles of clothing near the body, a head band, shorts, a brassiere and socks scattered around. The other sock was still on the body, the only garment left on the body. And also near the body were three pieces of concrete which – two of which appeared to be broken from one piece.

(T. 208). One of the pieces of concrete appeared to have blood on it (T. 209); there was blood splatter at the scene (T. 213).

The victim, Margaret Torres, had a laceration to her head and multiple skull fractures; the injuries were consistent with the piece of concrete found at the scene (T. 220, 239).

Adams testified that there were injuries to Torres' anus; she had "several tears ... there was hemorrhage into the tissue" and some "microscopic hemorrhage into the lining of the rectum." (T. 222). The injuries were consistent with anal intercourse (T. 222), though Adams could not determine whether the intercourse was consensual (T. 248). Adams opined that the injuries were

inflicted within 3 hours before her death (T. 247). Adams approximated the time of death as 3:00 a.m. on the 13th.

Torres blood alcohol content was .26% or .29% (T. 245).

Brett Bogle became the prime suspect in the crime. He had been dating Katie Alfonso, Torres' sister (T. 263). At this time, Torres' young children lived with Alfonso in a trailer (T. 261-2). Torres came by the trailer every day (T. 262).

Bogle moved in with Alfonso for 5 or 6 weeks (T. 264). Bogle and Torres "never got along" (*Id.*). Bogle tried to get along with Torres but they continued to argue (T. 266). Alfonso finally asked Bogle to leave (T. 266-7). Bogle moved out at the end of August, 1991, but continued to call Alfonso (T. 268).

On September 1, 1991, Bogle called Alfonso and asked if she wanted to go to Pinellas County to buy some beer (T. 269). Alfonso and Torres went with Bogle. On the way back, Bogle and Torres argued (T. 270).

On the ride home, Bogle called Torres a "bitch, whore" and a troublemaker (*Id.*). According to Alfonso, when the group arrived at her trailer, Bogle tried to enter. Torres threatened "to call the cops and [Bogle], he just blew up." (T. 272). He busted the screens and threw Alfonso out of the way to enter the trailer (T. 273). He grabbed the phone from Torres and twisted her arm (T. 274). Then, he took $54.00 from Alfonso's pocket and told Torres that "if she called the cops and pressed charges on him ... that she wouldn't live to tell about it." (T. 275).

That same day, a 911 call was placed from Alfonso's trailer

(T. 255). Deputy Sally Zdanwic responded and spoke to Alfonso and Torres (T. 256). Zdanwic observed some red marks on Torres' neck and wrist (T. 256). She also noticed that a screen on a few doors were torn and the front door was damaged (T. 256).

Within a few days, Bogle called and threatened Torres if she pressed charges (T. 277). Bogle called again and Alfonso told him they were not going to press charges (T. 278).

On the evening of September 12th, Bogle was seen at the Red Gables Bar (T. 374-5). Jeff Trapp testified that Bogle was with an individual named Guy Douglas (T. 375). Trapp testified that he drove Bogle, Douglas and Jeanie Bauerle to Club 41 (*Id.*). The group arrived between 10 and 11 p.m. and Trapp saw Torres, who was by herself (T. 376, 379). Bogle approached Torres and they had a conversation (T. 377).[1] Trapp didn't notice any injuries or scratches to Bogle (T. 378). Trapp left the bar 30 to 45 minutes later (T. 379).

Bogle called Alfonso around 11:00 p.m. and asked if he could come over (T. 281). Alfonso said "no" and Bogle became furious and told her that he loved her, but she "can be a real bitch sometimes." (T. 281).

Phillip and Tammy Alfonso saw Torres at Starky's Bar at 10:30 p.m. (T. 407, 432). After about 45 minutes the Alfonso's left Starky's and went to a friend's house (T. 408-9, 432). Sometime between 11:30 p.m. and midnight the Alfonsos arrived at

[1]As to Bogle's conversation with Torres, he testified that it did not appear heated, but "normal" and neither appeared upset with the other (T. 1219, 1230).

Club 41 and saw Torres again, alone (T. 433). Torres joined the Alfonsos at their table. Bogle approached the table and inquired if Torres was with them (T. 410, 434). Phillip responded "no" (*Id.*). Bogle showed him a scar he had from a car accident (T. 411).[2] Phillip saw Torres leave the bar around 1:00-1:15 a.m. (T. 412). He saw Bogle walk by him a few minutes later (T. 413). At 2:00-2:30 a.m. the Alfonsos left Club 41. They testified that they saw Bogle (T. 413). Though Tammy could not really see Bogle, her husband asked him why he was so dirty (T. 436). Phillip testified that Bogle looked like "he had been walking in the mud" and his crotch was wet (T. 414). Bogle said he had passed out in a van (T. 414, 437). Tammy testified that she noticed some scratches on his forehead at this time (T. 437).

On September 13, 1991, Detective Larry Lingo arrested Bogle (T. 359).[3] Lingo testified that Bogle "had what appeared to be scratches on his forehead and they appeared to be fresh to me at that point." (T. 363).

Ronald Cashwell, who worked in the crime scene unit, testified that he collected a pair of white pants from a bathtub and the pants "were still damp" (T. 346). Cashwell testified:

> Q: When you collected the shoes and the pants and you packaged them, where did you take them?

---

[2]The Alfonsos testified that they noticed no injuries to Bogle or scratches on his forehead (T. 411, 435).

[3]During Lingo's testimony, he told the jury that Torres' clothes were stacked beside her body in a pile and her sneakers were placed together on the other side of her body (T. 1281). They were not ripped or strewn about (T. 1282).

A: Packaged them separately and transported them to the ID garage.

Q: Okay. And are they – were they put in a secured area?

A: Yes, ma'am.

(T. 346-7; 350).

Corporal Art Picard photographed Bogle on September 14th (T. 339); *see* State's Trial Exs. 20 A, B and C. On September 17th Lingo checked Bogle's pants out of evidence and examined them:

A: I took a piece of brown wrapping paper put out on the counter and opened the pants up on top of this and as they were laying on the paper looking down at them, the zipper part opened, I found several what appeared to be pubic hairs inside of the pants and also inside the legs of the pants.

(T. 366).[4]

FBI Agent Michael Malone examined and compared the contents of S-Ex. 13, which was the debris from Bogle's pants, with the known head hair and pubic hair from Torres (T. 317). There was a single "Caucasian pubic hair which matched the pubic hairs of Margaret Torres. In other words it was microscopically indistinguishable from her's and, therefore, I concluded this one pubic hair from the pants was consistent with coming from Margaret Torres." (T. 317-8).

FBI Agent Robert Grispino testified that he identified a small drop of blood on Bogle's left shoe, but could not classify it any further (T. 392). Grispino's analysis also determined that blood was present under Torres' right fingernails (T. 394).

[4]Lingo testified that no one had come into contact with the pants prior to this time (T. 366).

FBI Agent Harold Deadman was provided the vaginal swabs on which another agent had identified seminal fluid and "portions of cloth having been removed from the victim's panties" (T. 462). Deadman explained that he was able to extract DNA from the panties but: "I obtained insufficient DNA to conduct our analysis." So, the result was inconclusive (T. 464). As to the vaginal swabs, Deadman testified:

> [T]here was only a very small amount of DNA obtained from the vaginal swabs of the three tests that I conducted. I obtained DNA patterns for two of the tests and one test I obtained no patterns. The sensitivity of that particular test was not sufficient to generate any results. So, again on one of the tests, the results would be inconclusive because nothing was obtained.
>
> On one of the tests I did on the – a DNA profile from the vaginal swab DNA that was matching to Brett Bogle's DNA profile. The second produced a result was also determined to be inconclusive, but for a technical reason.

(T. 465). Deadman testified that statistically the profile meant that one in twelve Caucasians would exhibit the same profile (T. 467). Deadman opined that the database overestimated the statistics so the percentages would be smaller (T. 468).

B. THE INITIAL POSTCONVICTION PROCEEDING

At the evidentiary hearing, trial counsel, Doug Roberts explained his perception of the case against Bogle:

> The State's case was that he was the most likely suspect because he had been arguing with her and there was just nobody else that they wanted to investigate.

(PC-T. 586). Roberts believed that the 'scientific evidence was the big deal in the case" (PC-T. 680). But, the case against Bogle was "circumstantial" (PC-T. 588, 651). Roberts believed

that Bogle was innocent (PC-T. 589).

1. Marcia & Guy Douglas

Guy Douglas was a target of investigation of Bogle's defense (PC-T. 594). ASA Karen Cox' notes reflect she had been provided information that Douglas confessed to involvement in the crime:

> Marcia Bowerly, sister of Jeane Burile, 6903 Michigan Avenue, Gibsonton, FL
>
> Guy Douglas 92-7731 capias
>
> talk to re: **Guy Douglas confessed to being involved.**

(D-Ex. 2)(emphasis added). The information contained therein was not disclosed to trial counsel (PC-T. 593-4).

Cox testified that she was unsure as to when or how she came into possession of the information that Douglas had confessed (PC-T. 425-6). However, Cox' file reflects that she was involved in the prosecution of Douglas where he had viciously beaten a pregnant Marcia as early as May 22, 1992. *See* D-Exs. 7, 8. Indeed, Cox had an investigative subpoena issued for Marcia to meet with her on August 5, 1992 (PC-T. 430, D-Ex. 5).

As Bogle's trial approached, Cox' file makes clear that she or someone with the State spoke to Marcia and that Marcia had been the source of the information regarding Douglas' confession and involvement in Torres' murder. Just days before Bogle's trial was to begin, local attorney Wayne Timmerman returned a call from Cox (D-Ex. 9). At the evidentiary hearing, the notes reflecting a return phone call from Timmerman to Cox were explained: In 1991, Marcia became pregnant with Douglas' baby. Marcia was in fear of

Douglas due to her knowledge of his involvement in killing Torres. She decided to place her child for adoption and contacted Timmerman (PC-T. 1026). Though Timmerman did not handle family law matters, he referred Marcia to another attorney with whom he shared office space (PC-T. 5255). That attorney, Elizabeth Hapner, used the services of Timmerman's wife, Suzanne, in her practice. However, whether it was because she initially attempted to retain Wayne Timmerman or because Suzanne Timmerman was present when Marcia gave birth to her child (PC-T. 817-8), or whether Marcia simply recalled Timmerman's name from the office building where she met with Hapner, Marcia confusedly reported that she was represented by Timmerman in the adoption proceedings and she reported that she had told her attorney about her reasons for giving up her baby and what she knew about Douglas' involvement in Torres' killing.[5]

Marcia told Cox that she had spoken to her attorney about Douglas' involvement in killing Torres and Cox attempted to verify the information. Cox did not disclose the information. Cox also attempted to verify the information with Marcia's husband, Gary Turley. *See* D-Ex. 15.

Had Cox disclosed the information Marcia possessed, the defense would have learned that Marcia and Douglas were dating in 1991 (PC-T. 491-2). In September 1991, Marcia lived at the Gables Motel and worked at the bar (PC-T 493-4). Marcia met Bogle on the

[5]Hapner recalled that the father may have committed a murder in the Gibsonton area in 1991 (PC-T. 5258).

night of the crime (PC-T. 494). Marcia observed scratches on Bogle's face and forehead, that he had difficulty walking and was wearing a sling (PC-T. 494, 530). Bogle explained that he had been involved in a car accident (PC-T. 494). In the early evening, Marcia, Douglas, Bogle and a girl named "Trish" went to the Red Gables bar for drinks and proceeded to Club 41 (PC-T. 495-6). When the foursome arrived, they played pool for awhile and then Marcia sat at the bar (PC-T. 497). Marcia recalled that later, she and Douglas argued and she decided to leave (PC-T. 498). Marcia, who had been drinking, went out to the parking lot and fell asleep in a car (*Id.*). When she awoke, she entered the bar, had a glass of water, used the restroom and left Club 41 to walk to the motel (PC-T. 499).

At the motel, Marcia was awakened by Douglas' entering the room (PC-T. 502). The next time Marcia woke up, it was daylight and Douglas was coming out of the shower (PC-T. 503). Marcia's sister, Jeanne, also saw Douglas coming out of the bathroom, holding his clothes in his arms (PC-T. 826).

Later, after learning that Torres had been killed, Douglas told Marcia that Bogle had been arrested, but he [Douglas] did not have to worry because he had been with Marcia all night (PC-T. 505). Marcia was shocked because he was not with her all night and when she said this to Douglas, "[h]e told me that he was with me all night and I needed to – that I didn't need to say anything other than that or they would be lucky if they found my body." (*Id.*). That same day Marcia moved out of the motel and left her

employ (PC-T. 505, 830). She was frightened about what Douglas may do to her if she did not provide him with an alibi and believed that his threat was in relation to Torres' murder (PC-T. 513, 523).

Jeanne confirmed that Douglas had told Marcia she should supply an alibi for him and that Marcia was "scared to death" of Douglas based on what happened (PC-T. 827). Jeanne recalled that Marcia had told her that the clothes Douglas held as he was leaving the motel were bloody (PC-T. 827).

In 1992, while pregnant, Douglas beat Marcia and told her "to quit running [her] mouth." (PC-T. 518). Marcia assumed that her sister had mentioned that Marcia had told her about what she saw on the night of the crime because Douglas and her sister were together the night before the beating occurred (PC-T. 518-9).

Gary Turley remembered the night of September 12, 1991. He recalled seeing Douglas leaving Club 41, after dark, in his truck with Torres (PC-T. 1013). They headed north from Club 41 (PC-T. 1014-5). After going into Club 41 to look for Marcia, Turley left and saw Bogle get into another car with a dark-haired, heavy-set female (PC-T. 1016). Turley observed that car head south from Club 41 (PC-T. 1016). When Turley passed the Beverage Barn, he saw what he thought was Douglas' truck in the parking lot (PC-T. 1017). Sometime later, Marcia told Turley that Torres had been killed; Marcia was hysterical because Douglas had threatened her and she was scared (PC-T. 1019).

Patricia Bowmen, whose maiden name was Diaz, was the "Trish"

that spent time with Bogle on the night of September 12, 1991 (PC-T. 1143). At this time Bowmen had dark hair, weighed over 200 pounds and was 5 feet 2 inches tall (PC-T. 1144-5). Law enforcement wanted to speak to her because it was believed that Bowmen gave Bogle a ride home on the night of the crimes (D-Ex. 55). Bowmen remembered the sequence of events consistently with Marcia (PC-T. 1143-4). Bowmen also testified that she had driven Bogle home from the club in the morning hours of the 13th (PC-T. 1145).

Trial counsel acknowledged the significance of this information and testified that he would have considered presenting such evidence in Bogle's defense (PC-T. 605-6).

Bogle also presented evidence that in a sworn deposition, Roger Kelly testified that Torres was drinking and dancing with a man – not Bogle (D-Ex. 24). As Kelly was leaving Club 41, he saw Torres outside standing next to the dumpster arguing back and forth with a man (*Id.*). Kelly maintained that Torres was arguing with Douglas (*Id.*). Bogle was not present during the argument.

And, even before the evidence concerning Douglas came to light, Cox was informed that Katie Alfonso had called the victim's advocate to report that there were two people involved in killing Torres (D-Ex. 1). Though Cox believed that this was the type of information she would want to investigate, she did not disclose the information to the defense.

2. Forensic Issues

a. Hair

At trial, Cox presented evidence that a pubic hair that matched Torres had been discovered on Bogle's pants. However, at the evidentiary hearing, Lingo admitted that his trial testimony concerning the storage of evidence and collection of the hair was not accurate (PC-T. 1404). The prosecution failed to reveal that after Cashwell collected Bogle's pants:

> CST Cashwell placed the evidence in the drying shed where they were left to air dry for approximately six (6) hours, when he removed them and placed them in the Evidence Room on September 14, 1991. ...
>
> On September 17, 1991, Detective Larry Lingo checked the pants out of the Evidence Room for investigative purposes. He found the pants to still be wet. Also, on September 17, 1991, CST Don Hunt removed the pants from the Evidence Room and air dried them until September 18, 1991 when he placed them back in the Evidence Room.

(D-Ex. 12). In Cashwell's own written statement he noted: "The items placed in the [drying] shed **are unable to be separated from each other and could contaminate each other and the shed was full of other evidence drying.**" (D-Ex. 12)(emphasis added).

In addition, at the hearing, it was revealed that Lingo was removing evidence from the secure evidence room to conduct "investigation". *See* S-Ex. 6; D-Ex. 60. Though Lingo had no training in the collection of evidence and there were crime scene technicians who were specially trained to collect and maintain evidence (PC-T. 1371), he took it upon himself to remove the white pants as well as evidence collected from the victim during the autopsy (*see* D-Ex. 12; S-Ex. 6). During the evidentiary

hearing, he could not explain why he had removed the evidence (PC-T. 1375). It was during this "investigation" that Lingo, who had no training in the comparison of hairs, happened to find what he described as a "pubic hair" on Bogle's pants.[6]

The prosecution also failed to supply trial counsel with FBI agent Malone's bench notes which reflected a critical discrepancy (PC-T. 634). In his testimony and report, Malone indicated that the hair found on Bogle's pants was a pubic hair. He testified that the pubic hair matched the known sample of pubic hair taken from Torres. However, Malone's bench notes indicated that the hair on Bogle's pants actually matched the known head hair taken from Torres (PC-T. 5192-3, 5196; *see also* D-Ex. 21).[7]

Dr. Terry Melton, an expert in mitochondrial DNA (mtDNA) analysis, testified in a proffer that Malone overstated the results of his comparisons (PC-T. 1090). Melton testified that independent studies have demonstrated that hair comparison has a high error rate, generally between 5-10% (PC-T. 1093).

b. DNA

i. The DNA profile from the blood beneath Torres' fingernails

Bogle had the fingernail cuttings from Torres subjected to YSTR DNA testing. The results of the testing reveal that two male

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[6]Lingo described the hair as a pubic hair, though he admitted he would not be able to tell the difference between a pubic hair and a hair that originated from a leg, arm, the chest, neck or any other body area (PC-T. 1376, 1406).

[7]Malone also testified that no records or chain of custody were kept as to the hair and fiber evidence that was submitted to the FBI (PC-T. 1476-7).

individuals did leave some genetic material beneath Torres' fingernails on the night she was killed – but neither of those individuals is Bogle (PC-T. 1782, 1837, 1902, 1911-2, 1943,[8] D-Exs. 76, 77). Nasir testified that Torres would have had "to come in direct contact with the individual" to have his DNA beneath her nails (PC-T. 1802, 1817). She believed Torres would have had to rub her hand against him or scratched him (PC-T. 1802). And, after the DNA was deposited "not a lot of cleaning [of Torres' hands] took place" (PC-T. 1803).[9]

ii. RFLP DNA testing in 1991-92

Bogle presented evidence that unbeknownst to him, Lingo checked out vital evidence, including the vaginal, anal, and oral swabs obtained from Torres, for a period of four hours after it had been submitted to the evidence section of the sheriff's office (D-Exs. 11, 60 and S-Ex. 6).

Bogle also presented evidence that the FBI's bench notes and data concerning the DNA testing evidenced several problems with the RFLP testing. *See* D-Ex. 20.[10]

In Bogle's case there was no chain of custody documented and no documentation concerning the integrity of the evidence (*see* D-Ex. 20, PC-T. 1232, 5102). The file does reveal that controls and

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[8]The State's expert, Dr. Martin Tracey confirmed Nasir's conclusion: "It is not [Bogle's] DNA." (PC-T. 1943).

[9]Tracey commented that if there had been a positive test for blood, then it would indicate that the DNA was developed from a blood source (PC-T. 1954).

[10]The file was not disclosed to Bogle (PC-T. 634).

tests were not run which may have effected the position of the fragments (PC-T. 1180-1). The file also reveals inexplicable difficulties and inconsistencies in the results of the tests (D-Ex. 20). There were artifacts in some of the autoradiographs that suggested the possibility that the samples had mixed (PC-T. 1198, *see also* D- Exs. 20 and 43). And, the fact that no result was produced demonstrated a problem with the testing (PC-T. 1199-200). There was no reproducibility of the result (PC-T. 1207).[11]

In addition, neither Bogle, nor the jury, was made aware that the DNA testing was conducted by an analyst whose name was never revealed until 2008 (PC-T. 1176-7). At the evidentiary hearing, agent Deadman testified for the first time in Bogle's case that he did not conduct the analysis of the vaginal swabs:

> There would be a biologist, physical science technician that would do essentially all of the laboratory work. They would be responsible for extracting the DNA, running through the RFLP procedure.

(PC-T. 1261). Deadman agreed that it was not made clear to Bogle's jury that there was a team analyzing the DNA as opposed to just him (PC-T. 1292).

Deadman also explained that what he characterized as a "match" in 1992 and 1993 only meant that "one could not exclude a particular person" (PC-T. 1252). And, the single probe "match" in Bogle's case was "relatively common" (PC-T. 1267).

iii. STR DNA testing in 2002

Former FDLE Analyst, Patricia Bencivenga, testified as to

[11]Dr. Libby, a DNA expert, opined that consistency at a single locus with no reproducibility was unreliable (PC-T. 1211).

the STR DNA analysis that was conducted on the vaginal swabs. When Bencivenga received the swabs they were not sealed and she had no idea when the swabs were packaged (PC-T. 1578-9). She also had no idea whether the items that came from Bogle, including buccal swabs, blood and clothes had been stored with the unsealed vaginal swabs (PC-T. 1592). If the vaginal swabs had been contaminated by Bogle's DNA due to the way items were stored there would be no way to know (PC-T. 1593). Indeed, STR DNA testing is very sensitive and causes more likelihood that contamination can occur (PC-T. 1593).

The results of combining all of the tips from the swabs (PC-T. 1559), was a mixture (PC-T. 1564). Bencivenga's interpretation of the mixture was subjective (PC-T. 1608, 1612).

The State's expert, Tracey, testified that while the data was consistent with two donors, "[y]ou could make the argument that there were three and they were undetected . . ." (PC-T. 1939). Furthermore, Tracey testified that the data was not conclusive evidence that the DNA reflected a male and a female (PC-T. 1940).

Upon interpreting the data, Bencivenga submitted what she believed was the male profile to CODIS and received a hit that matched Bogle (PC-T. 1566-7). Bencivenga also testified that the semen found on Torres' panties was analyzed and she interpreted the mixture as being the DNA profile for one male and one female (PC-T. 1569). She had obtained a profile at only one allele (PC-T. 1569). The one allele on the male profile was consistent with

Bogle's (*Id.*).

Lingo testified at the evidentiary hearing that Bogle denied having sex with Torres (PC-T. 1367). However, his notes that were taken contemporaneously in his interview with Bogle include no reference to Bogle denying he had sex with Torres (PC-T. 1421, D-Ex. 62). Lingo's report was not written until nine days after his interview with Bogle (PC-T. 1421).

3. Bogle's Auto Accident

Bogle was involved in an automobile accident on September 6, 1991. The prosecution obtained the accident report which contained information that Bogle and George Schrader were riding in a car when another car slammed into Schrader's vehicle, sending the vehicle head-on into a telephone pole (D-Ex. 13).

Bogle, who was not wearing a seat belt, was thrown head first into the windshield of the car and suffered major trauma. He was rushed to Tampa General Hospital. Bogle's records reflect that he sustained lacerations to the head and face (D-Ex. 33, *see also* PC-T. 884). He received sutures for the laceration over his right eye (*Id.*). He suffered traumatic pneumothorax," a collapsed lung caused by fractured or bruised ribs and an injury to his eye (*Id.*). He complained of pain on his left side. Bogle remained in the hospital for three days (*Id.*).

Mary Schraeder informed the defense investigator that "Brett had a tremendously difficult time walking, sitting, etc. after the accident. Mary saw Brett on the Tuesday before the murder and said that he needed help getting his shirt off because of his

injuries." (D-Ex. 50). Bogle's mother also described the injuries her son had suffered during the accident, including the injuries to his head. *See* D-Ex. 51. Photos were available of Bogle shortly after the accident occurred which depicted several facial lacerations. *See* D-Exs. 26, 27.[12]

4. The Events of September 1, 1991.

Shortly before Bogle's trial, Everett Smith told the defense: He knew Bogle because they lived at the same motel in September, 1991 (PC-T. 709). On September 1st, he and Bogle picked up Alfonso and Torres and they drove to Manatee County to purchase beer (PC-T. 712-13). From what Smith could tell Alfonso was happy and excited to see Bogle (PC-T. 714). After they picked up the beer, the foursome drove back to the motel where Smith and Bogle lived (PC-T. 714). Neither Alfonso nor Torres indicated any fear around Bogle (PC-T. 715). Rather, Bogle and Alfonso acted like a couple getting along (PC-T. 716).

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[12]Dr. Edward Willey testified as to the healing process of abrasions and lacerations (PC-T. 880-1). After reviewing records and photographs, Willey testified that Bogle's account of the accident was consistent with the description of the injuries noted in the records, i.e. injuries to his forehead and right cheek from being thrown into the windshield (PC-T. 884). Based on the photographs from the hospital, Willey would not expect the wounds to Bogle's forehead and face to heal in seven days (PC-T. 886)("Lacerations usually take somewhat longer than that"). The wounds depicted in the photographs taken after Bogle was arrested do not appear "fresh" and they do not look like wounds that were received within three days of the photographs, i.e., the time of the crime, because they were clean and depressed (PC-T. 886). The wounds in Bogle's post arrest photos also appeared in the same general area as was described in the medical records from Bogle's accident (PC-T. 887. And, they did not appear to be "reopened or reinjured" (PC-T. 889).

In the afternoon, Bogle asked Smith if he would take the girls home (PC-T. 716). Smith drove, Bogle was the passenger, and Alfonso and Torres sat in the backseat (PC-T. 717-8). While in the car, Smith did not hear any arguments, threats or name calling (PC-T. 717). When they arrived at Alfonso's trailer, Alfonso, Torres and Bogle walked into the trailer (PC-T. 718). No one was arguing (PC-T. 718). A few minutes later, Smith heard some arguing from inside the trailer (PC-T. 718-9). As Bogle left the trailer he kicked the screen out of the door (PC-T. 719).

5. Impeachment Evidence Of Prosecution Witnesses

Phillip and Tammy Alfonso and Trapp testified at trial about Bogle's movements and demeanor on the night of the crime. The Alfonsos, by Phillip's account to law enforcement, had been drinking for five hours when they observed Bogle's appearance and demeanor. They were not asked about their intoxication.

In addition, Trapp was inexplicably not questioned about his outstanding criminal issues. And, Trapp's testimony was contradicted by the Alfonsos who testified that Bogle did not speak to Torres at the bar (R. 412). Trapp also gave conflicting accounts of how much he drank at Club 41.

C. THE SUCCESSIVE POSTCONVICTION PROCEEDING

Unbeknownst to Bogle, in 2013, the DOJ and the FBI flagged his case, for a second time, to consider whether Malone "exceeded the limits of science by overstating the conclusions that may appropriately be drawn from a positive association between evidentiary hair and a known sample." *See* R2. 185.

In an August 20, 2013 letter to the Office of the State Attorney for the Thirteenth Judicial Circuit, the DOJ explained that it "determined that a report or testimony regarding microscopic hair comparison analysis containing erroneous statements was used in this case." (R2. 184). The following errors in Bogle's case were identified:

> We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included statements that exceeded the limits of science and were, therefore, invalid: (1) the examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all other-this type of testimony exceeded the limits of science; (2) the examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association-this type of testimony exceeded the limits of the science; and (3) the examiner cites the number of cases or hair analyses worked in the laboratory and the number of samples as predictive value to bolster the conclusion that a hair belongs to a specific individual-this type of testimony exceeded the limits of science.

(R2. 185). In fact, as to the second type of error, the jury heard five (5) separate statements that exceeded the bounds of science (R2. 188-89). And, at Bogle's resentencing proceeding, the jury heard testimony that exceeded the bounds of science as to all three areas of errors on multiple occasions (R2. 190).

In light of the recently disclosed results from the FBI's review of Bogle's case, Bogle learned that a plethora of documents related to the review that occurred in 1997, in which the DOJ, Office of the Inspector General, criticized the work of thirteen examiners at the FBI, one of whom was Michael Malone,

had been released. Bogle had requested these documents at the time of his evidentiary hearing and had attempted to question Malone and Steve Robertson about the review but was not permitted to do so by the state circuit court (PC-T. 1469, 5218-19).

The documents reflect that in more than eighty percent of the cases reviewed, Malone was criticized for the testimony he provided as to hair analysis – testimony similar to the testimony he provided to Bogle's jury. Specifically, Malone was rebuked for testifying to statistically invalid rates of error. And, Malone was criticized for misleading courts and fact finders as to the science behind hair analysis, i.e., that 15 characteristics were needed to make a "match". Malone's comparison and conclusions were not based on any research or literature and were completely fabricated to support his opinions. In Bogle's case, Malone told the jury: "[I]t's my policy or it's the policy of our lab that we have to find at least fifteen of these individual microscopic characteristics in the hair." (T. 312-13; *see also* T. 1304). This statement was false.

Malone was also highly criticized for failing to provide clear notes so that it could be determined whether he performed the hair comparison in an acceptable manner. And, again, in almost eighty percent of the cases reviewed, Malone's testimony was inconsistent with his lab report and/or bench notes; these inconsistencies were not the product of transcription errors. The number of inconsistencies could even be higher, but it was difficult to decipher Malone's notes in some cases. Similarly,

critical errors occurred in Bogle's case, one of which Malone testified was simply a transcription error.

FLORIDA SUPREME COURT'S RULING

In response to Bogle's claims that he was denied due process when the jury that convicted him and sentenced him to death heard materially false and misleading testimony, the Florida Supreme Court held:

> The 2013 DOJ/FBI review is of no help to Bogle here, however, because he cannot use a successive 3.851 motion to litigate issues that he could have raised in his initial postconviction motion. Bogle was well aware of potential deficiencies in Malone's testimony long before the 2013 review (which, in any event, on its face says nothing about what the state did or did not know about the reliability of Malone's testimony). In our opinion in *Bogle II*, for example, we noted that "Bogle ... claims that his trial counsel was deficient in failing to demonstrate that the hair comparison in this case was unreliable and flawed." 213 So. 3d at 847. Relatedly, the record in Bogle's initial postconviction motion shows that Bogle's counsel had received notice of the results of an earlier DOJ review of Malone's work in Bogle's case. That 1999 review found that the lab reports of Malone's work were not sufficiently documented to determine whether the work had been done in a scientifically reliable manner. With diligence, Bogle could have litigated in his initial postconviction motion the same *Brady* and *Giglio* claims that he raises now.

Bogle v. State, 288 So. 3d 1065, 1068 (Fla. 2019)(footnotes and citations omitted).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE ISSUE OF FBI AGENT MICHAEL MALONE TESTIFYING TO MATERIALLY FALSE STATEMENTS AND MISLEADING THE JURY THAT CONVICTED AND SENTENCED MR. BOGLE TO DEATH.

The Florida Supreme Court's analysis of Mr. Bogle's due process claim was factually and legally erroneous. Initially, the Florida Supreme Court failed to consider any of the previously suppressed information relating to the initial 1997 DOJ review of Malone and others at the FBI. The initial 1997 report prompted a specific review of several of Malone's cases, including Mr. Bogle's, but was confined to determining whether there were inconsistencies between Malone's bench notes, report and testimony and whether his documentation was sufficient to conclude that the analysis had been conducted in a scientifically reliable manner (S-Exs. 5, 5A). That review was not focused on the reliability of the science itself or whether his testimony was false or misleading.

Further, at the state court 2008 evidentiary hearing, Steve Robertson, the independent examiner who reviewed Mr. Bogle's case, testified that he had been threatened with the death penalty if he discussed his review of Malone as it related to other cases. The circuit court sustained the State's objection to questions to both Robertson and Malone about the initial review and Malone's work in other cases (PC-T. 1469, 5218-19). Notably, Robertson also testified as did Malone, under oath, that Malone's trial testimony was not misleading and was accurate. That testimony was credited and used in denying Mr. Bogle's due

process claims.

Between the initial review and the 2013 review, documents were released to a reporter and Mr. Bogle's postconviction counsel was finally able to review them. The documents reflect that in more than eighty percent of the cases reviewed, Malone was criticized for the testimony he provided as to hair analysis – testimony similar to the testimony he provided to Mr. Bogle's jury. Specifically, Malone was rebuked for testifying to statistically invalid rates of error. And, Malone was criticized for misleading courts and fact finders as to the science behind hair analysis, i.e., that 15 characteristics were needed to make a "match". Malone's comparison and conclusions were not based on any research or literature and were completely fabricated to support his opinions. In Mr. Bogle's case, Malone told the jury: "[I]t's my policy or it's the policy of our lab that we have to find at least fifteen of these individual microscopic characteristics in the hair." (T. 312-13; *see also* T. 1304). This statement was false and the State knew it.

Malone was also highly criticized for failing to provide clear notes so that it could be determined whether he performed the hair comparison in an acceptable manner. And, again, in almost eighty percent of the cases reviewed, Malone's testimony was inconsistent with his lab report and/or bench notes; these inconsistencies were not the product of transcription errors. The number of inconsistencies could even be higher, but it was difficult to decipher Malone's notes in some cases. Similarly,

critical errors occurred in Mr. Bogle's case, one of which Malone testified was simply a transcription error.

The Florida Supreme Court simply ignored this previously suppressed exculpatory evidence in its December 19, 2019, opinion, but it is surely the type of evidence that is admissible and should have been considered. Likewise, in light of the obfuscation and false statements made at the 2008 evidentiary hearing by the State's witnesses, there is no doubt that *Brady v. Maryland*, 373 U.S. 83 (1963), violations occurred. *See Banks v. Dretke*, 540 U.S. 668 (2004); *Strickler v. Greene*, 527 U.S. 263 (1999).

As to the conclusions of the second review of Mr. Bogle's case which were contained in the 2013 DOJ Report, the Florida Supreme Court faulted Mr. Bogle for not litigating those deficiencies "long before the 2013 review ..." *Bogle v. State*, 288 So. 3d at 1068. However, while Mr. Bogle has consistently challenged Malone and the reliability of his testimony, the State, through expert witnesses, disputed Mr. Bogle's experts and allegations and both the state circuit court and Florida Supreme Court sided with the State in the fact findings and analysis that was conducted. Now, due to the 2013 DOJ Report, it is indisputable that what Mr. Bogle has been saying for a decade or more is true: Malone's testimony before the jury that convicted him and the jury that sentenced him to death was false and misleading, and the State knew it.

The Florida Supreme Court's ruling is perverse and

inconsistent because both the state circuit court and the Florida Supreme Court have repeatedly credited Malone's testimony, based upon a flawed and unreliable science, in upholding Mr. Bogle's conviction. For instance, in denying Mr. Bogle's claim as to undisclosed information regarding Guy Douglas, the state circuit court's prejudice analysis relied in part on Malone's "testimony that one of the hairs collected from the pants that Defendant wore on the night of the murder was microscopically consistent with Margaret Torres's pubic hair." (R2. 622).

Further, in denying Mr. Bogle's claim as to undisclosed evidence concerning the storage and handling of Mr. Bogle's pants by Lingo and Cashwell, the state circuit court again relied on Malone's testimony:

> Agent Malone testified that placing evidence in drying rooms is standard procedure for wet evidence and it do[es] not cause contamination unless two items touch one another because hair does not "float through the air." (*See* 11/30/2009 EH, page 135). And after reading Technician Cashwell's reprimand, Agent Malone testified that there is nothing in the report that would cause him to alter his opinion that the hair found on Defendant's pants **is a match** to Ms. Torres' pubic hair. (*See* 11/30/2009 EH, page 160.)

(R2. 626)(emphasis added).

Finally, in denying Mr. Bogle's newly discovered evidence claim regarding Marcia Turley and the fingernail scrapings, the circuit court again relied in part on Malone's "testimony that one of the hairs collected from the pants that Defendant wore on the night of the murder was microscopically consistent with Margaret Torres's pubic hair." (R2. 654).

In denying Mr. Bogle's challenge, based on the DOJ report, to Malone's testimony at trial, the state circuit court accepted Malone's testimony that he made a transcription error:

> The Court finds Agent Malone's testimony extremely persuasive on this matter. The reference in the bench note to a pubic hair only makes sense if he is referring to K6, a pubic hair, as opposed to K7 which is a head hair. **The Court finds therefore that Defendant has failed to show that Agent Malone testified falsely at Defendant's trial**; consequently, he has failed to show that the State violated *Giglio* in regards to Agent Malone's testimony.

(R2. 657-58)(emphasis added).

The Florida Supreme Court likewise relied on Malone's testimony in its opinion affirming the denial of postconviction relief:

> 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 v. State, 213 So. 3d at 844-45. Further, in finding a lack of prejudice as to Mr. Bogle's guilt phase ineffective assistance of counsel claim, this Court relied in part on the determination that "A pubic hair found near the crotch of Bogle's pants **matched Torres**." 213 So. 3d 833, 846 (Fla. 2017)(emphasis added). In light of the 2013 DOJ Report, the Florida Supreme Court's prior

finding is clearly erroneous.

Though Mr. Bogle's expert, Dr. Melton, opined that Malone's testimony was unscientific, the state circuit court as well as this Court refused to consider or credit her testimony. *Bogle*, 213 So. 3d at 840. To punish Mr. Bogle for the State's failure to disclose exculpatory evidence violates due process.

Mr. Bogle submits that the rulings of the state circuit court and the Florida Supreme Court which relied on the testimony of Malone and the FBI at trial and during the initial postconviction proceedings must be re-examined in light of the recently discovered exculpatory evidence.[13] Moreover, the recently disclosed evidence "cannot be excluded merely because the new scientific evidence is contrary to the scientific evidence that the State relied upon in order to secure a conviction at the original trial. *Hildwin v. State*, 141 So. 3d 1178, 1187 (Fla. 2014).

Further, the Florida Supreme Court's analysis is flawed in that it overlooks the fact that if Mr. Bogle did not prevail on his claim that "'hair comparison in this case was unreliable and flawed'", *see Bogle*, 288 So. 3d 1068, it was only because the State and state courts refused to acknowledge that fact. A conclusion placing the burden on Mr. Bogle to do more than he did violates due process. *See Banks v. Dretke*, 540 U.S. 668, 696

[13]For instance, Mr. Bogle now possesses the exculpatory evidence that was withheld from him at the time of his evidentiary hearing which demonstrates that Malone's explanation as to the inconsistency in his bench notes and testimony was not credible.

(2004)("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

And, if the Florida Supreme Court's analysis is correct then surely the State was aware of the unreliability of hair analysis generally and Malone's testimony at Mr. Bogle's trial and Malone and Robertson's testimony in postconviction. Thus, there can be no doubt that the State violated *Giglio v. United States*, 405 U.S. 150, 153 (1972), due to the repeated "deliberate deception of [the] court[s] and jurors by the presentation of known false evidence [which] is incompatible with 'rudimentary demands of justice.'"

As to the impact of the DOJ's acknowledgment that the testimony was false and misleading, the Florida Supreme Court minimizes it by relying on a single statement made by Malone at trial after repeatedly misleading the jury and the DNA results from the vaginal swab and victim's underwear. In conducting a myopic analysis the Florida Supreme Court ignored the law and almost all of the admissible evidence, certainly the exculpatory evidence, which establishes that Mr. Bogle's conviction and death sentence have been undermined: YSTR DNA evidence that two male individuals left some genetic material beneath Torres' fingernails on the night she was killed – but neither of those individuals was Mr. Bogle. And, that because there was blood beneath Torres' fingernails, it is likely that the DNA was obtained from a blood source; evidence that Andy had told the

prosecution that two individuals were involved in the homicide; evidence that Guy Douglas was involved in the victim's murder; evidence that Malone's testimony regarding the hair was false and misleading; Mr. Bogle's medical records, which include the descriptions and diagrams of facial injuries from the car accident a week before the crime; medical testimony from Dr. Willey who testified that based on the photographs from the hospital, he would not expect the wounds to Mr. Bogle's forehead and face to heal in seven days; evidence demonstrating the flaws in the RFLP and STR DNA testing, including the fact that Detective Larry Lingo inexplicably removed evidence obtained from Mr. Bogle and the vaginal swabs to conduct "investigation" prior to sending the samples to the FBI; clear evidence that a *Giglio* violation occurred because it went unrevealed to Mr. Bogle that law enforcement mishandled the physical evidence, including Mr. Bogle's pants; Patricia Bowmen's testimony that she had driven Mr. Bogle home from the club in the morning hours of the 13th; and Everett Smith's testimony, which completely disproves much of Katie Alfonso's testimony about the "break-in" on September 1, 1991.

CONCLUSION

Petitioner, Brett A. Bogle, requests that certiorari review be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail, first class postage prepaid, to Marilyn Beccue, Assistant Attorney General, Office of the Attorney General Concourse Center Rd., 3507 E. Frontage Rd., Tampa, FL 33607, on July 10, 2020.

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COUNSEL FOR PETITIONER

ATTACHMENT A

288 So.3d 1065
Supreme Court of Florida.

Brett A. BOGLE, Appellant,
v.
STATE of Florida, Appellee.

No. SC17-2151
|
December 19, 2019

Synopsis

Background: After his convictions for murder, burglary with assault or battery, and retaliation against a witness, and his sentence of death, were affirmed by the Supreme Court, 655 So.2d 1103, on direct appeal, and the denial of his initial motion for postconviction relief was also affirmed by the Supreme Court, 213 So.3d 833, defendant filed successive motion for postconviction relief. The Circuit Court, 13th Judicial Circuit, Hillsborough County, Michelle Sisco, J., summarily denied the motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] defendant's claims that State violated *Brady* and *Giglio* were procedurally barred, and

[2] Department of Justice and FBI report that cast doubt on FBI lab examiner's testimony did not entitle defendant to relief on the basis of newly discovered evidence.

Affirmed.

Canady, C.J., filed opinion concurring in result.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (5)

[1] Criminal Law Particular issues and cases

Defendant's claims that State violated *Brady* by withholding exculpatory evidence about the unreliability of an FBI lab examiner's testimony comparing murder victim's pubic hair to a pubic hair found on defendant's pants after the murder, and that it violated *Giglio* by presenting lab examiner's false testimony, were procedurally barred when raised in successive postconviction motion; defendant was well aware of potential deficiencies in lab examiner's testimony long before the release of a Department of Justice and FBI report critical of the testimony, on which defendant relied, and defendant thus could have raised the *Brady* and *Giglio* claims in his first postconviction motion, and did in fact raise a claim that counsel was ineffective for failing to challenge the testimony. U.S. Const. Amend. 6; Fla. R. Crim. P. 3.851(e)(2).

[2] Criminal Law Newly discovered evidence

To prevail on a newly discovered evidence claim, the defendant must satisfy a two-prong test: first, the evidence was not at the time of trial known by the trial court, by the party, or by counsel, and the defendant or his counsel could not have known of it by the use of diligence, and second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.

[3] Criminal Law Newly discovered evidence

A court applying the second prong of the test for evaluating a claim of newly discovered evidence, which asks whether the evidence is of such a nature that it would probably produce an acquittal on retrial, must evaluate the importance of the newly discovered evidence in the broader context of any admissible evidence that could be introduced at a new trial.

[4] Criminal Law Newly discovered evidence

Even if Department of Justice and FBI report that cast doubt on FBI lab examiner's testimony comparing murder victim's pubic hair to a pubic hair found on defendant's pants after the murder constituted "evidence," for purposes of postconviction claim seeking relief on

the basis of newly discovered evidence, the information in the report would not probably produce an acquittal on retrial and, thus, was insufficient to entitle defendant to relief; report merely amplified lab examiner's testimony on cross-examination that hair comparisons did not constitute a basis for absolute personal identification, and more important evidence supported defendant's conviction, including DNA evidence showing his semen in victim's body and underwear. Fla. R. Crim. P. 3.851(e)(2).

[5] **Courts** In general; retroactive or prospective operation

Relief from a death sentence pursuant to decisions of the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616, and Florida Supreme Court in *Hurst v. State*, 202 So.3d 40, which held that facts necessary to a sentence of death must be found unanimously by the jury, and that the jury's recommended sentence of death must be unanimous, is not available to defendants whose death sentences were final before U.S. Supreme Court's decision in *Ring v. Arizona*, which held that a defendant has a Sixth Amendment right to have a jury find the statutory aggravating circumstances necessary for imposition of the death penalty. U.S. Const. Amend. 6.

***1067** An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge - Case No. 291991CF012952000AHC

Attorneys and Law Firms

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Ashley Moody, Attorney General, Tallahassee, Florida, and Timothy A. Freeland, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

Brett A. Bogle, a prisoner under sentence of death, appeals the circuit court's order summarily denying his successive motion for postconviction relief.[1] For the reasons that follow, we affirm the order.

FACTS

In 1992, Bogle was convicted of the first-degree murder of Margaret Torres, burglary with assault or battery, and retaliation against a witness. *Bogle v. State* (*Bogle I*), 655 So. 2d 1103, 1104-05 (Fla. 1995). At an initial penalty phase, the jury recommended death by a seven-to-five vote, but the trial court granted a new penalty phase due to an erroneous admission of evidence. *Id.* at 1105. The trial judge sentenced Bogle to death after the second penalty phase resulted in a jury recommendation of death by a ten-to-two vote. *Id.* This Court affirmed Bogle's conviction and sentence on direct appeal, *id.* at 1110, and Bogle's death sentence became final in 1995.[2] This Court also affirmed the denial of Bogle's initial postconviction motion and denied habeas relief. *Bogle v. State* (*Bogle II*), 213 So. 3d 833, 855 (Fla. 2017).

There were no eyewitnesses to Bogle's murder of Torres. Torres was the sister of a woman with whom Bogle had lived, and Bogle and Torres did not get along. *Bogle I*, 655 So. 2d at 1105. On the night of the murder, Bogle and Torres had been at a bar; Bogle left shortly after Torres. The next day, Torres's "nude and badly beaten body" was found outside the bar. *Id.* Her head had been "crushed with a piece of cement." *Id.* "Additionally, she had semen in her vagina and trauma to her anus consistent with sexual activity that was likely inflicted before death." *Id.* One of the state's witnesses at trial was Agent Michael Malone, an FBI lab examiner. Malone testified that a pubic hair found on Bogle's pants after the murder "microscopically matched the pubic hairs of Margaret Torres." *Bogle II*, 213 So. 3d at 847. On cross-examination, Malone acknowledged that "hair comparisons do not constitute a basis for absolute personal identification." *Id.* Unrelated to Malone's testimony, expert

witnesses testified at trial and at the evidentiary hearing on Bogle's first postconviction motion that Bogle's DNA was consistent with DNA found in Torres's body and underwear. *Id.* at 838, 846, 851.

In 2014, Bogle filed a successive postconviction motion claiming he had newly discovered evidence of *Brady*[3] and *Giglio*[4] violations related to Agent Malone's hair analysis testimony. Specifically, Bogle cited the results of a 2013 federal government review concluding that Malone's testimony in Bogle's case overstated the reliability of microscopic hair comparisons. The successive postconviction motion also alleged that Bogle was entitled to relief under ***1068** *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and under changes to Florida's capital sentencing statute enacted after *Hurst*. In September 2017, the circuit court entered an order summarily denying Bogle's second amended successive postconviction motion, finding that the newly discovered evidence claim was procedurally barred and that Bogle's *Hurst*-related claims lacked merit. This appeal followed.

ANALYSIS

Summary denial of a successive postconviction motion is appropriate "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B). Applying a de novo standard of review, we find that test satisfied here, and we therefore affirm the circuit court's summary denial of Bogle's motion.

Brady, Giglio, and Newly Discovered Evidence Claims

[1] Bogle's successive postconviction motion alleges that the state withheld exculpatory evidence about the asserted unreliability of Malone's testimony (in violation of *Brady*) and knowingly presented Malone's "false" testimony (in violation of *Giglio*). The trial court summarily denied these claims, finding them procedurally barred. We agree.

Bogle's claims rely on the results of a Department of Justice and FBI review of cases in which Agent Malone had testified about microscopic hair analysis. Released to the state in August 2013 and later provided to Bogle, the review found that Malone's testimony in Bogle's case "exceeded the limits of science" in three ways: (1) by stating or implying that an evidentiary hair could be associated with a specific individual to the exclusion of all others; (2) by assigning a statistical weight or probability to the likelihood that an evidentiary hair originated from a particular source; and (3) by citing prior cases to assign a predictive value to bolster the conclusion that an evidentiary hair belonged to a particular individual.

The 2013 DOJ/FBI review is of no help to Bogle here, however, because he cannot use a successive 3.851 motion to litigate issues that he could have raised in his initial postconviction motion. *See* Fla. R. Crim. P. 3.851(e)(2); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007).[5] Bogle was well aware of potential deficiencies in Malone's testimony long before the 2013 review (which, in any event, on its face says nothing about what the state did or did not know about the reliability of Malone's testimony). In our opinion in *Bogle II*, for example, we noted that "Bogle ... claims that his trial counsel was deficient in failing to demonstrate that the hair comparison in this case was unreliable and flawed." 213 So. 3d at 847. Relatedly, the record in Bogle's initial postconviction motion shows that Bogle's counsel had received notice of the results of an earlier DOJ review of Malone's work in Bogle's case. That 1999 review found that the lab reports of Malone's work were not sufficiently documented to determine whether the work had been done in a scientifically reliable manner. With diligence, Bogle could have litigated in his initial postconviction motion the same *Brady* and *Giglio* claims that he raises now.

[2] **[3]** To the extent that Bogle asserts a newly discovered evidence claim that is independent of his *Brady* and *Giglio* claims, that claim fails as well. To prevail on a newly discovered evidence claim, the defendant must satisfy a two-prong test: first, the evidence was not at the time of trial known by the trial court, by the party, ***1069** or by counsel, and the defendant or his counsel could not have known of it by the use of diligence; and second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Duckett v. State*, 231 So. 3d 393, 399 (Fla. 2017); *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). A court applying the second prong of this test must evaluate the importance of the newly discovered evidence in the broader context of any admissible evidence that could be introduced at a new trial. *Duckett*, 231 So. 3d at 399.

[4] Even if we assume that the 2013 review constitutes "evidence" that did not previously exist (and which Bogle therefore could not have known about or uncovered), Bogle cannot demonstrate that the information in the report would probably produce an acquittal on retrial. The report does little more than amplify what Malone already acknowledged on cross-examination at Bogle's trial: that "hair comparisons do not constitute a basis for absolute personal identification." *Bogle II*, 213 So. 3d at 847. And even more importantly, the DNA evidence showing that Bogle's semen was in the murder victim's body and underwear overwhelms the significance of Malone's testimony that a pubic hair of the victim was on Bogle's pants. *See Duckett*, 231 So. 3d at 399-400 (denying a similar newly discovered evidence claim arising out of a 2013 federal government review of Malone's testimony); *Long v. State*, 183 So. 3d 342, 347 (Fla. 2016) (same). The record in this case conclusively refutes Bogle's newly discovered evidence claim.

Hurst Claims

[5] Bogle also challenges the summary denial of his claim that the Sixth and Eighth Amendments, together with post-*Hurst* changes to Florida's capital sentencing statute, demand full retroactive application of this Court's decision in *Hurst v. State*. Under this Court's precedents, *Hurst* relief is not available to defendants, like Bogle, whose death sentences were final prior to the Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has repeatedly denied claims similar to Bogle's, and we decline to revisit our precedents here. *See, e.g.*, *Reese v. State*, 261 So. 3d 1246, 1246-47 (Fla. 2019).

CONCLUSION

For the foregoing reasons, we affirm the postconviction court's summary denial of Bogle's second amended successive postconviction motion.

It is so ordered.

POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

CANADY, C.J., concurs in result with an opinion.

CANADY, C.J., concurring in result.

I agree that the order summarily denying postconviction relief should be affirmed. I concur in the denial of Bogle's *Brady*, *Giglio*, and newly discovered evidence claims. I also agree that Bogle is not entitled to relief on his *Hurst* claims. But I would deny the *Hurst* claims on two grounds. First, I would conclude that no *Hurst* error occurred in this case. I adhere to the view that *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), only requires that the jury find an aggravating circumstance that renders a defendant eligible for a death sentence. *See Hurst v. State*, 202 So. 3d 40, 77-82 (Fla. 2016) (Canady, J., dissenting), *cert. denied*, —— U.S. ——, 137 S. Ct. 2161, 198 L.Ed.2d 246 (2017). Here, that requirement was satisfied because the jury's verdict that Bogle had committed "burglary with force ... on the victim" and her sister two weeks before the murder established ***1070** the existence of the prior violent felony aggravator. *Bogle v. State*, 655 So. 2d 1103, 1105 (Fla. 1995). Second, even if *Hurst* error were present in this case, I would still deny relief. In my view, *Hurst* should not be given retroactive application. *See Mosley v. State*, 209 So. 3d 1248, 1285-91 (Fla. 2016) (Canady, J., concurring in part and dissenting in part).

All Citations

288 So.3d 1065, 44 Fla. L. Weekly S327

Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

2 *Bogle v. Florida*, 516 U.S. 978, 116 S.Ct. 483, 133 L.Ed.2d 410 (1995) (cert. denied).

3 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

4 *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

5 Given this conclusion, we need not address whether Bogle's *Brady* and *Giglio* claims are also untimely. *See* Fla. R. Crim. P. 3.851(d)(2) (setting out limited exceptions to one-year time limit).

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ATTACHMENT B

Supreme Court of Florida

TUESDAY, FEBRUARY 11, 2020

CASE NO.: SC17-2151
Lower Tribunal No(s).:
291991CF012952000AHC

BRETT A. BOGLE vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
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