

DOCKET NO. 20-5065

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 FLORIDA SUPREME COURT

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In 1991 deceased victim Margaret Torres, her skull crushed with a piece of cement, was found behind a Hillsborough County bar. DNA analysis of semen found inside her body matched Brett Bogle, a man who had been dating the victim's sister, Katie Alfonso, and who was not known to be on good terms with the victim. Bogle's frequent arguments with Torres had grown more violent as his relationship with Alfonso deteriorated. Two weeks after Alfonso terminated their relationship, Bogle encountered Torres inside Club 41, and some hours later her body was discovered behind the bar. Part of the evidence linking Bogle to the homicide included testimony from FBI Analyst Michael Malone, who concluded that a pubic hair found on Bogle's clothing could have come from the victim. Post-trial mitochondrial DNA testing confirmed Malone's testimony.

Bogle has long been critical of the State's hair comparison evidence. Of particular relevance to the instant petition is Bogle's unsuccessful 1997 postconviction motion challenging the validity of Malone's conclusions. Florida's high court affirmed the postconviction court's determination that the claim lacked materiality, and this Court declined to grant certiorari review.

Some years later, the Justice Department released a memo in 2013 that harshly criticized Malone and suggested that his testimony exceeded the bounds of science. Bogle filed a

successive postconviction motion citing to the 2013 report and once again asserted, as he did in 1997, that Malone's testimony was unreliable. The postconviction court, noting that the two claims were substantially the same, denied relief on procedural grounds, a determination that the Florida Supreme Court affirmed. Bogle now seeks certiorari review.

Bogle's petition gives rise to the following questions before this Honorable Court.

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

I.

Whether this Court should review the correctness of Florida's decision to apply a state procedural bar because a substantially identical claim was previously rejected on the merits?

II.

Whether Brady v. Maryland, 373 U.S. 83 (1963), mandates relief where the information in question, the DOJ's 2013 review of Malone's testimony, did not exist at the time of Bogle's 1992 trial, was never withheld from the defense by the State, and in any event did not prejudice Bogle?

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PARTIES TO THE PROCEEDINGS

The following were parties in the proceedings below:

- 1) Brett A. Bogle, Petitioner in this Court, was the appellant below.
- 2) State of Florida, Respondent in this Court, was the appellee below.

CITATION TO OPINION BELOW

The published opinion of the Florida Supreme Court is reported at Bogle v. State, 288 So. 3d 1065 (Fla. 2019).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on December 19, 2019, and Petitioner's motion for rehearing was denied on January 3, 2020. (Pet. Appendix A). Respondent submits that any jurisdiction this Court may have over the Florida Supreme Court arises out of 28 U.S.C. § 1254(1). However, this Court's jurisdiction is limited to federal constitutional issues which were properly presented and considered by the Florida Supreme Court below. Illinois v. Gates, 462 U.S. 213, 217-19 (1983); Webb v. Webb, 451 U.S. 493, 496-97 (1981). As will be addressed more fully in the argument section of this brief, this Court does not have jurisdiction over the questions presented in Bogle's petition because they arise entirely out of a claim that was deemed untimely and procedurally barred by the state court and there is no federal constitutional dimension.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Petitioner, Brett A. Bogle, a counselled Florida prisoner under sentence of death for the murder of Margaret Torres, seeks certiorari review of the Florida Supreme Court's decision affirming denial of Bogle's successive postconviction claim because it had already been rejected on the merits and was therefore procedurally barred.

In Bogle v. State, 655 So. 2d 1103 (Fla. 1995), the Florida Supreme Court provided the following summary of the facts:

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.

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.

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.), cert. denied, 516 U.S. 978 (1995).

Direct Appeal

The Florida Supreme Court affirmed his conviction and death sentence in Bogle v. State, 655 So. 2d 1103 (Fla. 1995). This Court denied certiorari review. Bogle v. Florida, 516 U.S. 578 (1995).

State Postconviction Proceedings

Bogle filed his initial postconviction motion in 1997. He raised (among other things) a challenge to the FBI's hair and

fiber expert Michael Malone, claiming that the State violated Brady¹ when it failed to disclose Malone's bench notes which, in Bogle's view, would have indicated a lack of precision in his method. Florida's high court affirmed the postconviction court's Order finding that the notes lacked materiality. Bogle v. State, 213 So. 2d 833, 844 (Fla. 2017). Certiorari review was denied. Bogle v. Florida, 138 S. Ct 738 (2018).

Bogle's next challenge to Malone's testimony, filed in 2014, came after the U.S. Department of Justice, in a report released in 2013, concluded that some of Malone's hair comparison testimony was overstated and "exceeded the bounds of science." The lower court found that the DOJ's new report contained nothing that was not previously known to Bogle, any flaws in Malone's analysis and testimony lacked materiality, and because Bogle could have pursued his 2014 claims in his first postconviction motion, his successive claim was procedurally barred under Florida law. The Florida Supreme Court agreed. Bogle v. State, 288 So. 3d 1065 (Fla. 2019). Bogle now seeks certiorari review.

¹ Brady v. Maryland, 373 U.S. 83 (1963).

REASONS FOR DENYING THE WRIT

I.

Whether this Court should decline to review the correctness of Florida's decision to apply a state procedural bar where an identical claim was previously rejected on the merits?

Bogle advances two claims in his Petition. First, he asserts that the Florida Supreme Court erred in rejecting on procedural grounds his postconviction Giglio² and Brady claims. Secondly, he contends that the State violated Brady by failing to disclose impeachment evidence he could have used to challenge the hair comparison testimony adduced at Bogle's trial. Review of both claims should be denied.

This Court reserves its certiorari jurisdiction primarily to resolve conflicts among the United States courts of appeal and state courts "concerning the meaning and provisions of federal law." Braxton v. United States, 500 U.S. 344, 348 (1991). Bogle's argument is of extremely limited scope, does not identify any federal or state court conflict, and instead amounts to little more than his disagreement with the Florida Supreme Court's resolution of his postconviction claims. In short, there is no federal constitutional question here and no reason for this Court to grant review.

Cases that do not divide the federal or state courts or

² Giglio v. United States, 405 U.S. 150 (1972).

that do not present important, unsettled questions of federal law usually do not merit certiorari review. Rockford Life Insurance Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 184, n. 3 (1987). See also Supreme Court Rule 10. None of these considerations apply to the claims advanced by Bogle, however, and his request for Certiorari review should be denied.

Bogle's argument before this Court arises out of the testimony of Michael Malone, an FBI hair comparison analyst who testified that pubic hair found on Bogle's pants was consistent with and therefore could have come from the victim. The U.S. Department of Justice (DOJ) conducted a review and in 1999 released a report critical of Malone. Among other things, the DOJ concluded that Malone failed to adequately document his analysis in his bench notes, thus calling into question the scientific validity of his testimony. Bogle unsuccessfully challenged Malone's testimony in his initial postconviction motion in 1997. When the DOJ released another report in 2013 indicating that Malone's testimony overstated the significance of his findings and "exceeded the bounds of science," Bogle sought to use it as the basis for a successive postconviction claim. Review of the lower court's rejection on procedural grounds is the subject of the instant petition.

Florida rejected Bogle's claim because it was procedurally

barred and lacked merit. Florida imposes strict limits on successive postconviction motions, and prohibits a defendant from advancing a claim that was raised, or could have been raised, in a previous proceeding. In Bogle's case, the court found that he had already raised a substantially similar challenge to Malone's testimony in his initial postconviction motion which was denied on the merits and affirmed on review. See Bogle v. State, 213 So. 3d 833 (Fla. 2017) at 844. Florida law does not permit Bogle to raise the same claim twice, and the procedural bar was properly applied here. See Fla. R. Crim. P. 3.851(e)(2), Schwab v. State, 969 So. 2d 318 (Fla. 2007).

In the alternative, Florida's high court also rejected Bogle's successive claim on the merits. As newly discovered evidence, Florida requires the defense to establish that the new evidence could not have been discovered with diligence at the time of trial, and it must be of such a character that it would likely produce an acquittal. Jones v. State, 701 So. 2d 512 (Fla. 1998). Bogle's postconviction court found that the 2013 report did nothing more than amplify what was already known at the time of his initial postconviction motion, and was not newly discovered evidence. Bogle v. State, 288 So. 3d 1065 at 1068.

In rejecting Bogle's subsidiary claim that the State also violated Brady by failing to disclose the 2013 report, the

postconviction court noted that because it did not exist at the time of Bogle's trial, the DOJ report could not have been suppressed or withheld by the State.

On review, Florida's high court agreed, saying that the 2013 report merely documented the opinions of other DOJ experts and was not evidence. And, the court found that Bogle's claim lacked materiality. While Malone testified that the pubic hair found on Bogle's pants was consistent with and therefore could have come from the victim, Malone also admitted on cross that hair comparison cannot be used as a basis for establishing "absolute personal identification." The Florida Supreme Court found that while the 2013 report criticized Malone for overstating the significance of his findings as a means of identifying the source of a given strand of hair, his cross-examination testimony redeemed him. Indeed, the 2013 report did little more than amplify Malone's cross examination testimony. And Bogle suffered no prejudice. While he complains about the alleged flaws in Malone's hair analysis that linked him to the murder, he inexplicably ignores the fact that his semen was found in the victim's body. The Florida Supreme Court found the DNA evidence to be strongly persuasive. The presence of his DNA, the Court concluded, "overwhelms the significance of Malone's testimony" in terms of establishing Bogle's guilt. Bogle v.

State, 288 So. 3d at 1069.

Bogle also spends considerable time complaining about what he calls the "false and misleading" hair analysis testimony, and he infers that but for Malone, he would not have been found guilty or sentenced to death. Bogle ignores the fact that post-trial testing of the pubic hair's mitochondrial DNA confirmed that the hair found on Bogle's pants was consistent with having come from the victim. If Bogle were retried without Malone, the mitochondrial DNA still establishes that the hair most likely came from the victim. A copy of the test results is attached as Appendix A. As Malone told Bogle's jury, microscopic hair analysis is not as conclusive as fingerprinting, but narrows the field of individuals from whom the hair could have come. Mitochondrial DNA is similarly not conclusive, but is the functional equivalent of Malone's analysis and equally probative of Bogle's guilt.

Bogle next faults the Florida Supreme Court for failing to consider all admissible evidence in assessing the strength of his newly discovered evidence claim. Bogle, perhaps deliberately, ignores express language in the Florida high court's opinion that a correct evaluation of Bogle's newly discovered evidence claim requires consideration of all admissible evidence that could be introduced in the event of a

retrial. Bogle, 288 So. 3d at 1069. While the opinion does not contain any specific discussion of evidence, it is incorrect to say that the court failed to consider the admissible evidence in denying Bogle's claim, particularly when the Court's recitation of the applicable law documents the analysis used in assessing the strength of Bogle's claim. Bogle's complaint in this regard lacks merit.

Bogle's argument before this Court merely reflects his personal disagreement with the Florida Supreme Court's resolution of his claim. The lower court correctly applied this Court's precedent and to the extent that it relied upon Florida law to reject Bogle's claims, did not violate his constitutional rights. Certiorari review is not warranted here.

II.

Whether Brady v. Maryland, 373 U.S. 83 (1963) mandates relief where the information in question, the DOJ's 2013 review of Malone's testimony, did not exist at the time of Bogle's 1992 trial, was never withheld from the defense by the State, and in any event did not prejudice Bogle?

In his second claim, Bogle asserts that the State violated Brady v. Maryland when it failed to timely disclose the 2013 DOJ report. In rejecting this claim, the Court concluded not only that the claim was procedurally barred under Florida law, but also that the 2013 report contained nothing substantive that was

not previously known at the time Bogle advanced his initial postconviction motion. The Court specifically noted a DOJ report released in 1999 that strongly criticized Malone for failing to document his analysis; indeed, the DOJ found, his bench notes were so inadequate that it was impossible to assess whether his analysis was scientifically reliable.

Significantly, Bogle's initial postconviction claim asserted that counsel was ineffective for failing to secure Malone's bench notes and take other steps to impeach Malone's reliability. Bogle v. State, 213 So. 3d 833 (Fla. 2017). His 2014 claim merely restated his earlier one by citing to the 2013 report's criticism that Malone's testimony that hair found on Bogle's pants "matched" known hair belonging to the victim; this testimony, according to the 2013 report, "exceeded the bounds of science."

Even if this Court were to conclude that Bogle's 2014 motion contained new claims, Florida's high court found that the 1999 DOJ report adequately outlined the flaws in Malone's work product, was in Bogle's possession at the time of his initial postconviction motion,³ and provided the basis for every argument advanced in his 2014 postconviction motion. In short, to the

³ The postconviction court also found that Bogle received the 2013 DOJ report in September of the same year it was released. Any prejudice that Bogle claims to have suffered because the State allegedly suppressed or withheld it is *de minimus*.

extent that any new claims were raised, Bogle could have drafted and filed the motion at issue here while his initial postconviction motion was still under consideration.

Accordingly, Bogle's assertion that the State's alleged delay in providing him with the 2013 report fails because Bogle has not established that he was prejudiced. And, regardless of when he actually received it, Bogle could not advance the claim raised in his 2014 motion under Florida law because it amounted to nothing more than a restatement of previous argument. For that reason, Florida's correct determination that Bogle's 2014 motion was procedurally barred similarly precludes a finding that the State violated Brady; if Bogle was barred from raising the claim because it was available but omitted from his initial 1997 postconviction motion, he suffered no prejudice even if we were to agree that the State withheld the 2013 report.

On this record, the Florida Supreme Court's application of Brady and Giglio was correct. Even if this Court were inclined to grant review, Bogle's claims would require this Court to engage in fact-specific examination of a routine and meritless claim focusing primarily on how Florida applied its own state law regarding procedural bars. 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

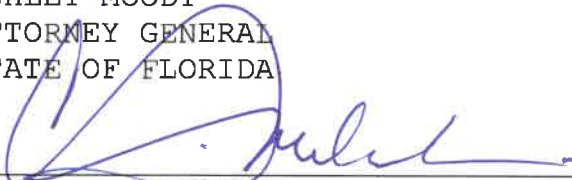
(1925); Texas v. Mead, 465 U.S. 1041 (1984). This Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). Accordingly, Bogle's request for certiorari review should be rejected.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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