

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO. SC02-37
Lower Tribunal Nos. 511991CF000521A000WS;
512015CF0A0147A000WS

OSCAR RAY BOLIN, JR.,
Appellant

v.

STATE OF FLORIDA,
Appellee

_____ /

**MOTION TO MODIFY BRIEFING SCHEDULE AND
REQUEST FOR ORAL ARGUMENT**

Appellant Oscar Ray Bolin, Jr., by and through his undersigned counsel, respectfully requests that this Honorable Court modify the expedited death warrant briefing schedule set forth in this Court's November 2, 2015 order, stay the active death warrant, and permit this appeal to proceed along a routine briefing and oral argument schedule. As grounds therefore, Appellant Bolin states as follows:

BACKGROUND AND PROCEDURAL HISTORY

1. Oscar Ray Bolin Jr. is currently incarcerated under an impending sentence of death imposed in Lower Tribunal Case Number 511991CF000521A000WS, in the Sixth Judicial Circuit of Florida, in and for Pasco County. On October 30, 2015, the Governor signed a death warrant and scheduled execution for January 7, 2016.

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2. On September 26, 2014, Mr. Bolin filed in the Sixth Circuit Court a successive motion to vacate and set aside the judgment and sentence of death based on newly discovered evidence. The motion raised the following issues: I) “Newly Discovered Evidence of the Confession of Steven Kasler,” II) “Newly Discovered Evidence of the Prior Bad Acts of FBI Agent Michael Malone, Malone’s Handling of Evidence that was Used Against Mr. Bolin, and the Probable Tampering that Occurred During Malone’s Handling of the Evidence,” and III) “The State’s Failure to Disclose Information Regarding Malone’s Misconduct and the Investigation into his Work Violated the State’s Duty to Disclose Favorable, Material Evidence Pursuant to *Brady v. Maryland*.”

3. Claim I arose based on the fact that an Ohio inmate named Steven Kasler confessed to having committed the murder at issue in the instant case. Shortly after the circuit court initially granted an evidentiary hearing on the Kasler confession issue, the parties learned that Kasler committed suicide. Given that unexpected event, the circuit court struck Claim I of Mr. Bolin’s motion with leave to amend the claim. The court also granted leave for Mr. Bolin to add an additional *Brady*-related claim that tied back to the Kasler issue and which was set forth as a Claim IV.

4. The circuit court went on to summarily deny the Malone-related grounds of the motion, Claims II and III, in a non-final order entered on December 15, 2014.

In denying relief on the Malone claims, the court found that the issues were conclusive and speculative at that point. In so reasoning, the court noted that the defense was not able to present any evidence of actual tampering of evidence on the part of Malone. Mr. Bolin, however, had requested an evidentiary on the Malone issues in hopes of being able to present such evidence. The court also found that the Malone issues were untimely because the prior Bolin defense team has known of issues regarding Malone for several years now. Mr. Bolin's claim, however, had relied on a case-specific letter he had received from the Department of Justice regarding the Malone issues, as well as on a U.S. Office of the Inspector General Report, issued in July, 2014, which criticized prior investigations into Malone and which reached new and additional conclusions regarding Malone's tainted work with the FBI.

5. On October 19, 2015, after conducting an evidentiary hearing on the Kasler claims (Claims I and IV), the circuit court entered its final order denying the motion. In denying the Claim I Kasler ground and the related *Brady v. Maryland* ground, the court reasoned that the Kasler confession was not evidence of a magnitude that it would probably produce an acquittal or a sentence other than death if admitted at a retrial.

6. Shortly thereafter, on October 30, 2015, before for the time for filing a motion for rehearing had passed, the Governor signed the death warrant for Mr. Bolin.

7. On November 2, 2015, this Court, correspondingly, issued a truncated briefing schedule in light of the death warrant having been signed.

8. On November 3, 2015, Mr. Bolin filed a timely motion for rehearing in the circuit court, setting facts points of law that the circuit court had overlooked with regard to both the Kasler and Malone claims, as well as newly discovered facts that pertained to the Kasler claims.

9. Mr. Bolin then filed a successive motion to vacate his death sentence pursuant to Rule 3.851(h)(5). That motion set forth a fifth¹ claim for relief: that “The Current Death Warrant Selection and Signing Procedure Results in the Arbitrary and Capricious Implementation of the Death Penalty in Violation of the Eighth and Fourteenth Amendments, Deprives Defendants of Due Process, and Violates the Separation of Powers Doctrine.”

10. On November 20, 2015, the circuit court entered an order summarily denying Mr. Bolin’s motion for rehearing and his successive motion to vacate.

11. Contemporaneous with this motion, Mr. Bolin filed a notice of appeal.

¹ In order to avoid any confusion if and when the motion should be appealed, Mr. Bolin reasserted the original four claims of his successive Rule 3.851 motion, which were then still pending on rehearing in the circuit court, and asserted the additional Rule 3.851(h)(5) claim as a Claim V.

GROUNDS FOR MODIFICATION OF THE BRIEFING SCHEDULE

12. As set forth above, the circuit court found that Mr. Bolin's Kasler-based newly discovered evidence grounds were sufficient to require merits review.

13. The appeal from the denial of Mr. Bolin's Rule 3.851 motion will require this Court to conduct an extensive merits review of significant issues arising from his newly discovered evidence. Under the precedent established by this Court, Mr. Bolin's counsel will be required to brief, and the Court will be required to evaluate, Mr. Bolin's newly discovered evidence arguments in the context of the *totality* of the evidence presented at trial, as well as the evidence uncovered during *all* post-conviction proceedings over the nearly 20 years since Mr. Bolin's conviction and sentencing. See *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *Swafford v. State*, 125 So. 3d 760 (Fla. 2013); *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014).

14. In *Swafford*, this Court held that, in evaluating post-conviction claims based on newly discovered evidence, courts must consider the *cumulative* effect of *all* of the evidence that would be admissible at a retrial. The cumulative analysis must include *all* of the evidence that was presented at the original trial, and *all* evidence uncovered during post-conviction proceedings, including any evidence that was previously excluded as procedurally barred, as well as any evidence underlying previously-presented claims under *Brady v. Maryland*, 373 U.S. 83 (1963). "In

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

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

16. The cumulative, probabilistic assessment required under *Swafford*, *Hildwin*, and related cases should not be undertaken within the constricted briefing schedule initiated by a death warrant.

17. In light of the significance of Mr. Bolin's newly discovered evidence, as well as the cumulative analysis demands of *Swafford*, *Hildwin*, and related cases, Mr. Bolin respectfully submits that counsel cannot professionally brief the issues, and the Court, in turn, cannot effectuate meaningful review of the denial of Rule 3.851 relief, in the constricted "under warrant" briefing schedule set forth in this Court's November 2, 2015 order.

18. Mr. Bolin also submits, respectfully, that the Court will not be able to conduct adequate review of the significant merits issues in the appeal without a stay of the death warrant.

19. Mr. Bolin's request that the Court alter the current briefing schedule, enter an untruncated schedule, permit oral argument, and enter a stay in order to proceed without the exigencies created by this death warrant is consistent with the perspective of the United States Supreme Court and the rationale underlying the current approach to cases litigated under Florida Rule of Criminal Procedure 3.851. Even under the framework of the federal habeas corpus statute -- a statutory framework more restrictive than Florida's system of post-conviction review -- the United States Supreme Court has endorsed a perspective consistent with Mr. Bolin's motion. Accordingly, the United States Supreme Court held that when a claim that was not available earlier, and therefore could not be presented earlier, is presented in a second petition, that petition should not be treated as a "successive"

petition, but the petitioner's claim, evidence, and argument should be reviewed in a manner consistent with the review afforded in first petition cases. *See Panetti v. Quarterman*, 551 U.S. 930 (2007). In such circumstances, the petition should be treated in the manner an initial petition would be treated, without the truncated timing and review associated with petitions after the first round of collateral litigation. Mr. Bolin's case is in that posture as the Circuit Court has found that this litigation is founded on a claim, and supporting evidence, that was not available earlier, and therefore that he claim could not be presented until the current post-conviction proceeding.

20. As to Florida litigation under Rule 3.851, the Court Commentary to the 1993 adoption of Rule 3.851 sets forth: “[I]t is important to emphasize that the governor agrees that absent the circumstances where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will be issued during the initial round of federal and state review, providing that counsel for death penalty defendants is proceeding in a timely diligent manner. This Court agrees that the initial round of post-conviction proceedings should proceed in a deliberate but timely manner without the pressure of a pending death warrant.”

21. While Mr. Bolin's current Rule 3.851 motion is not his first motion, it is the first motion on the new and previously unavailable evidence, i.e., it is a “first motion” for purposes of the current newly discovered evidence claim, which could

not have been raised earlier. As noted, the Circuit Court has found that the new evidence was not previously available. Thus, this is the first round of litigation concerning the evidence that another inmate confessed to the murder for which Mr. Bolin was convicted.

22. Counsel know only one other instance in Florida where an evidentiary hearing was conducted on a newly discovered evidence claim and a death warrant was signed after the evidentiary hearing had been conducted, but before this Court's appellate review was completed. That instance was the case of Paul Beasley Johnson. There, this Court stayed Mr. Johnson's execution, conducted oral argument and plenary, careful review, and ultimately vacated the death sentence, holding that it was infected by constitutional error. *See Johnson v. State*, 44 So. 3d 51 (Fla. 2010). Like Mr. Johnson's case, where this Court entered a stay and conducted full review, Mr. Bolin's case should also be afforded untruncated review, oral argument, and a stay of execution to effectuate such careful review without the exigencies created by the death warrant.

23. Given the circumstances in Mr. Bolin's case -- where an evidentiary hearing has been conducted and a determination has been made that the petition is predicated previously unavailable evidence that is newly discovered within the meaning of *Jones v. State*, 591 So. 2d 911 (1991), this Court's commentary to the adoption of Rule 3.851 should apply. Mr. Bolin's appeal, therefore, "should

proceed in a deliberate but timely manner without the pressure of a pending death warrant.”

WHEREFORE, based on the foregoing, Mr. Bolin respectfully requests that the Court stay the death warrant and modify the briefing schedule to permit the normal, untruncated appellate process to proceed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by email to the Office of the Attorney General at capapp@myfloridalegal.com; by email to the Office of the State Attorney at smacks@co.pinellas.fl.us; and by email to warrant@flcourts.org, on this 23rd day of November, 2015.

s/ J. Jervis Wise

J. JERVIS WISE, ESQ.
BRUNVAND WISE, P.A.
615 Turner Street
Clearwater, FL 33756
Ph: (727) 446-7505
Fax: (727) 446-8147
Email: jervis@acquitter.com
Florida Bar No. 0019181
Attorney for Petitioner

s/ Bjorn E. Brunvand

BJORN E. BRUNVAND, ESQ.
BRUNVAND WISE, P.A.
615 Turner Street
Clearwater, FL 33756
Ph: (727) 446-7505
Fax: (727) 446-8147
Email: bjorn@acquitter.com
Florida Bar No. 0831077
Attorney for Petitioner