IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,208

CHARLES MICHAEL KIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CERTIFICATION OF FONT

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ARGUMENT IN REPLY

ARGUMENT I

The only argument properly before the Court as to this issue is the propriety of the lower court's application of a procedural bar. The State goes further, however, and in addition to defending the application of the procedural bar, argues that O'Kelly's testimony is not newly discovered and that Mr. Kight's death sentence is not unconstitutionally disparate. As discussed below in Section 2, infra, these arguments are waived by the State for failing to cross-appeal the lower court's finding that Mr. Kight's death sentence is unconstitutionally disparate in light of the newly discovered evidence of O'Kelly's testimony and the record as it now exists.

1. This Claim is Not Procedurally Barred.

This Court's determination on direct appeal that Mr. Kight's sentence was proportionate to that of his codefendant Gary Hutto was based on the appellate record as it existed at the time. The State candidly concedes that this finding can be overcome if Mr. Kight "can present newly discovered evidence materially calling into question the relative involvement of the two codefendants"

(AB at 34).[1] The circuit court explicitly found after conducting an evidentiary hearing that Mr. Kight in fact presented such evidence:

> In his trial memorandum, Defendant also placed great emphasis on the fact that the death sentence was imposed upon him, as opposed to the lesser sentence Mr. Hutto received. That aspect of the case is very troubling to this Court. **An over-all review of the record herein indicates that Mr. Hutto's culpability for the murder was at least equal to that of Mr. Kight's. Thus, the death sentence herein appears unconstitutionally dispar[a]te.**

(PC-R. 452) (citations omitted) (emphasis added). Because the lower court's explicit findings "materially call into question the relative involvement of the two codefendants" (AB at 34), relief at this time is mandated under the law and under the candid concession by the State.

In the face of an explicit finding by the lower court that Mr. O'Kelly's testimony was newly-discovered and that Mr. Kight's death sentence is unconstitutionally disparate, the State resorts to usual boilerplate recitations of layers of alleged procedural bars. First, the State totally misses the point in "emphatically" stating that Hutto's sentence is not "new" evidence (AB at 35). Mr. Kight is not making the argument that the "newly discovered evidence" is Hutto's second-degree murder

[1]References to the State's Answer Brief shall be designated as "AB at page #."

conviction and subsequent life sentence, nor did the lower court make that finding. Rather, the lower court found as a matter of historical fact that (1) O'Kelly's testimony regarding inculpatory statements made by Gary Hutto was newly discovered evidence, and (2) that in light of the record at this time, Mr. Kight's death sentence is disproportionate in light of O'Kelly's testimony. These findings of fact are due deference by this Court. See Porter v. State, 723 So. 2d 191 (Fla. 1998) ("we defer to the present trial judge's resolution of issues of fact"). Accord Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (citation omitted) ("this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court"). The State's repeated references to the prior determinations regarding relative culpability between Mr. Kight and Hutto do not contemplate that the record before this Court at this time is vastly different from when this issue was previously addressed, as the lower court recognized.

The State asserts that this case is "controlled" by Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994);[2] however, in

[2]The lower court's basis for relying on Steinhorst was that, in its view, Mr. Kight could not challenge the disproportionality of his sentence, even in light of new evidence, because the issue of proportionality had been decided on direct appeal (PC-R. 453).

the next sentence, the State, speaking out of both sides of its mouth, repeats its concession that this claim is not barred in event of the discovery of "new evidence materially affecting any judgment made at that time" (AB at 36). The lower court made precisely that finding, which the State does not appear or is unwilling to grasp. Other than arguing that Mr. Kight previously raised a proportionality claim, the State does not address the simple fact that the newly discovered evidence of O'Kelly's testimony regarding Hutto's involvement in the murder totally changes the proportionality picture, as the lower court judge expressly found as a matter of fact.

As discussed in Mr. Kight's Initial Brief, the lower court's reliance on Steinhorst was misplaced, particularly in light of the State's concession that a procedural bar would only apply "absent new evidence" (AB at 36).[3] In light of the lower court's

[3]For the first time on appeal, the State argues that the proportionality claim is likewise barred because it was raised in the post-hearing memorandum and not explicitly addressed in the Rule 3.850 motion (AB at 36-37). This argument was not asserted below, and it is thus waived. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). Significantly, the lower court did not rule that the proportionality claim was barred for this reason. Moreover, the State was clearly on notice of the claims at issue. Mr. Kight's Rule 3.850 motion clearly alleged that the newly discovered evidence "exculpates Mr. Kight from being the major participant in the crime" (PC-R. 8), that "[i]t is consistent with, and corroborates, the testimony proffered at trial that Mr. Hutto was an intelligent and manipulative ex-prison guard capable of using, and willing to use, people with lesser mental capacities, such as the retarded Mr. Kight, to escape

finding that O'Kelly's testimony was in fact newly discovered, the lower court made a simple legal error in assuming that because proportionality was previously addressed, it could not be re-addressed in light of the new evidence. An issue cannot be "newly discovered" and at the same time "procedurally barred." The two concepts are internally inconsistent.

Under either law-of-the case or newly-discovered evidence principles, the State's concession that the previous determination of proportionality can be revisited in light of newly-discovered evidence is supported by the law. This Court has held that its jurisdiction over an appeal necessarily

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responsibility for his murder of Lawrence Butler" (PC-R. 9), and that the new evidence of Hutto's greater responsibility would have been significant at the penalty phase and that it infected all stages of his case, including his direct appeal (PC-R. 11). Moreover, in his motion for rehearing from the initial summary denial of the Rule 3.850 motion, Mr. Kight further emphasized that the newly discovered evidence in the form of O'Kelly's testimony "raises questions about the proportionality of Mr. Kight's sentence" (PC-R. 90) (citing Hazen v. State, 700 So. 2d 1207 (Fla. 1997)). The trial court granted Mr. Kight's rehearing motion and ordered a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) (PC-R. 112-13). Subsequently, the State **conceded** that Mr. Kight "is probably entitled to an evidentiary hearing as to the first allegation that there is newly discovered evidence" (PC-R. 143). The lower court subsequently granted a hearing on the allegations (PC-R. 157). Given the allegations set forth below, it was clearly permissible for the lower court to find that the legal effect of the newly discovered evidence resulted in Mr. Kight's death sentence being unconstitutionally disparate. See, e.g. Porter v. State, 723 So. 2d 191, 196 (Fla. 1998).

includes the "authority to change the law of the case previously set forth." Jones v. State, 559 So. 2d 204, 206 (Fla. 1990). See also Brunner Enterprises v. Department of Revenue, 452 So. 2d 550 (Fla. 1984) ("We are the only court that has the power to change the law of the case established by this Court"). In Preston v. State, 444 So. 2d 939, 942 (Fla. 1984), a capital case, the Court reaffirmed that "an appellate court does have the power to reconsider and correct erroneous rulings notwithstanding that such rulings have become the law of the case." The Court lifted the "law of the case" in Preston because "[t]he interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue." Id.

In an analogous situation, this Court recently revisited a previous ruling of procedural bar, noting that new evidence presented by the defendant overcame the procedural bar found to exist in a prior determination of the issue. Porter v. State, 723 So. 2d 191, 197 (Fla. 1998). Just as the newly-discovered evidence of judicial bias warranted overcoming a procedural bar and required a previously-litigated claim to be relitigated in Porter, the newly discovered evidence presented by Mr. Kight and found by the trial court requires that the proportionality analysis conducted on appeal be revisited and, in light of the lower court's findings of fact, requires that relief be granted at this time.

2. The Appellee's Waiver of the Merits of the Claim.

The State next argues that "Kight's death sentence is not disproportionate, with or without O'Kelly's testimony" (AB at 37). This is an argument which has been waived by the State. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). The State did not cross-appeal the lower court's order finding that Mr. Kight's death sentence was unconstitutionally disparate, and thus cannot challenge those findings on appeal. The lower court's findings thus stand; but for an erroneous application of a procedural bar, it would in fact be the State appealing this order, not Mr. Kight.

Notwithstanding the lower court's finding of fact that O'Kelly's testimony was credible and constituted newly discovered evidence, the State argues that "this Court explicitly found on direct appeal that the record supported the determination that Kight was the actual killer" (AB at 35). This argument of course ignores the fact that the record before the Court on direct appeal is vastly different than the record as it presently exists. The State's argument ignores the testimony below of O'Kelly, as well as the cumulative effect of the other evidence adduced in Mr. Kight's postconviction proceedings; the evidence that Hutto, not Charles Kight, was the actual killer, has mounted since the time of Mr. Kight's direct appeal, and all of this information must now be considered. See Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Swafford v. State, 679 So. 2d 736 (Fla. 1996).[4] This evidence is discussed at length in Mr. Kight's Initial Brief and will not be repeated here. Mr. Kight would, however, note the concessions made by the State in its brief regarding Hutto's involvement in the murder. See AB at 39 ("Hutto obviously was a party to the murder, and pled guilty to second degree murder. The state acknowledged at trial that

[4]The State complains about Mr. Kight's attempts to incorporate issues raised previously (AB at 8). The State fails to cite contrary authority. For example, in Swafford, this Court held that, in assessing a newly-discovered evidence claim, any trial evidence and prior testimony adduced in postconviction proceedings must be considered. Swafford, 679 So. 2d at 739 ("If the trial court determines that Lestz's statement is newly discovered evidence, it must then determine whether the statement, in conjunction with the evidence introduced in Swafford's first Rule 3.850 motion and the evidence introduced at trial, would have probably produced an acquittal").

Hutto's participation may have been greater than he was willing to admit. Furthermore, evidence was presented at trial that Hutto may have stabbed the victim: Kight said he did, and Lee Forman and Clifford Cutwright testified that Hutto had admitted to them that he had stabbed the victim"); AB at 42 ("evidence presented at trial indicated that Hutto participated in the murder, and may well have stabbed the victim and time or two himself"). Even the trial prosecutor recognized before the jury:

> Mr. Hutto is not on trial here. **With regard to his involvement it's a difficult question. It is honestly a difficult question.**

(R. 2380) (emphasis added). After hearing O'Kelly's testimony, the lower court also concluded that the relative involvement of Hutto and Mr. Kight "is very troubling to this Court" (PC-R. 452).

Faced with a finding that O'Kelly's testimony was credible, the State nonetheless asserts it was not (AB at 39). The State fails to cite controlling case law. See Porter, 723 So. 2d at 196 ("we defer to the present trial judge's resolution of issues of fact"); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (citation omitted) ("this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court"). Thus, not only has the State waived a challenge to the underlying finding by the lower court, the State's arguments also lack merit. Relief is warranted.

ARGUMENT II

The pith of the State's argument that the newly-discovered evidence of O'Kelly's testimony does not establish that Mr. Kight is entitled to a new trial or sentencing proceeding is that O'Kelly was not a credible witness (AB at 42).[5] The State overlooks that the lower court found O'Kelly to be credible and that his testimony was newly-discovered evidence. This finding is entitled to deference by this Court. See Porter v. State, 723 So. 2d 191 (Fla. 1998) ("we defer to the present trial judge's resolution of issues of fact"). Accord Blanco v. State, 702 So. 2d 1250 (Fla. 1997).

As to the effects of O'Kelly's testimony on the outcome of Mr. Kight's sentencing phase, the State argues that "O'Kelly's testimony simply adds nothing new to the sentencing calculus" because it "fails to contradict in any way evidence presented at trial establishing to the satisfaction of the jury and trial

[5]That the State would make this argument is particularly specious, given its State's involvement in procuring O'Kelly's the statement after having O'Kelly arrested in Chicago. The "inconsistent" statement discussed by the State is the one given to Assistant State Attorney Laura Starett in a Chicago holding cell while handcuffed to a wall (PC-R. 546, 549). State Attorney investigator Abramowitz acknowledged at the evidentiary hearing that O'Kelly was arrested in Chicago at the initiative of the Duval County State Attorney's Office which has contacted the Chicago authorities and requested that an NCIC search be done to uncover any outstanding warrants (PC-R. 627). Given its conduct in procuring these statements, the State should be estopped from arguing they establish O'Kelly's lack of credibility.

judge that Kight was the actual killer" (AB at 42). As discussed below, these arguments fail to contemplate O'Kelly's testimony as well as the record. Even the lower court recognized that the newly-discovered evidence "could have been helpful to Mr. Kight during the penalty phase of the trial" (PC-R. 451). The court, however, found the evidence was "at best, cumulative" as to whether a life sentence would probably have resulted (PC-R. 452). While the lower court was correct in concluding that the evidence would have been "helpful" at the penalty phase, in determining that it was "cumulative" to what was already before the jury and trial judge, the lower court's argument overlooks that the evidence of the involvement of both Mr. Kight and Gary Hutto was hotly disputed. Based on the information known at the time, the jury and trial court chose to disbelieve Mr. Kight's evidence and found that he was the actual killer. On such a disputed issue, however, any additional evidence, particularly credible evidence, that Hutto had confessed not only his participation in the murder but that he was setting up Mr. Kight because of his mental retardation, would clearly have had an effect at the penalty phase and probably would have resulted in a life sentence. Even the prosecutor acknowledged during closing argument that the issue of Hutto's involvement in the killing was "honestly a difficult question" (R. 2380).

As Mr. Kight pointed out in his Initial Brief, O'Kelly's testimony established at best that Mr. Kight's participation in

the criminal episode was limited to assisting Hutto in the robbery. Thus, Mr. Kight would not have been eligible to receive the death penalty under Enmund v. Florida, 458 U.S. 782 (1982). For example, Hutto told O'Kelly that "he stabbed a taxicab driver, a black taxicab driver," and that Mr. Kight was "basically kind of -- I don't know if he said retarded or slow or stupid, whatever, and that -- that he didn't think somebody of, you know, mentality like that could get a death penalty" (R. 538). As O'Kelly explained, Hutto "led me to believe that he was responsible for the killing" and that "he could probably save his own hide by putting everything onto Charles Kight" (PC-R. 539; 555-56). This evidence on its own establishes a clear effect on the "sentencing calculus" because it establishes death-ineligibility under Enmund. And given the fact that the relative involvement of both Mr. Kight and Gary Hutto was hotly disputed at trial -- in the prosecutor's own words, an "honestly difficult question" -- the lower court's conclusion that O'Kelly's testimony was merely "cumulative" to that which was already before the jury cannot withstand scrutiny.[6]

[6]The impact of O'Kelly's testimony must also be evaluated in light of the previous evidentiary hearing testimony presented in 1989. At trial the State expressly vouched for the credibility of the jailhouse informants it presented to establish that Mr. Kight confessed to the killing. See R. 2375 ("I submit if you look, you couldn't find one single reason for them to come in and testify to what they heard other than it's the truth. Plainly and simply, it's the truth"). The State next assailed the credibility of the defense

The new evidence not only impacts Mr. Kight's death-eligibility under Enmund but also calls into question, alone and in conjunction with the previous evidence presented in postconviction, the existence of aggravating circumstances. The trial court here found only two aggravating circumstances -- during the course of a robbery, and heinous, atrocious, or cruel (R. 673-74). In support of both aggravating factors, the trial court expressly found that they applied because Mr. Kight was the actual killer (Id.).[7] Even assuming *arguendo* that the felony

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witnesses who testified that Hutto had been the killer, not Charles Kight ("Compare those people. Do you honestly believe they are credible, that those are two witnesses that are credible"). At the 1989 hearing, however, the jailhouse snitch testimony was recanted. Any prior determination that the recanting witnesses lacked sufficient credibility to warrant relief must be reevaluated in light of O'Kelly's newly-discovered credible evidence. See Lightbourne v. State, 742 So. 2d 238 (Fla. 1999) ("We remand for an evidentiary hearing as to Emanuel's testimony and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the reliability and veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase hearing is required, either under Lightbourne's Brady or newly-discovered evidence claims"). This is particularly true in Mr. Kight's case, where this Court acknowledged that there was "conflicting testimony" regarding the State's deals with informants at trial. Kight v. State, 574 So. 2d 1066, 1073 (Fla. 1991).

[7]In rejecting the avoiding arrest factor, however, the trial court, in a glaring contradiction, found as a matter of fact that "[t]he evidence is in dispute as to who actually killed the victim" (R. 674).

murder aggravating factor was properly found,[8] the law is clear that the heinous, atrocious, or cruel aggravating circumstance cannot be applied when the evidence does not show beyond a reasonable doubt that the defendant, and not an accomplice, had the requisite mental state and was the actual killer. Archer v. State, 613 So. 2d 446, 448 (1993); see also Williams v. State, 622 So. 2d 456, 463 (1993); Omelus v. State, 584 So. 2d 563, 567 (Fla. 1991). With the HAC aggravator in doubt, all that would remain is the felony murder aggravator, which alone cannot be sufficient to sustain a capital sentence. See Rembert v. State, 445 So. 2d 337 (Fla. 1984).[9] Mr. Kight is entitled to a new trial and/or a new sentencing proceeding.

ARGUMENT III

As this Court has repeatedly acknowledged, when confronted with a claim of newly-discovered evidence, a court "cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision." Lightbourne v. State, 740 So. 2d 238 (Fla. 1999). This evidence includes the evidence presented at trial, Lightbourne, as well as

[8]A point Mr. Kight in no way concedes. See Initial Brief at 72-73.

[9]The impact that O'Kelly's testimony would have had on the treatment by the trial court of Mr. Kight's mitigation is extensively discussed in the Initial Brief at pp. 74-78, and is incorporated herein. As the State's brief does not even address this issue, and so Mr. Kight's argument will not be repeated herein.

the evidence previously presented in prior postconviction proceedings. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996). The State argues that Mr. Kight is not entitled to any cumulative review because he has not presented any new evidence (AB at 43). This specious argument of course overlooks the factual finding by the lower court that Mr. Kight indeed presented newly-discovered evidence that was "very troubling" (PC-R. 452). Thus, the State's reliance on Jones v. State, 591 So. 2d 911 (Fla. 1991), and Jones v. State, 709 So. 2d 512 (Fla. 1998), is misplaced. In both Jones opinions, the Court would not reconsider testimony that had been procedurally barred or was held not to qualify as newly-discovered evidence. Jones, 591 So. 2d at 916 n.2; Jones, 709 So. 2d at 522 n.7. Here, of course, Mr. Kight is seeking reevaluation of prior merits determinations in light of the newly-discovered evidence found by the lower court. This case is controlled by Lightbourne: "We remand for an evidentiary hearing as to Emanuel's testimony **and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the reliability and veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase hearing is required, either under Lightbourne's Brady or newly-discovered evidence claims**". In light of binding case law and the record in this case, Mr. Kight submits that he is entitled to a new trial and/or a new sentencing proceeding.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 20, 2000.

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