IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-553

IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

CORRECTED REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lightbourne's motion for post-conviction relief. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on 3.850 appeal to this Court following the 1990-91 evidentiary hearings;

"PC-R2" -- record on 3.850 appeal to this Court following the 1995-96 evidentiary hearings;

"PC-R2. Sup." -- supplemental record on 3.850 appeal to this Court following the 1995-96 evidentiary hearings; and

"PC-R3." -- record on 3.850 appeal following the 1999 evidentiary hearing;

"PC-R3. Sup." -- supplemental record on 3.850 appeal to this Court following the 1999 evidentiary hearing.

All other references will be self-explanatory.

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REPLY TO STATEMENT OF THE CASE AND FACTS

The State makes the same arguments it has made throughout Mr. Lightbourne's post-conviction proceedings: the recantation testimony of Theodore Chavers and Theophilous Carson, a.k.a James Gallman, is not credible and even if the trial testimony of Chavers and Carson is untrue, Mr. Lightbourne' sentence would stand as the aggravators are supported by independent evidence.

The State complains that Mr. Lightbourne is substituting his own factual findings for that of Judge Angel, and "objects to argumentation [sic] that involves a factual finding contrary to Judge Angel's" (AB at 3). However, because Judge Angel's order contains only conclusory findings without providing any legal or factual support, the State engages in the same type of argument. While Mr. Lightbourne's factual arguments are based on the record and fully explained, the State provides only a laundry list of quick blurbs of testimony which have no context, and complaints about "bold" or "underlined" typeface (AB at 3).

In its statement of facts, the State asserts that Larry Emanuel "acknowledged" that his 1994 affidavit was "a little bit misleading" (AB at 4). In fact, it is the State's characterization of this testimony that is misleading. As the record shows, Emanuel was questioned by the prosecutor below about his affidavit, and then stated "All right, we've already been all through that and when your charges were dropped with respect to when the murder actually occurred, haven't we, this morning? So that's a little bit misleading there" (PC-R3. 977).

This questioning must be put in the context. During its cross-examination of Emanuel, the State was under the misimpression that Emanuel's pending charges were dismissed prior to the time that Mr. Lightbourne was in the Marion County Jail and thus was attempting to confuse Emanuel about this issue. See PC-R3. 945-46. Thus, the particular comment in question made by the prosecutor referred to the issue of Emanuel's arrest dates; it is clear that Emanuel was agreeing with the prosecutor's statement that "we've been all though that . . . this morning," not that he "acknowledged" that his affidavit was misleading. This reading of the record is supported by the fact that Mr. Lightbourne's counsel objected to the prosecutor's characterization Emanuel's affidavit as "misleading," and that Emanuel immediately explained that the "only thing [the prosecutor] is showing is my date and time is off. I told him that was 20 years ago" and that the prosecutor was "blowing the dates out of proportion" (PC-R3. 978). At no time did Emanuel affirmatively disavow the truth of the contents of his 1994 affidavit.

REPLY TO ARGUMENT I

The State correctly notes that the trial court's factual findings are entitled to deference to the extent they are supported by competent substantial evidence, but fails to recognize that the application of those facts to the law must be reviewed *de novo*. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Way v. State, 760 So. 2d 903 (Fla. 2000). The particular facts of this case must also be assessed in context of this Court's opinion in Lightbourne v. State, 742 So. 2d 238 (Fla. 1999). Although the trial court applied the wrong legal standards in Mr. Lightbourne's case, the State neglects any discussion of the legal standards to be applied to Mr. Lightbourne's Brady,[1] Giglio,[2] and newly discovered evidence claims. While Mr. Lightbourne's brief addressed the legal standards at length, the State provides no response.[3] In fact, it misrepresents the proper legal standards in its Answer Brief, asserting that Mr. Lightbourne bears the burden of establishing

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

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

[3]The State refers to this Court's opinion in Melendez v. State, 718 So. 2d 746 (Fla. 1998), as "capsulizing" the principles it wishes the Court to apply. This is rather troublesome, as Mr. Melendez was recently granted a new trial based on the combined effects of newly discovered evidence and Brady violations, and in fact was released from death row after the State dropped all charges against him. The subsequent history of Mr. Melendez's case highlights the danger associated with deferring exclusively to trial court credibility findings. Reliance on "credibility" findings made by judges must be carefully scrutinized, and not simply rubber-stamped, as the State wishes the Court to do in Mr. Lightbourne's case.

that "no reasonable [person] would take the view adopted by the trial court" (AB at 14) (quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980)). This is glaringly inaccurate. The discussion in Canakaris was how a reviewing court was to address a trial court's apportionment of assets during a dissolution of marriage proceeding. Canakaris, 382 So. 2d at 1202. Asset apportionment is not a constitutional issue. The claims presented by Mr. Lightbourne, on the other hand, are clearly constitutional in nature, and this Court's standard of review in these proceedings is well-settled. Stephens; Way.

The bulk of the State's argument centers on Emanuel's credibility and the credibility of Chavers and Carson. The State asserts that the combined postconviction testimony of Chavers, Carson, Carnegia, Hall and Emanuel is not believable. However, Mr. Lightbourne's conviction, and especially his death sentence, rest primarily upon the credibility of Chavers and Carson who testified at trial to incriminating and highly prejudicial statements allegedly made by Mr. Lightbourne. After considering the evidence, the lower court concluded that "[n]o reasonable juror would place much credence in the testimony of these informants" (PC-R3. 1396).[4] This, of course, is the relevant finding made by the trial court which establishes Mr.

[4]In fact, the State Attorney's Office own investigator apparently would place no credence in anything Theodore Chavers would have to say. According to the investigator, Chavers was "well-known" to law enforcement in Marion County as someone who was "always one to come up with some type of something that he thought would be beneficial to him" (PC-R3. 1065).

Lightbourne's entitlement to relief.[5]

The State argues that raw numbers of recanting witnesses does not justify providing Mr. Lightbourne with a new penalty phase, yet the State plays its own numbers game, creating a list of minutiae to bolster its argument that Emanuel was not credible. Mr. Lightbourne did not argue that simply because there are now numerous inmates who have recanted their previous lies that Mr. Lightbourne confessed details of the crime to them, he should receive a new penalty phase. Rather, Mr. Lightbourne contends that the content of their recantations and the cumulative effect of the statements of Chavers, Carson, Emanuel, Hall and Carnegia (all of which corroborate the other), warrants relief.

The State's first point which it believes calls into question Emanuel's credibility is law enforcement's decision not to call Emanuel as a witness at Mr. Lightbourne's trial (AB at 15). The State asserts that Detective LaTorre did not use Emanuel as a witness because he would be of no benefit to the case and because he was a convicted felon. This argument has no factual basis whatsoever. In fact, the opposite is true; LaTorre specifically testified that he chose not to use Emanuel's testimony because "[t]he information that he supplied to me was similar to information that I had already received from another

[5]The lower court's finding also belies the State's current points on appeal which, for example, argue that Chavers "credibly" testified at Mr. Lightbourne's trial (AB at 17). According to Judge Angel's finding, Chavers did not "credibly" testify at trial.

individual. And because of the association with another case, which was the Oats case, I chose not to take a taped statement from him or involve him in the [Lightbourne] case" (PC-R3. 1070). LaTorre's characterization of the information Emanuel provided to him as being "similar" to that provided by the other informants is further indication that Emanuel indeed provided the information to law enforcement, contrary to the State's assertions at this time. Finally, that the State would even *attempt* to argue that it would not call a witness because he was a convicted felon barely passes the laugh test, since it was the State that used jailhouse informants at trial -- Chavers and Carson -- who "provided many of the inflammatory details of the crime" and "graphic details of what allegedly occurred before the actual murder" all of which "formed the basis of at least three of the aggravators found by the trial court." Lightbourne, 742 So. 2d at 249.

The State next attacks Emanuel's testimony that "Theodore (Chavers) said (through McBride) that Lightbourne `killed that lady'" because Chavers never testified that Mr. Lightbourne killed the victim (AB at 16). In support of this statement, the State argues that if Chavers actually had information that Lightbourne killed the victim, "then certainly the prosecution would have used it at trial" (AB at 17). This argument is ludicrous in light of the record. The State overlooks Chavers' actual testimony, where although he said that Mr. Lightbourne did not use the words "I killed her," because of what Mr. Lightbourne

allegedly did say, "he might as well [have] killed her" and that "you all had to find him guilty of it" (Trial Testimony of Chavers at p. 790). See also id. at 797 (Chavers testimony that Mr. Lightbourne "told me every detail" about what happened). The Eleventh Circuit also acknowledged that "[a]lthough Chavers's testimony reveals that petitioner never explicitly admitted killing Nancy, Chavers stated that petitioner never denied it **and made statements giving rise to the inference that he took her life.**" Lightbourne v. Dugger, 829 F. 2d 1012, 1015 n.3 (11th Cir. 1987) (emphasis added). And to erase any doubts as to the implication of Chavers' testimony, the prosecutor argued during closing arguments that "Theodore Chavers and Theophilus Carson [] say that he admitted the crime to him" (Trial Transcript at 1069). The State's own evidence **supports** Mr. Emanuel's testimony, contrary to the representations made now in the State's brief, and its current arguments are mere speculation unsupported by the record.

The State asserts that Emanuel testified that his memory had commingled other cases with that of Mr. Lightbourne's, therefore he cannot be believed. This is not Emanuel's testimony. After the State's line of questioning regarding the dates of Emanuel's own charges and their disposition, the State questioned Mr. Emanuel on his affidavit in Mr. Lightbourne's case:

> Q Okay. So let's go back and look at Paragraph Three that I just read to you, where you say: "The police pulled me out of the cell by myself and told me if I got Lightbourne to admit killing the rich white

> woman from the horse farm, they would get my charges dropped and let me out."
>
> On direct you testified that that's what happened. But we know now, do we not, that that's not right? Your charges were dropped before the murder?
>
> MR. SCHER: Judge, I, again, am going to object. That's completely misleading. Mr. Hooker is not providing all the information.
>
> THE COURT: Overruled. You may answer the question.
>
> A Yeah, he's misleading me on the dates at the same time, because I didn't exact the dates. Because if that's the case, I wouldn't have just--I said to my knowledge that was the date. I didn't know exactly, exactly that was the date.
>
> * * *
>
> Q So you thought that your charges were dropped after you gave a statement about the Nancy O'Farrell murder; correct?
>
> A Yeah. Well, in a way I did, because it was so much stuff mingling in my head, and mingling, messing with them. So, I can't say exactly what was what.

(PC-R3. 982-83). Emanuel's confusion pertained to the dates of his own charges, not commingling of other cases with Mr. Lightbourne's as the State would have this Court believe. As Mr. Lightbourne pointed out in his initial brief, Emanuel's confusion over the relevant dates was clarified during redirect. Mr. Emanuel had two burglary charges; one of which was disposed of in December 1980 prior to the murder of Nancy O'Farrell, and the other for which he was arrested in January 1981 was disposed of after Mr. Emanuel gave law enforcement officials information pertaining to Mr. Lightbourne.

Relying on the 1996 evidentiary hearing testimony of Ken Raym and Edward Scott, the State next asserts that Emanuel "lied about" or was "very confused about" which officers spoke with him about Mr. Lightbourne's case (AB at 18). In 1996, both Raym and Scott testified that they had nothing to do with the investigation into the Nancy O'Farrell murder; rather, they were detectives in the Sonny Boy Oats case (Id.). Given the passage of time, and especially the number of officers with whom Emanuel spoke about both the Lightbourne and Oats cases in a very short period of time, Emanuel's confusion is hardly surprising. When Emanuel was re-arrested in January, 1981, he was questioned regarding the Oats case, and he eventually gave a statement to the State, in the presence of Edward Scott, about the Oats case on January 23, 1981 (PC-R3. 963-63). Detective Frederick LaTorre was the lead detective in *both* the Oats and Lightbourne investigations (PC-R3. 1067). At the evidentiary hearing below, LaTorre acknowledged that *he* was the one that spoke with Emanuel about Mr. Lightbourne's case (PC-R3. 1067-68). In fact, he acknowledged this point at Mr. Lightbourne's trial as well:

> Q Did anyone else at the jail offer to assist you in your investigation of this case?
>
> A Yes.
>
> Q Who would that be?
>
> A There was another individual there, a black male by the name of Larry Emanuel.
>
> Q Has he assisted you in the past?
>
> A Yes.

Q Did he assist you in the Sonny Boy Oats case?

A He came forth with some information in that case.

Q **What specifically -- or how specifically did he offer to help you in this case?**

A **He was in the same cell that the Defendant and Theodore Chavers were in at the time the Defendant was talking to Chavers, where Chavers alleges this, and he had virtually the same information that Chavers did; so I didn't bother taking any statements from him.**

(R. 1026-27) (emphasis added). Thus, it is certainly possible that Emanuel spoke with Raym and Scott about Mr. Lightbourne's case despite their protestations to the contrary,[6] and it is undisputed by LaTorre and Emanuel that Emanuel spoke with LaTorre about Mr. Lightbourne's case. The bottom line is that LaTorre confirms that Emanuel was in the same cell as both Mr. Lightbourne and Theodore Chavers, and that, in the words of LaTorre, Emanuel provided the State with "virtually the same information that Chavers did." This testimony only serves to buttress Emanuel's credibility and counters the State's present arguments that this entire incident was a figment of Emanuel's imagination.

Any confusion and/or misunderstandings to exhibited by Emanuel's testimony was partly based on the confusion of the

[6]Emanuel was familiar with Eddie Scott aside from the interaction they had in the Oats case. Emanuel explained below that his cousin, Otis McBride, was a "snitch" for Scott, and Emanuel knew who Scott was (PC-R3. 1010-11).

prosecutor himself during the evidentiary hearing. For example, Assistant State Attorney Hooker attempted to show that Emanuel's charges on burglary of a dentist's office were dropped in December 1980, prior to Emanuel giving law enforcement information about Lightbourne. However, Mr. Hooker was apparently unaware that there was a second burglary charge, also involving a dentist's office in January 1981, just prior to Emanuel providing information to law enforcement. In addition, Mr. Hooker tried to impeach Emanuel regarding whether he had ever been given any written agreement of immunity or promise to drop charges with respect to Mr. Lightbourne's case. After Emanuel confirmed that he had not been given anything in writing pertaining to Mr. Lightbourne's case (PC-R3. 948), Mr. Hooker asked if in his deposition he made a statement to the contrary, when in fact the deposition contains no such statement (PC-R3. 957-58).[7] The State's own ignorance of the facts of the case and/or its intentional attempts to mislead a witness are not the basis for a conclusion that the witness lacked credibility.

The State centers its argument that Emanuel was not credible on his lack of memory of certain details of events occurring over two (2) decades ago. This argument is ironic in light of the testimony below from other witnesses on which the State relies. For example, State witnesses called at the hearing could not remember things they had done just months before the hearing.

[7]LaTorre himself confirmed that he took no written statement about what Emanuel told him with respect to Mr. Lightbourne (PC-R3. 1069).

For example, Assistant State Attorney Black could not remember with specificity (1) how long he had been in private practice (PC-R3. 1028); (2) the name of a capital case he had worked on in Hernando County as well as "one or two others, but I can't remember. I just can't remember" (PC-R3. 1029); (3) when the evidentiary hearing occurred in the Sonny Boy Oats case (Id.); (4) the exact number of evidentiary hearings that have taken place in Mr. Lightbourne's case (PC_R3. 1030); (5) the nature of the claims being litigated in Mr. Lightbourne's prior hearings because "I don't have a sharp enough recollection to suggest that you rely on it" (PC-R3. 1031); (6) whether or when he represented Mr. Emanuel while he was in private practice (PC-R3. 1033); (7) whether he knew that Mr. Emanuel was involved in the Oats case at the time he represented Mr. Emanuel (PC-R3. 1034); (8) the date when this Court issued its opinion in Mr. Lightbourne's case (PC-R3. 1035); (9) when contact had been made with Texas authorities regarding Mr. Emanuel (PC-R3. 1038). The list goes on in terms of Mr. Black's memory lapses, many of which involved events occurring just months prior to his testimony. Similarly, Richard Deen of the State Attorney's Office could not recall with specificity certain events that had happened within months of his testimony. For example, he could not recall (1) when he first spoke with Mr. Raym about Mr. Lightbourne's case (PC-R3. 1055); (2) any specific conversations with Detective DeFalco about who they were going to be picking up in Texas (PC-R3. 1058; (3) who, if anyone, was present when Mr. Emanuel made some statements (PC-

R3. 1063. Detective LaTorre also lacked memory on a number of specifics, such as how he first found out about the existence of Larry Emanuel as someone he should talk to about Mr. Lightbourne's case (PC-R3. 1068); he could not remember when Sonny Boy Oats' trial took place (PC-R3. 1071), could not remember the dates of the interviews with Mr. Emanuel about Mr. Lightbourne's case (PC-R3. 1072). For the State to be arguing that Emanuel's lack of "memory" establishes his lack of credibility would mean that Mr. Black, Mr. Deen, and Mr. LaTorre suffer from similar credibility problems -- yet the State makes no such arguments.

The State continually relies on isolated phrases from Mr. Emanuel's testimony to argue his lack of credibility. At one point in its brief, the State alleges that "Emanuel admitted that, in spite of his sworn assertion to the contrary, he 'can't remember' providing Officer Eddie Scott a 'statement' about this homicide" (AB at 20). The actual testimony reflects:

> Q All right. Well, anyway, I'm going to ask you again. Is it possible that when you gave that statement right there to Eddie Scott that that was the only statement about a homicide that you gave to Eddie Scott?
>
> A I can't remember.
>
> Q Okay. So you can't remember. So the answer would be then, of course, that you might have been mistaken about having given a statement to Eddie Scott about Ian Lightbourne, right? You might never have done that then?
>
> A I can't remember if I did or not.
>
> Q All right. Thank you. That's

> good. But you did talk to somebody about Ian Lightbourne; is that true?
>
> Maybe it wasn't Eddie Scott, but you would still say, it would still be your sworn testimony that you talked to somebody, some law enforcement person from the sheriff's office about Ian Lightbourne when you were in jail with him?
>
> A Yes.

(PC-R3. 966). The "statement" referred to by the State in the initial paragraph of this questioning was a written statement Emanuel gave in the Oats case, which the prosecutor was showing Emanuel. Therefore Emanuel's responses that he could not remember giving a statement in Mr. Lightbourne's case refer to a written statement similar to the one he gave in Oats. Mr. Emanuel unequivocally testified that he spoke to law enforcement officers regarding Mr. Lightbourne's case;[8] whether they recorded the conversation in some fashion he could not remember.

In its laundry list, the State refers to "robotic responses" given by Emanuel during redirect examination (AB at 20). The State first fails to point out that there was no objection by the State to the questions propounded by Mr. Lightbourne's counsel to Emanuel, and thus any complaints about this issue are waived. The State also fails to point out that Emanuel admittedly could not read and, as the record bears out, much of redirect was spent going over documents pertaining to his previous convictions and previous statements after the prosecutor's misleading questions

[8]Testimony which is corroborated by lead detective LaTorre himself, both at the evidentiary hearing (PC-R3. 1068; 1072), and at Mr. Lightbourne's trial (R. 1026-27).

propounded on cross-examination. Because he could not read them to refresh his own recollection, counsel for Mr. Lightbourne read the documents to him. The State also accuses Mr. Emanuel of taking long pauses, however, there is nothing wrong with a witness thinking before answering a question.

The State asserts that Mr. Emanuel's delay in coming forth with the information supporting Chavers' and Carson's lack of veracity is evidence of his own lack of credibility. The State also claims that when Mr. Emanuel was asked why he didn't come forward sooner, he failed to reply. This is not correct. Mr. Emanuel stated he didn't know whether Mr. Lightbourne's sentence had been carried out yet (PC-R3. 992). Emanuel also stated he had not been back to Florida since 1985 (PC-R3. 991). Contrary to the State's assertion, there was no "mysterious reason" that he has now decided to tell the truth: he came forward with the truth about what occurred in the jail cell in 1981 as it pertained to Mr. Lightbourne's case when he was located and questioned about it by Mr. Lightbourne's collateral counsel.

Both the State and the trial court have overlooked the fact that it is not simply whether they believe Emanuel, but whether a reasonable jury may believe his testimony, and whether, cumulatively, the evidence warrants a resentencing. In analyzing a Brady claim, the United States Supreme Court has observed that credibility findings are not the issue *vel non* of determining materiality; rather, it is whether *the jury* "would reasonably have been troubled" by the withheld or new information. Kyles v.

Whitley, 514 U.S. 419, 443 (1995). Indeed, in Kyles, the lower court which heard the evidence found the Brady evidence unworthy of belief. See Kyles, 514 U.S. at 471 (Scalia, J., dissenting). The majority, however, determined that this was not fatal to the Brady analysis because the lower court's post-trial credibility determination "could [not] possibly have affected the jury's appraisal of Burns' credibility *at the time of Kyles's trials*." Id. at 450 n.19 (emphasis added). Recently, the Second District Court of Appeals observed, similar to the Kyles language, that while "a trial court's determinations of credibility are afforded great weight by a reviewing court," the focus of a court's determination should be on "whether the nature of the evidence is such that a reasonable jury may have believed it." Light v. State, 796 So. 2d 610, 617 (Fla. 2d DCA 2001). Thus, a trial judge's capacity to determine the credibility of the witnesses in a postconviction motion is more limited when the trial judge is examining whether the particular testimony would have had an effect *on the jury*, and the question is not whether the judge "believes the evidence presented as opposed to contradictory evidence presented at trial, but whether the nature of the evidence is such that a reasonable jury may have believed it." Id. In Mr. Lightbourne's case, Judge Angel made his view of this issue clear, and determined that "[n]o reasonable juror would place much credence in the testimony of these informants" (PC-R3. 1396). Under Kyles and Light, Mr. Lightbourne must prevail.

Next, the State's argues that other evidence aside from the

evidence from Chavers and Carson supported the existence of the aggravating circumstances (AB at 41). This argument, however, has been determined adversely to the State:

> We find it more difficult to discount the probable effect the evidence would have on the penalty phase because of the potential significance of Chavers' and Carson's testimony as to several of the aggravators. **Chavers' and Carson's testimony provided many of the inflammatory details of the crime. Specifically, Chavers testified that Lightbourne told him that he had surprised the victim as she was coming out of the shower, forced her to perform sex acts, including forcing her to perform oral sex "over and over," and that she "was begging him not to kill her." Carson testified that Lightbourne told him police "had him" for "shooting a bitch," meaning O'Farrell, and that he shot her because "she could identify him." This testimony provided graphic details of what allegedly occurred before the actual murder and may have formed the basis of at least three of the aggravators found by the trial court—HAC, CCP, and committed to avoid arrest. Without their graphic testimony of what Lightbourne allegedly told them, there is serious doubt about at least two of these aggravators—HAC and committed to avoid arrest. We simply cannot ignore this cumulative picture and the effect it may have had on the imposition of the death penalty.**

Id. at 249 (emphasis added). This Court's pronouncement in its 1999 decision is the law of the case, and the State's attempt to go behind this Court's 1999 opinion must be rejected.

Although acknowledging this Court's prior conclusion, the State nonetheless argues that a "panoply" of "non-informant evidence" supports the aggravators (AB at 46): for example, the State argues that the cold, calculating, and premeditated [CCP] aggravating circumstance and the pecuniary gain aggravating

circumstance remain "even without any testimony from Chavers or Carson" (AB at 41-43). This argument, however, is precisely the type of "harmless error" analysis that is contrary to binding precedent. When assessing materiality under Brady, or whether a Giglio violation warrants relief, sufficiency of the remaining evidence is not the test.[9] Kyles, 514 U.S at 434-36; United States v. Bagley, 473 U.S. 667 (1985). Rather,

> the focus in postconviction Brady-Bagley analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

Young v. State, 739 So. 2d 553, 559 (Fla. 1999). See also United States v. Scheer, 168 F.3d 445, 456 (11th Cir. 1999) (emphasis added) ("In short, [the witness about whom impeachment evidence was withheld] was a crucial prosecution witness. Again, we do not imply that he was the only witness who testified against Scheer, nor do we suggest that there was not other compelling

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[9]It is also not the test for assessing prejudice under Strickland v. Washington, 466 U.S. 668 (1984), which is the same analysis as for Brady materiality. See Thompson v. State, 796 So. 2d 511, 517 (Fla. 2001) (footnote omitted) ("[t]he issue is not whether the evidence was sufficient to support the convictions; the real issue is whether, as a result of counsel's performance, the panel which made that ultimate determination was composed of jurors who held the fact that Thompson exercised a fundamental constitutional right against him").

testimony that would support Scheer's conviction. **Rather, it is because of the relative importance of Jacoby's testimony that we view his credibility to the jurors as so fundamental to Sheer's convictions"**). Similarly, to establish relief under Giglio, a defendant is required to establish that the testimony was false, that the State knew or should have known that it was false, and that it was "material to the guilt or innocence of the defendant." Williams v. Griswald, 743 F. 2d 1533, 1542 (11th Cir. 1984). The "materiality" standard for a Giglio violation is whether the false testimony "could ... in any reasonable likelihood have affected the judgment of the jury." Id. at 1543 (quoting Giglio, 405 U.S. at 154). The standard for establishing a Giglio violation is less onerous than for a Brady violation. United States v. Agurs, 427 U.S. 97 (1976). See also United States v. Anderson, 574 So. 2d 1347, 1355 (5th Cir. 1978) (the standard for establishing "materiality" under Giglio has "the lowest threshold" and is "the least onerous"); Craig v. State, 685 So. 2d 1224, 1232-34 (Fla. 1996) (Wells, J. concurring in part and dissenting in part) (discussing differing legal standards attendant to Brady and Giglio claims).

The State's argument overlooks that this Court has already determined that Chavers and Carson contributed significantly to the findings of both the heinous, atrocious, or cruel [HAC] aggravating circumstance, and the avoiding arrest aggravating circumstance. Id. Moreover, the Court determined that the testimony from the informants "may have" also contributed to the

jury's consideration of the CCP aggravating circumstance. Id. Again, the issue to be determined is whether the cumulative impact of all the evidence now known could reasonably have affected the jury's consideration of the proper penalty in this case. Kyles; Light. Put another way, the issue is not whether Mr. Lightbourne would still have been sentenced to death if Chavers and Carson had not testified, which is in essence what the State is in fact arguing.

The State also ignores the stark reality that many details provided by Chavers and Carson were adduced in support of the existence of aggravating circumstances for which no independent evidence supported. For example, the State argues that there was "independent evidence" to support the pecuniary gain aggavator (AB at 43). The issue in Mr. Lightbourne's case, however, involves the propriety of the doubling of the pecuniary gain and felony murder aggravating circumstances, and the effect of such on the *jury's* consideration of Mr. Lightbourne's penalty. On direct appeal, this Court rejected Mr. Lightbourne's argument that the trial court had improperly doubled the pecuniary gain and during the commission of a robbery aggravating factors because "[t]here was adequate proof of rape" and "the trial court does not improperly duplicate robbery and pecuniary gain where defendant committed the crime of rape in conjunction with the murder." Id. Chavers and Carson were the only source of information that a sexual battery occurred. As to the sexual battery aggravator, while evidence of semen and pubic hair may

show that a sexual *encounter* occurred, the graphic details establishing a sexual battery (the victim was "crawling around on the floor and sucking his penis"; the victim was "screaming and hollering"; "she was begging him not to kill her"; "they had oral sex, you know, over and over"), were provided only by Chavers and Carson. See also Initial Brief at 55 *et. seq.*[10] It goes without saying that these aggravating circumstances must be proven by the State beyond a reasonable doubt.

Next, the State argues that the "strong aggravation vastly outweighed" the nonstatutory mitigation *presented at the original penalty phase* (AB at 48). As noted above, the characterization of the aggravation as "strong" is not borne out by the record. In any event, the State's analysis of materiality is again incorrect, for it, as well as the trial court, fail to consider the lack of mitigation presented at Mr. Lightbourne's penalty phase and the ultimate affect that all of this evidence would

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[10]The State cites two cases, Hartley v. State, 686 So. 2d 1316 (Fla. 1996), and Knight v. State, 746 So. 2d 423 (Fla. 1998), for the proposition that execution style killings are generally not heinous, atrocious and cruel unless there is other evidence to show physical or mental torture of the victim prior to the killing (AB at 45). The only evidence here of emotional torture came from Chavers and Carson. The mere fact that the perpetrator broke into the victim's house and had sexual intercourse with her is not evidence of torture, particularly where the lead detective on the case admitted that there was no evidence of a struggle between the victim and Mr. Lightbourne (R. 1180), and the medical examiner opined that there was no evidence that a sexual assault had occurred (R. 742, 763). Thus, the State's reference to these cases only support Mr. Lightbourne's position. There is no independent evidence of what occurred prior to the victim's death but Chavers' and Carson's testimony that the victim was screaming, hollering and begging for her life.

have had on *the jury*. This error highlights both the State's and trial court's lack of understanding of a proper cumulative analysis. A proper prejudice analysis *must* contemplate the mitigation presented both at the original penalty phase as well as the mitigation presented in the postconviction proceedings that was not previously considered by the jury. Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000) (proper analysis of prejudice must "evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation").[11]

Finally, the State continues to assert that Chavers affidavit should not be considered because this Court upheld its inadmissibility. However, that prior determination was made expressly on the grounds that it lacked necessary indicia of reliability. Lightbourne v. State, 644 So. 2d 54, 57 (Fla. 1994). In the Court's 1999 decision, it directed that a cumulative analysis of *all* this information be conducted in light of Emanuel's testimony, which was not previously available. As the Court observed, all of the cellmates who have been located, "either by hearsay testimony, deposition or affidavit, corroborate Lightbourne's claims." Lightbourne, 742 So. 2d at 248. Just as the State argued at trial that the similarity of Chavers' and Carson's trial testimony strengthened the

[11]The prejudice test under Strickland v. Washington, 466 U.S. 668 (1984), is the same as the materiality analysis for a Brady violation.

credibility of each witness, the recantation testimony of Carson, the testimony of Emanuel, the testimony of Richard Carnegia, the affidavit of Jack Hall, and the numerous other documents admitted in this case, demonstrate the reliability of Chavers' recantation in his affidavit and letters. Accordingly, in accordance with this Court's 1999 decision, all of this evidence must now be assessed in order to cumulatively evaluate whether Mr. Lightbourne is entitled to relief.

The undeniable fact is that Mr. Lightbourne is entitled to, at a minimum, a resentencing. The lower court judge in this case has determined that "no reasonable juror would place much credence in the testimony of these informants." The time has come to acknowledge that a resentencing must be afforded to Mr. Lightbourne on the facts of this case. Relief is warranted.

REPLY TO ARGUMENT II

The State classifies Reginald Black's involvement in Mr. Lightbourne's post-conviction case as limited and unaffected by his representation of Larry Emanuel. The characterization of Mr. Black's role as limited is inaccurate. Mr. Black was the prosecutor representing the State throughout 1996. Mr. Black also acted as prosecutor and witness during the March 15, 1996, evidentiary hearing arguing to the trial court that Emanuel's memory of when Black represented him was incorrect and that the Marion County Clerk's files support his argument that his representation of Emanuel ended in 1980. This testimony/argument is not correct. The clerk records demonstrate that Mr. Black in fact represented Mr. Emanuel through January 1981, just as Emanuel has represented consistently in his deposition and 1999 testimony. Contrary to his previous "testimony" in 1996, in 1999 Black acknowledged that he was in no position to dispute Emanuel's recollection (PC-R3. 1034).

Once Mr Lightbourne became aware that Mr. Black represented Mr. Emanuel in January 1981, the same time Emanuel was housed in the same cell with Mr. Lightbourne, it was necessary to question Black regarding his involvement with Emanuel. Thus, Black was a witness. Even Emanuel's simplest statement, pointed to by the State, that "I had told [Black] that I had been working with the police department on some cases" indicates some knowledge on Black's part. Certainly, when confronted with the claims in Mr. Lightbourne's post-conviction motion of recanted jailhouse snitch

testimony and Henry violations, a flag should have been raised in Black's mind that he was a possible witness. Instead of recusing himself, Black acted as both prosecutor and witness in contradiction of the warnings of United States v. Hosford, 782 F. 2d 936 (11th Cir. 1986). The situation here is not one of the limited circumstances in which an attorney may act as a witness nor is there any exceptional circumstance provided by the State.

REPLY TO ARGUMENT III

The State misses the crux of Mr. Lightbourne's conflict of interest argument. The State seems to focus on a situation in which an attorney represents co-defendants or where Sonny Boy Oats would be a witness against Lightbourne. Mr. Lightbourne has not represented that to be the situation. Here, the issue is two clients who have adverse interests as a result of a mutual witness, Emanuel. Certainly there is no more adverse an interest than questioning a witness' veracity in one case while arguing in favor of his veracity in another. In fact, the prosecutor indicated that he had some knowledge that Emanuel was going to deny the truthfulness of his statement in the Oats case (PC-R3. 970). Thus, the State has placed Mr. Lightbourne's counsel in a conflicting situation: although counsel has a duty to determine if Emanuel was truthful or not when he gave a statement in Mr. Oats case, he also has a duty to defend Emanuel's veracity in Mr. Lightbourne's case. The State's entire discussion of this claim does not contemplate the conflict argued by Mr. Lightbourne. Relief is warranted.

CONCLUSION

On the basis of the arguments presented herein, Mr. Lightbourne urges that this Honorable Court set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to Stephen White, Asst. Attorney General Department of Legal Affairs, The Capitol, Tallahassee, FL 32399 on February 18, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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