IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-1213

PAUL BEASLEY JOHNSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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A. Mr. Johnson's claim as to Mr. Smith's trial testimony

Rather than directly address Mr. Johnson's claim in its answer brief, the State resorts to derogatory labeling to distort Mr. Johnson's claim and make it something it's not in order to ridicule it.[1] By doing so, the State seeks to hide the ball wanting this Court to forget the State's misconduct which is at the heart of Mr. Johnson's claim.

In February of 1981, the State sent James Smith into the jail to gather evidence against Mr. Johnson. In both, Mr. Johnson's first trial and in his second trial, Mr. Smith and law enforcement misrepresented the nature of the contact between Mr. Smith and law enforcement when he was incarcerated with Mr. Johnson.[2] The

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[1]Examples of the State's use of labeling are: "Johnson's convoluted argument", "Johnson bases this novel defense on a twisted reading" (Answer Brief at 51).

[2]Inv. Wilkerson testified that he had not previously told Mr. Smith to try to talk to Mr. Johnson. Inv. Wilkerson testified that in his conversation with Mr. Smith on February 5th, he did not "give Smith any instructions on what to do in the future as far as going back and talking to Johnson again and getting more information" (R. 1927).

At the 1981 trial, Hardy Pickard, argued that "Mr. Smith on his own without talking with anybody from a police agency or the State or anyone else" decided to converse with Mr. Johnson and report the content of the conversation to law enforcement (R. 1942). According to the prosecutor, "once they were aware that statements had been made to Mr. Smith they made no request of him, did not tell him to go back and get more information" (R. 1943). The prosecutor concluded, "The issue is whether the police had anything to do with what Smith was doing. And they did not according to all the testimony from all the police officers and Mr. Smith, Smith did it on his own initiative" (R. 1946).

misrepresentations and falsehoods were necessary in order to render Mr. Smith's testimony admissible.[3]

After this Court granted Mr. Johnson habeas relief and granted a new trial, the trial court again relied upon the misrepresentations and falsehoods to hold that Mr. Smith's testimony was admissible. On direct appeal, this Court again affirmed. Johnson v. State, 608 So. 2d 4 (Fla. 1992).

At the 1997 evidentiary hearing, Mr. Smith came clean and explained he had been a state agent, and that he had been sent in to gather evidence to be used against Mr. Johnson. However, the State then called Mr. Smith a liar and argued that his story lacked credibility. The State presented the testimony of the prosecutor from 1981 proceedings to testify that Mr. Smith had not been a state agent and that he had received no promises of leniency in exchange

[3]Mr. Johnson's motion to suppress was denied because the presiding judge concluded that when Mr. Smith took notes, he was "passively receiving those things. Finally, **Mr. Smith himself testified that he was doing it all on his own**" (R. 1948)(emphasis added). According to the judge, "the officers did not directly or surreptitiously or in any fashion direct Mr. Smith to do what he did" (R. 1949). Accordingly, the judge concluded that Mr. Smith was not a state agent.

This Court affirmed the ruling and noted that Mr. Smith had "**testified that he decided to take notes, solely on his own**, because he had trouble remembering things." Johnson v. State, 438 So. 2d 774, 776 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984)(emphasis added). This Court observed that the trial court had found that "**the detectives did not direct Smith, either directly or surreptitiously, to talk with Johnson or to take notes** on their conversations." Id. (emphasis added). Accordingly, this Court concluded, "We agree with the trial court that **this case presents a close question on whether Smith had become an agent of the state**, but we find the ruling that he had not to be supported by the evidence." Id. (emphasis added).

for his testimony against Mr. Johnson.[4] As a result, the circuit court was convinced by the State that Mr. Smith's testimony was not credible and denied Mr. Johnson's claim. This Court affirmed the denial of relief on appeal.

But, the testimony from Mr. Pickard in 1997 was not accurate. On December 4, 2007, Mr. Pickard was again called to testify. He reviewed handwritten notes which he identified as notes he had made. After reviewing the notes and their content, Mr. Pickard testified: "I'm sure [Mr. Smith] was told to listen, to take notes if he had an opportunity to take notes as to anything that Mr. Johnson said. He may have been even told to turn over the notes" (2PC-R. 1908). Mr. Pickard specifically testified that his "understanding [was] that Ben Wilkerson had told Mr. Smith to keep his ears open and to make notes" (2PC-R. 1927). This testimony from Mr. Pickard provided

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[4]The State called Mr. Pickard to testify that he had no recollection of any agreement with Smith other than that his cooperation would be made known to the parole commission (PC-R. 357):

> Q. Prior to the trial commencing were there any other agreements with Smith, that you can recall or know of by yourself or the agents for law enforcement, that were not disclosed to the defense?
>
> A. Not that I have any recollection of.
>
> Q. Were there any suggestions or directions given by you to Smith as to what he should do or could do or must do in terms of testifying or gathering information?
>
> A. The only thing I told Mr. Smith is that he would be required to testify truthfully. As far as I know that's what he did.

(PC-R. 357-58).

corroboration for Mr. Smith's 1997 testimony which had previously been found incredible. Mr. Pickard's 2007 testimony demonstrated that the ruling in 1981 that Mr. Smith was not a state agent was erroneous and premised upon testimony that was not accurate.

An examination of this Court's first direct appeal opinion affirming the conviction and sentence obtained in 1981 clearly discloses the basis for its conclusion that Mr. Smith's testimony was properly admitted. This Court explained that Mr. Smith had "**testified that he decided to take notes, solely on his own**, because he had trouble remembering things." Johnson v. State, 438 So. 2d 774, 776 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984)(emphasis added). This Court observed that the trial court had found that "**the detectives did not direct Smith, either directly or surreptitiously, to talk with Johnson or to take notes** on their conversations." Id. (emphasis added). Accordingly, this Court concluded, "We agree with the trial court that **this case presents a close question on whether Smith had become an agent of the state**, but we find the ruling that he had not to be supported by the evidence." Id. (emphasis added).

It is clear from Mr. Pickard's 2007 testimony that this Court was deceived by the State when it reached its conclusion on this issue during the first direct appeal. Since this Court found that "this case presents a close question on whether Smith had become an agent of the state," it is clear that the result would have been different had this Court known the truth, *i.e.* that "Ben Wilkerson had told Mr.

Smith to keep his ears open and to make notes" (2PC-R. 1927).[5] Contrary to what this Court understood, Mr. Pickard testified in 2007 that: "I'm sure [Mr. Smith] was told to listen, to take notes if he had an opportunity to take notes as to anything that Mr. Johnson said. He may have been even told to turn over the notes" (2PC-R. 1908). These instructions to Mr. Smith would led to a finding that he was a state agent and would have rendered his testimony inadmissible at Mr. Johnson's trial.

B. Diligence

The primary thrust of the State's answer brief is to argue that Mr. Johnson was not diligent. In making this argument the State focuses upon the handwritten notes that were used to jog Mr. Pickard's memory. The State contends that Mr. Johnson should have understood what the notes meant when they were disclosed in 1997. Accordingly, the State's argument is that Mr. Johnson's one year clock began running from the date of the disclosure of the handwritten notes.

In making this argument the State overlooks the language set forth in Rule 3.851(d)(2)(A). Under this provision, the issue is when did the facts upon which the claim is premised become known to

[5]In its answer brief, the State fails to acknowledge that the 2007 testimony from Mr. Pickard demonstrates that the basis for this Court's ruling that Mr. Smith was not a state agent and thus his testimony was admissible was premised upon the erroneous factual understanding that the State did not give Mr. Smith any instructions regarding his contact with Mr. Johnson. Had the truth been known, this Court would have found Mr. Smith to be a state agent and his testimony would have been ruled inadmissible.

the defense, or when should have the facts upon which the claim is premised become known to the defense.

Unfortunately for the State, the pieces of paper on which handwritten notes appear do not themselves constitute facts which support Mr. Johnson's claim.[6] At the 2007 evidentiary hearing, the prosecutors for the State were called to testify and they acknowledged that on the face of the notes there was no information to show who wrote the notes, when they were written and what exactly they meant. Candance Sabella testified that there was nothing in the handwritten notes indicating who had written the notes or when they were recorded (2PC-R. 2082). She indicated that looking at the exhibit, "I don't know who wrote it" (2PC-R. 2082). She also indicated that she made no effort to determine who had written the notes or what was their significance (2PC-R. 2082). Lee Atkinson, the prosecutor at the 1988 trial, was also called to testify at the 2007 evidentiary hearing. He reviewed Mr. Pickard's handwritten notes that had been introduced

[6]In Mr. Johnson's case, there had been a full trial in 1981, a mis-trial in 1987, and a full trial in 1988. The 1981 proceedings had been handled by the Polk County State Attorney's Office. The 1987 and 1988 proceedings had been handled by the Hillsborough County State Attorney's Office. When the state attorney's file was disclosed, it was discovered in the possession of the Attorney General's Office. The handwritten notes in question could have been written by any of the attorneys or investigators who had worked for any one of these three offices and could have been prepared in connection with the original trial, the mistrial, the 1988 trial resulting in the conviction and sentence of death at issue in these proceedings, or in the various appellate proceedings handled by the Attorney General's Office. The prosecutor's file when disclosed contained no type of delineation as to what portion of the files had been collect or prepared by which offices through which the file had passed.

into evidence. Mr. Atkinson testified that to the extent that he would have been aware of these notes prior to the 1988 trial, he saw nothing in the notes that would have been discoverable by the defense.

It is as if the notes were encrypted. Their significance and their meaning could only be discerned by one who knew the handwriting of the person who made the notes, who knew the format that the author used for his note taking, who knew when the notes were made. Only with that information could the meaning of the notes be unlocked.

Further, Mr. Johnson presented a claim in 1997 that Mr. Smith had been a state agent and the State withheld this fact from the defense and from the courts. The claim in 1997 was premised upon the testimony of James Smith. Mr. Johnson presents the same claim now. In 1997 the State argued that Mr. Smith was not credible, and that his testimony was not true. Accordingly, the State stood behind the previous rulings that Mr. Smith was not a state agent because he acted solely on his own initiative.

Now before this Court, the State is arguing that Mr. Johnson should have known of the significance of the handwritten notes in 1997 and used the notes then to show that Mr. Smith was telling the truth and that he had in fact been in a state agent. The State makes this argument even though Ms. Sabella who was representing the State in those proceedings did not know the significance of the notes and argued that Mr. Smith had not been a state agent. And, the State makes this argument even though Mr. Pickard who took the witness stand for

the State and disputed Mr. Smith's testimony knew that Mr. Smith had received instructions from law enforcement when he was sent in to talk with Mr. Johnson and gather evidence.

According to the State, Ms. Sabella had no obligation to know that in fact Mr. Pickard, whom she called as a witness for the State, knew that law enforcement had provided Mr. Smith with instructions which would have made him an agent of the State within the meaning well-established law. According to the State, Ms. Sabella had no obligation to go through her files to learn and acknowledge that Mr. Smith was an agent of the State when he went into the jail to solicit evidence for the State.

According to the State, Mr. Pickard had no obligation when he testified in 1997 to acknowledge that Mr. Smith had in fact received instructions to keep his ears open and to take notes. According to the State, Mr. Pickard had no obligation to acknowledge and advise the courts and Mr. Johnson that his argument on the motion to suppress in 1981 that Mr. Smith had received no instructions was not true.

Thus, it is the State's position that when Mr. Johnson presented his claim in 1997 and called Mr. Smith to testify neither the State's representative in that proceeding, nor the original prosecutor who was called as a witness, had any obligation to the courts or Mr. Johnson to learn and disclose the truth that Mr. Smith had in fact received instructions when he was sent in to gather evidence from Mr. Johnson. According to the State, all of responsibility for learning

of the State's withholding of the fact that Mr. Smith did receive instructions fell upon Mr. Johnson. Even though Mr. Johnson had spoken with Mr. Smith and presented his testimony that he had received instructions, according to the State it is Mr. Johnson who bore responsibility for not decoding the handwritten note and showing that Mr. Pickard's testimony was false. Even though Ms. Sabella possessed the handwritten note and had no idea what it meant, according to the State when she disputed Mr. Smith's credibility and argued that his testimony was false, she had no obligation to decode the handwritten notes in her possession and ascertain the truth.[7]

Mr. Johnson and his counsel had an obligation to exercise due diligence and they met that obligation. In 1997, Mr. Johnson called

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[7]The United States Supreme Court has written under the American system a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). When it comes to the government withholding evidence from criminal defendants, the U.S. Supreme Court has made clear that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, 373 U.S. at 87. It is axiomatic that the prosecution's suppression of evidence favorable to the accused violates due process. Cone v. Bell, --- U.S. ---, 129 S. Ct. 1769 (2009); Kyles v. Whitley, 514 U.S. 419 (1995).

The State's argument in Mr. Johnson's case seems to be that a prosecutor's obligations under Berger and Brady do not extend to evidentiary hearings conducted in post conviction proceedings.

Mr. Smith as a witness. Mr. Smith testified that the State had sent him in to gather evidence that could be used against Mr. Johnson and the State gave him instructions as to how to proceed. Surely at that point the obligation to exercise due diligence did not impose an obligation on Mr. Johnson that due process did not impose upon the State.[8] Surely, Mr. Johnson was no more obligated to unravel the meaning of handwritten notes that the State was when both had possession of those encrypted notes.

The United States Supreme Court has held that due process imposes burdens upon prosecutors. "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275. This means that the defense's obligation to exercise due diligence cannot be used as a mechanism which relieves the State of its due process obligation to "set the record straight."

Here, neither Mr. Johnson nor his counsel had the necessary information to decode the handwritten notes until 2006 when Mr.

[8]Implicit in the State's argument is an assertion that it was permissible for the prosecutors handling the 1997 proceedings for the State to argue that Mr. Smith was not credible when he testified that he given instructions by law enforcement to speak with Mr. Johnson, even though those prosecutors possessed notes which when decoded demonstrated that Mr. Smith had in fact received instructions from law enforcement.

Johnson's counsel at the time, Terri Backhus had a discussion with Martin McClain. On the basis of Hardy Pickard's testimony in two other cases, Mr. McClain had learned of Mr. Pickard's practices in taking notes and how to intuit the meaning of his notes. It was only after the handwritten notes were gathered and provided to Mr. McClain that they could be decoded and their content be understood. Thus until the encrypted handwritten notes had been decoded, Mr. Johnson had no new facts to present in support of a Rule 3.851 motion. Once he had been able to learn the meaning of the notes, Mr. Johnson then presented a Rule 3.851 motion based upon the information gleaned from the decoded handwritten notes. Mr. Johnson exercised due diligence.

C. Banks v. Dretke

The State argues that Mr. Johnson is employing a twisted reading of Banks, one which means that Banks changed the law. However, neither arguments made by the State is true. Mr. Johnson's positions has been and is that 1) Banks merely explained what Brady required which the lower court in Banks had failed to recognize, and 2) the language in Banks is straightforward and the U.S. Supreme Court meant what it said.

In Banks, the Supreme Court stated: "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). Thus, a rule "declaring 'prosecutor may hide, defendant must seek,' is not

tenable in a system constitutionally bound to accord defendants due process." Id. at 1275. There is nothing to twist. When as here, the State has concealed significant exculpatory or impeaching information, it is the State's obligation to come clean. It is not the defendant's job to try to figure out what has been hidden if the State has not set the record straight.

The U.S. Supreme Court has long recognized that the prosecutor's obligation is not just to win. The prosecution cannot, by itself, determine the truth. See Kyles, 514 U.S. at 440. The prosecution cannot assume the validity of its own theory of the crime is the whole truth and ignore exculpatory evidence that undermines that theory. Id. Failure to disclose exculpatory information to a defendant precludes the defense from conducting a "reasonable and diligent investigation" as mandated by McCleskey v. Zant, 499 U.S. 467 (1991); Strickler v. Greene, 527 U.S. 263, 287 (1999).

> An incomplete response to a . . . request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that this evidence does not exist. In reliance on this missing representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.

United States v. Bagley, 473 U.S. 667, 682 (1985). Any impediment to the defense's investigation that results from the State's failure to turn over exculpatory evidence unfairly skews the fact-finder in the prosecution's favor, which prevents a finding of the whole truth and violates the defendant's right to a fair trial. United States

v. Agurs, 427 U.S. 97, 108 (1976).

Prosecutorial misconduct is "a corruption of the truth-seeking function of the trial process." Bagley, 473 U.S. at 681. The truth-seeking function that is demanded of court proceedings obligates the prosecution to produce favorable evidence to the defense. Cone, 129 S.Ct. at 1782.[9] "For though the attorney for the sovereign must prosecute the accused with earnestness and vigor he must always be faithful to his client's overriding interest that justice shall be done." Agurs, 427 U.S. at 110. Justice demands that the State engage solely in legitimate means to bring about and maintain a just conviction; improper methods calculated to produce and protect wrongful convictions cannot exist in just system. Cone, 129 S.Ct. at 1782.

Individual prosecutors have a duty to learn of any favorable evidence discovered or generated by others acting on the prosecution's behalf, including police investigators. Kyles, 514 U.S. at 437. Undoubtedly, police will mistakenly fail to turn over evidence to the defense, but the duty to learn of favorable evidence applies to all prosecutors regardless of situation. Id. at 438; Bagley, 473 U.S. at 682-83.

The State's good or bad intentions in withholding evidence are irrelevant, making any implied defense of mistake equally irrelevant.

[9]"Truth is critical in the operation of our judicial system." Florida Bar v. Feinberg, 760 So. 2d 933, 939 (Fla. 2001).

Id. Because the prosecution alone can know what to disclose, the State "must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." Kyles, 514 U.S. at 437. Accidental nondisclosures demonstrate a strong need for procedures and regulations for the prosecutorial office. Kyles, 514 U.S. at 438. Such procedures foster necessary communication between a prosecutor and his investigative team such that no relevant information goes overlooked. Id. Because the constitutional duty to disclose exculpatory evidence ultimately falls to the individual prosecutor of a case, a prudent prosecutor would err on the side of disclosure when in doubt. Id. at 439; Agurs, 427 U.S. at 108.

Because the purpose of the criminal justice system is to ensure fairness and truth, the prosecutor cannot escape his constitutional duty even when he is not aware of the suppressed or missing information. Kyles, 514 U.S. at 440. "Any argument for excusing a prosecutor from disclosing what he does not happen to know boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." Id. at 438. While the prosecutor is free to form his own opinion as to what happened, any prosecutorial misconduct employed to support his theory defeats the "truth-seeking function" of the proceedings in court and is unacceptable. Cone, 129 S.Ct. at 1782; Bagley, 473 U.S. at 681.

The straightforward language in Banks is neither new nor novel. It is merely an attempt to clearly articulate that which was set forth in Berger and Brady years before.

D. The withheld information warrants a new trial and/or penalty phase

The U.S. Supreme Court has repeatedly held that favorable evidence must be produced for the defense when it is material. A finding of materiality does not necessitate a preponderance of the evidence to show that disclosure would have resulted in the defendant's acquittal. Kyles, 514 U.S. at 434 (quoting Nix v. Whiteside, 475 U.S. 157, 175 (1986)). Rather, a defendant need only show a "*reasonable probability* that, had the evidence been disclosed, the result of the proceeding would have been different." Cone, 129 S.Ct. at 1783 (citing United States v. Bagley, 473 U.S. 667, 682 (1985)) (emphasis added).

Evidence must be considered cumulatively to determine whether confidence in the verdict has been compromised, but specific evidence that may be critical to a particular defense is heavily weighted. Cone, 129 S.Ct. at 1773 and 1783. If such specific evidence is withheld from the defense, even if it is of small quantity, the defense is effectively crippled. See id. at 1783. In Cone, for instance, trial counsel attempted to argue the specific defense that after the defendant's honorable service in Vietnam, he began using drugs to cope with the long-term trauma caused by war, and that eventually, his long-term drug abuse led to "amphetamine psychosis" and the crimes

for which he was charged. Id. at 1772-73. In the State's closing argument, the prosecutor declared that this specific defense was "baloney." Id. at 1772 and 1774. He made the declaration *even though his office possessed several undisclosed statements*, which described the defendant as "wild-eyed," looking around in a "frenzied manner," and a "drug user / heavy drug user." Id. at 1777 (emphasis added). If the State had produced the witness statements and police bulletins as it was constitutionally mandated to do, defendant's trial counsel would not have been forced to put on a crippled defense. Id. at 1783. Each statement strengthened the specific defense in Cone. Id. at 1773. As a result, the case was remanded to the district court to determine whether the undisclosed statements were material to the petitioner's sentencing, i.e., the district court must determine whether there is a reasonable probability that at least one juror's assessment of the appropriate penalty would have been altered. Id. at 1786.

In Mr. Johnson's case, the State presented Mr. Smith to testify that Mr. Johnson had told him that he was going to play crazy. This evidence was used to counter Mr. Johnson's insanity defense and to convince the jury that no mental health mitigators should be found during the penalty phase. However, the undisclosed information would have resulted in the inadmissibility of Mr. Smith's testimony. Had the State not been able to present Mr. Smith's testimony, the lynchpin of the State's case that Mr. Johnson was faking, the entire

proceeding is cast in a new light. Accordingly a new trial and/or new penalty phase proceeding is warranted.

E. Presentation of false and/or misleading evidence to convince courts that otherwise inadmissible evidence was admissible w warrants a new trial.

The State seems to completely ignore the aspect of Mr. Johnson's claim that is premised upon Giglio v. United States, 405 U.S. 150, 153 (1972). There, the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'"

A claim under Giglio is a species of Brady claim, and as such, the underlying principle is to protect the jury from any false representations by a prosecutor against a defendant. Ventura v. Attorney General, Florida, 419 F.3d 1269, 1276 (11th Cir. 2005). Prosecutorial misconduct that results in the "deception of a court and jurors by the presentation of false evidence is incompatible with rudimentary demands of justice." Giglio, 405 U.S. at 153. The jury depends on the truthfulness and reliability of witnesses in determining guilt, innocence, or the appropriate sentence. Napue v. Illinois, 360 U.S. 264, 269 (1959). Thus, when a prosecutor allows a witness to provide false or misleading testimony – either by encouraging false testimony or by allowing the false and/or misleading testimony to go unchecked – the principles of Giglio are violated. A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28

(1957)(principles of due process violated where prosecutor deliberately "gave the jury the false impression that [witness's] relationship with [defendant's] wife was nothing more than casual friendship"). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993). "A lie is a lie, no matter what its subjects and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." Napue, 360 U.S. at 269.

Under Giglio, a petitioner must prove: (1) the testimony was false; (2) the prosecutor knew of the false testimony or failed to correct testimony that he subsequently learned was false; and (3) the false testimony was material to petitioner's trial. Giglio v. United States, 405 U.S. 150, 154 (1972); Ventura v. Attorney General, Florida, 419 F.3d 1269, 1282 (11th Cir. 2005). A Giglio claim is evaluated under a more "defense–friendly" standard than its sister claim under Brady. United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995). The lower standard for determining materiality as defined in Giglio requires a petitioner to show that there is a "reasonable likelihood that the false testimony *could have* affected the judgment of the jury." Id. (emphasis in original). This Court has recently explained, "[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false

testimony at trial was harmless beyond a reasonable doubt." Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003).

Here, the State's reliance upon false and/or misleading testimony and argument to obtain a ruling that Mr. Smith's testimony was admissible cannot be harmless beyond a reasonable doubt. Accordingly, Rule 3.851 relief must issue.

CONCLUSION

In light of the foregoing arguments, Mr. Johnson requests that this Court reverse the lower court, vacate Mr. Johnson's conviction and/or death sentence and grant other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Candance Sabella, Assistant Attorney General, Office of Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, on September 12, 2009.

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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