IN THE SUPREME COURT OF FLORIDA

CASE NO. __________

IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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# EMERGENCY APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF OF APPELLANT ON APPEAL OF DENIAL OF MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF

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

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## INTRODUCTION

Ian Lightbourne's case has persistently troubled members of this Court. See Lightbourne v. State, 471 So. 2d 27, 29 (Fla. 1985) (Overton, McDonald, and Shaw, JJ., dissenting from affirmance of trial court order denying Rule 3.850 motion); Lightbourne v. State, 438 So. 2d 380, 392 (Fla. 1983) (direct appeal) (Overton, J., dissenting from denial of new trial); id. at 392 (McDonald, J., dissenting as to sentence). The evidence which has only now come to light -- evidence withheld by the prosecution during trial and prior post-conviction proceedings -- demonstrates that this case should indeed trouble:

> I have lied to help get what you wanted, that black nigger on death row so please help me.
>
> * * * *
>
> Mr. Gill, . . . I hope your office never need me in that case and [or] I'll tell the truth and take what ever [happens] after that.

(Letters of Theodore "Nut" Chavers to State Attorney's Office.)

> Lightbourne never spoke to any of these guys the whole time they were in our cell . . . I specifically remember the guy called "Nut" talking about what they were going to tell the cops about Lightbourne. They said that they were going to say that Lightbourne told them all about the murder of the O'Farrell woman. I also heard them talking about getting out of jail and heard "Nut" telling the others that he had gotten out this way before.

(Affidavit of cellmate Jack Hall.)

In 1981, I was very familiar to the law law enforcement officers because of numerous arrests and charges made against me in Ocala. When I was in the Marion Couunty Jail in January of 1981, I was placed in a cell with Ian Lightbourne and several other inmates.

Shortly ater being put in the cell with Lightbourne, Detective La Torre took me out and talked to me at length. He made it clear to me that it was in my best interest to find out all I could from Lightbourne about the O'Farrell murder. I in fact did this and then several charges pending against me were dropped.

Theophilus Carson, who was also in the cell with Lightbourne and me, worked for the state too. Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial by dropping his charges. I know that he lied on Lightbourne to get out of trouble.

The officers pressed me for details about what Lightbourne was saying even though there was not anything really to say. I told them I didn't want to get involved since they had other evidence but with all they had on me they could make me do what they wanted.

(Affidavit of Theodore "Nut" Chavers.)

> [M]y testimony was a key in convicting Lightbolt, in return I got nothing but frustration. I was suppose to get a witness pay which I haven't received yet. I was suppose to have had a deal worked out with the state attorney office here in Tampa, but they tell me they have no records of it, and wasn't contacted.

(Letter of Theophilus Carson, AKA James Gallman, to State Attorney's Office).

This Court, like Mr. Lightbourne's trial counsel, jurors, and sentencing judge, was misled: <u>both</u> Chavers and Carson were

state agents when they elicited the statements Mr. Lightbourne purportedly made. Cf. Lightbourne v. State, supra, 438 So. 2d at 386. Both were working for the State and both were instructed to elicit incriminating information.

Deals were made, money was offered, and charges were dropped with both informants -- informants who were the key to the State's case. The State did not tell the defense. The informants then lied about their status during defense counsel's cross-examination.

The lies went a step further: what is shown by the evidence which has now come to light is that the statements purportedly made by Mr. Lightbourne to these two government agents were in fact never made. The informants' testimony was the key to the State's case, but that testimony was false: it precluded the development of true facts and resulted in the admission of false ones. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986).

Mr. Lightbourne's Rule 3.850 motion presented additional troubling claims: the impartiality of the judge who sentenced Mr. Lightbourne to death is now open to serious question. A defendant cannot waive the right to an impartial judge, especially in a case such as this -- where the judge's own disclosures at trial about his financial relationship with the victim's family and the State, and the gifts he received from the victim's family, were far from full. A defendant cannot forfeit his right to a reliable capital sentencing determination. What

is now known about the judge who sentenced Mr. Lightbourne to death demonstrates that the very reliability of this death sentence is open to very, very serious questioning.

The result reached by this Court with regard to Mr. Lightbourne's penalty phase ineffective assistance of counsel claim during the litigation of his prior Rule 3.850 motion was fundamentally flawed, as reflected herein (Claim IV), in Claim I of Mr. Lightbourne's accompanying habeas corpus application, and by trial counsel's own affidavit.

This case indeed should trouble, and the issues it presents should be fully and fairly resolved by this Honorable Court before Mr. Lightbourne is dispatched to his execution, an execution about to take place in less than 24 hours.

On January 30, 1989, Judge William Swigert, the original trial judge and the judge who sentenced Mr. Lightbourne to death, recused himself from this action. Judge Carven Angel was assigned to the case.

On the morning of January 31, 1989, less than one day after his involvement in the case commenced, Judge Angel denied all relief. Counsel has just completed a telephonic conference with Judge Angel and the State's representatives. Judge Angel indicated, on the record, that he would deny relief notwithstanding the fact that Mr. Lightbourne's motion had "substantial emotional appeal" to him, and notwithstanding the fact that Claim I of Mr. Lightbourne's motion raised "concerns."

Judge Angel stated his reasons for denying relief on the record. Apparently misunderstanding what Mr. Lightbourne's motion alleged, Judge Angel indicated that he would deny Claims II and IV on the basis of this Court's prior adverse rulings -- rulings called into question by the facts which Mr. Lightbourne's motion pled (see infra, Claims II and IV). Judge Angel also indicated that he would deny Claims I and III because Mr. Lightbourne had failed to explain why the claims were not raised on direct appeal, or earlier, apparently again misconstruing what Mr. Lightbourne's motion pled (see infra). The motion did in fact provide a detailed explanation, as this brief does. In any event, Judge Angel has not yet entered an order. The State objected to the entry of undersigned counsel's proposed order, an order stating that relief was denied for the reasons set forth orally by Judge Angel on the record. The State wanted to prepare an order for Judge Angel, an order presenting details. Apparently, Judge Angel's on-the-record pronouncements were not good enough for the State. Undersigned counsel objected to any order being prepared by the State, other than an order stating that relief would be denied for the reasons stated on the record. See Van Royal v. State, 497 So. 2d 625 (Fla. 1986). The court below "noted" counsel's objection. Judge Angel stated that he would not have the time today to prepare his own order. Counsel does not understand why the State disapproves of Judge Angel's ruling -- the State won below. In any event, as this brief is

being prepared, we do not know which order Judge Angel will sign.

We do know what the State's facile argument was before the lower court, an argument which is far from sufficient to overcome Mr. Lightbourne's right to be heard, and an argument which will be discussed in this brief. The four (4) claims presented below are presented again herein. What cannot be seriously disputed, on the basis of the claims pled, is that a stay of execution is proper in this case -- the claims deserve judicious consideration. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by capital prisoners litigating during the pendency of a death warrant. See Johnson v. State, No. 72,231 (Fla. April 12, 1988); Riley v. Wainwright, No. 69,563 (Fla. November 3, 1986); Roman v. State, ___ So. 2d ___, No. 72,159 (Fla. 1988)(granting stay of execution and a new trial); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and post-conviction relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The issues Mr. Lightbourne presents are no less substantial than those involved in any of those cases. A stay is proper here as well.

Mr. Lightbourne's right to be fully and fairly heard is not lost simply because this is not Mr. Lightbourne's first application for post-conviction relief. The claims pled demonstrate that this precept assuredly applies to Mr.

Lightbourne's case. Neither is the need for a stay of execution in this action something that should be cavalierly swept aside, as the State would like, simply because Mr. Lightbourne filed a previous motion. See, e.g., Hall v. State, No. 73,029 (Fla. Sept. 1988)(granting stay of execution to post-conviction litigant whose capital conviction and sentence had been previously affirmed in Rule 3.850 proceedings); Clark v. State, No. 72,303 (Fla. April 1988)(granting stay of execution to post-conviction litigant whose capital conviction and sentence had been previously affirmed in Rule 3.850 proceedings); Johnson v. State, No. 72,231 (Fla. April 1988)(granting stay of execution to post-conviction litigant whose capital conviction and sentence had been previously affirmed during state and federal post-conviction proceedings); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987)(affirming circuit court's grant of stay of execution in case involving successive post-conviction motion and denying State's motion to vacate stay), subsequent history in, State v. Sireci, 14 F.L.W. ___ (Fla. 1989)(granting post-conviction relief); State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985)(affirming circuit court's grant of stay of execution to successive post-conviction litigant and denying State's motion to vacate stay because "[t]he State has failed to show an abuse of the trial court's discretion in finding that the files and records do not conclusively show that the defendant is entitled to no relief . . .").

In Mr. Lightbourne's case, as in Crews and Sireci, the "files and records" do not "conclusively" show that he is entitled to "no relief." A stay is proper. Id.; see also Thompson v. Dugger/Thompson v. State, 515 So. 2d 173 (Fla. 1987)(granting stay of execution and relief to successive post-conviction litigant although identical claim had been rejected earlier by state and federal courts); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(granting stay of execution and post-conviction relief to litigant presenting successive post-conviction proceeding); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(same); McCrae v. State, 510 So. 2d 874 (Fla. 1987)(granting relief to post-conviction litigant presenting third motion to vacate pursuant to Rule 3.850).

Indeed, the facts upon which Mr. Lightbourne's claims are predicated were unknown to Mr. Lightbourne or his counsel at the time of trial, or (when Mr. Lightbourne's prior post-conviction application was filed), or at any other time in the past. The facts could not reasonably have been ascertained, for the State hid them.

Trial counsel and former collateral counsel relied on the State's good faith: discovery demands were made, discovery was ordered, and counsel in good faith believed that the State had in good faith complied. Mr. Lightbourne's former trial and post-conviction attorneys, however, were misled. The State had not complied:

I, JAMES R. CRAWFORD, having been duly sworn, hereby depose and say:

1. On May 10, 1985, I was informed that Ian Lightbourne, a Florida prisoner under sentence of death, was without counsel and that a death warrant had been signed setting his execution for June 4, 1985. I was further informed that no counsel was available in Florida to represent Mr. Lightbourne and that, unless I would agree to come to Florida to do so, Mr. Lightbourne would likely be executed without ever having counsel to review the record in his case to consider whether the serious constitutional claims raised on direct appeal should be presented in federal court or whether there were other grounds for state or federal collateral attack.

2. My law firm, Schnader, Harrison, Segal and Lewis, had agreed to provide counsel to an indigent defendant under sentence of death in a state where local counsel were unavailable, and agreed to let me represent Ian Lightbourne. I arrived in Florida approximately the 23rd of May, 1985, and the only support my firm was willing or able to provide me was a law student, Michele Silverman, who had just finished her second year of law school.

3. Miss Silverman and I went to Tallahassee in May of 1985, at which point we began to review the record and do legal research. Although I had been a state court prosecutor in Pennsylvania before 1972, I was unfamiliar with Florida criminal law and had devoted the great majority of my post-1972 practice to civil appellate litigation, so that I had to bring myself up-to-date on criminal law in the limited time within which I had to file state and federal petitions on behalf of Ian Lightbourne.

4. In the few days between our arrival in Tallahassee and late May when we filed the state motion for a stay and for a hearing under Florida Rule 3.850, Miss Silverman and

I received no financial assistance whatsoever. Consequently, we were unable to retain any mental health experts to evaluate Mr. Lightbourne with regard to mental health evidence in mitigation of sentence, although I believed that such an evaluation was necessary to an adequate and proper presentation of Mr. Lightbourne's claims. Neither was I able to retain the services of an investigator. My law firm paid our transportation, housing and food costs; everything else had to be paid by me out of my own pocket. Given the limited time available and the total lack of funds, I was limited in what I could do for Ian Lightbourne.

5. At the time, I reviewed the record, spoke with Ronald Fox, Mr. Lightbourne's trial counsel, and investigated Mr. Lightbourne's case as best I could under the circumstances, circumstances involving an absolute lack of funding. Witnesses Chavers and Carson were hiding at the time and could not be found, although we undertook efforts to locate them. Moreover, given the fact that money was not available to devote to the litigation of Mr. Lightbourne's case, it was impossible for us to retain any mental health professionals to evaluate Mr. Lightbourne and assist us with mental health issues.

6. I understand that evidence has recently been uncovered which demonstrates that Mr. Lightbourne's rights under Brady v. Maryland, United States v. Bagley, and Giglio v. United States were violated. The State provided no hint to me that such evidence existed or was available in their files. The State, in fact, did not turn over and did not allow me to review their files on Mr. Lightbourne at the time that I litigated this action. At the time, Florida's Freedom of Information Act did not allow for disclosure of State Attorney files to a criminal defendant such as Ian Lightbourne. I therefore relied on the good faith of the State's representatives in this regard, as was the case with other post-conviction counsel during that time period. I also knew

that Mr. Fox had made discovery demands and, like Mr. Fox, I assumed that the State had complied with those requests in good faith.

7. I also understand that information has recently come to light regarding the Honorable Judge Swigert's financial relationship with Mr. O'Farrell's family. Neither the judge nor the State disclosed such information to me. I investigated Mr. Lightbourne's case, but had no reason to suspect such a relationship in 1985. Indeed the judge in the record purported to make a full disclosure of his relationships with the O'Farrell's by noting only his prior representation of the victim's father. Had I been made aware of what has now come to light, I would have presented the issue. I would have also requested that Judge Swigert recuse himself from hearing the case during the post-conviction proceedings.

8. Additionally, at the time that I filed Mr. Lightbourne's pleadings, Caldwell v. Mississippi, 472 U.S. 520 (1985), had not been decided. I therefore had no eighth amendment basis upon which to present such an issue. (In fact, California v. Ramos, 463 U.S. 992 (1983), was the Supreme Court's controlling precedent at the time.) There was no tactical, strategic, or intentional reason on my part for failing to present the claim. At the time that Mr. Lightbourne's 1985 state and federal court pleadings were filed, the law did not recognize any Caldwell-type claims. Mr. Lightbourne did not waive any issue, and I did not withhold or waive the claim. As the Eleventh Circuit has recognized, there simply was no basis for presenting it at the time.

9. Given the impossible time constraints (we had less than a week to put Mr. Lightbourne's case together) and the fact that no money was available, Mr. Lightbourne's case simply was not effectively presented during his 1985 Rule 3.850 action. Given the State's withholding of evidence, we had no way of knowing that other important issues existed in this case, issues which we

> would have raised. Given the fact that the trial judge's relationship with the victim's family was withheld from us, we had no way of knowing that this important issue also should have been raised.

(Affidavit of James Crawford) (emphasis added). Mr. Crawford's account is confirmed by Theodore Chavers' affidavit -- as he explains, until this past week he was unwilling to talk, on the instructions of law enforcement.

Ronald Fox, Mr. Lightbourne's trial counsel, also explains that due diligence was exercised:

> [A]t the time of Mr. Lightbourne's trial, I did not have the information that Theodore Chavers and Theophilus Carson, two key State witnesses against Mr. Lightbourne, had been placed in Mr. Lightbourne's cell by law enforcement to elicit incriminating evidence, that they had never actually spoken to Mr. Lightbourne, and that their testimony was false. I have recently reviewed information from state attorney files about these witnesses, and I am shocked by what was kept from me at the time of Mr. Lightbourne's trial. The testimony of these witnesses at Mr. Lightbourne's trial was devastating to Mr. Lightbourne and central to the state's case. At that time, any information discrediting their testimony was essential to Mr. Lightbourne's defense, and I certainly would have used such information had it been available. Such information was also essential to my pretrial motions to exclude the testimony of these witnesses regarding any statement Mr. Lightbourne purportedly made to them. None of the State's secret deals with these witnesses were disclosed to me. It is now clear, in fact, that these witnesses lied when I questioned them at depositions and at trial. I have also reviewed their correspondence with the State, affidavits, and other documents about these witnesses. I would have used all of this information at Mr. Lightbourne's trial. It

> would certainly have made a difference. These witnesses, after all, were the essence of the State's case. Information about them such as what was withheld from me would, without a doubt, have affected the jury. With this information I would have obtained at least a lesser conviction than first-degree murder.
>
> Finally, I wish to note that this is not the first capital case in which I have been involved and in which critical information was withheld from me by the State Attorney's office for the Fifth Judicial Circuit. Critical information was withheld in State v. Routly. The Florida Supreme Court ordered a new trial because of the withholding of information in Roman v. State.
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> In Mr. Lightbourne's case, I made all available discovery demands. Obviously, my requests were not complied with.

(Affidavit of Ronald Fox.)

Mr. Lightbourne's motion set out the recently discovered evidence demonstrating that the State's two key witnesses testified falsely about their relationships with state authorities, about their encounters with Mr. Lightbourne, and about what was said between them and Mr. Lightbourne. None of this evidence was revealed to Mr. Lightbourne, to defense counsel or to prior post-conviction counsel. The violations of Mr. Lightbourne's rights pled in the motion to vacate show that state misconduct has precluded the development of true facts and has resulted in the presentation of falsehoods throughout the prior proceedings in Mr. Lightbourne's case.

Both former counsel reasonably relied on the State's good faith. The State had said counsel that it had turned over all

the facts. In fact, the State hid them.

A petitioner cannot be faulted for not raising a claim earlier when it is the State itself that suppresses the "tools" upon which the claim can be based:

> In the present case, [the petitioner] has not deliberately withheld this ground for relief, nor was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for [the petitioner's] delay in presenting this claim rested on the State's failure to disclose. Under the circumstances, [the petitioner] has not waived his right to [be heard] on the claim.

Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); see also, Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979).

Mr. Lightbourne's claims therefore must be determined on their merits, for they are a paradigm of claims involving interference by state officials which precluded the petitioner from bringing the claims earlier. See Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights); cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986).

In this regard, in a different but related factual context, the United States Supreme Court recently held that a State's asserted procedural obstacles are insuffecent to overcome a post-conviction petitioner's entitlement to relief when it is the State's own misconduct that resulted in the petitioner's failure to urge the claim. In Amadeo v. Zant, 108 S. Ct. 1771, 1777

(1988), the United States Supreme Court noted:

> If the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents.

Likewise, in Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), the Seventh Circuit found cause for procedural default when the evidence which gave rise to a claim of ineffective assistance of counsel was concealed by the Assistant State Attorney.[1] Of

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[1]The evidence concealed concerned fifteen-year-old convictions of the defendant in another jurisdiction. The State argued that defense counsel, who stipulated to two such prior convictions which in fact did not exist, could have independently secured the records of the convictions from the other jurisdiction. The court pointed to the difficulty the State itself had had in attempting to secure the records, and said:

> As an indigent death row inmate relying on the efforts of appointed counsel, petitioner did not have available to him all of the resources of the State in attempting to secure copies of the alleged New York convictions. He sought the help of the NAACP Legal Defense Fund in New York in locating the records, but that office was unable to produce certified copies of the New York records until the summer of 1985. Without the factual information contained in those records, any ineffective assistance of counsel claim based on Mr. Kinser's stipulation to the existence of the New York convictions would have been useless for petitioner who would have been unable to demonstrate prejudice as a result of Mr. Kinser's error.

Lewis, 832 F.2d at 1457.

course, in Mr. Lightbourne's case it was "interference" (i.e., the concealment of evidence) which made the factual basis for the claims unavailable earlier. Murray v. Carrier, 106 S. Ct. at 2646. No bar applies.

The claims presented in this proceeding involve issues whose factual basis could not have been and was not known during prior litigation in this case. Founded upon Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, the facts supporting these claims were unknown at the time of trial, for they were suppressed by the State. The suppression continued throughout the prior post-conviction proceedings.

In related contexts, the United States Supreme Court has repeated reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." Kuhlmann v. Wilson, 477 U.S. 436, 437 (1986), quoting Fay v. Noia, 372 U.S. 391, 438 (1963). "Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." Fay, 372 U.S. at 438. The State comes before this Court not with clean hands, but in breach of a fundamental constitutional duty -- to reveal to the defense exculpatory evidence that could change the result at trial, and to present only truthful evidence to the factfinder. A holding that Mr. Lightbourne is barred from review under the facts of this case would not serve any equitable principles which govern the equitable nature of post-conviction remedies. Instead, it

would reward the State for unconstitutional conduct.

Procedural bars, after all, depend on the proper functioning of the adversarial system. That functioning, in turn, is founded upon two independent components. On the one hand, it requires discharge of the defense function. See Murray v. Carrier, 477 U.S. 478, 496 (1986). Criminal proceedings are a "reliable adversarial testing process" only where an accused in represented by counsel whose performance satisfies professional standards commensurate with the sixth amendment. Strickland v. Washington, 466 U.S. 668 (1984). If the adversarial process is to work, defense functions must be carried out in a way that precludes "sandbagging," or the withholding of claims at trial so that they may be relied upon in subsequent proceedings. Sykes, 433 U.S. at 89. No sandbagging or intentional withholding of claims has taken place here.

The adversarial process is also impaired by the perversion of its other component, the prosecutorial function. Giglio v. United States, 405 U.S. 150 (1972); Miller v. Pate, 386 U.S. 1 (1967); Napue v. Illinois, 390 U.S. 264 (1959); United States v. Bagley, 473 U.S. 667 (1985). Such a perversion unquestionably occurs where the prosecutor jeopardizes the integrity of formal proceedings by misleading or deceptive conduct that is especially intended to accomplish illegal ends. Franks v. Delaware, 438 U.S. 154 (1978)(fourth amendment violated where state relies upon material misstatements in warrant proceedings); Oregon v.

Kennedy, 456 U.S. 667 (1982)(fifth amendment violated where prosecutor commits acts with the specific intent to violate double jeopardy rights); Napue v. Illinois (due process violated by prosecutor's failure to correct misleading trial testimony); United States v. Bagley (due process violated by prosecutor's withholding of critical impeachment evidence).

None of the interests served by any procedural rule, or ultimately by the adversarial system, would be furthered by enforcement of a procedural bar against Mr. Lightbourne. To be sure, the "sanctity" and "prominence" of his trial were undermined, Engle v. Isaac, 456 U.S. 107, 127 (1987), but not because of Mr. Lightbourne. And just as surely, his trial was marred by sandbagging, but it was not he who sought to manipulate the process to gain a tactical advantage.

In this case it was the State, not Mr. Lightbourne, that has undercut the integrity of judicial process and that is responsible for the failure to litigate paramount constitutional questions in accord with state procedural law. It is the prosecutor who jeopardized the adversarial process when he distorted and withheld the factual basis for the claims and deliberately bypassed lawful procedure to gain an untenable end.

Procedural rules must protect protect the defense's good faith, as they should protect a state's good faith attempts to honor constitutional rights. Isaac, 456 U.S. at 128 (emphasis added). It would be ironic indeed if a doctrine rooted in equity

were turned on its head and used to shield the State's deliberate subversion of a defendant's constitutional rights.

Thus, the equitable principles which govern Rule 3.850 all militate strongly against the State's assertion of procedural default here. The fairness and integrity of process will best be served by the vindication of the important federal rights denied Mr. Lightbourne, rights denied by the State's deliberate misconduct.

Indeed, it would be a gross miscarriage of justice to refuse to consider Mr. Lightbourne's claims since it was the State's suppression of evidence that resulted in his failure to raise them earlier:

> In the present case, [the petitioner] has not deliberately withheld this ground for relief, nor was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for [the petitioner's] delay in presenting this claim rested on the State's failure to disclose. Under the circumstances, [the petitioner] has not waived his right to [be heard] on the claim.

Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); cf. Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). These claims must now be heard, for Mr. Lightbourne's failure to present the claims in prior actions can by no means be characterized as an "abuse of procedure." Rather the State's failure to disclose has precluded the claims' earlier presentation.

Plainly, the facts upon which these claims are based were unknown to the movant or his attorney and could not have been reasonably ascertained. The interests of justice mandate that a stay of execution be granted and that the claims be fully determined on their merits after full and fair evidentiary development: the constitutional errors herein asserted "precluded the development of true facts" and "perverted the jury's deliberations concerning the ultimate question[s] whether in fact [Ian Lightbourne was guilty of first-degree murder and should have been sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original).

Furthermore, the ends of justice require that these issues be resolved on their merits. Murray v. Carrier, 477 U.S. 478, 495-96 (1986); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)(plurality opinion). The ends of justice would be ill-served by disposition of these claims on procedural grounds. The State profited from its misconduct when it convicted Mr. Lightbourne and had him sentenced to death. The State should not be allowed to profit twice from its own misconduct by arguing now that Mr. Lightbourne's claims should not be heard.

Murray involved procedural default, and Kuhlmann involved the rule against successive habeas petitions. Both cases, however, addressed a similar set of circumstances: where procedural rules (of default, successive petitions, or abuse of process) would otherwise bar a court's determination of a claim

on the merits, that claim must nevertheless be decided on the merits if the constitutional violation "has probably resulted in the conviction of one who is actually innocent. . . ." Murray v. Carrier, 477 U.S. at 496. Accord Kuhlmann v. Wilson, 477 U.S. at 454 (federal courts are required to entertain successive habeas claims "where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"). The showing of innocence which must be made in order to invoke this formulation of the ends of justice rule is the following:

> [T]he prisoner must show a fair probability that, in light of all of the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt about guilt.

Kuhlmann, 477 U.S. at 454 n.17.

Under the Murray-Kuhlmann rule, Mr. Lightbourne can show a fair probability that the trier of facts would have entertained a reasonable doubt about guilt and about the propriety of the death sentence. As set out in Mr. Lightbourne's motion, the two jailhouse informants lied about their relationships with state authorities, about the deals and promises offered by the State for their testimony, and about the very substance of their testimony, i.e., their encounters with Mr. Lightbourne and what Mr. Lightbourne in fact said. These revelations involve no question of harmlessness -- the State presented lies. Thus, the

disclosure and presentation of the true facts would not only have removed the informants' "evidence" from the State's case, but would also have undermined the State's case in its entirety, raising substantial doubts about the case against Mr. Lightbourne. Without the informants, after all, there was no case. The information provided, however, was lies. This is a "colorable showing of factual innocence" -- there is a "fair probability" that "the trier of the facts would have entertained a reasonable doubt about guilt [and the death sentence]."

Additionally, the information now available but previously concealed by the State is essential to the development of the true facts regarding Mr. Lightbourne's previously litigated Henry claim. Although both state and federal jurists have been troubled by this issue in Mr. Lightbourne's case, see Lightbourne v. State, 438 So. 2d 380, 392 (Fla. 1983)(Overton, J., dissenting); Lightbourne v. Dugger, 829 F.2d 110, 128 (11th Cir. 1987) (Anderson, J., dissenting), courts have ultimately found no Henry violation. Lightbourne v. State, 438 So. 2d at 386; Lightbourne v. Dugger, 829 F.2d at 120. We now know that this case indeed does involve a Henry violation: the evidence regarding the informants' agency status has now been uncovered.

Finally, these claims require an evidentiary hearing for their disposition. First, the merits of such claims can only be determined after an evidentiary hearing at which the true facts are adduced. Mr. Lightbourne has made more than a sufficient

proffer of affidavits and documentary evidence establishing his entitlement to such a hearing. Second, questions regarding default or abuse also require an evidentiary hearing for their proper resolution. Mr. Lightbourne has proffered the affidavits of former counsel (Mr. Fox and Mr. Crawford) showing that due diligence has been exercised throughout the proceedings in this case. The Respondent apparently contests that proffer. A hearing is required.

Since due diligence was exercised, by the very terms of Rule 3.850 no procedural bar can apply.

Having shown that the State's concealment of the basis for the claims, rather than any deliberate withholding, inexcusable neglect, or lack of due diligence in failing to learn their basis, foreclosed their litigation in earlier proceedings, Mr. Lightbourne offends no principle of equity or jurisprudence attendant to Rule 3.850 in seeking review of his claims at this time. See State v. Sireci, 502 So. 2d 1221 (Fla. 1987); see also Smith v. Yeager, 393 U.S. 122 (1968); Sanders v. United States, 373 U.S. 1 (1963); Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983). A stay of execution and an evidentiary hearing are proper.

## CLAIM I

THE STATE'S DELIBERATE USE OF FALSE AND MISLEADING TESTIMONY, AND THE INTENTIONAL WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE, VIOLATED MR. LIGHTBOURNE'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

As discussed in the introduction to this brief, it was the State's own misconduct that resulted in Mr. Lightbourne's failure to present this claim earlier. Former trial and collateral counsel exercised due diligence, and relied on what the State purported to be good faith full disclosures. The facts, however, did not come to light earlier because the State concealed them. By the very terms of Rule 3.850, therefore, this claim must now be heard, for Mr. Lightbourne's failure to present the claim in prior actions can by no means be characterized as an "abuse of procedure." Rather the State's failure to disclose has precluded the claim's earlier presentation. A full evidentiary hearing is required, see, e.g., Arango v. State, 437 So. 2d 1099 (Fla. 1983); Demps v. State, 416 So. 2d 808 (Fla. 1982); Smith v. State, 461 So. 2d 1354 (Fla. 1985), for the files and records do not conclusively show that Mr. Lightbourne is entitled to "no relief" on this claim -- a claim which could not earlier have been brought. See Sireci v. Sireci, 502 So. 2d 1222, 1224 (Fla. 1987).

Under these circumstances, the State's invitation that the merits of what Mr. Lightbourne has pled be ignored is an invitation to grossly miscarry justice. Mr. Lightbourne should

not be punished for the State's misconduct, and the State should not be allowed to profit from it. The interests of justice thus mandate that a stay of execution be granted, that the claim be fully determined on its merits, and that full and fair evidentiary development be allowed: the constitutional errors herein asserted "precluded the development of true facts" and "perverted the jury's deliberations concerning the ultimate question[s] whether in fact [Ian Lightbourne was guilty of first-degree murder and should have been sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986) (emphasis in original). Under such circumstances, the State's asserted procedural bars are unavailing, for the ends of justice require that Mr. Lightbourne's claim be heard.

Ian Lightbourne was convicted and sentenced to death on the basis of the testimony of jailhouse informants. Aside from this testimony, the State had very, very little else. Two inmates with long histories of criminal behavior and incarceration testified at trial regarding statements Mr. Lightbourne had allegedly made to them while incarcerated. Upon these statements, the case for guilt and for death was based.

Both of these informants, according to their trial testimony, contacted authorities on their own after Mr. Lightbourne made spontaneous, unsolicited incriminatory admissions to them. Neither of the informants, of course, had been made promises by the government, beyond a reduction of a few

days or weeks in their jail terms, regarding their assistance in the case, and none had been in any way instructed by the police or prosecution prior to their meetings with Mr. Lightbourne.

As portrayed by the State at trial, the informants were fortuitously present when Mr. Lightbourne made incriminating admissions, and were then prompted by their consciences to contact the authorities and ultimately testify. We now know, although defense counsel, the jury, and this Court were not allowed to know, that this was simply not the truth.

Rather, this testimony resulted from the government's deliberate exploitation of the jailhouse informants. The statements which the informants testified were made by Mr. Lightbourne were taken at the behest of the government, under circumstances created and controlled by the machinations of the State. In fact, the purported "statements" of Mr. Lightbourne were never even made. The government's informants were instructed on the salient facts, and were rehearsed again and again for their trial testimony. Defense counsel and Mr. Lightbourne's jury were never made aware of the careful maneuvering and complex dealing which led to this testimony. There was also a great deal more that they were not allowed to learn. The government suppressed critical facts: it turned over neither what it knew, nor what it should have known, about its informants, their testimony, or the agreements and understandings that had been reached. The government misled the jury, presented

false testimony, and allowed its informants to lie. The government then not only failed to correct the lies -- it used them.

Undersigned counsel have recently discovered some of the facts withheld by the State at the time of trial. We are still investigating -- additional evidence is being discovered even as this pleading is being prepared. The evidence we now have shows that critical facts were deliberately withheld from the defense, facts which would have demonstrated that any statements that may have been elicited from Mr. Lightbourne were elicited in direct contravention of rudimentary constitutional prescriptions. Critical evidence which could have been used to undermine the government's case, and to show that the government's informants were simply not worthy of belief, never got to the jury -- it was suppressed. In its place, the government allowed the jury to hear false and misleading testimony.

Much of the testimony provided by the government's informants was simply false, and the State knew or should have known it was false. Quite simply, Mr. Lightbourne's conviction and death sentence resulted from appalling governmental misconduct. The withheld evidence, and the false and misleading testimony provided to the Court and jury, is presented below.

A. Theodore Cleveland Chavers

Theodore Cleveland Chavers, well-known to Ocala and Marion

County authorities as "Uncle Nut," just happened to be placed in a cell with Mr. Lightbourne in the Marion County Jail when Mr. Lightbourne made incriminating statements. According to his trial testimony, Chavers had been in another cell but was moved into a cell with Mr. Lightbourne on January 29, 1981, because he asked to be in a cell where he could watch television (R. 1107, 1121). There, Chavers and Mr. Lightbourne had conversations (R. 1107), and because Mr. Lightbourne "knew too much" about the homicide, Chavers contacted Detective La Torre of the Marion County Sheriff's Office (R. 1113). Chavers testified that he had not been promised anything (R. 1124), that everything he knew about the offense came from Mr. Lightbourne (R. 1144), and that he had not met with prosecutors except to discuss his own pending charges (R. 1165). Chavers further testified that he was released from jail on February 10, 1981, only nineteen days before his jail term was to expire (R. 1119). Although he had three other charges pending when he was released, Chavers testified that he was released on recognizance on one of those charges, that he had posted $5,000 bond on the others, and that trial was still pending on all three of those charges (R. 1165).

The information the State provided to defense counsel pretrial was consistent with Chavers' trial testimony. In transcribed statements Chavers made to Detective La Torre, Chavers recited information he had supposedly heard from Mr. Lightbourne (Statements of 2/3/81 and 2/12/81, App. 12 and 13),

and stated that Detective La Torre had not talked to Chavers before Chavers' conversation with Mr. Lightbourne (statement of 2/12/81, p. 3, App. 13). Likewise, Chavers' account at his deposition was that Mr. Lightbourne had made incriminating statements which prompted Chavers to contact Detective La Torre (Deposition of Theodore Cleveland Chavers, 3/27/81, pp. 5, 7, App. 6). Although trial counsel attempted to explore Chavers' relationship with the police and motivation for testifying at depositions and during pretrial hearings, Chavers' account remained consistent: no agency relationships, no promises, no rewards, no coaching (see Deposition of Chavers, App. 6).

The picture thus painted was that Chavers had no interest in testifying in this case, that he had never had such an interest, and that he had received virtually nothing from anybody in connection with this case aside from a nineteen-day reduction in his jail sentence and a $200 reward. What was not revealed, however, and what we now know, is that Chavers was instructed to gather information and pressured to cooperate, and that the story he eventually told was false.

As he testified, Chavers was in jail [serving a sentence for driving with a suspended license] at the time he came in contact with Mr. Lightbourne. He also had three other pending charges: escape, resisting arrest with violence, and grand theft (R. 1165). Chavers testified that he was released on recognizance on the escape charge, and that he posted bond on the other two

charges (R. 1165). However, jail records demonstrate that on February 10, 1981, after Chavers had provided Detective La Torre with information regarding Mr. Lightbourne, Chavers was released from jail on his own recognizance on all three charges <u>at the direction of the State Attorney's Office</u> (App. 9).

Other records indicate that if indeed Chavers "posted bond" on the other two charges, he did so at no charge from the local bondsman, who had "bonded him before...for free for some of the city people...so he could do snitch work for 'em and...after he...blowed [sic] the whistle on the... murder...down there that time I bonded him out then... free and what not as a kind of a reward. . . ." (App. 17). Further, although Chavers testified that these charges were still pending at the time of Mr. Lightbourne's trial, in fact the State had filed an "Announcement of No Information" on the escape charge before Mr. Lightbourne's trial (App. 7), despite the fact that a jail corrections officer was an eyewitness to the escape (<u>Id</u>.). Finally, five days after Mr. Lightbourne was sentenced to death, Chavers entered a plea agreement on the resisting arrest and grand theft charges and received three years probation (App. 8), although these charges carried a maximum possible sentence of ten years imprisonment (<u>Id</u>.).

Of course, as the State must have known at the time of Mr. Lightbourne's trial, Chavers was a career criminal and perjurer who could not stay out of trouble long. Thus, despite the

State's efforts to help its informant, Chavers violated his probation later in 1981. In the Violation Report form, the Department of Corrections officer recommended, "[b]ased on this individual's extensive arrest history and persistent criminal activity,... Chavers should be removed from free society... [and] be incarcerated...for a meaningful period of time." (App. 11). Although Chavers apparently attempted to strike another deal with the State, the State this time refused to negotiate because of Chavers' "perjurous testimony" at the violation of probation hearing (App. 11).

As the State knew, Chavers was a perjurer, and the little lies he told at Mr. Lightbourne's trial about his release from jail and his pending charges were nothing compared to the big lie -- that Mr. Lightbourne had made incriminating statements to him. After he was sent to prison for violating his probation, Chavers tried to trade on his cooperation in Mr. Lightbourne's case, repeatedly writing to the State Attorney for assistance with his then current sentence. In those letters, the truth was finally revealed:

> I have lied to help get what you wanted, that black nigger on death row so please help me.

(Letter dated 1/6/85, App. 16).

> Sir, everybody in prison know I have a guy on death row.

(Letter dated 8/8/85, App. 16).

Chavers' letters of 1985 had their desired effect. At the behest of the State Attorney's office, an Ocala Police Department officer met with Chavers to discuss cases in which Chavers was the suspect. Chavers "was offered immunity for any crimes short of murder by Asst. S.A. R. Ridgeway" (App. 63), and confessed to forty-one offenses (Id.). Based on the immunity offer, all of those cases were "cleared exceptionally" (Id).

Chavers continued to be unhappy, however, and once again wrote to the State Attorney:

> [W]hile I was in jail Ronald Fox talk with me about the man I lied on and help your office put on death row. Sir, Fox gave me his card in case I wanted to change my mind and tell the truth on his defendant. . . . [W]ell I got busted at Lowell 6/1/85 and they was suppose to take fox accused defendant to the chair. Mr. Gill, everyone said that happen to me because of that, it look like I'll never got [sic] out of prison anyway so I hope your office never need me in that case and [or] I'll tell the truth and take what ever [happens] after that.

(Letter dated 1/6/86, App. 16).

As these letter indicate, Chavers' testimony at Mr. Lightbourne's trial was a fabrication, concocted in order to gain assistance from the State. Chavers recently, finally provided an affidavit in which he described his involvement in Mr. Lightbourne's case:

> I, THEODORE CLEVELAND CHAVERS, having been duly sworn, hereby depose and say:
>
> 1. My name is Theodore Cleveland Chavers and my nickname is "Uncle Nut". I

was made to testify against Ian Lightbourne at his trial in 1981.

2. In 1981, I was very familiar to the local law enforcement officers because of numerous arrests and charges made against me in Ocala. When I was in the Marion County Jail in January of 1981, I was placed in a cell with Ian Lightbourne and several other inmates.

3. Shortly after being put in the cell with Lightbourne, Detective La Torre took me out and talked to me at length. He made it clear to me that it was in my best interest to find out all I could from Lightbourne about the O'Farrell murder. I in fact did this and then several charges pending against me were dropped.

4. Theophilus Carson, who was also in the cell with Lightbourne and me, worked for the state too. Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial by dropping his charges. I know that he lied on Lightbourne to get out of trouble.

5. The officers pressed me for details about what Lightbourne was saying even though there was not anything really to say. I told them I didn't want to get involved since they had other evidence but with all they had on me they could make me do what they wanted.

6. The state attorneys went over and over what they wanted me to say at the trial. They told me the things they wanted me to say to the jury at Lightbourne's trial. They came at me and rehearsed everything I should say.

7. When the investigators involved me in this case, they made it clear that if I scratched their backs, they'd scratch mine - but if I didn't cooperate, they could bring me even more trouble than I already have. In fact, what really happened in my conversations with Lightbourne and the way they made me say it was very different. I

knew I had to make things look good for the way they wanted the investigation to go.

8. Before the trial, I heard that the O'Farrell family had offered a $10,000.00 reward for anyone who helped with their case. I called the O'Farrell's to collect and they agreed to meet with me, but they didn't show up but the cops did instead. They gave me $200.00 and told me to leave the O'Farrell family alone and not to talk to anyone about this or the case.

9. In the past, I refused to discuss this matter with anyone because the police wanted it to stay quiet. They told me to keep my mouth shut and I knew they'd give me heat if I didn't. Because I had been in so much trouble in the past, the police would make me cooperate with them whenever they wanted me to, just like in Lightbourne's case.

10. I am now willing to discuss these things because I no longer have any pending charges which could be held over my head.

(App. 1). None of this was disclosed.

Another inmate who was in the jail cell with Mr. Lightbourne and Chavers has also described what occurred in that cell, in a way markedly different from what the jury heard at Mr. Lightbourne's trial:

I, JACK R. HALL, having been duly sworn, hereby depose and say:

1. My name is Jackie R. Hall and I currently reside at the Marion Correctional Institute in Lowell, Florida. I am 48 years old.

2. In January and February of 1981, I was incarcerated at the Marion County Jail. I was in a cell with Ian Lightbourne the entire time I was at the jail.

3. Because Lightbourne spoke with a thick accent, he had a real hard time communicating with other inmates. I was the only inmate at the jail during this time that Lightbourne would talk to.

4. When Lightbourne was first brought to the Marion County Jail, he was placed in the same cell with me. Shortly after Lightbourne's arrival, three trustees were moved into our cell. One of these trustees was "Nut" Chavers, but I did not and do not know the name of the others. Neither Lightbourne nor I ever talked with them. They huddled in the corner talking together for awhile and then called for the guards to come and let them back out. Lightbourne never spoke to any of these guys the whole time they were in our cell.

5. These same trustees were placed in our cell several more times, and acted the same way each time. They would huddle up and whisper together like they were making a plan, and they would laugh a lot, too. A few times I overheard the things they were saying - they were talking about Lightbourne and a murder case. I specifically remember the guy called "Nut" talking about what they were going to tell the cops about Lightbourne. They said that they were going to say that Lightbourne told them all about the murder of the O'Farrell woman. I also heard them talking about getting out of jail and heard "Nut" telling the others that he had gotten out this way before.

6. Long after I was transferred back to the state prison system, I learned that at least one of the trustees who had been in the cell with me and Lightbourne - "Nut" Chavers - testified at Lightbourne's trial and said that Lightbourne had told him that he did the murder. I knew when I heard this that it was a lie -- Lightbourne and I were together the whole time, in the same cell, and neither of us spoke to those guys who were put in with us. Like I said, I had heard "Nut" and the others talking about what they were going to tell the cops, but I never thought they would

> or could actually get up in a court and say this like it was true.
>
> 7. I didn't know Ian Lightbourne before I met him in the Marion County Jail, and never saw him again after he left. I wouldn't say we were friends - I am about twenty years older than Lightbourne, white, and born and raised in Ocala, so we didn't really have a lot in common. We were cellmates and were together for about 24 hours a day for quite a while and so we naturally got to talking. I just couldn't sit here and let any man die because of a bunch of lies.

(App. 2).

None of this information was revealed to defense counsel, and, of course, none of it reached the jury or the trial court. Instead, the State presented testimony it knew or should have known was false, and used that testimony to convict Mr. Lightbourne and sentence him to death. Trial counsel has recently explained that he was not aware of the information discussed above at the time of Mr. Lightbourne's trial and that the information was essential to his defense of Mr. Lightbourne:

> [A]t the time of Mr. Lightbourne's trial, I did not have the information that Theodore Chavers and Theophilus Carson, two key State witnesses against Mr. Lightbourne, had been placed in Mr. Lightbourne's cell by law enforcement to elicit incriminating evidence, that they had never actually spoken to Mr. Lightbourne, and that their testimony was false. I have recently reviewed information from state attorney files about these witnesses, and I am shocked by what was kept from me at the time of Mr. Lightbourne's trial. The testimony of these witnesses at Mr. Lightbourne's trial was devastating to Mr. Lightbourne and central to the State's case. At that time, any information

> discrediting their testimony was essential to Mr. Lightbourne's defense, and I certainly would have used such information had it been available. Such information was also essential to my pretrial motions to exclude the testimony of these witnesses regarding any statement Mr. Lightbourne purportedly made to them. None of the State's secret deals with these witnesses were disclosed to me. It is now clear, in fact, that these witnesses lied when I questioned them at depositions and at trial. I have also reviewed their correspondence with the State, affidavits, and other documents about these witnesses. I would have used all of this information at Mr. Lightbourne's trial. I would certainly have made a difference. These witnesses, after all, were the essence of the State's case. Information about them such as what was withheld from me would, without a doubt, have affected the jury. With this information I would have obtained at least a lesser conviction than first-degree murder.
>
> Finally, I wish to note that this is not the first capital case in which I have been involved and in which critical information was withheld from me by the State Attorney's office for the Fifth Judicial Circuit. Critical information was withheld in State v. Routly. The Florida Supreme Court ordered a new trial because of the withholding of information in Roman v. State.
>
> In Mr. Lightbourne's case, I made all available discovery demands. Obviously, my requests were not complied with.

(App. 4) (Affidavit of Ronald Fox).

Chavers was an informant for the State, attempted to elicit incriminating evidence at the State's behest, and was offered undisclosed inducements for his cooperation. Ultimately, Chavers lied for the State. None of this information was provided to the defense, and as defense counsel has attested, the information

would have made a difference.

B. Theophilus Carson

Theophilus Carson, whose true name is James Gallman, also testified that Mr. Lightbourne made incriminating statements to him and that he received absolutely nothing in exchange for his assistance in Mr. Lightbourne's case. According to his testimony, Carson/Gallman had been in jail for approximately 100 days when he spoke to Mr. Lightbourne (R. 1184). Carson/Gallman testified that he was released from jail on March 3, 1981 (R. 1180), after he had spoken to Mr. Lightbourne and relayed that information to Detective La Torre. His release, Carson testified, was the result of plea negotiations which occurred before he ever spoke to Mr. Lightbourne (R. 1181). Thus, the impression left with the jury and the trial court was that Carson/Gallman was offered nothing and received nothing in exchange for his testimony.

However, as with Chavers, there was more to the negotiations between the State and Carson/Gallman than was revealed at trial. In fact, the information against Carson/Gallman was not even filed until February 27, 1981, three days after he had spoken to Detective La Torre and ten days after he had allegedly spoken with Mr. Lightbourne. Moreover, Carson/Gallman was offered money and assistance with charges pending against him in Tampa, as he reminded the State Attorney's office in 1982:

STATE ATTORNEY OFFICE OF OCALA

To Head State Attorney

I James T. Gallman, AKA (Theophilus R. Carson) was a key witness in the homicide trial of Egin Lightbolt, the murder of the Ocala Stud Farm owner. I took the stand for the state, I put my life on the line concerning this matter, my testimony was a key in convicting Lightbolt, in return I got nothing but frustration. I was suppose to get a witness pay which I haven't received yet. I was suppose to have had a deal worked out with the state attorney office here in Tampa, but they tell me they have no records of it, and wasn't contacted.

Sir, I am writing this letter in regards and hoping to get some response and a positive reply. I need some legal documents showing that I was a state witness for Marion County, involvement with this trial. I need these appears to present to Judge Harry Lee Coe, III and state attorney office of Tampa. And the witness pay -- sir, I am in very need of it. I would like to thank you for your time, and much needed consideration in the matter.

Thank you kindly

P.S. in the name of God please help me.

James L. Gallman
AKA (Theophilus R. Carson)

(App. 5).

These deals were not disclosed to the defense and, of course, never reached the jury or the trial court. Defense counsel's affidavit (App. 4), excerpted above, establishes that, and that had this information been disclosed, defense counsel would have used it to discredit Carson/Gallman's testimony.

Furthermore, as with Chavers, Carson/Gallman's testimony that Mr. Lightbourne made incriminating statements to him was also false. As Chavers has recently said, "Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial. . . . I know that he lied on Lightbourne to get out of trouble" (App. 1). Carson/Gallman did in fact testify that Mr. Lightbourne admitted shooting the victim, testimony now shown to be false.

Again, as with Chavers, Carson/Gallman was an agent of the state who was offered inducements in exchange for his cooperation. He, too, like Chavers, lied for the State. As Chavers now, finally, explains, an explanation confirmed by Hall:

> Theophilus Carson, who was also in the cell with Lightbourne and me, worked for the state too. Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial by dropping his charges. I know that he lied on Lightbourne to get out of trouble.

(App. 1). None of this information was provided to the defense, and, as defense counsel has attested, it would have made a difference.

C. Other Withheld Information

In addition to withholding information regarding its informants, the State suppressed information regarding the extent of law enforcement's investigation of the murder and law enforcement's interest in other suspects. The story presented at trial was that law enforcement had collected circumstantial

evidence in the two weeks immediately following the murder, but that there were no suspects until Theodore Chavers fortuitously stepped forward with information linking Mr. Lightbourne to the offense.

However, law enforcement had another suspect under serious consideration: Joseph M. (Mike) O'Farrell, Jr., the victim's brother. So serious was law enforcement about its theory that Mike O'Farrell had arranged the victim's murder that it subjected another Bahamian employee at the farm to extensive interrogation and even a polygraph:

> 7. When this happened my husband, Anthony, was taken in for a lie detector test. The police at that time believed Michael O'Farrell had something to do with this. It was well known by the people who worked on the farm that Mr. O'Farrell did not get along with his sister and well known that she would inherit everything when her parents died. With Miss O'Farrell out of the way Michael O'Farrell got everything. The police kept asking my husband if Michael O'Farrell paid Ian to do this and if Michael O'Farrell paid my husband to lie. They really suspected Michael O'Farrell at that time.

(App. 29).

Nothing regarding law enforcement's suspicions about and investigation of Mike O'Farrell appears in the discovery provided defense counsel. Needless to say, the possibility that another person had committed the murder or arranged to have it committed would have made a difference in Mr. Lightbourne's case.

D. The Pattern

Mr. Lightbourne's case was not the first or only case involving the State Attorney's Office for the Fifth Judicial Circuit in which prosecutorial misconduct and the withholding of information has been established. Several other such instances of State misconduct exist, demonstrating a pattern of misconduct.

For example, in State v. Taylor, a first-degree murder trial which occurred in the same time period as Mr. Lightbourne's, after the defendant had been convicted and the conviction reversed on appeal, it was discovered that the same Assistant State Attorney who prosecuted Mr. Lightbourne -- Al Simmons -- had withheld critical exculpatory evidence from the defense (App. 58, 59). The person who had provided that information to the State recently explained what happened:

> I, H. EDWIN PIKE III, having been duly sworn, hereby depose and say:
>
> 1. My name is H. Edwin Pike II and I have lived in Ocala for over ten years. I have provided information to the federal government on an assignment basis in overt criminal investigatory operations. In the course of such work, I have cooperated in many investigations that led me to work closely with former Marion County Assistant State Attorney Albert C. Simmons.
>
> 2. I have worked on several cases in which I have information to the Marion County State Attorney's Office through Al Simmons. In fact, on many of these occasions, Al Simmons has hidden and concealed material exculpatory evidence given by me and others in criminal cases that he personally prosecuted, and did prosecute people that he knew for a fact were innocent. Al Simmons engaged in serious

> improprieties and conspiratorial acts while prosecuting criminal cases for the Marion County State Attorney's Office. Because I was directly involved in at least two of these cases, I have specific first-hand knowledge of Mr. Simmons' wrongdoings.
>
> 3. One of the cases in which I provided information to Al Simmons was the Taylor case. Ben McLaughlin, a Marion County bondsman, told me that he had arranged for Eugene Bailey to be killed by a hitman. In fact, I accompanied Mr. McLaughlin and another person who I later learned was the hitman that Mr. McLaughlin said he hired. We drove to Orlando where the apparent hitman left town. I do not know what this supposed hitman did or did not do, however, shortly thereafter, Walter Scott, while in the company of Mr. Bailey, was murdered. McLaughlin repeatedly told me that he was good friends with Al Simmons, and could get Al Simmons to "take care of things" for him. Local attorney Ray Taylor was prosecuted by Al Simmons for the murder of Walter Scott. I reported what I knew in detail to Gerard King who was then Al Simmons' investigator employed by the State Attorneys' Office in Ocala, Marion County, Florida, and to FBI agent Jerry Hale of the Gainesville FBI Office. This report was tape recorded and transcribed by the State Attorneys' Office. Al Simmons hid this written report and came to me on at least two occasions with Ben McLaughlin to tell me that I had better "forget" what I knew and what I had said. Simmons said "we'll handle this our way and we don't need you or your Fed Buddies interfering." Mr. Taylor was later convicted for Mr. Scott's murder and, as far as I know, my report was never disclosed to Taylor's attorney or to the Court.

(App. 3; see also App. 60).

In Routly v. State, a former prosecutor with the Fifth Judicial Circuit (now a disbarred federal narcotics law violator, see United States v. Fitos (M.D. Fla., Ocala Division, 1988-89)),

testified that his understanding of discovery and his office's method of providing discovery was to place discovery materials in the State's file, not to provide it to the defense:

> Q Prior to Mr. Routly's trial, did you provide that document [an immunity agreement with a key state witness] to Ron Fox?
>
> A It was placed in the normal procedure into the file.
>
> * * *
>
> Q Did you ever hand that document to Ron Fox?
>
> A I did -- no; I do not recall ever personally handing it to him.
>
> Q Did you ever mail that document to Ron Fox?
>
> A I did not.
>
> Q Did you ever hand that document to Jim Burke?
>
> A I don't believe so.
>
> Q Did you ever mail that document to Jim Burke?
>
> A I don't really recall ever having done that.
>
> Q Did you ever hand that document to anybody in the Public Defender's office?
>
> A I don't recall whether I had done that or not, specifically.
>
> Q Did you ever mail that document to anybody in the Public Defender's office?
>
> A I don't know.
>
> * * *

Q Did you ever tell anybody else about that document?

A I can't remember specifically that I told anybody about the document.

(App. 61, pp. 602-06).

Finally, in Roman v. State, 528 So. 2d 1169 (Fla. 1988), another first-degree murder case prosecuted by the State Attorney's Office for the Fifth Judicial Circuit, the Florida Supreme Court granted a new trial in post-conviction proceedings because the prosecution withheld material evidence.

As these cases demonstrate, failures to disclose material evidence were routine for the Fifth Judicial Circuit State Attorney's Office during the same time period that Mr. Lightbourne was prosecuted. That practice infected the proceedings in Mr. Lightbourne's case, as well, resulting in the suppression of material evidence and the presentation of false and misleading testimony.

E. The False and Misleading Testimony and the Suppressed Evidence Were Material

Chavers and Carson were key elements of the State's case against Mr. Lightbourne. Particularly as related to sentencing, the deletion of Chavers' and Carson's testimony would have left the State's case for death non-existent. An examination of the Florida Supreme Court's opinion on direct appeal demonstrates why this is so:

Aggravating Circumstances

1. The capital felony was committed while the defendant was engaged in the commission of a burglary and sexual battery. Section 921.141(5)(d)), Fla.Stat.(1981). The evidence presented to the jury in this case, and considered by the learned trial judge at sentencing was clearly sufficient to establish the burglary and sexual battery. A screen had been cut and a window of victim's house had been pried open and broken. Testimony revealed that the defendant had admitted surprising the victim in her home, that he took some money, a necklace, and a small silver coin bank. The phone cords had been severed. Viable sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death. The defendant's blood type was consistent with semen and blood tests and factors present therein as testified to by experts. Pubic hair found at the crime scene was miscroscopically matched with those of the defendant. These facts and others contained in the record in this case are clearly sufficient to support the findings of burglary and sexual battery. As such they also stand sufficiently strong to support the aggravating circumstance under section 921.141(5)(d).

The evidence was sufficient to show premeditated design. During the burglary the victim was forced into acts of oral sex and intercourse as she begged him not to kill her. Despite her pleas that he not kill her, defendant fired a shot striking her on the left side of the head. The weapon was held against a pillow at the time it was fired. The examining doctor said she bled to death. Defendant's argument with respect to the unconstitutional effect of "automatic" aggravating circumstances solely in the felony murder context is inappropriate in this case.

2. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. Section 921.141(5)(e), Fla.Stat.

> (1981). Once again the evidence presented at trial strongly supports this aggravating circumstance. Defendant admitted knowing the victim. Plainly the defendant killed to avoid identification and arrest. Proof of the requisite intent to avoid detection is strong in this case. See Riley v. State, 366 So. 2d 19 (Fla. 1978).
>
> 3. The capital felony was committed for pecuniary gain. Section 921.141(5)(f), Fla.Stat. (1981). Defendant says that the consideration of murder for pecuniary gain and murder while engaged in a burglary is a doubling of aggravating circumstances. We have held in applying the aggravating circumstances that the trial court does not improperly duplicate robbery and pecuniary gain where defendant committed the crime of rape in conjunction with the murder. Brown v. State, 381 So. 2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118, 101 S.CT. 931, 66 L.Ed.2d 847 (1981). There was adequate proof of rape.
>
> 4. The capital felony was especially heinous, atrocious, or cruel. Section 921.141(5)(h), Fla.Stat. (1981). Taking into consideration the totality of circumstances in this case, the murder and the events leading up to its consummation were carried out in an unnecessarily torturous way toward the victim. The record reflects that the victim was forced to submit to sexual relations with defendant prior to her death, while pleading for her life, and we cannot say that the trial court's finding of heinouseness is at material variance with the facts.

Lightbourne v. State, 438 So. 2d 380, 390-91 (Fla. 1983)(emphasis added).

The only information that the victim was forced to engage in oral sex and that she pleaded for her life came from Theodore Chavers (R. 1115-16). The only information that Mr. Lightbourne

"admitted surprising the victim" and that the homicide was committed to avoid identification and arrest came from Theophilus Carson (R. 1177, 1180). In fact, the only information that the victim had been raped came from Chavers and Carson. Without the testimony of either one of them, the State's case for death would have been substantially weakened; without the testimony of both Chavers and Carson, the balance would have tipped toward life.

This case involves more than a simple violation of Brady v. Maryland, 373 U.S. 83 (1963). As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The fourteenth amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . 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).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, supra, but also to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it

relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue, supra; Giglio v. United States, 405 U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In short, the State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, supra, 427 U.S. at 103-04 and n.8. The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 105 S. Ct. 3375, 3382

(1985), quoting United States v. Agurs, 427 U.S. at 102. In sum, the most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is any reasonable likelihood, Bagley, supra, that the falsity affected the verdict. This motion demonstrates that these principles were flouted during the proceedings resulting in Mr. Lightbourne's capital conviction and sentence of death. Thus, if there is "any reasonable likelihood" that the informants' uncorrected false and/or misleading testimony affected the verdicts at guilt-innocence or sentencing, Mr. Lightbourne is entitled to relief. Obviously, here, there is much more than just a possibility -- as the factual allegations in the motion to vacate demonstrate.

In this regard, the Eleventh Circuit Court of Appeals' opinion in Brown v. Wainwright, 785 F.2d 1457 (1986), is very much on point -- so much so, in fact, that we can employ its legal analysis and simply use the facts of Mr. Lightbourne's case. Initially, however, it must be noted that when the "inquiry is whether the state authorities knew" of the falsity of a government witness' testimony, "[i]t is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge will be imputed to state prosecutors."

Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984) (citations omitted) (emphasis supplied).

Turning to Brown,

> The government has a duty to disclose evidence of any understanding or agreement as to prosecution of a key government witness. Haber v. Wainwright, 756 F.2d 1520 (11th Cir. 1985); Williams v. Brown, 609 F.2d 216, 221 (5th Cir. 1980); U.S. v. Tashman, 478 F.2d 129, 131 (5th Cir. 1973). The government, in this case, did not disclose. The government has a duty not to present or use false testimony. Giglio [v. U.S., 405 U.S. 150 (1972)]; Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984). It did use false testimony [testified to by the informants]. If false testimony surfaces during a trial and the government has knowledge of it, as occurred here, the government has a duty to step forward and disclose. Smith v. Kemp, 715 F.2d 1459, 1463 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S. Ct. 510, 78 L.Ed.2d 699 (1983) ("The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony."). It did not step forward and disclose when [the informants] testified falsely. The government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false. See U.S. v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977) (defendant's conviction reversed because "The Government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider"). Here the government [argued for Ian Lightbourne's capital conviction and death sentence on the basis of the informants' testimony].

785 F.2d at 1464 (footnotes omitted). Moreover, "[i]t is of no consequence that the falsehood [bears] upon the witness's

credibility rather than directly upon [the] defendant's guilt." Brown, 785 F.2d at 1465, quoting Williams v. Griswald, and Napue v. Illinois.

In Mr. Lightbourne's case the informants' false testimony obviously involved their credibility -- credibility which should have been suspect from the outset, but which was bolstered by the State's failure to correct the lies that they neither expected nor wanted any benefit for their testimony. The Rule 3.850 motion demonstrates a great deal more. There is much more than a "reasonable likelihood" that the informants' false and misleading evidence affected the jury's judgment at guilt-innocence or sentencing.

In this case, the government's misconduct was not limited solely to the failure to correct false testimony. We know that reversal is required in this case under the Brady materiality standard. We know that evidence relating to the informant's credibility was critical. We know that the government withheld important information in this regard. And we also know that the defense could have used the withheld materials to show the jury that the informants' testimony was false, to litigate the Henry claim which the government hid, and to significantly undermine the testimony of the informants and the lead detective.

This case involves almost every type of classically recognized Brady material about or relating to the informant/witnesses, none of which was turned over: prior

dealings, future expectations, prior rewards, present benefits, agency and informant relationships, money, etc., etc.

The prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S. Ct. 3375 (1985). Thus the prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, supra. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d at 1542.

Mr. Lightbourne's motion alleges that the State's action of withholding exculpatory evidence violated the fifth, sixth, eighth and fourteenth amendments. An explanation of how each amendment's guarantees were denied Mr. Lightbourne is appropriate. The cornerstone is the fourteenth amendment: the government's hiding of exculpatory, impeachment, or otherwise useful evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 93

S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived, so hiding exculpatory or impeaching information violates the sixth amendment right to effective assistance of counsel as well. United States v. Cronic, 104 S. Ct. 2039 (1984). In this case such errors are even more obvious for the withholding of substantial Henry-type evidence may well have been the reason why the informants' statements were not suppressed. The unreliability of fact determinations resulting from such state misconduct also violates the Eighth Amendment requirement that no unreliable death sentence be imposed.

These rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in Mr. Lightbourne's case. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). As is obvious, there is "particular need for full cross-examination of the State's star witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and here the star-witnesses were all informants. The agency relationship between the government and its informants was suppressed. As discussed above, the informants testified falsely about their status. Their lies were not corrected. Given the pattern of State misconduct and evidence suppression presented in Mr. Lightbourne's motion, this may be a good point to consider:

> By requiring the prosecutor to assist the defense in making its case, the Brady

> rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . 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). See Brady v. Maryland, 373 U.S., at 87-88.

United States v. Bagley, 105 S. Ct. at 3380 n.6.

There can be little doubt that material evidence was withheld in Mr. Lightbourne's case -- evidence which would have made a difference at trial and sentencing. Material evidence is evidence of a favorable character for the defense which would affect the outcome of the guilt-innocence and/or capital sentencing trial. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence). Napue, Giglio, and Bagley make it clear that exculpatory evidence as well as evidence which can be used to impeach are governed by the same constitutional standard of reversal. Moreover, the materiality of the evidence at issue must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United

States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973).

Promises and threats to witnesses are classically exculpatory. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Any motivation for testifying

and all the terms of official or unofficial agreements or understandings with witnesses must be disclosed to the defense. Giglio. Impeachment of prosecution witnesses is often critical to the defense case, as is especially true in Mr. Lightbourne' case. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in criminal cases when a person must be allowed to effectively confront a co-defendant witness:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 U.S., at 87, so, that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Bagley, 105 S. Ct. at 3300 (emphasis added). And so it is here: the informants expected and received benefits, they worked for the State; law enforcement consistently went out of its way to help them; they were allowed to walk away from serious charges; the State got them out of their trouble; and so on.

Evidence which even tends to impeach a critical state witness is clearly material under Brady. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Brown v. Wainwright, 785 F.2d (11th Cir. 1986). This is so because "[T]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative . . . and it is upon such subtle factors as the possible interest of a defendant's life . . . may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). The jurors at Mr. Lightbourne's trial were never allowed to hear the important information regarding the government's informants -- the information was critical to any adequate guilt-innocence or penalty determination. However, the government and its informants kept it from defense counsel, and never allowed it to get to the jury or the Court.

F. Because the Files and Records Do Not Conclusively Establish That Mr. Lightbourne is Entitled to No Relief and Because the True Facts Were Kept From the Record and Therefore Not Available on Direct Appeal, Mr. Lightbourne is Entitled to an Evidentiary Hearing on this Claim.

Mr. Lightbourne's motion to vacate judgment and sentence pleads the substantial facts supporting his claim. See Fla. R. Crim. P. 3.850. The claim is based upon nonrecord [hidden] evidence of prosecutorial misconduct and knowing use of false evidence which was kept from the jury at the time of Mr. Lightbourne's trial. That the State concealed the truth and kept it from the record, in fact, is an essential component of the

claim which Mr. Lightbourne has pled. Because the State kept the truth from the "record" at trial and allowed its informants to testify falsely, there was no "record" from which the claim could have been brought on direct appeal. The true facts revealing the State's misconduct have only now come to light.

Such claims cannot be raised anywhere but post-conviction, as the Florida Supreme Court has acknowledged. See Arango v. State, 437 So.2d 1099, 1102 (Fla. 1983) ("A Brady violation is normally predicated on the defendant's not knowing of the withheld evidence."); see also Smith v. State, 400 So.2d 956, 963 (Fla. 1981). Rule 3.850, Fla. R. Crim. P., provides the forum and the mechanism. This Court should stay this execution and remand for an evidentiary hearing -- the files and records do not demonstrate that Mr. Lightbourne is entitled to no relief. Mr. Lightbourne's claim must be heard and fairly determined. Demps v. State, 416 So.2d 808, 809-10 (Fla. 1982) (ordering Rule 3.850 evidentiary hearing on Brady claim); Smith v. State, supra, 400 So.2d at 962-64 (same); Arango v. State, supra, 437 So.2d at 1104-05 (same), subsequent history in, 467 So.2d 692 (Fla. 1985) (granting Rule 3.850 post-conviction relief), vacated and remanded, ___ U.S. ___, 106 S.Ct. 41 (1985) (directing reconsideration in light of United States v. Bagley), 497 So.2d 1161 (Fla. 1986) (granting Rule 3.850 post-conviction relief under Bagley). Claims predicated on Brady v. Maryland are precisely the type of issues which must be heard pursuant to Rule

3.850. See Demps, supra, 416 So.2d at 809-10 (directing a Rule 3.850 hearing on Brady claim); Smith, supra, 400 So.2d at 963 ("Since the trial court believed that [a Brady claim] was inappropriate to a rule 3.850 proceeding, it did not pass on the merits of the question . . . and accordingly we remand this singular issue to the trial court to make this determination."); Arango, supra, 437 So.2d at 1104-05 ("[P]etitioner has made a prima facie case which requires a hearing. We remand to the trial court for the purpose of conducting a hearing on the claimed Brady violation."); cf. Cash v. State, 207 So.2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So.2d 618 (Fla. 4th DCA 1966); Wade v. State, 193 So.2d 459 (Fla. 4th DCA 1967). As in Demps, Mr. Lightbourne's claim is that "the state affirmatively manipulated testimony, a violation more egregious than the mere passive nondisclosure disapproved in Brady v. Maryland." 416 So.2d at 809. As in Arango, Mr. Lightbourne's Rule 3.850 pleadings have made a prima facie showing sufficient to allow him to present the proof supporting his claim at a hearing. 437 So.2d at 1104-05.

Mr. Lightbourne's claim must be determined on the merits -- the merits call for a stay of execution, an evidentiary hearing, and Rule 3.850 relief.

G. The Material Evidence Was Withheld by the State During the Post-Conviction Process as Well; No Bars Can or Should be Applied to Fully and Fairly Determining the Claim Now.

Both Mr. Fox (trial counsel) and Mr. Crawford (former collateral counsel) exercised due diligence. Both were misled. As discussed in the introduction to this brief, no amount of reasonable, diligent efforts resulted in the disclosure of this material evidence earlier. The State hid it, and the State's informants would not talk. Under these circumstances, no procedural bar can be ascribed to Mr. Lightbourne's claim -- the State's own withholding resulted in Mr. Lightbourne's failure to present it earlier. See Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985)(en banc); Amadeo v. Zant, 108 S. Ct. 1771 (1988); Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979); Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987). This Court's refusal to entertain the claim now would therefore be a miscarriage of justice, for the claim was "reasonably unknown," see Rule 3.850, to former trial and collateral counsel (see affidavit of Mr. Fox; affidavit of Mr. Crawford, Apps. 4 and 64), because of "interference by [state] officials" -- i.e., the State's concealment of the true facts. Amadeo v. Zant, 108 S. Ct. 1771, 1777 (1988), citing, Murray v. Carrier, 477 U.S. 478, 488 (1986).

A stay of execution, full and fair evidentiary resolution, and post-conviction relief are appropriate.

## CLAIM II

### THE STATE'S UNCONSTITUTIONAL USE OF JAILHOUSE INFORMANTS TO OBTAIN STATEMENTS VIOLATED MR. LIGHTBOURNE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

This claim was litigated earlier. *See Lightbourne*, *supra*, 438 So. 2d at 386. Relief was then denied because no agency relationship between the government and its informants was revealed by the record. The record, however, reflected a lie: the agency relationship was hidden at the time of trial, and hidden during post-conviction proceedings. Indeed, the State's witnesses testified falsely about this relationship, and the State allowed that testimony to go uncorrected. There was, however, an agency relationship between the state and *both* Chavers and Carson. As discussed in preceding sections of this brief, this relationship has only now come to light: the State misled former counsel and withheld truth during earlier proceedings. This claim should now be heard.

On January 24, 1981, Mr. Lightbourne was arrested on a charge of carrying a concealed weapon and placed in the Marion County Jail. On January 26, probable cause was found, and the Public Defender was appointed to represent him. Formal proceedings were underway, the government had committed itself to prosecution, Mr. Lightbourne was incarcerated, and adversarial proceedings had been initiated.

On January 17, 1981, Nancy O'Farrell had been discovered shot to death in her home. Over the next ten days, law enforcement investigated her death, but apparently had no viable suspects.

On January 28, 1981, Detective Fred La Torre of the Marion County Sheriff's Office, lead detective in the homicide case, interviewed Cathleen Gifford, an employee of the Ocala Stud Farm. Detective La Torre asked Ms. Gifford whether she knew if any of the farm workers carried weapons:

> Q Do you know of any other people on the farm, any other workers out there that might tend to have kinda of a violent nature, or maybe carrying weapons out there that you've seen, heard about.
>
> A Most of em carry weapons; in fact the man I used to go out with, he's in jail now for that, cause they caught him; he was gettin pretty violent too.
>
> Q Who is that?
>
> A Eon Lightburn.
>
> Q How long has he been in jail?
>
> A I think they picked him up Sunday morning.
>
> Q What is his name, Eon?
>
> A Um hum. IAN.
>
> Q Lightburg.
>
> A L I G H T B O U R N E.
>
> Q And you think he was arrested last Sunday?
>
> A Um hum.

Q Here in town?

A Um hum.

(App. 15).

The very next day, January 29, Theodore Chavers was fortuitously transferred into the same cell as Mr. Lightbourne. Contrary to his trial testimony, Chavers was an agent of the State, sent into Mr. Lightbourne's cell to elicit incriminating statements (see Claim I, supra).

Chavers was well-known in the community as a police informant. He had provided Detective La Torre with information in the past (R. 1598), and had been an informant in another capital case involving Sonny Boy Oats (R. 1015). The local bondsman even bonded Chavers out of jail for free so that he could assist law enforcement (App. 17). In fact, Chavers' assistance was in so much demand that after he had provided Detective La Torre with information regarding Mr. Lightbourne, he went on to another job for the Ocala Police Department (App. __).

Not only did Chavers have experience with being an informant and its rewards, but he also received specific instructions from Detective La Torre regarding Mr. Lightbourne's case and was sent into the cell to do his work:

> I, THEODORE CLEVELAND CHAVERS, having been duly sworn, hereby depose and say:
>
> 1. My name is Theodore Cleveland Chavers and my nickname is "Uncle Nut". I was made to testify against Ian Lightbourne at his trial in 1981.

2. In 1981, I was very familiar to the local law enforcement officers because of numerous arrests and charges made against me in Ocala. When I was in the Marion County Jail in January of 1981, I was placed in a cell with Ian Lightbourne and several other inmates.

3. Shortly after being put in the cell with Lightbourne, Detective La Torre took me out and talked to me at length. He made it clear to me that it was in my best interest to find out all I could from Lightbourne about the O'Farrell murder. I in fact did this and then several charges pending against me were dropped.

4. Theophilus Carson, who was also in the cell with Lightbourne and me, worked for the state too. Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial by dropping his charges. I know that he lied on Lightbourne to get out of trouble.

5. The officers pressed me for details about what Lightbourne was saying even though there was not anything really to say. I told them I didn't want to get involved since they had other evidence but with all they had on me they could make me do what they wanted.

6. The state attorneys went over and over what they wanted me to say at the trial. They told me the things they wanted me to say to the jury at Lightbourne's trial. They came at me and rehearsed everything I should say.

7. When the investigators involved me in this case, they made it clear that if I scratched their backs, they'd scratch mine - but if I didn't cooperate, they could bring me even more trouble than I already have. In fact, what really happened in my conversations with Lightbourne and the way they made me say it was very different. I knew I had to make things look good for the way they wanted the investigation to go.

> 8. Before the trial, I heard that the O'Farrell family had offered a $10,000.00 reward for anyone who helped with their case. I called the O'Farrell's to collect and they agreed to meet with me, but they didn't show up but the cops did instead. They gave me $200.00 and told me to leave the O'Farrell family alone and not to talk to anyone about this or the case.
>
> 9. In the past, I refused to discuss this matter with anyone because the police wanted it to stay quiet. They told me to keep my mouth shut and I knew they'd give me heat if I didn't. Because I had been in so much trouble in the past, the police would make me cooperate with them whenever they wanted me to, just like in Lightbourne's case.
>
> 10. I am now willing to discuss these things because I no longer have any pending charges which could be held over my head.

(App. 1).

Another inmate who was in the jail cell with Mr. Lightbourne and Chavers has also described what occurred in that cell, in a way markedly different from what the jury heard at Mr. Lightbourne's trial:

> I, JACK R. HALL, having been duly sworn, hereby depose and say:
>
> 1. My name is Jackie R. Hall and I currently reside at the Marion Correctional Institute in Lowell, Florida. I am 48 years old.
>
> 2. In January and February of 1981, I was incarcerated at the Marion County Jail. I was in a cell with Ian Lightbourne the entire time I was at the jail.
>
> 3. Because Lightbourne spoke with a thick accent, he had a real hard time

communicating with other inmates. I was the only inmate at the jail during this time that Lightbourne would talk to.

4. When Lightbourne was first brought to the Marion County Jail, he was placed in the same cell with me. Shortly after Lightbourne's arrival, three trustees were moved into our cell. One of these trustees was "Nut" Chavers, but I did not and do not know the name of the others. Neither Lightbourne nor I ever talked with them. They huddled in the corner talking together for awhile and then called for the guards to come and let them back out. Lightbourne never spoke to any of these guys the whole time they were in our cell.

5. These same trustees were placed in our cell several more times, and acted the same way each time. They would huddle up and whisper together like they were making a plan, and they would laugh a lot, too. A few times I overheard the things they were saying - they were talking about Lightbourne and a murder case. I specifically remember the guy called "Nut" talking about what they were going to tell the cops about Lightbourne. They said that they were going to say that Lightbourne told them all about the murder of the O'Farrell woman. I also heard them talking about getting out of jail and heard "Nut" telling the others that he had gotten out this way before.

6. Long after I was transferred back to the state prison system, I learned that at least one of the trustees who had been in the cell with me and Lightbourne - "Nut" Chavers - testified at Lightbourne's trial and said that Lightbourne had told him that he did the murder. I knew when I heard this that it was a lie -- Lightbourne and I were together the whole time, in the same cell, and neither of us spoke to those guys who were put in with us. Like I said, I had heard "Nut" and the others talking about what they were going to tell the cops, but I never thought they would or could actually get up in a court and say this like it was true.

> 7. I didn't know Ian Lightbourne before I met him in the Marion County Jail, and never saw him again after he left. I wouldn't say we were friends - I am about twenty years older than Lightbourne, white, and born and raised in Ocala, so we didn't really have a lot in common. We were cellmates and were together for about 24 hours a day for quite a while and so we naturally got to talking. I just couldn't sit here and let any man die because of a bunch of lies.

(App. 2).

After Chavers fulfilled his assignment, providing Detective La Torre with information, he received his rewards. As discussed in Claim I, he was released from jail although he had serious charges pending against him, had one of those charges dropped and received probation on the others. In fact, in the years following his participation in Mr. Lightbourne's case, Chavers has received immunity for "anything short of murder" from the State Attorney's Office (<u>see</u> Claim I, <u>supra</u>).

Chavers was in the regular employ of Ocala and Marion County law enforcement and actively working on the investigation of the murder of Nancy O'Farrell before, while, and after he elicited the statements from Mr. Lightbourne to which he testified. It was his job; he did it in the course of his duties as an informer. In this respect, he was no different than Detective La Torre, or any other employee of the department. He performed his assigned task, eliciting statements from Mr. Lightbourne, and was released from jail. He was then assigned further investigative

tasks, and performed them as any employee would.

Mr. Lightbourne's right to counsel was deliberately (and deviously) circumvented by the actions of Chavers and his employers. Chavers was directed by his employers to obtain evidence, and he did. Formal proceedings had commenced against Mr. Lightbourne and his sixth amendment right to counsel had therefore attached, and the statements elicited by Marion County Sheriff's Department employee Chavers were elicited in direct violation of that right.

The situation with Carson/Gallman was the same. As Chavers has attested, "Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial. . . . I know that he lied on Lightbourne to get out of trouble" (App. 1). Furthermore, in exchange for his cooperation, Gallman was offered money and assistance with charges pending against him in Tampa, as he reminded the State Attorney's office in 1982:

> STATE ATTORNEY OFFICE OF OCALA
>
> To Head State Attorney
>
> I James T. Gallman, AKA (Theophilus R. Carson) was a key witness in the homicide trial of Egin Lightbolt, the murder of the Ocala Stud Farm owner. I took the stand for the state, I put my life on the line concerning this matter, my testimony was a key in convicting Lightbolt, in return I got nothing but frustration. I was suppose to get a witness pay which I haven't received yet. I was suppose to have had a deal worked

out with the state attorney office here in Tampa, but they tell me they have no records of it, and wasn't contacted.

Sir, I am writing this letter in regards and hoping to get some response and a positive reply. I need some legal documents showing that I was a state witness for Marion County, involvement with this trial. I need these appears to present to Judge Harry Lee Coe, III and state attorney office of Tampa. And the witness pay -- sir, I am in very need of it. I would like to thank you for your time, and much needed consideration in the matter.

Thank you kindly

P.S. in the name of God please help me.

James L. Gallman
AKA (Theophilus R. Carson)

Carson/Gallman's elicitation of statements from Mr. Lightbourne and subsequent testimony hinged on the State's promise of money and help on other charges. Carson/Gallman was compensated, and was acting as an agent of the government when he elicited statements from Mr. Lightbourne. Carson/Gallman fulfilled his end of the bargain, and got angry when the State was slow to discharge theirs. Mr. Lightbourne was actively represented by counsel at the time Carson/Gallman elicited statements from him. The State and its agent Carson/Gallman deliberately circumvented Mr. Lightbourne's right to counsel, and the use of the statements thus obtained to convict and sentence him to death violates the sixth, eighth and fourteenth amendments.

Here, as discussed regarding Claim I, the testimony of Chavers and Carson/Gallman was essential to the State's case. Their testimony regarding Mr. Lightbourne's "Statements" directly linked Mr. Lightbourne to the offense and provided support for several aggravating circumstances. Without either or both of them, the sentencing balance would have tipped toward life.

The statements used to convict Mr. Lightbourne and sentence him to death were obtained in violation of his right to counsel. But for the State's misconduct, these statements would not have, could not have, been admitted. Mr. Lightbourne's conviction and sentence of death violate the sixth, eighth and fourteenth amendments and cannot stand.

In this case, the true facts which demonstrated that the statements Mr. Lightbourne "made" to jailhouse informants were, in fact, the product of the State's deliberate efforts to extract confessions were concealed. Even with what little the record reflected, jurists reviewing this case have been troubled by the State's misconduct. See Lightbourne v. State, 438 So. 2d at 392 (Overton, J., dissenting). This motion demonstrates that the State dispatched informants on statement-gathering missions. Law enforcement placed the informants in close proximity to Mr. Lightbourne -- when they purportedly got the statements they were after, they would be released.

At the time of trial nothing was provided to the defense which showed the truth: that the witnesses at issue were not

just cellmates who happened to be at the right place at the right time. Rather, the cellmates were government informants, agents of the State, who were working for the State at the time that they elicited the statements. The informants lied about their status at their depositions and at trial -- the State kept its orchestration of its agents' statement-gathering missions hidden. Defense counsel was lied to and misled. No one told the jury, the Court, or defense counsel that these people were not just cellmates, but highly valued agents. When he tried to ask he was lied to or steered away from the truth.

The very same governmental misconduct -- concealment of evidence and presentation of lies -- which requires that Claim I be entertained on the merits and fully determined in a Rule 3.850 proceeding also mandates that this claim be now heard and properly determined. See Arango v. State, supra, 437 So.2d 1099; Demps v. State, supra, 416 So.2d 808; cf., Smith v. State, 400 So.2d 956; Wade v. State, 193 So.2d 459. This claim simply could not have been presented earlier -- the government hid the true facts.

We now know that these "cellmates" were State agents. But the government covered all this up at the time of Mr. Lightbourne's trial. This presents yet another reason why this Court should hear the merits of Mr. Lightbourne's claim -- if this Court refuses consideration it will, in effect, allow the State to profit twice from its own misconduct. Due process,

equal protection, and the Eighth Amendment counsel only one thing: this Court must now hear Mr. Lightbourne's claim, for only now have the true facts come to light. Cf. Michael v. Louisiana, 350 U.S. 91 (1955); Parker v. Illinois, 333 U.S. 571 (1948); Reece v. Georgia, 350 U.S. 85 (1955). See also, Demps; Arango; Smith.

The files and records do not conclusively show that Mr. Lightbourne is entitled to no relief. The claim could not have been brought earlier because the government hid the truth. This Court should now determine the claim, and this Court should grant relief.

Mr. Lightbourne was incarcerated and had a lawyer during the time that the State sent in its agents. The detectives never bothered to call Mr. Lightbourne's lawyer and inform him what they were up to with his client. After Mr. Lightbourne was charged with murder, and after he had a lawyer in this case, the State was still trying to obtain statements through the use of informants -- again, no detective called counsel. But the "right to counsel" issue in this case does not require any elaborate chronological analysis:

> . . . the right to the assistance of counsel is shaped by the need for the assistance of counsel, . . . the right [therefore] attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

Maine v. Moulton, 106 S.Ct. 477, 484 (1985), citing, inter alia,

United States v. Wade, 388 U.S. 218, 224 (1967), and United States v. Gouveia, 467 U.S. 180, 189 (1984). In addition, once adversarial criminal proceedings have begun, i.e., once the State has committed itself to the prosecution, the Sixth Amendment provides the accused with the protection of the right to counsel. Moulton, 106 S.Ct. at 484, citing, Gouveia, 467 U.S. at 189. Mr. Lightbourne was incarcerated, and the State had committed itself to prosecution. The Sixth Amendment's protections had attached.

We now know there was an agent relationship between the informants and the State. We know that Ian Lightbourne was protected by the Sixth Amendment. We know that the State sent its agents in to see Mr. Lightbourne. We know -- even from the trial record -- that the government's informants were not docile little listening posts. They asked specific questions; they initiated conversation; they interacted. They both went in with one purpose in mind -- to get statements.

Mr. Lightbourne could not present his claim earlier because only now have the facts showing that the State set the whole thing up come to light. The informants obviously could not care less about Ian Lightbourne's Sixth Amendment rights. The government gave that right about the same deference that it was given by its informants.

There can be no doubt in this case that the government, at minimum, "must have known" that its informants would take the steps necessary to secure statements for the government. United

States v. Henry, 447 U.S. 264, 271 (1980). Here, as in Henry,

> "[b]y intentionally creating a situation likely to induce [Ian Lightbourne] to make incriminating statements without the assistance of counsel, the Government violated [Ian Lightbourne's] Sixth Amendment right to counsel."

447 U.S. at 274. The United States Supreme Court has recognized that "[d]irect proof of the State's knowledge [that it is circumventing the Sixth Amendment] will seldom be available to the accused." Moulton, 106 S.Ct. at 487 & n.12. That is why the standard only requires a showing of what the government "must have known." Id. at 487 n.12, citing, United States v. Henry.

Here, even on the basic documentation presented with the motion, we can show that the government "must have known," Henry, supra, that it was "circumventing [Mr. Lightbourne's] right to have counsel present in [...] confrontation[s] . . . [with] state agent[s]." Moulton, 106 S.Ct. at 487.

The government here set the whole thing up. It created the opportunity to obtain statements from Mr. Lightbourne, and it then used its jailhouse informants to knowingly exploit, Moulton, supra, that opportunity. In the process, the State trampled the Sixth Amendment.

Because the government's own misconduct precluded the claim from being brought earlier, it should now be determined. Because the files and records do not conclusively refute Mr. Lightbourne's claim, he should be permitted to present his proof at an evidentiary hearing. Because the claim is substantial, the

Court should enter a stay and order proper evidentiary development.

CLAIM III

MR. LIGHTBOURNE WAS DENIED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE HE WAS TRIED, CONVICTED, AND SENTENCED TO DEATH BEFORE A JUDGE WHO WAS NOT IMPARTIAL.

A criminal defendant cannot waive his right to be tried before and sentenced by an impartial judge. The trial judge in this case (the Honorable William Swigert), however, never disclosed to the defense the extent of his financial relationship with the victim's family and the State, or of his personal relationship with the victim's family.

On January 30, 1989, Judge Swigert recused himself from this action. At the argument on Mr. Lightbourne's Rule 3.850 motion thereafter conducted before the Honorable Carven Angel (the judge replacing Judge Swigert), Judge Angel expressed concerns about the effect of these facts on the propriety of Mr. Lightbourne's sentence of death. Those concerns were well-founded: a sentnce of death imposed by a sentencing judge whose impartiality is open to question raises serious doubts indeed.

A capital defendant cannot forfeit the right to a reliable sentencing determination. The reliability of this sentence of death has now been undermined. Even on the record now before this Court, resentencing is appropriate.[2] An evidentiary hearing is necessary on the reliability of the guilt-innocence determination.

One of the most basic precepts of the American Constitution is that of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 344,

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[2] As stated, a different judge now presides over this action, after Judge Swigert's ruling recusing himself.

> 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951)(Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Due process guarantees the right to a neutral detached judiciary in order

> to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.

Carey v. Piphus, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

Certainly, a critical factor to be considered in evaluating judge bias is any financial interest the judge has in the outcome or monetary ties he has with individuals with a stake in the litigation. See Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

However, judicial bias may also arise from personal or emotional involvement. For example, a judge was barred from presiding over a lawyer's trial for contempt where the contempt charges resulted from personal exchanges between the judge and the lawyer during court proceedings on another matter. Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

Judge bias exists in violation of due process whenever the criminal judicial proceedings at issue "offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused." Marshall, supra, 446 U.S. at 242, quoting Turner, supra, 273 U.S. at 532.

Here, the judge presiding at Mr. Lightbourne's trial (the Honorable William Swigert) had personal and financial entanglements with both the prosecutor and the victim's family. At the time of trial, the judge only disclosed a relationship with the victim's family which was minor. The extent of the judge's personal and financial dealings went far beyond what was

disclosed at the time and establish that the line was crossed and that judicial bias existed which offended the eighth amendment and the fourteenth amendment.

On September 23, 1974, Judge Swigert, Mr. Lightbourne's trial judge, assumed the position of circuit court judge. At a motion to suppress on April 14, 1981, shortly before the commencement of the trial, Judge Swigert noted the following for the record:

> THE COURT: Okay. Motion is denied. One thing, for the record, and we talked about it this morning; You know, some time ago, before I became a Judge, I used to represent Joseph M. O'Farrell, myself and the law firm and so forth. I was with Ayres, Swigert, Cluster, Tucker & Curry, and I've already advised -- they asked me about that, and I said, "Yeah, that's true", and they have no objection to me hearing the case. I want to put that on the record.

(R. 1655).

However, there was a great deal of additional involvement with Ocala Stud, Inc. -- the business owned by Joseph M. O'Farrell -- which was not disclosed. This involvement continued on into the time Judge Swigert served as a circuit court judge. On September 15, 1977, Judge Swigert filed with the Secretary of State a disclosure of gifts valued in excess of a hundred dollars received during 1976. According to the disclosure, Judge Swigert received gifts from "Ocala Stud, Inc. -- Board and Stud Service for Thoroughbred Horse named Lascassis." The value of this gift was "$1,000.00." On June 15, 1978, Judge Swigert filed the gift

disclosure covering the calendar year of 1977. According to this disclosure Judge Swigert again received from "Ocala Stud, Inc. -- Board and Stud Service for Horse named Lascassis and Colt." The value was again estimated at "$1,000.00." No value was assigned to the colt which was apparently the product of the stud service (App. 18). Thus, Mr. Lightbourne's sentencing judge had received gifts in excess of $2,000.00 from the victim's family business.

Judge Swigert's filings with the Secretary of State in 1977 also reflected that on December 23, 1976, a "[m]ortgage by S. Ray Gill in William T. Swigert" was recorded. The principal was $14,800.00 (App. 19). According to the mortgage as recorded in Marion County: "This is a Purchase Money Mortgage, given to secure the payment of a portion of the purchase price for the above described lands." The terms of the mortgage was "Fourteen Thousand Eight Hundred and No/100 Dollars ($14,800.00) payable at the rate of one hundred dollars ($100.00) per month with interest of 8 1/2 per cent per annum until paid in full." (App. 19). At the time of Mr. Lightbourne's trial, S. Ray Gill was an Assistant State Attorney for the Fifth Judicial Circuit. Thus, the financial entanglement between Judge Swigert and S. Ray Gill was one between judge and prosecutor. According to the records this entanglement continued at least until 1985 well after Mr. Lightbourne's trial and during the pendency of Mr. Lightbourne's Rule 3.850 motion filed in May of 1985 when Mr. Gill was in fact the State Attorney (App. 19).

Defense counsel, Ron Fox, stated in his affidavit:

> Also at the time of Mr. Lightbourne's trial, I was unaware that The Honorable William T. Swigert, the judge who presided at the trial, had had past financial dealings with the family of the victim. I did know that Judge Swigert had represented the victim's family when he was in private practice before taking the bench: the judge told us so. But I did not know that he had received gifts from the family. This was not disclosed. Had I been aware of this past relationship, I would have moved for Judge Swigert to recuse himself from the trial.

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. As the United States Supreme Court indicated in Beck v. Alabama, 447 U.S. 625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In a capital case, the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, 470 U.S. 68, 87 (1985)(Burger, C.J., concurring). Thus, in a capital case, such as Mr. Lightbourne's, the eighth amendment imposes additional safeguards over and above those required by the fourteenth amendment. In Caldwell v. Mississippi, 472 U.S. 320 (1985), for example, a prosecutor's closing argument in the penalty phase was found to violate the eighth amendment's heightened scrutiny even though a successful challenge could not be mounted under the fourteenth amendment. See Caldwell, supra, 472 U.S. at 347-52. (Rehnquist, J.

dissenting); Adams v. Dugger, 816 F.2d 1493, 1496 n.2 (11th Cir. 1987).

In fact, the decision in Booth v. Maryland, 107 S. Ct. 2529 (1987), reflected the differing standard of review between the eighth amendment analysis and fundamental fairness/due process analysis. There the Supreme Court held that victim impact information could not be presented to the sentencer in a capital case even though it could be in a non-capital case. The Court's holding was "guided by the fact death is a 'punishment different from all other sanctions,'' see Woodson v. North Carolina, 428 U.S. 280, 303-04, 305 (1976)."

Here the trial and sentencing judge's participation must be examined under not only the traditional due process standards enunciated in Marshall, but also the heightened scrutiny arising under the eighth amendment. In light of Judge Swigert's substantial gifts from the victim's family business, special consideration must be given the Supreme Court's concern in Booth, 107 S. Ct. at 2534 -- namely, that "factors about which the defendant was unaware, and that were irrelevant" should not be allowed to divert the sentencer's "attention away from the defendant's background and record, and the circumstances of the crime."

Indeed, during voir dire, one juror acknowledged a relationship with the victim's family:

Q    State your name and address.

A (BY THE PROSPECTIVE JUROR): Charles Couture, 2750 Southwest 87th Place.

Q And what questions do you have an affirmative response to?

A I know two members of the family through school.

Q What members are they?

A Margie O'Farrell and then a younger one, Bunny O'Farrell.

Q And they are Joseph O'Farrell's other children?

A Yes.

Q Okay, and your said you knew them through the school board. Do you teach school?

A No. I knew them through school when I was attending school at a younger age.

Q You attended school with them?

A Yes.

Q Okay, and when was the last time you had contact with them?

A Oh, it's been quite a while.

Q When you say --

A Well, a year, two years, something like that.

Q You think your relationship with those other two members of the family would affect your consideration of this case if you are chosen as a Juror?

A No.

Q Did you know the victim?

A No.

Q Do you know anything about this case?

A No.

Q Have you discussed this case with those two members of the family?

A No.

Q You ever discussed this case with any members of the O'Farrell family?

A No.

(R. 363-64).

The judge excused this juror for cause saying:

> BY THE COURT: Based on the testimony -- I think the Court in this particular case, I will excuse you because of your relationship and so forth. Granted for the Defense.
>
> (Thereupon Mr. Couture left the Courtroom.)

(R. 369).

Certainly the judge's relationship with the victim's family was much more significant. The judge failed to disclose the extent of the relationship. This relationship was such that it "might lead him not to hold the balance nice, clear and true between the state and the accused." Marshall, supra, 446 U.S. at 242. The sentencing judge's undisclosed relationship with the victim's family "is inconsistent with the reasoned decisionmaking [the United States Supreme Court] require[s] in capital cases." Booth, supra, 107 S. Ct. at 2536. Accordingly, Mr. Lightbourne's trial and sentencing were conducted in violation of the eighth

and fourteenth amendments. The judgment and sentence entered against him must therefore be vacated.

This claim is a classic example of a constitutional error which served to preclude the full and fair determination of true facts and "perverted the [sentencer's] deliberations concerning the ultimate question whether [Ian Lightbourne should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). The relationships and dealings of the judge who sentenced Mr. Lightbourne to death were never disclosed, and therefore the claim could not have been brought earlier. Under any circumstances, Smith v. Murray requires that the claim now be fairly adjudicated, and that no bar be applied, for it would be a gross miscarriage of justice to allow a capital defendant to be dispatched to his execution when he has been sentenced to die by a judge whose fairness and impartiality are so seriously called into question. An evidentiary hearing and Rule 3.850 relief are appropriate.

## CLAIM IV

### IAN LIGHTBOURNE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This Court denied this claim during the litigation of Mr. Lightbourne's prior Rule 3.850 motion. That denial, however, was founded on a fundamentally erroneous mistake of law:

> The trial record clearly indicates that the sentencing judge [through a pre-sentnece investigation report] was in fact aware of many of the mitigating factors that counsel on appeal is now presenting to the Court.

Lightbourne v. State, 471 So. 2d 27, 28 (Fla. 1985)(emphasis added).[3] But the basis of Mr. Lightbourne's claim has always been that the jury never heard the mitigation. The jury never heard it because trial couunsel failed to investigate and prepare, as counsel's own sworn affidavit attests (see infra). Had the jury heard the compelling available case for life that should have been presented on Mr. Lightbourne's behalf, the results of the sentencing proceeding would have been different. A life sentence from this jury could not have been overridden, for the compelling mitigation discussed below provides much more than a "reasonable basis" for a jury life recommendation. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

This Court's disposition of this significant constitutional claim thus constituted fundamental error of law. "[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled . . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Prejudicial fundamental error was involved in the Court's

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[3]Even this conclusion is open to question, on the basis of what is reflected in Claims I and II of Mr. Lightbourne's accompanying petition for writ of habeas corpus.

prior disposition of this claim. An evidentiary hearing should now be allowed.

Mr. Lightbourne's trial counsel, under oath, explains:

> It would have been important for me to testify about these matters [the penalty phase of Mr. Lightbourne's trial] at an evidentiary hearing on these issues. The court's opinions in this case, however, seem to indicate that because Mr. Lightbourne's PSI contained background information about Ian Lightbourne, that my errors were harmless. This analysis is wrong: the jury never saw the PSI, and therefore never learned anything about Ian from any source; Judge Swigert reached his sentencing decision immediately after the jury, and signed a sentencing order prepared by the state attorney -- he therefore did not properly consider the PSI information; the PSI came nowhere close to capturing the mitigating information that should have been heard in this case -- it said nothing about statutory mental health mitigating circumstances, or the other significant information that the jury and judge should have heard before deciding whether death was appropriate. I have no hesitation whatsoever in stating that I would have presented to the jury and judge mitigating evidence and information reflected in the affidavits, records, and expert reports developed by the attorneys who took over Mr. Lightbourne's sentencing. The information was available then. There was no strategic reason behind my failure to investigate and present it. It would have made a difference.

(Affidavit of Ronald Fox, App. 4)

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation

omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Lightbourne has pled and now shows each. Given a full and fair evidentiary hearing, he can conclusively establish each.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F. 2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F. 2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and

remanded, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 471 U.S. 1016, (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, 469 U.S. 1208 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards. Cf. King v. Strickland, supra, see also O'Callaghan v. State, supra; Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, supra, Thomas v. Kemp, supra, 796 F.2d at 1325. As explained in Tyler v. Kemp, supra:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted). Mr. Lightbourne is entitled to the same relief.

In O'Callaghan v. State, supra, 461 So. 2d at 1354-55, the Florida Supreme Court examined allegations that trial counsel ineffectively failed to investigate, develop, and present

mitigating evidence. 461 So. 2d at 1355. The court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing. Mr. Lightbourne's counsel's preparation reflected similar fundamental flaws, and Mr. Lightbourne is similarly entitled to full and fair Rule 3.850 evidentiary resolution in the trial court.

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel fails in that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. State v. Michael, 530 So. 2d 929 (Fla. 1988). See, e.g., Kimmelman v. Morrison, supra, 106 S. Ct. at 2588-89 (1986)(failure to request discovery based on mistaken belief state obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986)(failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986)(little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)(failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984)(failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978)(defense counsel presented

no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972)(refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

There was a wealth of significant evidence which was available and which should have been presented in Mr. Lightbourne's case. However, counsel failed to present this evidence in mitigation. The failure to properly investigate and prepare cannot be viewed as tactical. See Nealy v. Cabana, supra; Kimmelman v. Morrison, supra. Mr. Lightbourne's capital conviction and sentence of death are the resulting prejudice. Clearly here, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d at 1325. A full and fair evidentiary hearing, O'Callaghan, supra; Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), and, thereafter, relief is proper.

Ian Lightbourne had a great deal of evidence that could have been and should have been presented in mitigation. However,

defense counsel, completely failed to investigate and prepare for this phase of trial:

> 1. My name is Ronald Fox and I am an attorney in private practice in the Fifth Judicial Circuit, State of Florida. In 1981, I was an Assistant Public Defender and served as trial attorney for Ian Lightbourne when he faced charges for first-degree murder.
>
> 2. At the time I represented Mr. Lightbourne, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Lightbourne was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. However, I never conducted any investigation in preparation for that penalty phase. At the time, I was unaware of the significance that mitigating evidence and information regarding the defendant's background and mental health would have on a capital sentencing jury. Such issues were not investigated. Relevant records regarding Mr. Lightbourne were not obtained. Although I requested that the court appoint mental health experts, I never inquired of the experts, for example, Dr. Bernard, regarding mitigating circumstances -- statutory or nonstatutory. I also did not pursue the investigation of information available from witnesses who knew Mr. Lightbourne. There was <u>no</u> tactical, strategic, or reasoned decision on my part not to investigate and develop this type of evidence. Rather, this omission was based on my deficient performance. In fact, I know as the trial attorney who observed Mr. Lightbourne's jury that information regarding Mr. Lightbourne -- for example, mental health mitigating evidence, information about his upbringing -- could have persuaded the jury to vote for life. The jury, however, was given none of this. Additionally, Mr. Lightbourne was from the Bahamas, and I was not provided funds to travel there to investigate or to secure relevant information. As a result of this lack of investigation, I had no information to

present at the penalty phase and only presented very limited testimony from Mr. Lightbourne. This was not based on any tactic.

3. Without hesitation, I can say that my performance regarding the penalty phase of Mr. Lightbourne's trial was deficient. I was simply not prepared, and did not give the penalty phase the thought it deserved. Had I had background and/or mental health information regarding Mr. Lightbourne, I would without hesitation have presented it. There was no reason not to present such information.

4. I would like to note again that information about Mr. Lightbourne, and mental health mitigating evidence, could have resulted in a life sentence. In fact, a juror contacted me after Mr. Lightbourne's trial and told me that death was an inappropriate sentence in this case. The jurors, however, had no information on which they could have based a life vote because of my omission.

5. I have also had the opportunity to review mitigating evidence regarding Mr. Lightbourne which was investigated by Mr. Lightbourne's current counsel. All of this mitigating evidence was available at the time of Mr. Lightbourne's trial. Dr. Bernard's affidavit, for example, explains the obvious -- that such information was available but that he was never asked about it. Dr. Bernard's original report, although he was discussing sanity and competency, also reflected information that could have been used as mitigating evidence. Dr. Carbonell's thorough report reflects that Mr. Lightbourne had mental health problems at the time. As stated, all of these types of statutory (extreme emotional disturbance, impaired capacity) and nonstatutory mitigating factors were available then. I simply failed to develop them.

6. Additionally, the accounts of family, friends, and others about Mr.

> Lightbourne (as reflected in various affidavits I recently reviewed) would also have convinced Mr. Lightbourne's jury that a life sentence was appropriate. Mr. Lightbourne was not a violent person, and his history made it clear that he would be no problem in prison had he been given a life sentence. Even this alone would have established that a life sentence was appropriate with this jury. Had the jury voted for life -- and this information would have convinced them to do so -- that decision could not have been disturbed by the sentencing judge (Judge Swigert) under the standard of Tedder v. State, 322 So. 2d 908 (Fla. 1975).
>
> 6. As stated, all of this information was available at the time I represented Mr. Lightbourne. Some of it (for example, Dr. Bernard's report) was even in my possession. None of it was properly investigated, developed, presented or even thought about at the time.

(Affidavit of Ron Fox, App. 4) (emphasis added).

In fact, the following is all the evidence presented by the defense during the penalty phase:

> IAN DECO LIGHTBOURN,
> being first duly sworn by the Clerk to tell the truth, being called as a witness in behalf of the Defendant, testified as follows:
>
> DIRECT EXAMINATION
>
> Q (BY MR. BURKE): Mr. Lightbourne, would you state your name and address for the Ladies and Gentlemen of the Jury?
>
> A (BY THE WITNESS): Ian Deco Lightbourne, Marion County Jail.
>
> Q And how old are you, Ian?
>
> A 21 years of age.

Q And what's your birth date?

A December 11th, 1959.

Q Where were you born, Mr. Lightbourne?

A I was born on the Island of New Providence, Nassau, Bahamas.

Q And what's your citizenship, sir?

A Bahamian.

Q Bahamian, and are you in this Country legally, sir?

A I came here legally, check in with Immigration. They supposed [sic] to send me some papers in January concerning my job and everything but the next I know of it they send me some papers to have a hearing to determine whether I be subject to deportation or -- whatever. That's after this is over.

Q Did you attend the hearing?

A The hearing is -- they said -- the Chief Jailer must notify them thirty days prior to my release.

Q Okay, and with regard to criminal episodes, have you ever been convicted of a crime?

A Back in 1975 I was given four lashes by a police sergeant on the butt for throwing stones.

Q And did that involve -- what, a fight?

A Well, was a guy in the mid thirties. I was about -- between fifteen and sixteen years old. He tried to physically abuse me. I throwed some stones at him, caused a small -- in there and took about four stitches.

Q As an adult have you ever been convicted of a crime?

A Never.

BY MR. BURKE: I don't have any further questions. May I have a minute?

(Thereupon, Mr. Burke conferred briefly with co-counsel).

Q (BY MR. BURKE): What's your education, Mr. Lightbourne?

A (BY THE WITNESS): Well, I reached standard in high school, C plus 2-B minus.

Q And is that equivalent to our high school that you graduated from?

A Yes.

Q Do you have any children, sir?

A Yes.

Q How many?

A Three.

Q And where are they?

A There's two boys in Nassau, Bahamas, and one is here in Gainesville, Alachua Adoption Center.

BY MR. BURKE: I don't have anything further, Your Honor.

BY THE COURT: Mr. Simmons?

BY MR. SIMMONS: The State has no questions.

BY MR. FOX: That's all.

BY THE COURT: You can step down.

> BY MR. FOX: The Defense has no further evidence to present.

(R. 1453-56).

As Mr. Fox stated, he failed to ask Dr. Barnard, the expert retained at the time of trial, for any information relating to mitigation. Had he done so, Dr. Barnard would have presented compelling mitigation:

> Had I been asked to formulate and provide an opinion in this regard [non-statutory and statutory mitigation], there certainly existed important mental health issues in mitigation regarding which I would have been more than willing to testify. I noted mitigating evidence of which I was aware at the time and original report in fact made reference to some of the mitigating evidence of which I was aware and with regard to which I could have provided expert testimony. In that report I noted:
>
> > His parents separated when he was six. He is seventh in a sibling group of ten. He got along in the family except he was physically abused by an older brother and remembered going to the hospital on five or six occasions because of beatings by his brother....He has thought of suicide but had no fits or venereal disease. He has had no psychiatric treatment either as an inpatient or as an outpatient. He saw a psychiatrist on one occasion while he was in school after he threatened a teacher.
>
> Mr. Lightbourne has a history of drug and alcohol abuse. In my report I also stated:
>
> > He has no hallucinations except on one occasion after he took too many Valiums at age 16. He began the use of alcohol at age nine and since 1976 estimated he drank three or more bottles of wine per day. He has had no shakes,

> DT's, blackouts or treatment for alcohol abuse. He began the use of drugs at age nine. He has used pot, Valium, downers, acid, PCP, heroin, cocaine, THC, but has had no treatment for drug abuse.
>
> Factors such as Mr. Lightbourne's lifetime history of severe alcohol and substance abuse continuing up to the time of the crime would also have been relevant with regard to nonstatutory mitigation. Prolonged and continuous use of such substances without treatment impair judgment and control, affect one's emotions and thought processes, and affect one's behavior. Such substance abuse was noted in my original report as is quoted above.
>
> Based upon the information which was known to me at the time, I could have testified to nonstatutory mititgating [sic] factors. Even my report, which was not prepared to answer questions regarding mitigation, stated that Mr. Lightbourne suffered from deficits in memory, could only abstract three out of five proverbs, had suffered child abuse, has had suicidal thoughts, and saw a psychiatrist while in school in addition to the matters discussed above.
>
> At the time of the original trial, I would have been willing to discuss such nonstatutory mitigation circumstances had I been asked to do so. Had I been asked questions in that regard, psychological testing would have been appropriate and helpful.

(Affidavit of Dr. George Barnard, App. 21).[4]

However, Mr. Fox failed to request Dr. Barnard's input

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[4]In response to Claim I of Mr. Lightbourne's accompanying habeas corpus petition the Respondent asserts that the pre-sentence investigation report contained the "conclusions of the

regarding evidence in mitigation of Mr. Lightbourne's conviction. "There was no tactical, strategic, or reasoned decision on my part not to investigate and develop this type of evidence." (App. 4)(affidavit of Ronald Fox).

Defense counsel also failed to investigate Mr. Lightbourne's background. "Mr. Lightbourne was from the Bahamas, and I was not provided funds to travel there to investigate or to secure relevant information." (Id).

Dr. Barnard stressed the importance of such information:

> Since the time of my initial evaluation, I have reviewed additional materials regarding Mr. Lightbourne which have been recently provided to me. These materials include family affidavits, school records, statements by Mr. Lightbourne, official court transcripts, a presentence report, and other information. Had I been provided with such information at the time of my original

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[4] (footnote continued from preceding page) appointed psychiatrist, Dr. Barnard, to the effect that no substantial or emotional defect seemed to exist." Response, pp. 7-8 (emphasis in original). The Respondent's misstatement of what the PSI reflects is grossly misleading. We know what Dr. Barnard's account was, and that of Mr. Fox: their affidavits were proffered below and are before this Court. We also know what the pre-sentence investigation report said that Dr. Barnard said. The PSI has been proffered as well (App. 57). Contrary to the State's assertions, Dr. Barnard never said that there was "no substantial or emotional defect." He did say, according to the PSI, that Mr. Lightbourne was "oriented," had no loosening of associations of delusions, but had "Mild deficits in both recent and remote memory" (consistent with brain damage and substance abuse, see infra), and that he was competent to stand trial. Nowhere in the PSI does Dr. Barnard discuss emotional disturbances or defects, and nowhere does he discuss mitigation. The PSI author never asked. Neither did trial counsel.

> evaluation of Mr. Lightbourne, my opinions and ultimate conclusions with regard to evidence of a nonstatutory mitigation nature (discussed above) would have been further bolstered. Such information is critically important to the broad questions involved in an evaluation of statutory and nonstatutory mitigating evidence. In fact, at the time I specifically requested additional information regarding witnesses' accounts of Mr. Lightbourne's behavior at the time of the offense. No such background information was provided. In addition the materials I have reviewed reflect a childhood of material impoverishment and physical abuse.

(App. 21).

Recently those background materials were also made available to Dr. Joyce Carbonell, an eminently qualified professor and clinical psychologist. In addition to reviewing those materials, Dr. Carbonell conducted her own independent testing and evaluation. Dr. Carbonell's report follows:

> As you requested I have examined Mr. Ian Lightbourne who is currently an inmate on Death Row at Florida State Prison in Starke, Florida. The report that follows outlines my findings. I will be happy to answer any additional questions you may have regarding my findings on this defendant. As you requested I will address my findings to the issues of statutory mitigation and non-statutory mitigation that was available for presentation at his 1981 capital trial. Since your request I have seen Mr. Lightbourne and have interviewed him and administered various psychological tests. I saw him on January 20, 1989 for approximately four and one half hours. In addition I reviewed the list of materials provided at the end of the report. My report is also based on my training and experience as a clinical psychologist. I have done numerous assessments that involve the use of psychological tests and I teach the

administration, scoring and interpretation of these tests at the graduate level. I have been qualified as an expert in the state and federal courts in civil and criminal cases. I am currently an associate professor of clinical psychology at Florida State University. I am also a consultant for the Georgia Department of Human Resources at a state hospital for the mentally ill. I have served as a consultant for the Office of Disability Determination and have also been retained as an expert by the Department of Professional Regulation. I am licensed as a psychologist in the states of Florida and Georgia and am certified as an instructor by the Florida Commission on Criminal Justice Standards and Training.

Background Information and Interview

Mr. Lightbourne was born December 11, 1959 in the Bahamas. He was the seventh of ten children. He was raised in Dumping Ground Corners in Nassau, Bahamas. His father, who was also the parent of two of his sisters, deserted the family when Ian was a child. He failed to pay child support, leaving Ian's mother as the sole support of the family. Ian is described as a good child who was quiet, well liked and an altar boy at the Catholic church.

The area in which he grew up is described as a rough ghetto area. In addition to problems in the neighborhood, Ian was frequently beaten by his older brother. The beatings were serious enough to require visits to the hospital; many of the beatings were to his head. The beatings were apparently without cause and consisted of being beaten with various objects. At one point, Mr. Lightbourne's brother threw a hatchet at him, hitting him in the arm. Mr. Lightbourne reports that it was at this time that he realized that he would have to leave home. Because of these beatings, his behavior deteriorated and he was referred to Sandilands Hospital by his high school guidance counselor, Angela Jones Barber.

According to information provided by the psychiatrist at the hospital where he was referred, there was a "family problem." Ian was prescribed sleeping pills, and an appointment was made for his mother and brother, but they did not return.

School records indicate that he did average work until grade nine at which point his grades began to fall. His personal qualities (such as attitudes, work habits, reliability and maturity) were still described as acceptable. According to his high school guidance counselor, his problems were a result of home pressures coupled with the fact that he began to drink heavily. It is also reported by the psychiatrist who saw him at age 16 that he had begun smoking marijuana four and one half years prior to that. His high school guidance counselor (Angela Jones Barber) reports that he was seriously depressed and suicidal while he was in high school. He was also noted to have come to school intoxicated. In spite of his alcohol and drug abuse, his problems in the home, the neighborhood in which he grew up, and his lack of adequate parenting, Mr. Lightbourne was not a serious problem in the schools. Rather it seems that he turned his problems inward, becoming depressed and wishing that he could be a horse. He reported that he felt more affection from horses than he ever did from people.

Although records indicate that he attended high school until the twelfth grade, he did not graduate. Eventually, he received a graduate equivalency diploma while in prison. He has no juvenile record with the exception of an incident in which he received "four strokes" for throwing rocks. There is no adult criminal record on Mr. Lightbourne, save the instant offense.

Descriptions of Mr. Lightbourne as an adult are not significantly different than descriptions of him as a child. In depositions taken prior to his 1981 trial he was reported by most everyone to be nonviolent. He was described as someone who

was not known to fight. The brother of the victim, for whom Mr. Lightbourne worked, stated that Mr. Lightbourne was not a problem and not a violent man. Other co-workers also described that they did not have problems with him. The only reports of violence concerning Mr. Lightbourne were domestic; none of these incidents involved the police. His girlfriend, though, stated that she did not believe that it was in him to kill someone. Another girlfriend also reports that he threatened her, but that he then gave her a gun and asked her to kill him with the gun. She too, stated that she did not think that Ian could have killed someone.

Ian's self report and demeanor during an interview were consistent with records and reports of others. His demeanor was quiet and somewhat depressed. He was fairly accurate in his self-report confirming a history of drug and alcohol abuse, physical abuse by his brother, and his one incident as a child of throwing rocks. He does not report that he was abused by his mother although his high school guidance counselor reports that this was the case. He does report that he began to get into trouble when he was in high school because of his drug abuse and that he was sent to a psychiatrist for this reason.

There is no indication in his records that he was ever considered to have an antisocial personality disorder or a conduct disorder. Even his current prison records indicate that he was not in fact diagnosed in this fashion. He was, though, referred to psychiatry at Florida State Prison because of severe depression, consistent with his history. He was given Sinequan for this depression. Throughout his incarceration at FSP he has not received a single disciplinary report, which is a very unusual occurrence. Mr. Lightbourne reports this and it is corroborated by the records. Once again, this is supportive of the reports of others that he is quiet, withdrawn and at times depressed, but not a violent man. He reports a history of drug and alcohol abuse, noting

that he used marijuana, quaaludes, THC and alcohol. He reports that he began to smoke "reefer" at age nine and reports corroborate that he started as early as age 12. He has consistently reported that on the night of the offense he had drunk a good deal and was smoking marijuana.

Throughout the testing and interview, Mr. Lightbourne was cooperative and pleasant. He seemed somewhat detached and depressed and was unable to tell me what day of the week his execution was to take place. He denies any involvement in the crime and seems to have developed some delusional beliefs about the crime and why he was arrested. There is no significant history of delusional beliefs, but there are some indicators of decompensation in the record. He did for example, express wishes to be a horse. In addition, he reported that while awaiting trial, his wrist bones were growing in an unusual fashion. One other time he reported that he would not allow the medical technicians at the prison to poison him.

Test Results

Because Mr. Lightbourne has a history of head injury as a result of beatings received from his brother and a history of drug and alcohol abuse, testing was done to screen for brain damage. In addition, the MMPI (Minnesota Multiphasic Personality Inventory), the WAIS-R (Wechsler Adult Intelligence Scale-Revised) and the WRAT-R2 (Wide Range Achievement Test-Revised, Level 2) were administered.

On the WAIS-R, Mr. Lightbourne achieved a Full Scale I.Q. of 85, a Performance I.Q. of 82 and a Verbal I.Q. of 90. His highest score came on a vocabulary subtest while his lowest score came on the digit symbol subtest. On the WRAT-R2 Mr. Lightbourne received percentile ranks of 34 on reading recognition, 55 on spelling and 3 on arithmetic. His standard scores on these tests are 94, 102 and 71 respectively,

indicating that while he can perform at a level commensurate with his I.Q. on rote memorization tasks, he has trouble with tasks such as math which require problem solving skills.

On the Booklet Categories Test, Mr. Lightbourne scored in a range that is indicative of brain damage. He made eighty errors. Given his Performance I.Q. score which is generally predictive of scores on the Categories Test, it would be expected that if he were not brain damaged he would have made less than half of the errors that he made. Thus, even when his I.Q. score is taken into account, his scores are indicative of brain damage. On Trails A and Trails B, another test for brain damage, Mr. Lightbourne performs poorly. He performs at the 10th percentile on Trails A and the 25 percentile on Trails B when compared to others in his age group. On the Stroop Test, Mr. Lightbourne performed in a fashion consistent with brain damage. It should also be noted that his lowest score on the WAIS-R was his score on the digit symbol subtest, one of the most sensitive indicators of brain damage on the WAIS-R. Vocabulary, on the other hand, one of the tests least susceptible to the effects of brain damage, provided Mr. Lightbourne's highest subtest score. These results may indicate left hemisphere brain damage and are consistent with the results of the Canter Background Interference Procedure for the Bender Gestalt, a test related to right hemisphere functioning, on which Mr. Lightbourne performed in the average range.

On the MMPI, Mr. Lightbourne answered the questions in a valid fashion. The test results seem to be an accurate indicator of his current level of functioning. People with similar profiles are likely to have a paranoid predisposition, be sensitive to the reactions of others, and may not like to talk about their emotional problems. In interpersonal situations, persons with similar profiles are likely to be passive, dependent and submissive. Mr. Lightbourne is

likely to show a paranoid character structure, if not a psychotic thought disorder. The results are congruent with Mr. Lightbourne's behavior in the interview and as described by other people.

Mitigating Circumstances

As you requested I examined Mr. Lightbourne in regard to possible mitigating circumstances in the mental health area. My understanding is that mitigating factors involve such matters as an extreme mental or emotional disturbance at the time of the offense and/or that the defendant could not appreciate the criminality of his conduct or his ability to conform his conduct to the requirements of law was substantially impaired. It is also my understanding that the court will consider any aspect or factor regarding the defendant or the offense which may serve to mitigate the sentence or to demonstrate to the judge and jury that a sentence of life imprisonment would be more appropriate.

Mr. Lightbourne has numerous problems. He has a history of depression, accompanied by suicidal ideation. He has paranoid symptomatology. He has clear indicators of organic brain damage, noted on neuropsychological tests. Etiologically this damage may be related to head injuries as a result of beatings by his brother and by his chronic, long term, drug and alcohol abuse. Additionally, a person with brain damage is more susceptible to the effects of drugs and alcohol. These factors would combine to create an emotional disturbance, particularly given that his drug and alcohol abuse was contemporaneous to the time of the offense.

Given Mr. Lightbourne's organic brain damage and alcohol abuse and drug abuse his ability to conform his conduct to the requirements of law would have been substantially impaired. There is evidence that Mr. Lightbourne began drinking at an early age. There is evidence in fact that he

was fired from a job on January 1st of 1981 because of drunkenness. In addition when he was arrested on January 24th and reported to the police that he had been been "sleeping off a drunk." His then girlfriend noted in her deposition that he spent most of his time in a bar and would stay out most of the night. Others report that he was using drugs (Carson and Samuels' statements to police) and was in particular using drugs the night of the offense.

Prolonged use of drugs and alcohol impair judgment, impulse control, affect, emotions and behavior. Clearly, Mr. Lightbourne would have been affected by his substance abuse.

In regard to nonstatutory mitigation there are many factors that could be considered. Mr. Lightbourne was raised in impoverished surroundings and suffered severe physical abuse at the hands of his brother and also his mother. The abuse was severe enough to require visits to the hospital. He was referred to a psychiatrist by his school guidance counselor. He began using drugs and alcohol at an early age and continued to do so until the time of the offense.

In spite of his abusive background, poverty and drug/alcohol problems, he was known to be a kind and gentle person. He has no juvenile history save one offense of throwing rocks. There is no adult criminal history with the exception of the instant offense. In fact, there was a history that Mr. Lightbourne was a good, helpful and considerate child. Given his lack of criminal history, lack of delinquency, and generally his non-violent demeanor, it could easily have been predicted that he would not have been a problem in prison in terms of violence or management. This is corroborated by his continued non-violent behavior in prison as was described earlier. In fact, there is no indication in his pre-trial jail records that he was a problem in any way.

> The question remains as to why this information was not presented at Mr. Lightbourne's trial by the mental health experts who were retained at the time. The answer seems to be that they were not asked any questions in regard to mitigation. Dr. Barnard's recent affidavit in fact states, "I was never asked to evaluate Mr. Lightbourne's mental state and background with regard to mental health evidence, which may have been considered as statutory or nonstatutory mitigation." Dr. Carrera's report mentions nothing about mitigation; no doubt he was not asked questions in this regard either.
>
> Had these professionals been asked about mitigation they no doubt would have obtained collateral data regarding Mr. Lightbourne's background, history and upbringing. Dr. Barnard in fact specifically requested additional information regarding Mr. Lightbourne's behavior at the time of the offense, but none was provided to him.
>
> In summary, mental health mitigation was available in Mr. Lightbourne's case. Had the experts in the case been asked to evaluate in this regard, or had requests for information been honored, they would no doubt have provided ample mental health mitigation. Dr. Barnard's recent affidavit corroborates this; he notes in his affidavit that mitigation was available.

(App. 23).

None of this evidence ever reached the jury. "[T]his omission was based on my deficient performance." (App. 4)(Affidavit of Ronald Fox). Mr. Fox admittedly failed to investigate and "[a]s a result of this lack of investigation, I had no information to present at the penalty phase and only presented very limited testimony from Mr. Lightbourne. This was not based on any tactic." (Id.)

It is clear that the failure to present this to the jury was prejudicial to Mr. Lightbourne. In his affidavit, Mr. Fox noted that "[i]n fact, a juror contacted me after Mr. Lightbourne's trial and told me that death was an inappropriate sentence in this case." (Id.) That juror felt that way although no mitigation was presented. As Mr. Fox has stated:

> Additionally, the accounts of family, friends, and others about Mr. Lightbourne (as reflected in various affidavits I recently reviewed) would also have convinced Mr. Lightbourne's jury that a life sentence was appropriate. Mr. Lightbourne was not a violent person, and his history made it clear that he would be no problem in prison had he been given a life sentence. Even this alone would have established that a life sentence was appropriate with this jury. Had the jury voted for life -- and this information would have convinced them to do so -- that decision could not have been disturbed by the sentencing judge (Judge Swigert) under the standard of Tedder v. State, 322 So. 2d 908 (Fla. 1975).
>
> As stated, all of this information was available at the time I represented Mr. Lightbourne. Some of it (for example, Dr. Bernard's [sic] report) was even in my possession. None of it was properly investigated, developed, presented or even thought about at the time.

(App. 4).

A proper presentation at sentencing would have told the jurors who Ian Lightbourne was and how he came to be facing a sentence of death in a Florida Court.

a. Ian Lightbourne was born at home, without medical assistance, on December 12, 1959, in Dumping Ground Corners,

Nassau, Bahamas, to Naomi Neely and Walter Lightbourne.

b. Ian's parents were never married, and his father deserted the family to live with another woman shortly after Ian's birth. He thereafter never offered any assistance or support to his family.

c. Ian was raised in Dumping Ground Corners, so named because it had formerly been the site of a public refuse dump, amidst abject poverty and squalor. Dumping Ground Corners is part of Baintown, one of the poorest and most densely populated slum areas in a town notorious for its slums. Most of the dwellings in the community are the most rudimentary of shacks, consisting of one or two rooms without running water or sanitary facilities, often occupied by eight or more people.

d. Mrs. Neely, who is illiterate, supported Ian and her nine other children by working several regular jobs and preparing and selling food out of her home. Despite her educational handicaps and the obstacles imposed by her environment, Mrs. Neely nevertheless managed to feed, clothe, and educate her children, and maintain some semblance of family unity. The family was deeply religious, intimately involved with the Catholic church: Ian himself was the head altar boy at the local church, serving mass weekly from the age of seven until he left Nassau at the age of seventeen.

e. Ian was a model child and an A student at St. Joseph's grammar school. The support in the community for Ian was

unanimous and overwhelming, as evidenced by the attached letters of support. His friends and neighbors from Dumping Ground Corners uniformly remember him as an exemplary human being, variously describing him as a "loving and easy going individual", (Affidavit of Melinda Pratt, App. 47), "friendly, helpful, and considerate", (Affidavit of Dennis Pratt, App. 45) and "a nice guy who liked to make us laugh and have fun". (Affidavit of Antonio Lamm, App. 49). The elderly people in the community who knew Ian remembered him for his perfect manners and the respect he always showed them. Many of them grew to depend on Ian's help in performing chores and running errands, such as bringing water from the communal pump and retrieving groceries.

f. The younger children in the neighborhood gravitated toward Ian because of the tolerance and friendliness he displayed toward them, often assuming a 'big brother' role and tutoring them in athletic skills. Ian also assumed a protective role with his younger siblings, teaching them basic skills, helping them with their schoolwork, and giving them small allowances whenever he managed to earn a little money.

g. Ian had a reputation as a handyman as a teenager, displaying an intuitive understanding of mechanics and a natural bent toward craftsmanship. As described in the attached exhibits, he often repaired the cars of people in the neighborhood and worked with local carpenters, craftsmen, and artisans, some of whom he looked to as the authoritative male

role models which were missing from his home life. Ian was also a talented athlete, competing and excelling in track, basketball, and baseball.

h. When Ian was in high school he would get along well with his teachers, but especially with Mr. Brown who taught math and English to Ian and visited with Ian after school.

i. Ian also confided in his high school guidance counselor, Angela Jones Barber, who vividly remembered Ian since she spent a lot of time counseling with him. She remembered feeling that Ian "was not receiving the necessary love and guidance at home and [that] he suffered from periods of depression and great disturbance." (Affidavit of Angela Jones Barber, App. 20). Ms. Barber's affidavit and 1981 report (a report never reviewed by jury or judge) in fact explained what should have been obvious: that an overwhelming case for life existed (<u>see</u> App. 20).

j. Those who knew him are in unanimous agreement that Ian was one of the most nonviolent, nonargumentative, and congenial persons they had ever known. His family and closest friends all agree that they never saw him fight or argue with another person. Ian was never in any sort of serious trouble at school or in the streets, and was remembered as being cooperative and honest by teachers and administrators at his high school. No one who was acquainted with him can reconcile his conviction with the character and reputation he displayed in the community. The only

trouble anyone can remember Ian being involved in was an incident that occured when he was sixteen: as described by his mother, "a retarded man in the neighborhood, who was a big man who often picked on the children, was drunk and pulled a knife on Ian and shoved him down onto the street. Ian started to cry when this happened and threw some rocks at him out of fear. Ian was taken to the police station and was lashed for throwing stones." (Affidavit of Naomi Neely, App. 31).

k. Ian, like most of the males his age in the community, had an interest in horses and a pervasive desire to be a successful jockey. Until 1973 there was a horsetrack in the area which employed many of the local men. Ian's older brother, Stan McNeil, had been a successful jockey, locally famous for his riding skills, until the track was closed. As the oldest male in the family, Stan was naturally looked up to by Ian, and also idolized for his success as a jockey. Ian's interest in horses no doubt arose in part as an attempt to emulate Stan.

l. Stan, on the other hand, did not return Ian's admiration and respect. Stan's reputation in the family and the community was that of a tyrannical despot given to violent episodes of temper aggravated by his drinking problem, and Ian was the usual subject of these unprovoked outbursts. As described by Mrs. Neely, "Stan always drank a lot and it made his head bad . . . (he) is nine years older than Ian and would always pick on Ian because Ian would let him get away with it. When

Stan would tell Ian to do something, Ian would always obey him, even if he was being mean. When Stan was drinking . . . he would beat Ian just because he felt like it. Stan would beat Ian three times a week." Id. As related by Ian's sister, Stan "got a big head about being a good rider and has refused to find work since they closed down the track. He always drank a lot and always acted mean and bossy to everyone. When he would come home and the kids would be playing in the house he would just walk in and kick them for no reason." (Affidavit of Florine Neely Maultsby, App. 33).

m. The beatings inflicted upon Ian were severe, on several occasions resulting in his hospitalization. Stan kept a horsewhip at home for the purpose of beating Ian, and often employed other hard objects, such as rocks and bottles, to inflict his punishment. On one occasion, Stan beat him about the head so severely that his head swelled, requiring medical attention and medication. On another occasion, Stan threw a hatchet at Ian and hit him in the arm, inflicting a deep wound which required stitches and left a scar which remains to this day (see medical records). After Ian finally left Nassau to escape Stan's brutality, Stan turned on their younger brother, Ricardo, as the outlet for his frustrations. Ricardo to this day suffers from an unexplained bleeding from the eyes as a result of one of Stan's unmerciful beatings. Ricardo, however, unlike Ian, began fighting back, and the beatings finally ceased.

n. These beatings ultimately took their psychological, as well as physical, toll on Ian. As related by Mrs. Neely, "(t)he beatings by Stan made Ian very jumpy as he grew up. One night when Ian was about sixteen or seventeen he was pitching in his sleep and I went in to see what was wrong. He said he felt real bad and couldn't sleep because he kept seeing things in the room." As a result of this episode, Mrs. Neely took Ian to see a psychiatrist, who interviewed Ian and asked that he return. When Stan found out about this incident, he beat Ian on the head with a shoe for waking up his mother in the middle of the night. Upon Ian's return to the psychiatrist, the doctor learned of Ian's situation at home and requested that he return with Stan and his sisters. Stan, of course, refused to visit the psychiatrist, and Ian never received the psychiatric counseling he so obviously needed. (Affidavit of Naomi Neeley, App. 31).

o. The inner turmoil caused by his relationship with Stan was also reflected in Ian's school work. His grades began slipping from the standard of academic excellence he had established in grade school, and his teachers became concerned about the lethargic behavior he displayed. Some concerned school administrators, noticing that he seemed upset with his home situation, (Affidavit of Thelma Ferguson, App. 39) attempted to help him, but failed to uncover the cause of his problems, the physical abuse inflicted by Stan. Ian became more and more obsessed with his dream of becoming a successful jockey like

Stan, and at one time expressed in an interview with his high school guidance counselor, Angela Jones Barber, his overwhelming desire to be a horse.

p. Ms. Barber remembered:

> Ian was severely abused by his older brother and mother and he had many scars all over his body.
>
> When Ian would get depressed he was silent, reflective, and introspective. He would spend hours in my office talking and smoking cigarettes. Ian was a very bright young man and I felt very close to him and concerned for him. I thought that the brutal treatment he received at home made him distrustful of people. Ian would tell me that he felt more love and affection from horses than from people and that more than anything he wanted to be a horse.
>
> Ian was never agressive at all. When something upset him he would withdraw, and often he would skip classes and go to the stables to be with the horses there. He was the only child I knew who wanted to be a horse.
>
> The neighborhood where Ian grew up, Dumping Ground Corner, was a rough ghetto community. This environment, along with the problems in the home, contributed to Ian's isolation and inability to grow up feeling loved and wanted. Because I was concerned about him, I referred him to Sandelands Hospital for assessment and therapy. Because of the extreme pressures he faced at home, Ian began drinking heavily during high school.

(Affidavit of Angela Jones Barber, App. 20). In her original report Ms. Barber stated:

> Ian Lightbourne was referred to me by a member of the school's administration, as a result of a confrontation with a teacher in

March 1977. Ian was discovered to be intoxicated at the time.

After a series of sessions and social investigations it was discovered that Ian came from an extremely stressful and unstable home environment. He seemed to have had strong ambiguous feelings towards his mother who was the sole provider of a family of seven. Ian never received much attention and felt isolated from the rest of the family members. He had to learn to survive and fend for himself at an early age. He was physically abused by his brothers and mother and as a result was frequently unable to attend school.

I found Ian to be a very depressed individual who felt unwanted and unloved from an early age. He soon developed a feeling of closeness and love towards the horses he cared for at that time and frequently expressed a strong desire to be a horse.

Ian managed to perform at an average level academically up to grade nine when his ability to cope with the home pressures seemed to have deteriorated and he began to chain smoke and drink heavily. The problems intensified and he began to exhibit strong suicidal tendencies at which time he was referred to a psychiatrist.

(App. 20).

q. Unfortunately, not much occurred as a result of Ms. Barber's referral:

RE: IAN LIGHTBOURNE

I saw the above named on one occasion at Princess Margaret Hospital, Nassau, Bahamas in the Psychiatric Clinic on September 10, 1976 as having being referred because of "abnormal behavior".

He presented in a tense state, gave a coherent account and appeared to have insight into his problems at that time. There was no

> evidence of psychosis, however, there was a history of several years smoking of marijuana.
>
> An appointment was made to see the family a few days later but there is no record nor do I have any recollection of a follow-up consultation at the Psychiatric Department in Nassau.
>
> Dr. Brian Humblestone
> Ag. Chief Psychiatrist

(App. 24).

r. The continuing conflicts caused by his love/hate relationship with Stan ultimately led Ian to flee his home in Dumping Ground Corners for the United States, both to escape the brutal domination of Stan and to emulate his success as a horseman. Mrs. Neeley begged Ian to stay and further his education, but she "always knew that (he) left because he couldn't stand being hurt by Stan anymore." (Affidavit of Naomi Neeley, App. 31). Stan himself realizes now that Ian left both because he was afraid of him and because he wanted to emulate Stan's success as a horseman (Affidavit of Stan McNeil, App. 32).

s. While at the race track, Ian had met his friend, Anthony Smith "Smitty." Smitty and Ian both dreamed of being jockeys but when the race track closed, the dream was put on hold until Joseph O'Farrell from Ocala, Florida, made it known he was hiring people to work on his stud farm in the States. Ian and Smitty were hired (Affidavit of Anthony Smith, App. 28).

t. But even working at the Ocala Stud Farm, it soon became clear that Ian was little better than a stable boy and his dream

of being a successful jockey and emulating his brother Stan eventually failed altogether.

u. Mr. Smith remembered the prejudice that he and Ian endured from being two of the "Nassau boys."

> In Ocala there was always prejudice toward the "Nassau Boys" or what we were sometimes called the "Bahamian niggers." We worked hard for the horse farms and often got paid a lot less. We took jobs that the locals wouldn't and they resented us for it. But the local blacks didn't want to work hard the way we did.

(Affidavit of Anthony Smith, App. 28).

v. But the prejudice wasn't only from outside. Mr. Smith recalled that Mr. Michael O'Farrell refused to let the "Bahamians ride" and that O'Farrell seemed especially to dislike Ian (Affidavit of Anthony Smith, App. 28).

w. Both Mr. Smith and his wife, Gloria, remembered Ian as did everyone else who knew him, as a very gentle man:

> Ian loved horses. He was always gentle and kind with them. In fact, Ian was a very quiet and gentle person. I've never known him to be violent in any way.

(Affidavit of Anthony Smith, App. 28).

> I had known Ian since 1979 and Ian was just a very lovely, very gentle and caring person. Everyone in the neighborhood would say that about Ian because he was nice to everybody.

(Affidavit of Gloria Smith, App. 29).

x. No one who knew Ian Lightbourne believed him capable of anything like this crime. He simply was not a violent person.

> It is just not plausible that Ian Lightbourne is capable of murder. I always found Ian to be a gentle, sad and reflective young man. In fact, it was my great concern for him and my awareness of the tragic emptiness he felt that keeps him so vividly in my mind.

(Affidavit of Angela Jones Barber, App. 20).

> About three years after Ian left Nassau we heard the news that Ian had been arrested. I was very upset and confused because I had very little information and couldn't believe it was true. I was sitting on my porch with a lady neighbor who was trying to cheer me up about Ian when a boy named Fernando came to talk to me. He told me that he just came back from Florida where he had worked at the Ocala Stud farm with Ian. He told me he had left the farm because he was afraid since how they did Ian like they did. He told me how the police were asking all the Bahamian men there how much money they had been paid to kill Mr. O'Farrell's daughter. Fernando told me that he and the other Bahamian men did not believe that Ian had murdered anyone and that they were all afraid that they would be arrested too. He also told me that he would never go back there and that he even put all of his things and his car on a boat back to Nassau even though it cost him $1500. Fernando said that he knew Ian well and that they used to live like brothers and that is why he knew that Ian couldn't have done what they said he did.

(Affidavit of Naomi Neeley, App. 31).

> I cannot believe Ian did this. Ian was very nice to everyone. He was so neat and had many, many girlfriends. Ian would not have raped and murdered anyone.

* * *

> All I know is that I know Ian Lightbourne and I know he could not have done this crime.

(Affidavit of Gloria Smith, App. 29).

> I was shocked when I heard Ian was convicted of murder. He is just not the kind of person who could do such a thing.

(Affidavit of Stanford McNeil, App. 32).

> No one who ever knew Ian could ever believe that he could ever murder anyone. He was always good and kind to everyone and a very religious person. For as long as I can remember, Ian was an altar boy at our church, St. Joseph's.

(Affidavit of Margaret Lightbourne, App. 34).

All of this and much more was waiting to be told to the judge and jury. Mr. Fox had only to ask:

> All of this mitigating evidence was available at the time of Mr. Lightbourne's trial. Dr. Bernard's [sic] affidavit, for example, explains the obvious -- that such information was available but that he was never asked about it. Dr. Bernard's original report, although he was discussing sanity and competency, also reflected information that could have been used as mitigating evidence. Dr. Carbonell's thorough report reflects that Mr. Lightbourne had mental health problems at the time. As stated, all of these types of statutory (extreme emotional disturbance, impaired capacity) and nonstatutory mitigating factors were available then. I simply failed to develop them.

(Affidavit of Ron Fox, App. 4).

As Mr. Fox also pointed out, this Court believed these omissions to be harmless because the judge had a presentence investigation to consider:

> It would have been important for me to testify about these matters at an evidentiary hearing on these issues. The court's opinions in this case, however, seem to indicate that because Mr. Lightbourne's PSI contained background information about Ian Lightbourne, that my errors were harmless. This analysis is wrong: the jury never saw the PSI, and therefore never learned anything about Ian from any source; Judge Swigert reached his sentencing decision immediately after the jury, and signed a sentencing decision immediately after the jury, and signed a sentencing order prepared by the state attorney -- he therefore did not properly consider the PSI information that should have been heard in this case -- it said nothing about statutory mental health mitigating circumstances, or the other significant information that the jury and judge should have heard before deciding whether death was appropriate. I have no hesitation whatsoever in stating that I would have presented to the jury and judge mitigating evidence and information reflected in the affidavits, records, and expert reports developed by the attorneys who took over Mr. Lightbourne's case after me had I had that information at the time of Ian Lightbourne's sentencing. The information was available then. There was no strategic reason behind my failure to investigate and present it. It would have made a difference.

(Affidavit of Ron Fox, App. 4). The court was fundamentally wrong. The jury should have heard it. It would have made a difference.

There is no question that this information should have been offered in mitigation and no question that this type of evidence is, in fact, mitigating. For example, a deprived childhood is mitigating. Holsworth v. State, 522 So. 2d 348 (Fla. 1988)("Childhood trauma has been recognized as a mitigating

factor"); BuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988)(jury could have considered "deprived family background"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)(jury could have considered "family history of physical and drug abuse"); Brown v. State, 526 So. 2d 903 (Fla. 1988)("family background and personal history . . . must be considered"). Evidence that a defendant "was kind, good to his family and helpful around the home," constitutes mitigation. Perry v. State, 522 So. 2d 817, 821 (Fla. 1988). Evidence of substance (alcohol and drug) abuse constitutes mitigation. See Holsworth, supra, 522 So. 2d at 354 (evidence defendant "had a drug problem" properly considered by jury in mitigation particularly where other evidence indicated he was "generally a quiet, nonviolent person."); Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988)(history of alcoholism mitigation which jury should be able to consider); Norris v. State, 429 So. 2d 688, 698 (Fla. 1983)(evidence that defendant had "a drug abuse problem" was mitigation for the jury to weigh). Evidence of a defendant's employment history and efforts to better himself is mitigation. Holsworth, supra, 522 So. 2d at 354 ("Jury may have considered in mitigation appellant's employment history and positive character traits as showing potential for rehabilitation and productivity within the prison system").

In 1985 in the appeal from the denial of Rule 3.850 relief, the Florida Supreme Court concluded, by a 4-3 vote, that Mr. Fox was not ineffective. The Court made this determination because

the mitigation not presented by Mr. Fox to the jury was presented in the presentence investigation to the sentencing judge. Thus, "[t]he additional mitigating factors now presented to the Court are merely cumulative, not new." Lightbourne v. State, 471 So. 2d 27, 28 (Fla. 1985). The Court, however, never saw the obvious: the jury never heard the evidence. See Mann v. Dugger, 844, F.2d 1446, 1454 n.10 (11th Cir. 1988)("Because the jury's recommendation is a critical factor in the ultimate sentencing decision, the jury's function, like the function of any capital sentencer, must be evaluated pursuant to eighth amendment standards").

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the United States Supreme Court concluded that "mere presentation" was not sufficient unless the sentencing jury was adequately instructed that it could consider the mitigation presented. Here the jury never even had it "presented" to them. In Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), the Court recognized that Hitchcock was new law which overturned the Court's previously adopted "mere presentation" standard. Downs applies to Mr. Lightbourne's case. The jury never got to hear or consider the mitigation contained in the presentence investigation report. Thus the Court's rationale in Lightbourne, supra, 471 So. 2d at 28, does not survive Downs and Hitchcock.

An evidentiary hearing should now be ordered on Mr. Lightbourne's claim of ineffective assistance of counsel at the penalty phase. Rule 3.850 relief is appropriate here.

## CONCLUSION

Ian Lightbourne has presented compelling, important, and troubling claims for this Court's review. This capital defendant has never been truly heard. He is, however, scheduled to die tomorrow, February 1, 1989, at 7:00 a.m. We pray that this Honorable Court will not allow that to happen, for that execution would be wrongful. We urge that the Court will allow Mr. Lightbourne to be fully and fairly heard.

An evidentiary hearing is appropriate in this action on the basis of the claims pled. An evidentiary hearing is appropriate on the State's allegations of abuse. A stay of execution is eminently proper.

Respectfully Submitted,

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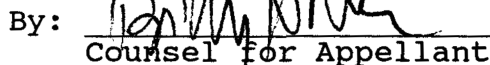
By: 
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been furnished by U.S. Mail/Hand Delivery to Richard Martell and Margene Roper, Assistant Attorneys General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida, 32014, this 31st day of January, 1989.