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IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

Appellant,

v. Case No.: 80,366

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS.....i

TABLE OF CITATIONS.....ii

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE AND FACTS.....3

SUMMARY OF THE ARGUMENT.....47

ARGUMENT

Issues I & II

WHETHER THE LOWER COURT PROVIDED LIGHTBOURNE WITH A FULL AND FAIR EVIDENTIARY HEARING AND "ADVERSARIAL TESTING" ON HIS BRADY CLAIMS.....49

Issue III

WHETHER THE SENTENCING COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCES.....73

Issue IV

WHETHER CONSIDERATION OF THE PRESENTENCE INVESTIGATION SOLELY BY THE SENTENCING COURT, AND NOT THE JURY, VIOLATED LIGHTBOURNE'S CONSTITUTIONAL RIGHT TO PRESENT MITIGATING EVIDENCE TO HIS JURY.....85

CONCLUSION.....89

CERTIFICATE OF SERVICE.....90

TABLE OF CITATIONS

CASES.....PAGE(S)

Aldridge v. State,
503 So. 2d 1257 (Fla. 1987).....71

Alvord v. State,
355 So. 2d 108 (Fla. 1977).....88

Brady v. Maryland,
373 U.S. 83 (1963).....*passim*

Caldwell v. Mississippi,
472 U.S. 320 (1985).....20

Capehart v. State,
583 So. 2d 1009 (Fla. 1991),
cert. denied, 112 S. Ct. 955 (1992).....81

Card v. State,
453 So. 2d 17 (Fla. 1984).....55

Chambers v. Mississippi,
410 U.S. 284 (1973).....54,55

Cochran v. State,
547 So. 2d 928 (Fla. 1989).....87

Combs v. State,
403 So. 2d 418 (Fla. 1981).....80

Engle v. State,
438 So. 2d 803 (Fla. 1983),
cert. denied., 485 U.S. 924 (1984).....87

Espinosa v. Florida,
112 S. Ct. 2926 (1992).....*passim*

Espinosa v. State,
18 Fla. L. Weekly S470 (Fla. Sept. 2, 1993).....80

Francis v. State,
473 So. 2d 672 (Fla. 1985),
cert. denied, 474 U.S. 1094 (1986).....71

Francois v. State,
407 So. 2d 885 (Fla. 1981).....80

TABLE OF CITATIONS (Continued)

CASES.....PAGE(S)

Godfrey v. Georgia,
446 U.S. 420 (1980).....83

Hall v. State,
614 So. 2d 473 (Fla. 1993).....82

Hegwood v. State,
575 So. 2d 170 (Fla. 1991).....49

Henderson v. Singletary,
617 So. 2d 313 (Fla. 1993).....80

Hitchcock v. Dugger,
481 U.S. 393 (1987).....*passim*

Hitchcock v. State,
614 So. 2d 483 (Fla. 1993).....83

Hodges v. State,
619 So. 2d 272 (Fla. 1993).....78

Hoy v. State,
353 So. 2d 826 (Fla. 1978).....80

James v. State,
615 So. 2d 668 (Fla. 1993).....82

Johnson v. Singletary,
612 So. 2d 575 (Fla. 1993).....86

Jones v. State,
591 So. 2d 911 (Fla. 1991).....83

Kennedy v. Singletary,
602 So. 2d 1285 (Fla. 1992).....78

King v. Dugger,
555 So. 2d 355 (Fla. 1990).....70

Knight v. State,
338 So. 2d 201 (Fla. 1976).....80

Lewis v. Erickson,
946 F.2d 1361 (8th Cir. 1991).....71

TABLE OF CITATIONS (Continued)

CASES.....PAGE(S)

Lightbourne v. Dugger,
549 So. 2d 1364 (Fla. 1989).....19,20,85

Lightbourne v. Dugger,
829 F.2d 1012 (11th Cir. 1987).....18,85

Lightbourne v. Dugger,
494 U.S. 1039 (1990).....21

Lightbourne v. Dugger,
488 U.S. 934 (1988).....18

Lightbourne v. Florida,
465 U.S. 1051 (1984).....16

Lightbourne v. State,
438 So. 2d 380 (Fla. 1983).....15,72

Lightbourne v. State,
471 So. 2d 27 (Fla. 1985).....16,85

Maqueira v. State,
588 So. 2d 221 (Fla. 1991),
cert. denied, 112 S. Ct. 1961 (1992).....81

Maynard v. Cartwright,
486 U.S. 256 (1988).....20,83

Melendez v. State,
612 So. 2d 1366 (Fla. 1992).....78

Melendez v. State,
498 So. 2d 1258 (Fla. 1986).....80

Mills v. Maryland,
486 U.S. 367 (1988).....20

Murray v. Giarratano,
492 U.S. 1 (1989).....88

Palmes v. Wainwright,
460 So. 2d 362 (Fla. 1984).....71

Peninsular Fire Ins. Co. v. Wells,
438 So. 2d 46 (Fla. 1st DCA 1983).....53

TABLE OF CITATIONS (Continued)

CASES.....PAGE(S)

Porter v. State,
564 So. 2d 1060 (Fla. 1990),
cert. denied, 498 U.S. 1110 (1991).....81

Porter v. State,
429 So. 2d 293 (Fla. 1983).....88

Preston v. State,
607 So. 2d 404 (Fla. 1992),
cert. denied, 113 S. Ct. 1619 (1993).....82

Richmond v. Lewis,
121 L. Ed. 2d 411 (1992).....81

Rogers v. State,
511 So. 2d 526 (Fla. 1987),
cert. denied, 484 U.S. 1020 (1988).....81

Slawson v. State,
619 So. 2d 255 (Fla. 1993).....79

Sochor v. Florida,
119 L. Ed. 2d 326 (1992).....78-79

Sochor v. State,
580 So. 2d 595 (Fla. 1991).....78

Sochor v. State,
619 So. 2d 285 (Fla. 1993).....80-81

Spaziano v. State,
545 So. 2d 843 (Fla. 1989).....83

State v. DiGuilio,
491 So. 2d 1129 (Fla. 1986).....79

Steinhorst v. State,
574 So. 2d 1075 (Fla. 1991).....71

Swafford v. Dugger,
569 So. 2d 1264 (Fla. 1990).....88

Swan v. State,
322 So. 2d 485 (Fla. 1975).....88

TABLE OF CITATIONS (Continued)

CASES.....PAGE(S)

Thompson v. State,
619 So. 2d 261 (Fla. 1993).....79

Thompson v. State,
553 So. 2d 153 (Fla. 1989),
cert. denied, 495 U.S. 940 (1990).....51

United States v. Agurs,
427 U.S. 97 (1976).....55-56

United States v. Bagley,
473 U.S. 667 (1985).....49

White v. State,
403 So. 2d 331 (Fla. 1981).....80,88

OTHER AUTHORITIES.....PAGE(S)

C. W. Ehrhardt, Florida Evidence
Declarant Unavailable § 804.4 (1993 ed.).....52-53

Fla. R. Crim. P. 3.712.....87

Fla. R. Crim. P. 3.713.....87

Fla. R. Crim. P. 3.850.....*passim*

Fla. Stat. § 90.804(1)(b) (1991).....51

Fla. Stat. § 90.804(1)(c) (1991).....51

Fla. Stat. § 90.804(2)(a)-(d) (1991).....52

Fla. Stat. § 90.804(2)(c) (1983).....55

Fla. Stat. § 90.804(2)(d) (1991).....52

Fla. Stat. § 775.15(2)(b) (1991).....53

Fla. Stat. § 837.02 (1991).....53

Fla. Stat. § 921.141(1) (1991).....70

Fla. Std. Jury Instr. (Crim.)
Penalty Proceedings -- Capital Cases
79-79a (1990).....82

IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

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Preliminary Statement

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, IAN DECO LIGHTBOURNE, the defendant in the lower court, will be referred to in this brief as Lightbourne. All references to the instant record on appeal will be noted by the symbol "PCR"; all references to the instant supplemental record on appeal will be noted by the symbol "PCSR"; and all references to the record on appeal in Lightbourne's direct appeal, this Court's case number 60,871, will be noted by the symbol "OR." All references will be followed by the appropriate page numbers in parentheses.

Lightbourne presents arguments under Issues I and II which are so closely interrelated as to constitute only one

claim. Accordingly, the state responds to Lightbourne's Issues I and II under one issue heading.

Although not critical to the resolution of this case, the state simply points out that page *v* is missing from its copy of Lightbourne's brief.

STATEMENT OF THE CASE AND FACTS

Procedural History

At Lightbourne's 1981 trial, Theodore Chavers testified on direct examination that he, Lightbourne, Rick Carnegia, Larry Emanuel, and others shared a jail cell (OR 1107). Chavers recalled that Lightbourne told him that investigators had spoken with him about the O'Farrell murder, that he might be the one who killed her, and that the gun Lightbourne had might be the one that killed the victim (OR 1108). Chavers later discovered that no investigators had spoken with Lightbourne (OR 1108-09). Lightbourne told Chavers that, when police officers stopped him, they found a gun in his jacket pocket (OR 1109). Chavers recalled Lightbourne pacing the floor and acting like something was bothering him (OR 1110). Lightbourne told Chavers that the police had no suspect, no fingerprints, and no bullet, and that the telephone wire had been cut (OR 1112). Chavers said he called LaTorre after this conversation with Lightbourne (OR 1112-13).

After the police charged Lightbourne with the crime, Lightbourne and Chavers discussed the murder again, and this time Lightbourne related that he had been in the victim's house and surprised the victim who was in the shower (OR 1115). Lightbourne said he did not want to hurt the victim,

and that they had performed various sexual acts; Lightbourne described the acts and the victim's anatomy (OR 1115-16). Lightbourne never said why he went to the O'Farrell house (OR 1116), and never said he killed the victim (OR 1117).

On cross examination, Chavers admitted to resisting arrest and theft charges, but stated that no one had had his bond reduced (OR 1120). Chavers stated that he had been moved into Lightbourne's cell because Chavers told prison authorities that he wanted to be in a room with a television (OR 1121).[1] Lightbourne told Chavers about the O'Farrell family being in Hialeah for a race show (OR 1125, 1142). Lightbourne said the murder might have been a "hit job" and Mike O'Farrell, the victim's brother, might have been involved; Chavers recalled Lightbourne's statement that, if the "old man passed," the property would be split between the victim and her brother (OR 1143).

Chavers admitted to three convictions -- accessory after the fact, possession of marijuana, and contempt of court (OR 1163). Chavers stated that, although he used to be a trustee, he was not one when he spoke with Lightbourne because Chavers had been charged with escape (OR 1165). Chavers stated that he was released on his own recognizance

[1] The television in Chavers's previous cell, holding cell G-2, was in the repair shop (OR 1121-22).

on the escape charge (OR 1165). Chavers recalled posting a $5,000.00 bond to Baillie on other charges (OR 1165-66). Chavers said he had no knowledge whether LaTorre spoke with the state attorney's office on his behalf (OR 1166).

Theophilus Carson[2] testified that he was housed with Lightbourne in the same cell (OR 1174-75). Lightbourne related to Carson that he was in jail for shooting a "bitch" (OR 1176). Lightbourne told Carson he had "messed up" the crime by taking her necklace and forgetting to take the pendant off; he also stated that he had had sex with the victim and taken some money and "something silver"[3] from her (OR 1176, 1178). Lightbourne called the victim by name -- O'Farrell (OR 1179). Lightbourne told Carson that he had shot the victim because she could identify him, and that he had bought the gun from a black male ex-foreman at the Ocala Stud Farm (OR 1179-80, 1192).[4] Lightbourne said he worked at the stud farm where the victim was killed (OR 1189).

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[2] Carson acknowledged that his "real name" was James T. Gallman (OR 1184).

[3] In conducting a search of Lightbourne's vehicle, LaTorre observed, but did not take custody of, a piggy bank which was all silver in color (OR 1005-06).

[4] Carson did not recall the foreman's name, but had been incarcerated with Jimmy Williams, a relative of this foreman (OR 1192). Williams confirmed what Lightbourne had told Carson, i.e., that Williams had gotten the gun in a burglary and had given it to the foreman (OR 1193).

Carson admitted to being in jail for accessory to grand theft charges (OR 1180). Carson said the state did not have strong evidence against him because the state's witness had exonerated Carson (OR 1180, 1183). Carson recalled that he had entered a plea agreement with the state before his conversation with Lightbourne and before he spoke with LaTorre (OR 1180-82); Carson pled no contest and received time served (OR 1184). Carson remembered being in the cell with Chavers for about three weeks before Lightbourne was arrested; after Lightbourne was arrested, however, he, Lightbourne, and Chavers were not in the same cell anymore (OR 1184-85). Carson had no knowledge of whether Chavers had been in a cell with Lightbourne prior to Lightbourne being in Carson's cell (OR 1185).

Deputy Sheriff Frederick LaTorre testified that Chavers never stated that he expected something in return for the information he relayed to LaTorre (OR 1017). However, LaTorre acknowledged that Chavers probably wanted "to try to make [himself] look better before [he went] to court . . ." (OR 1017). LaTorre also admitted that, subsequent to his conversations with Chavers, he contacted someone from the state attorney's office and Judge McNeal about having Chavers released from custody (OR 1026). Chavers was released, and LaTorre acknowledged that the release was in exchange for the information provided by Chavers (OR 1026).

LaTorre also acknowledged the $200.00 reward received by Chavers (OR 1026).

LaTorre recalled contacting the state attorney's office about Carson, but not in reference to having him released from custody (OR 1025). Instead, LaTorre knew that Carson was incarcerated, and wanted to discover the charges and Carson's status to make certain that Carson would be around for Lightbourne's trial (OR 1025). LaTorre had no interest in assisting Carson with his pending charges, because Carson had specifically stated during his interview with LaTorre that he was not expecting any favors and was not "looking for anything" (OR 1025).

During closing argument, defense counsel commented on both Chavers and Carson:

> The motivation of Mr. Chavers, what -- what particular things do you now know about him. You know that after he gave this statement implicating Ian Lightbourn[e] in this very serious offense he received two hundred dollars. You know that his sentence was reduced through the efforts of Investigator LaTorre and he was released from custody. You know that he supplied information in the past to Investigator LaTorre in another previous case which Investigator LaTorre could -- I guess the best way to say it is neither confirm nor deny. You will recall that Investigator LaTorre remembering earlier testimony he had given said that he was of the understanding that Theodore Chavers might say anything to get out of jail. That's what he knew about him.

> He knew him from before and that -- that was a general comment on his reputation, I guess. Theodore Chavers would have you believe that he was locked up down in jail and he said to the Jailer, Mr. Jailer, my cell doesn't have a TV. May I please be moved. The Jailer said, why, of course, Theodore, we'll just move you right over here to make sure you don't miss the Dating Game.

(OR 1350). Defense counsel continued, noting Chavers's past convictions, and then pointed out to the jury that, to believe Chavers's version of events, the jury would have to disbelieve other witnesses (OR 1351-54).

Defense counsel also commented on Carson during closing argument:

> [W]hat about Theophilus Carson. He got up there and said, listen, I got nothing in return for this. I didn't get any money; I didn't get any deals. I didn't get any -- my time cut, nothing. I just -- I don't know; I'm a concerned citizen, or whatever, so I -- I went ahead and told Investigator LaTorre this. All right. What -- what other things do you know about his testimony, in spite of his saying he got no consideration for this testimony. You knew he had been in jail ninety days, three weeks of which were spent with Theodore Chavers in his cell, at the time he gave his statement to the police. Okay; he'd been down there ninety days. He'd been with Theodore three weeks of that ninety days, and I think he said he'd been with Ian Lightbourne one week, and at that time he gives a statement. The day before he gave that statement his lawyer had been down to see him to talk to him about his case. Well, they didn't know. The

> State didn't have any case, he said, against him. It wasn't him, and they didn't have any evidence; so it's no big deal that he got out. Well, eight days after he gave a statement to Fred LaTorre he was sentenced to time he'd already served in the County Jail, after a plea of no contest to an offense he said he didn't do and the State couldn't prove. He didn't get anything in return. He'd been there for ninety days and not moved off dead center but eight days after this statement he's on the street. He had hit the proverbial bricks, as the saying goes, and he was out. Well, you say, that -- that's just -- that can very well just be coincidental. You know, his lawyer happened to go down the day before and just happened to get out a week later. That -- that doesn't convince me too much. Well, how about this. How about his testifying incorrectly under oath. How about the first thing that came out of his mouth, what's your name? Theophilus Renee Carson. On Cross Examination, what's your real name? James Gallman. Well, damn; his name, he got that wrong. He told you that. He in effect said, yeah, I just testified under oath; my name in Theophilus Carson. The truth of the matter is my name is James Gallman. Did he forget it, a slip of the tongue. If you can spit out Theophilus Carson, you can spit out just about anything. What else, then, would he have testified about that was incorrect. If you can't believe him when he tells you what his name is, what can you believe about him.

(OR 1354-56). Defense counsel reviewed Carson's recollection of what Lightbourne had told him, and concluded:

> A more likely explanation of the testimony of Chavers and Carson might be

this, that, yes, Ian Lightbourn[e] was in the cell with both of those persons and had occasion to discuss being charged with he murder, being a suspect in her murder, having discussed that he worked out there, that the family would be out of town in Hialeah. Ian Lightbourn[e] knew all that stuff; talking about the case, nervous, a charge of first degree murder, facing the ultimate penalty -- sure, he's nervous, and Lightbourn[e] suggesting, well, there's no evidence; I mean, they've got no evidence to tie me to it.

Carson and Chavers say, well, now this sounds kind of good. There's a big case pending here, an unsolved murder. The community is very concerned about it; an old, well-established family, been in town a long time. This kind of thing is one of the most outrageous crimes going on. Carson and Chavers have been around police long enough to know that the heat gets on them in a case such as this. The public demands a solution. The family demands a solution. Chavers and Carson say, well, we'll just kill two birds with one stone. We'll help the police by filling in the gaps that they don't know anything about. We'll help them -- we'll help them prove the case. That'll make them happy. Probably make the family happy, and we'll walk out of the door; so we will most certainly be happy. That kind of scenario certainly makes as much sense as anything either of those two suggested.

Let me suggest one other thing to you about these two persons' testimony. I don't know if it was Chavers or Carson or Gallman or both or all three, or which one, but I recall one of them saying that Ian Lightbourn[e] was bragging about how clean a job it was, professional job, no prints, cut phone wires, took nothing, slick, clean. Okay, if you believe those guys, then you've got to believe that Ian

> Lightbourn[e] told them that, and if you believe that he was bragging on how slick and clean this job was, then how in the world can you believe that somebody who would do such a slick, clean professional job would tell somebody the likes of Theodore Chavers and Theophilus Carson about it. Thank you.

(OR 1360-61).

Defense counsel's final words on these two witnesses were:

> Mr. Simmons'[s] an[a]logy that Theodore Chavers opened up this case for law enforcement just leads me to the next statement that -- and as a result of that, law enforcement opened up the jail for Theodore Chavers. He's suggesting to you the case was shaky and that Theodore Chavers comes on the scene and it's solved. Think about that when you're evaluating the case and Theodore Chavers. Makes much of the fact that Theodore got two hundred dollars for this information, but you all remember Sonny Boy Oats and you all remember going to the Jiffy store and seeing the thousand dollar reward out there for Sonny Boy Oats. You all remember that. Do you also remember that Theodore Chavers tried to collect on that, too. LaTorre told you that Theodore Chavers called him with some information on Sonny Boy Oats. He couldn't confirm it. Theodore Chavers might be classified as the new Steve McQueen, the new bounty hunter, as it were. A reward is out and Theodore has the answer. He's got some information.
>
> Carson, he didn't care. He was getting out. No deal; he didn't need nothing. He's just -- just a good old concerned thief, but Investigator

> LaTorre told you, I went to the State Attorney's Office to see what was going on, why he was there, what he was charged with, things like that; just out of idle curiosity, you are to presume, and then a week thereafter he's hitting the bricks. He's on the street; he's gone, and he still ain't sure where the man is. Theophilus Carson -- well, he didn't say where he shot her; he didn't say how he shot her. He also didn't say who he shot. The fact that Carson -- Mr. Simmons suggests that Theophilus Carson didn't know what was going on in this case and he -- he cites as evidence of that, he called the wrong police officers. Well, he was looking for LaTorre. He called the wrong Department. So because of that Mr. Simmons argues, based on his ignorance that gives more believability to his testimony. It's an[a]logous to pulling yourself up by your boot straps. You know it's a neat trick if you can do it, but it don't last long.

(OR 1407-09).

The jury convicted Lightbourne of first degree murder and recommended a death sentence (OR 123, 182). In following the jury's recommendation, the sentencing court found five aggravating factors: (1) the murder was committed during the commission of a burglary and sexual battery; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, and cruel; and (5) the murder was committed in a cold, calculated and premeditated manner (OR 176-78). The court also found two statutory mitigating

factors -- no significant history of prior criminal activity and age -- and no nonstatutory mitigation (OR 177).

Lightbourne appealed, raising the following issues: (1) The trial court erred in denying Lightbourne's motion to dismiss the indictment and in finding that the indictment sufficiently alleged the time of the offense; (2) the trial court erred in denying Lightbourne's motion to dismiss the indictment or to declare that death is not a possible penalty; (3) the trial/sentencing court erred in not granting Lightbourne's motion to declare section 775.082(1), 921.141, and 782.04(1) unconstitutional;[5] (4) the trial

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[5] Specifically, Lightbourne argued that section 775.082 eliminated judicial discretion; section 921.141's enumeration of mitigating circumstances was unconstitutional because the factors are limited by statute, but Lockett v. Ohio, 438 U.S. 586 (1978), mandated consideration of all evidence of mitigation; section 921.141 was facially invalid because the State of Florida could not justify the death penalty as the least restrictive means available to further a compelling state interest; section 921.141 was unconstitutional as applied, because (1) the prosecutor had absolute discretion as to whether to seek the death penalty; (2) the evidence of aggravating circumstances varies in each case; (3) the evidence of mitigating circumstances varies in each case; (4) the jury recommendation varies in each case; (5) the alternate sentence imposed varies in each case; (6) the imposition of sentence varies in each case; and (7) all involved in the conviction and sentence are human beings with no special insight to pass judgment on the life of another; section 982.04(1)(a) was unconstitutional on its face and as applied, because Florida's felony murder rule requires no intent; and section 921.141's enumeration of aggravating circumstances was impermissibly vague and overbroad. On this last point, Lightbourne commented on the following aggravating circumstances -- under sentence of imprisonment, convicted of another capital felony or violent felony, risk of death to many persons, committed during the course of a felony, avoiding arrest, pecuniary gain,

court erred in denying Lightbourne's motion to quash the jury venire; (5) the trial court erred in denying Lightbourne's motion in limine and his motion to suppress statements;[6] (6) the trial court erred in denying Lightbourne's motion to suppress items taken from him at the

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hindrance of law enforcement, and heinous, atrocious, and cruel (HAC). Regarding HAC, Lightbourne argued:

> Capital felonies by their very nature would appear to satify this requirement. Such criminal activity as premeditated murder and child rape were found by the legislature to be of an unusually serious nature based on penalty to be imposed upon conviction. Proof of the cime itself, which of course is a pre-condition to the application of these circumstances, might satisfy this requirement in the minds of the laymen jurors who seldom, if ever, deal with such crime as premeditated murder or child rape. The application of this circumstance would vary with the personal values of the individuals applying it and as such, reasonable, consistent, and equal application thereof is impossible.

Lightbourne's Initial Brief on direct appeal at 34. Lightbourne's motion to declare section 921.141 unconstitutional filed in the lower court tracked the appellate arguments (OR 31-36).

[6] Lightbourne's "basic claim under [this point was] that Theodore Chavers, a state witness at trial, was acting as an agent of the state during the time he shared a cell with the defendant at the Marion County jail." Lightbourne v. State, 438 So. 2d 380, 386 (Fla. 1983). This Court found that, "[w]ithout some promise or guarantee of compensation, some overt scheme in which the state took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the state's actions in this case to an agency relationship with the informant Chavers." Id.

time of his arrest; (7) the trial court erred in denying Lightbourne's motion to suppress all of the items listed in the March 31, 1981, motion; (8) the trial court erred in denying Lightbourne's motion to suppress his videotaped statements to LaTorre; (9) the trial court erred in denying Lightbourne's motion to impose sanctions; and (10) the sentence of death was inappropriate as it was based on improper aggravating circumstances, the sentencing court failed to consider an "unenumerated" mitigating circumstance, and the mitigating circumstances outweighed the aggravating circumstances.[7] This Court affirmed Lightbourne's conviction and death sentence in Lightbourne v. State, 438 So. 2d 380 (Fla. 1983).

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[7] Specifically, Lightbourne argued that the use of the underlying felonies for aggravation defeated the function of the statutory aggravating circumstances to confine and channel capital sentencing discretion; because avoiding arrest is inherent in every murder, use of this aggravator constitutes an "automatic cumulation"; use of the pecuniary gain and during-the-commission-of-a-felony (burglary) aggravators constituted a doubling of aggravators; there was no direct testimony that Lightbourne gained anything of pecuniary gain from killing the victim; the heinous, atrocious, and cruel aggravating factor did not apply because there was no evidence that the victim struggled or suffered; the cold, calculated, and premeditated aggravator was unconstitutional because all first degree murders are cold, calculated, and premeditated, and application of this factor "doubled" it with the substantive crime; the sentencing court should have concluded that the two mitigating factors outweighed the aggravating factors; and the sentencing court should have considered "as an unenumerated mitigating circumstance the fact that [Lightbourne] had no past history of violence." Lightbourne's Initial Brief on direct appeal at 86.

Lightbourne next sought relief before the United States Supreme Court in Lightbourne v. Florida, 465 U.S. 1051 (1984), where he raised the following points: (1) Certiorari should be granted to determine whether the trial court erred in denying his motion in limine and motion to suppress statements elicited by jailhouse informants; (2) certiorari should be granted to review the circumstances surrounding his initial detention to determine whether evidence obtained should have been suppressed; and (3) certiorari should be granted to review the balance of the aggravating and mitigating circumstances. That Court denied certiorari.

After the signing of Lightbourne's first death warrant, Lightbourne filed a motion, which the lower court construed as a postconviction motion, raising the following points: (1) Lightbourne was denied a fair trial by the state's impermissible use of peremptory challenges; (2) the sentencing court improperly considered various aspects of the presentence investigation report in determining Lightbourne's sentence; (3) the evidence was insufficient to support the conviction and sentence; and (4) Lightbourne did not receive effective assistance of trial counsel. In Lightbourne v. State, 471 So. 2d 27 (Fla. 1985), this Court found that the first three issues either were or could have been raised on direct appeal and thus were foreclosed in a

postconviction motion. As to the last issue, this Court found nothing in the record to indicate ineffectiveness. Finally, this Court held that the lower court was correct in summarily denying Lightbourne's motion.

Lightbourne next sought federal habeas corpus relief in the Middle District, presenting the following claims: (1) His rights under the Fifth, Sixth, and Fourteenth Amendments were violated by the admission into evidence of a custodial statement elicited by law enforcement after Lightbourne had indicated his desire to stop questioning; (2) his right to counsel was violated by the actions and testimony of Lightbourne's cellmate, who related various statements made by Lightbourne; (3) trial counsel were ineffective at trial based on their failure to obtain experts to rebut state experts and for inadequately challenging the testimony of a jailhouse informant because of an alleged conflict of interest; (4) trial counsel were ineffective at sentencing in their failure to investigate Lightbourne's background, in their failure to prepare adequately for sentencing, and in their permitting the sentencing court to consider prejudicial evidence at sentencing; (5) the sentencing court considered evidence which was prejudicial and did not support any aggravating circumstance, and trial counsel did nothing to exclude this improper evidence; (6) the prosecutor impermissibly used peremptory challenges to

strike black jurors; and (7) Lightbourne was entitled to the aid of experts and was denied same through ineffective trial counsel. The Middle District denied the petition, and the Eleventh Circuit affirmed this denial in Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987). Lightbourne appealed the Eleventh Circuit's decision to the United States Supreme Court, which denied his petition for writ of certiorari in Lightbourne v. Dugger, 488 U.S. 934 (1988).

After the governor signed Lightbourne's second death warrant, Lightbourne filed his second postconviction motion, raising the following claims: (1) The state's deliberate use of false and misleading testimony from Chavers and Carson, and the intentional withholding of material exculpatory evidence, violated Lightbourne's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments; (2) the state's unconstitutional use of jailhouse informants Chavers and Carson to obtain statements violated Lightbourne's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments; (3) Judge Swigert, the trial and sentencing judge, was not impartial; and (4) Lightbourne received ineffective assistance of trial counsel at the sentencing phase.

The lower court denied this motion, reasoning that it was successive and Lightbourne had failed to demonstrate why the claims had not been raised before January 1, 1987, as

required by **Fla. R. Crim. P.** 3.850. Lightbourne appealed to this Court. In Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), this Court found an evidentiary hearing was required on the allegations concerning Chavers and Carson, and that those claims could not be considered procedurally barred because the first postconviction motion did not address the current allegations and the facts upon which the claims were predicated were unknown and could not have been ascertained by the exercise of due diligence.[8] This Court found procedurally barred the claim that Judge Swigert was not impartial, because the judge's financial disclosures had been of record for many years but Lightbourne waited until 1989 to raise the claim. Finally, this Court held that the ineffectiveness of trial counsel claim had been raised in the previous postconviction motion and was procedurally barred by the time limits of rule 3.850.

Also on January 30, 1989, Lightbourne filed a petition for writ of habeas corpus with this Court, presenting the following issues: (1) ineffective assistance of appellate counsel for his failure to brief a claim that the sentencing court allegedly failed to allow Lightbourne to present evidence in mitigation, in addition to a claim on the merits based on Hitchcock v. Dugger, 481 U.S. 393 (1987); (2)

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[8] Thus, on this point, this Court remanded this case for an evidentiary hearing.

ineffective assistance of appellate counsel for his failure to brief a claim that the judge had failed to weigh aggravating and mitigating circumstances independently before imposing sentence; (3) the judge improperly instructed the jury on a duplicative aggravating circumstance; (4) the heinous, atrocious, or cruel aggravating factor was applied arbitrarily in violation of Maynard v. Cartwright, 486 U.S. 256 (1988); (5) the cold, calculated, and premeditated aggravating circumstance was applied arbitrarily in violation of Maynard; (6) the jury was misled as to its role in sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985); (7) the penalty phase instructions could have been read as requiring the mitigating circumstances to be proven beyond a reasonable doubt in violation of Hitchcock and Mills v. Maryland, 486 U.S. 367 (1988); (8) the jury instructions unconstitutionally shifted the burden to the defense to prove mitigation in violation of Caldwell and Mills; and (9) the jury instructions did not expressly state that only six votes were required for a life recommendation in violation of Caldwell and Mills. This Court found that issues two through nine were procedurally barred for not having been argued on appeal, and denied those claims dealing with the ineffectiveness of appellate counsel "for lack of merit." Lightbourne v. Dugger, 549 So. 2d at 1366 n.2. Regarding the first issue, this Court found no ineffectiveness and

rejected Lightbourne's Hitchcock claim because the judge and the jury were aware that nonstatutory mitigating evidence could be considered in the sentencing proceeding.[9]

Lightbourne then sought relief in the United States Supreme Court, raising the following issues: (1) Whether certiorari should be granted based on the sentencing court's refusal to allow Lightbourne to present significant mitigating evidence included in a presentence investigation report violated the Fifth, Sixth, Eighth, and Fourteenth Amendments, and conflicted with various decisions of that Court and the Eleventh Circuit; and (2) whether certiorari should be granted based on the pendency of several cases from that Court and the claim that the sentencing court impermissibly shifted the burden to Lightbourne to prove that death was not appropriate. The United States Supreme Court denied certiorari in Lightbourne v. Dugger, 494 U.S. 1039 (1990).[10]

On remand, the lower court conducted several evidentiary hearings, at which Lightbourne called James Burke, David Baillie, Ronald Fox, Larry Spangler, Robert

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[9] This Court ruled on both the habeas petition and appeal from the denial of Lightbourne's second postconviction motion in Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989).

[10] The evidentiary hearings in the instant appeal were continued pending this appeal to the United States Supreme Court (PCR 1998A).

Bray, Theodore Chavers, Richard Carnegia, Dr. Mills, and Theresa Farley as witnesses. The state called James Phillips, Guy McWilliams, Patricia Lumpkin, Richard Ridgway, Tom Neufeld, and Fred LaTorre as witnesses. Subsequent to the hearings, the parties filed memoranda of law (PCR 2064-85, 2129-204, 2237-83). Defense counsel moved to reopen the hearings and to compel the production of Chavers (PCR 2205-10). The lower court granted this motion (PCR 2223), but eventually denied relief:

> In this 3.850 proceeding, the Defendant attacks the truth of evidence admitted against him, the integrity of the process by which the evidence was obtained, and the suppression of material evidence.
>
> The Defendant says the State knowingly admitted false and misleading evidence. To support that charge the Defendant says two witnesses recanted their trial testimony.
>
> The Defendant does not attack the truth of evidence proving the following facts: while the Defendant was in jail on unrelated charges, at a time when the Defendant was not a suspect in this crime, one cellmate fortuitously picked out a man in the county jail who had the following facts associating him with this crime (which facts of identification were not known to anyone prior to this fortuitous selection): he had purchased and had in his possession, both before and after the murder, the gun which shot the bullet which killed the victim; his pubic hair and blood matched hair and semen stains taken from the crime scene; he was the same sex and race as the person who left semen stains and hairs at the crime scene, he had in

his possession a gold necklace and pendant taken from the victim at the time of the crime; he had worked at the farm where it was common knowledge among employees that the owners would be out of town at the time of the murder; an empty metal cartridge case was found in his car after the crime similar to the case which housed the murder bullet. The man the cellmate fortuitou[s]ly selected, who coincidentally and these associating factors, was the Defendant.

The cellmate, Theodore Chavers, says he selected the Defendant because he confessed. Later, another cellmate, Theophilus Carson, corroborated that confession. The Defendant does not contest the truth of the evidence associating himself with this crime. He contests the method by which he was selected -- he says the cellmates lied about his confession, recanted their testimony, were agents of the State, and lied about or misrepresented facts which would impeach them.

Upon the evidence at the 3.850 hearings, the Court makes the following findings and conclusions:

1) No witness who testified at trial recanted any testimony.

2) The Defendant has not shown that any witness lied about or misrepresented any fact which would be a basis for impeachment, nor about any fact which would tend to show that Chavers and Carson acted as State agents.

3) The Defendant has not shown that the State suppressed any material evidence, that is any evidence which, if it had been available to the Defendant at trial, would raise a reasonable probability that the result of the trial would have been different.

4) The Defendant has not presented any newly discovered evidence of such a

> nature that would probably produce an acquittal on retrial.
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> Therefore, it is
>
> ORDERED that the Defendant's 3.850 Motion for Post Conviction Relief be and is hereby denied. It is further
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> ORDERED that the Defendant's request for an additional sixty (60) days to locate Theophilus Carson be and is hereby denied. The Defendant is advised that he has thirty (30) days from the date of this order to appeal.

(PCR 2284-86).

Lightbourne moved for rehearing and for permission to amend based on the issuance of Espinosa v. Florida, 112 S. Ct. 2926 (1992) (PCR 2287-96). The state moved to strike these motions on the grounds that they were untimely and that Lightbourne had failed to preserve the Espinosa issue (PCR 2299-301). The lower court denied Lightbourne's motions as untimely (PCSR 142-43).

Lightbourne appealed this denial to this Court in this instant appeal (PCR 2372). After Espinosa issued, Lightbourne filed his third rule 3.850 motion, claiming that, based on Espinosa, the jury instructions on the heinous, atrocious, and cruel, and cold, calculated, and premeditated aggravating factors were unconstitutionally vague (PCR 2328-53). The State responded, stating that: (1) it did not contest the allegation that the heinous,

atrocious, and cruel jury instruction was unconstitutionally vague; (2) it did not contest that this error was properly preserved, because, although Lightbourne did not object in a timely manner to the instruction, he did offer an alternative instruction and argued its merits to the court; (3) it did contest the allegation that the instruction on the cold, calculated, and premeditated aggravating factor was unconstitutionally vague; (4) any error committed on this point was harmless, as it was clear that the jury would have made the same recommendation with any jury instruction; (5) a harmlessness conclusion was supported further by two other remaining aggravating factors and no mitigation; and (6) the challenge to the cold, calculated, and premeditated jury instruction was barred by the two year time limit of rule 3.850 and also because it had been raised on direct appeal (PCR 2354-67).

This Court relinquished jurisdiction to permit the lower court to consider this motion (PCSR 144, 349, 354). On March 15, 1993, the lower court denied the third postconviction motion, stating:

> Pursuant to remand from the Florida Supreme Court, the Defendant seeks amended 3.850 relief under Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), alleging error in the jury instructions on the "heinous" factor and the "coldness" factor. These were two of five aggravating factors the trial judge found sufficient to outweigh two

mitigating factors in imposing the death sentence, as recommended by the jury.

In a pretrial motion "To Declare Florida Statutes 775.082(1) and 921.131 Unconstitutional," Defendant attacked nine aggravating factors as vague and overbroad, including the "heinous" factor. The motion did not attack the "coldness" factor. The motion was denied. On appeal, the Defendant repeated the same arguments. In addition, the Defendant appealed the applicability of the "coldness" factor, but his appeal did not attack the jury instruction on the "cold, calculated and premeditated" factor.

Even if the Defendant attacked both factors in pretrial motions and on appeal, the critical question in whether he objected to the jury instructions at the time they were given, or whether he requested a special instruction on these factors which was denied.

It is clear from the record of the jury charge conference that the Defendant objected to the sufficiency of the evidence to support either factor. He objected to the Court allowing the jury to consider either factor. He did not object to the jury instructions on either factor. On the contrary, it affirmatively appears the Defendant was satisfied with the definitions of each factor. He did not object to the proposed instructions. He did not request a special instruction for either factor. He did not object to the instructions as given.

Fla. R. Crim. P. 3.390(d) provides that "no party may assign as error (or) grounds of appeal the giving of the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection." The Florida Supreme Court

> has consistently held that failure to follow this rule waives the right to object on appeal. It is not sufficient to object in a pretrial motion, or to object on appeal. The point must be preserved by a timely objection when the instructions are given, or by a request for a specific instruction. If not, the point is waived. Pointicelli v. State, 18 FLW S133 [sic]. The U.S. Supreme Court has agreed. An objection to a jury instruction must be preserved under state law, or it is waived. Sochor v. Florida, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992).
>
> Based on the trial record, the Court finds that the Defendant did not object to the instructions on the "heinous" and "coldness" factors, nor did he request a special instruction for either factor. The objection has been waived.
>
> Therefore, it is
>
> ORDERED that the Defendant's Amended Motion for 3.850 Relief under Espinosa be and is hereby denied.

(PCSR 346-48). Lightbourne moved for rehearing (PCSR 350-53), which the lower court denied (PCSR 369-70).

The "Remand" Hearings

James Homer Burke, Jr., testified that he was co-counsel with Fox in representing Lightbourne at trial (PCR 43). When Burke learned that the state would be introducing Lightbourne's statements as related to cellmate Chavers, Burke felt there was a possibility that Chavers had been placed in Lightbourne's cell "to act as a listening post for

the State." (PCR 45). Burke also recalled feeling that the state had not given them full information (PCR 46). Burke testified that, if he had had evidence of an agency relationship, he and Fox would have used that as evidence at trial (PCR 47). Burke recalled being dissatisfied with the state's response to the defense's Brady request (PCR 60). On cross examination, Burke admitted that he could have requested a viewing of the state attorney's files at any time and been granted same as a matter of course (PCR 147). Burke had "no clear recollection of viewing the file or being denied a view of the file in this case." (PCR 147).

Burke also admitted that Chavers was so notorious as a pimp and street person that use of him as a witness "could be fairly characterized as an open invitation to impeachment" (PCR 159). Burke stated that such was not the case with Carson[11] (PCR 159). Burke stated that there was no reason for Chavers to know, at the time he testified, that his escape charge had been nolle prossed[12] (PCR 164).

Sergeant Guy McWilliams testified that, regarding the $200.00 Chavers received, Chavers contacted the sheriff by telephone and the sheriff contacted Captain King, and arranged for Chavers to have the $200.00 (PCR 194-95). This

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11 See Carson's Letter (PCR 1416).

12 See Announcement of No Information (PCR 1431).

was done without McWilliams's or LaTorre's knowledge (PCR 195). "[A]t that time it was fairly commonplace for the sheriff to offer rewards for information, either through the newspaper or media, for unsolved cases or cases with high visibility . . . ." (PCR 195).

David Baillie testified that Chavers's reputation for truthfulness in the community was such that one would have "to take whatever he had to say with a grain of salt." (PCR 213). Baillie stated that he had bonded Chavers out on several occasions (PCR 214), but had not bonded him out on an escape charge on February 10, 1981, for $5,000.00 (PCR 223).

Ronald Fox testified that, as appointed trial counsel for Lightbourne, he was concerned with Chavers's status as a repeat offender with questionable credibility (PCR 236).[13] Although Fox was concerned with both Chavers and Carson being placed in Lightbourne's cell to obtain information for the state, he was less concerned with Carson's credibility because he had no prior knowledge about Carson (PCR 236). Fox viewed Chavers as a critical witness for the state, because, in his opinion, the state's evidence against Lightbourne was all circumstantial, but for the statements rendered to Chavers and Carson (PCR 236-37). Fox also

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13 See Fox's Affidavit (PCR 1408-14).

believed Chavers's testimony also established aggravating factors (PCR 237). Fox found Chavers most harmful to the defense, characterizing Carson's testimony as the more general of the two: "Chavers supplied details unavailable from any other source." (PCR 237).

Fox stated that, because Chavers "had been moved within the jail at times which seemed to coincide with when this sort of information became available," he suspected that Chavers had been placed in Lightbourne's cell intentionally (PCR 240). Fox recounted a difference between Chavers's statement to police about Lightbourne never telling him anything about sexual relations and Chavers's testimony (PCR 244). Fox admitted to having an understanding of Chavers's criminal history (PCR 246). Fox stated that, had he known at trial that Chavers had received the $200.00 about two hours before speaking with police officers on February 12, 1981, he would have shared this information with the jury (PCR 247). Fox said he would also have used the information that Chavers received a nolle prosse on an escape charge, if he had had that information at the time of trial (PCR 256).

On cross examination, Fox admitted that Chavers's reputation for truthfulness was at "a very low ebb," but stated that, nevertheless, he believed all the more recent letters and affidavits from Chavers (PCR 283). Fox also corrected his earlier testimony, noting that the jury in

fact knew about Chavers's receipt of the $200.00 (PCR 287-88). Fox had no recollection of whether he had used "standard operating procedure" to ask the state attorney's office for an appointment to review their files, but did recall that he had not been denied access to the files (PCR 291). Fox also recalled, after reading the trial transcript, that Chavers in fact never claimed that he bonded out on the escape charge, only that he had been "ROR-ed" (PCR 297). Fox did not claim that the Carson letter had been suppressed, because it was written after his representation of Lightbourne had concluded (PCR 300).

Larry Spangler testified that he witnessed Chavers escape from jail and completed the probable cause affidavit (PCR 357). Spangler related that he was surprised to learn that the charge against Chavers was dropped due to insufficient evidence (PCR 361).

Robert Bray testified that, in his opinion, Chavers was a "reliable snitch" (PCR 384). Bray recalled no consideration, favors, or rewards being extended to Chavers for his testimony at Lightbourne's trial (PCR 394). Bray stated that Chavers had contacted him in the past with information, and that the "pattern" was that Chavers always contacted him, not vice versa (PCR 395). Following Bray's testimony, Lightbourne's counsel informed the trial court

that of their inability to locate defense witnesses Carson and Jackie Ray Hall[14] (PCR 420-437).

Chavers testified that, when he was incarcerated with Lightbourne, other men, such as Larry Emanuel and Rick Carnegia, were incarcerated with them (PCR 443), but he did not remember Carson being in the cell (PCR 446). The lower court stopped taking testimony from Chavers due to his apparent inability to understand questions (PCR 451-536), and scheduled Chavers for testimony the following day (PCR 531).

Richard Carnegia testified that he was incarcerated with Lightbourne in 1981 (PCR 550).[15] Although Carnegia remembered Larry Emanuel, Shelby Reynolds, and Theodore Chavers sharing the cell with him and Lightbourne (PCR 551), he did not remember anyone named Hall, Carson, or Gallman in the cell (PCR 588). Carnegia knew before being incarcerated with Chavers of Chavers's reputation on the street for being a snitch (PCR 553). Carnegia said that, during his incarceration with Chavers, Chavers approached him about whether he wanted to get out of jail (PCR 558). Carnegia recalled Chavers telling him that, if he wanted to get out, all he had to do was say that he heard Lightbourne say that

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[14] See Hall's Affidavit (PCR 1401-02).

[15] Carnegia admitted to five or six felony convictions (PCR 593).

he killed somebody (PCR 558). Carnegia said Chavers indicated that Carnegia's saying this would make Chavers's assertions more believable (PCR 559). Carnegia declined to do so, however, because it was not true (PCR 558-59).

Carnegia said he heard Lightbourne and Chavers talk about the O'Farrell murders two or three times, and that Chavers did most of the talking (PCR 560). Carnegia recalled that Chavers asked Emanuel to assist him in providing information against Lightbourne (PCR 561); Carnegia did not hear Emanuel's response (PCR 586). Carnegia recounted hearing Lightbourne saying something that denied the murder, but did not hear Lightbourne say anything about being involved in the murder (PCR 585). However, Carnegia admitted that Lightbourne and Chavers could have discussed the murder while he was in the cell without his hearing it (PCR 586). As Carnegia observed: "I might not have been in the cell. It's possible they could have been whispering." (PCR 587).

After the lower court excused Carnegia, it examined Chavers about his head injury, and ordered that hospital records be obtained and that Chavers be examined by a doctor to determine if he was competent to testify (PCR 613-17). After a brief examination of Chavers, Dr. Mills testified that it was "clear that he can't handle cross examination," and that he could not discern the truth from a falsehood (PCR 639). The lower court continued the hearing (PCR 648).

At this later hearing, the prosecutor noted the lab report results that Chavers was under the influence of cocaine, contrary to prior his testimony that he was not under the influence of any drugs (PCR 678). Lightbourne's counsel noted Dr. Poetter's opinion that Chavers suffered from post concussion syndrome and was still incompetent to testify (PCR 679).[16]

At a subsequent hearing, Lightbourne's counsel reviewed Dr. Lora's opinion concerning Chavers,[17] namely that Chavers could stand questioning from a neurological perspective, but his answers might not be reliable based on chronic drug and alcohol consumption (PCR 720). Counsel also discussed Dr. Poetter's report that Chavers had improved in his competency (PCR 721). The prosecutor related that the state attorney's office had recently charged Chavers with two counts of the sale of cocaine (PCR 722). Because Chavers had been in jail on these charges for over a week, the prosecutor opined that Chavers had remained substance free and was more competent than when first examined (PCR 722-23).

Although Chavers took the stand, he appeared to be unable to recall much (PCR 739-66). The lower court stated:

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16 See Dr. Poetter's Report (PCR 2041-43).

17 See Dr. Lora's Report (PCR 2054).

> I think he's playing games. He was playing games the last time also. He was competent to testify the last time. Dr. Lora has told us this man is competent. Dr. Lora says he . . . has not suffered any such brain damage in any 70-mile-an-hour automobile accident. I don't believe it. I don't think it has been shown he suffered any such injury.
>
> Mr. Chavers'[s] every now and then very lucid response to questions indicates he is perfectly competent. His mental function is perfectly intact. I don't think he's suffering from any automobile injury. He's not suffering from any prolonged drug abuse or alcohol abuse or any other kind of abuse. He remembers details as clear[ly] as he wants when he wants to, and I think he's playing games here.

(PCR 771-72).

James Phillips testified that, in January 1989, he had a conversation with Chavers, who was incoherent and under the influence of "something" (PCR 961), but made reference to having lied at Lightbourne's trial (PCR 969, 979). Patricia Lumpkin testified that she spoke with Chavers in January 1989 before he spoke with Phillips, and Chavers exhibited distinct signs of drug abuse and did not seem "fully aware of what all he was saying." (PCR 988). In fact, Chavers admitted to Lumpkin that he had consumed cocaine that day (PCR 988).[18]

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[18] Phillips testified at an earlier hearing concerning the existence of two taped audio recordings of conversations with Chavers -- one on January 30, 1989, when Chavers turned

Theresa Farley testified regarding the affidavit signed by Chavers in January 1989 (PCR 1396-99), stating that she wrote what Chavers told her, reviewed it with Chavers, and Chavers signed it in her presence under oath (PCR 1013, 1015). Afterwards, Chavers told Farley to leave and not provide him with a copy of the affidavit (PCR 1042). At Farley's next visit with Chavers, he was initially cooperative, but refused to review the affidavit and told her to come back later (PCR 1019-20). At the next visit, Chavers was "a wreck," incoherent and obnoxious (PCR 1027). When Farley later located Chavers, once again he was "very messed up," "could barely speak," and "was stoned." (PCR 1032). Chavers refused to speak with Farley later, but finally returned to her hotel a day later (PCR 1034). At this time, Chavers was still obnoxious, rambling, and difficult to understand (PCR 1035). Although Chavers agreed to attend the instant hearings, he did not appear on the scheduled day (PCR 1037).

Based on her conversations with Chavers, Farley believed that Chavers remembered what happened at

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himself in, at which Phillips, Sgt. Lumpkin, and Deputy Sylvester were present; and the other on June 12, 1990, when Chavers spoke with Phillips on the telephone (PCR 680-94, 2093-107). See Transcripts of these conversation (PCSR 100-41).

Chavers also wrote to Phillips a number of times (PCR 2219-22, 2380-81, 2384-85, 2388, 2392-96).

Lightbourne's trial (PCR 1038). Further, Chavers never indicated to Farley that the affidavit he signed was not true (PCR 1038). Farley admitted that, regarding the affidavit, she first spoke with Chavers for about an hour, called Lightbourne's counsel in Tallahassee, and after that conversation, drafted the affidavit for Chavers's signature (PCR 1056-58). Farley also admitted that the affidavit was not a transcript of Chavers's verbatim words; she composed the affidavit with her own editing and writing skills, organizing it in a chronological manner that "seemed to make sense" to her (PCR 1061-63).

Richard Ridgway testified that he gave Chavers an "exceptional clearance" on several burglary charges because he did not believe that the state had enough evidence to prosecute Chavers for those offenses (PCR 1103).[19] Ridgway stated that the letters contained in Exhibits 7A, 7B, and 7C (PCR 2434-38) had nothing to do with his decision to clear Chavers's cases (PCR 1104-05).

Officer Tom Neufeld testified that he came into contact with Chavers while investigating a string of burglaries (PCR 1113). Neufeld stated that Chavers had become implicated in these burglaries through statements given by his brother-in-law, Nathaniel Robinson, and that the only evidence they had

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[19] See Clearances (PCR 1865-905).

[illegible] the small caliber automatic weapon found on Lightbourne to discern whether the casing found at the murder scene was fired from Lightbourne's gun (PCR 1127). This analysis revealed that the casing found at the scene had been fired from the gun taken from Lightbourne (PCR 1128).

Lt. Frederick LaTorre testified that he was the lead investigator in the O'Farrell murder investigation (PCR 1124). Lightbourne evolved as a suspect in this murder after Chavers called LaTorre from the county jail (PCR 1125).[20,21] [illegible][22] [illegible]

[illegible] and discovered a necklace "that had a rose on it that . . . had some inscription on it which was associated with a sorority from Gainesville" and "ultimately identified as belonging to Miss O'Farrell by her sister."

[20] Chavers's contacting LaTorre "was totally his [own] [illegible] (PCR 1134).

[21] Lightbourne's name had surfaced prior to LaTorre's conversation with Chavers, in an interview with Cathleen Gifford, who worked at the Ocala Stud Farm and knew Lightbourne (PCR 1140-41). See Gifford's statement to LaTo[illegible]

[22] See [illegible] statement to LaTorre (PCR 1447-50).

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LaTorre recalled that, sometime later, Chavers contacted the sheriff's office about receiving a reward for providing information in the Lightbourne case (PCR 1132). LaTorre stated that this type of reward was publicized regularly in the Ocala Star Banner (PCR 1199). When Chavers arrived to receive the $200.00 reward,[23] LaTorre took another statement from him,[24] in which Chavers provided more detailed information (PCR 1133). Specifically, Chavers told LaTorre that Lightbourne had been involved in some sexual conduct with the victim (PCR 1134).

LaTorre recalled telling Chavers at their first meeting the possibility of LaTorre's discovering what Chavers's status was at the state attorney's office and informing that office how Chavers had cooperated (PCR 1135). LaTorre did not discuss any reduction of sentence or dismissal of escape charges with Chavers (PCR 1135-36). When Investigators Kugler and Bray asked for assistance in a different case, i.e., they wanted Chavers out of jail for their investigation, LaTorre told a judge how Chavers had cooperated in the Lightbourne case (PCR 1137-38). LaTorre stated that he never exerted any pressure on Chavers to inform against Lightbourne (PCR 1139). Further, LaTorre

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[23] This happened about one week after Lightbourne had been charged with the murder (PCR 1134).

[24] See Chavers's Statement to LaTorre (PCR 1452-59).

said that he was never a party to any conversation involving the hiding of any evidence concerning Chavers from Lightbourne (PCR 1139). Finally, LaTorre said that he never advised Chavers as to the content of Chavers's testimony at deposition or trial (PCR 1140).

Al Simmons testified that Chavers had been an important witness for the state, in the sense that they had no idea who had killed the O'Farrell woman until Chavers called LaTorre (PCR 1233). After LaTorre found the gun, the case fell into place, because the lab expert testified that the match between the gun and the bullet taken out of O'Farrell's head "was one of the most perfect matches he had ever seen in his life." (PCR 1233). Thus, Simmons "had no reason to doubt what Chavers was telling [him] . . . because what he told [him] was corroborated later by other evidence." (PCR 1243). However, Simmons did not believe that Chavers was an important witness at trial (PCR 1233).

Simmons remembered Carson telling him that Lightbourne told him something about the victim's necklace which was found in Lightbourne's personal effects (PCR 1244).[25] Simmons pointed out that Chavers's statement that Lightbourne said he had had sexual relations with the victim was corroborated by the evidence, namely semen stains on the

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25 See Carson's Statement to LaTorre (PCR 1461-65).

bed, negroid pubic hair found on the bed, and sperm found in the victim's vagina (PCR 1244-45). Simmons said he had no reason to believe that Lightbourne's statements to Chavers and Carson were not made, and that he had never told either witness how to testify (PCR 1247-48).

Lightbourne's counsel then informed the court that he wished to call Ray Taylor, who Chavers had mentioned several times at the hearing, as a witness (PCR 1254). Although Taylor had been waiting in a cell to testify, when the bailiff checked on Taylor, the bailiff discovered that Taylor had been transported to Lake Butler about 15 minutes prior (PCR 1256).[26] Counsel then informed the court that they had a letter from Taylor to his counsel, Trish Jenkins, who had not seen the letter because it had been in Investigator Sanchez's possession (PCR 1257). Purportedly, this letter would have shown that Chavers did remember testifying at Lightbourne's trial, that Chavers said Lightbourne was innocent, that Chavers knew who actually killed the O'Farrell woman, and that Chavers was faking incompetence (PCR 1258-59). The court found that the letters from Chavers to Gill,[27] the affidavit from Chavers, and the evidence concerning Taylor was hearsay:

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[26] Because defense counsel failed to inform jail personnel of their intent to call Taylor, Taylor was transferred (PCR 1258).

[27] See Letters from Chavers to Gill (PCR 1478-82).

Mr. Chavers is unavailable because he either does not remember or refuses to testify.

This evidence from Mr. Taylor, if it was admitted, would further substantiate the Court's finding that he is unavailable and that he is also in contempt of court because he is refusing to testify.

* * * *

Okay. None of this constitutes former testimony. None of it is a statement on the belief of pending death. It's not a statement about personal or family history.

The only way any of this could be considered as substantive testimony would be it's a statement against his interest. None of this evidence you offered appears to be a statement against this witness's interests.

All these were made after the Statute of Limitations had run. He suffers absolutely no sanction for having made these statements in a telephone conversations with Mr. Phillips, in these alleged statements to Mr. Taylor, the affidavit, the letters to Mr. Gill -- none of these subject him to any type of criminal sanctions . . .

There is nothing to indicate that there is any reliability in any of these statements. In fact, the evidence in the record seems to be entirely contrary, that these statements are not reliable.

The only thing that is tending to be corroborative about them is the fact that he says that he is lying. So it seems to me that none of this evidence that you are offering is admissible, and should be considered as substantive evidence.

> If that's all that Mr. Taylor would be testifying about, I'll consider that as a proffer of what he would say. And even if that is what he would testify about, it would seem to me that is not going to be admissible as substantive evidence, because none of these meet any of the exceptions to the hearsay rule and should not be considered.

(PCR 1260-61).

The court declined to hold the proceedings in abeyance (PCR 1272-75), and then queried:

> Where does this leave us now in the proceedings?
>
> It seems to me you made some claims that the State has presented false evidence at the trial. I don't see any evidence that any false evidence was used at trial.
>
> The other thing that you are claiming is that the State has withheld favorable evidence to the defendant. Can we go ahead and address these matters now? I'm not sure that we need to go through the memo process.
>
> What evidence do you have that false evidence was used, excluding these statements from Mr. Chavers? His conversations? His affidavit? His letters?
>
> This testimony from Mr. Taylor? Excluding that as substantive evidence, what evidence do you have that there was any false evidence used at the trial?

(PCR 1276). Lightbourne's counsel replied that the other evidence included the letter from Carson and the affidavit

from Hall (PCR 1276). The court observed that the letter from Carson offered "nothing about his having given false testimony" (PCR 1277). The court also noted that, despite the claim of Lightbourne's counsel to the contrary, Hall's affidavit was not corroborative of Chavers's post-judgment accounts (PCR 1280). Although Lightbourne's counsel argued that LaTorre never testified at trial that he had helped "cut a deal" for Chavers, the state pointed to the transcript that LaTorre had in fact admitted his actions in this regard during questioning by defense counsel at trial (PCR 1282-84).

Lightbourne's counsel later advised the court that they had located Hall, only to discover that he had died (PCR 1305).[28] Chavers then testified once again, acknowledging that he had been sentenced recently to "20 years or something" for "[p]ossession or something like that." (PCR 1310). He stated that he was supposed to be taking Thorazine everyday but was not doing so, and that he was classified as a "Psych III." (PCR 1310-11). Chavers did not remember Lightbourne, testifying at his trial (PCR 1321), but recalled being sentenced for contempt[29] (PCR 1323-24).

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[28] See Hall's Certificate of Death (PCR 2399).

[29] See Order of Civil Contempt (PCR 2045-46).

Lightbourne's counsel again requested that Chavers be held in contempt, but the court denied that motion (PCR 1355). Counsel again requested that Chavers's affidavit be admitted into evidence, but the court denied that motion (PCR 1357). Theresa Farley then testified about her additional efforts to find Jackie Ray Hall, noting that, when she contacted Hall's probation officer, he forwarded Hall's death certificate to her (PCR 1362).

SUMMARY OF THE ARGUMENT

Issues I & II

The lower court provided Lightbourne with a full and fair evidentiary hearing and "adversarial testing" of his Brady claims. Despite the claim of Lightbourne's counsel to the contrary, the record clearly shows that the lower court was fully cognizant of its Brady duties on remand. Further, Lightbourne knew about and adequately explored at trial each ground on which he now claims a Brady violation.

Issue III

Lightbourne's claim that the sentencing court provided the jury with constitutionally infirm instructions on the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravating factors is not preserved for appellate review. Should this Court determine otherwise, any error committed by the sentencing court on this point was harmless. Even if this Court were to invalidate these two aggravating circumstances, three strong aggravating factors remain to be weighed against two weak mitigating circumstances.

Issue IV

The sentencing court committed no error in considering the presentence investigation report without sharing same

with the jury. Despite Espinosa's holding that the jury is the co-sentencer in Florida, the court's consideration of information not provided to the jury in no way invalidates Lightbourne's sentence, and Lightbourne has cited to no authority which holds to the contrary.

ARGUMENT

Issues I & II

WHETHER THE LOWER COURT PROVIDED LIGHTBOURNE WITH A FULL AND FAIR EVIDENTIARY HEARING AND "ADVERSARIAL TESTING" ON HIS BRADY CLAIMS.

Lightbourne claims he is entitled to a new trial based on alleged violations of Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985). In Hegwood v. State, 575 So. 2d 170 (Fla. 1991), this Court set forth the applicable standard for such a claim:

> To establish a Brady violation a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Id. at 172. Two things are immediately apparent from the record. One, despite the claim of Lightbourne's counsel to the contrary, the record clearly shows that the lower court was fully cognizant of its Brady duties on remand (PCR 1276, 2284-86). And two, although the first requirement enunciated in Hegwood is applicable to all the evidence adduced by Lightbourne at the hearing, none of the other

requirements are applicable because Lightbourne knew about and adequately explored at trial each ground on which he now claims a Brady violation.

The Full and Fair Hearing Claim

This claim is somewhat of an enigma, as the record shows that the lower court made every effort possible to provide Lightbourne an opportunity to fully explore his Brady claims. The lower court initially conducted hearings from June through October 1990, permitted Lightbourne to reopen the hearings in 1991, and did not complete its order of denial until 1992. Lightbourne called nine witnesses, the state six, and the lower court permitted Lightbourne to exhaustively question all the witnesses. Lightbourne presented various letters and affidavits, all of which the lower court considered regardless of whether it technically "admitted" these items into evidence. See e.g., Holding of Trial Court (PCR 1261) ("If that's all that Mr. Taylor would be testifying about, I'll consider that as a proffer of what he would say."). The lower court simply could have done no more than it did in ensuring that Lightbourne received a full and fair evidentiary hearing.

Lightbourne claims that the lower court improperly relied on trial evidence which that court believed was unrefuted and proved Lightbourne's guilt. Brief at 43. The

record citations provided by Lightbourne do not support this argument. The written order of the lower court shows that the court understood that Lightbourne's challenges concerned only Brady matter, and then listed those items which Lightbourne did not attack (PCR 2284-85). Moreover, in determining whether to grant relief under Brady, it is eminently appropriate for the lower court to examine the "entire record." Thompson v. State, 553 So. 2d 153 (Fla. 1989), cert. denied, 495 U.S. 940 (1990).

Lightbourne's claim that the lower court did not permit Taylor to testify is a misrepresentation of the record. When defense counsel attempted to call Taylor to the stand, he discovered that Taylor had been transferred from the county jail as a result of defense counsel's failure to inform county jail personnel that Taylor was scheduled to testify on that particular day. Thus, because Taylor's inadvertent transfer due to a defense mistake, the trial court understandably deemed Taylor unavailable.

Accordingly, because Taylor was unavailable, Hall was dead, and Chavers either refused to testify or suffered a loss of memory, **Fla. Stat.** § 90.804(1)(b) & (c) (1991), their affidavits and letters could have been admitted only if these evidentiary items qualified under one of four hearsay exceptions: Former testimony; statement under belief of impending death; statement against interest; or

statement of personal or family history. **Fla. Stat. §** 90.804(2)(a)-(d) (1991). As is immediately apparent, none of the evidence from Taylor, Hall, and Chavers qualified as former testimony, statements under belief of impending death, or statements of personal or family history. The only remaining exception was statement against interest, which is defined as:

> A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

Fla. Stat. § 90.804(2)(d) (1991).

Taylor's letter, Hall's affidavit, and Chavers's affidavit and letters were not contrary to their pecuniary or proprietary interests. The statute requires the declarant to be aware of the fact that the statement is against his interest at the time he makes it. In making this determination, the lower court necessarily utilized an objective test. See **C. W. Ehrhardt, Florida Evidence**

Declarant Unavailable § 804.4 at 713 (1993 ed.).[30] Here, it cannot be said that a reasonable person would have believed to be subject to a perjury penalty eight years after providing testimony at Lightbourne's trial. As the lower court pointed out, Chavers could no longer be prosecuted for perjury. See **Fla. Stat. §§** 775.15(2)(b) & 837.02 (1991). Further, Taylor's and Hall's statements cannot be said to be against their interests, as they were in prison at the time they made their statements and had made no previous statements (PCR 1401).

Moreover, there are absolutely no indicia of reliability surrounding any of these statements. As for Hall and Taylor, it is reasonable to infer that the charges for which they were incarcerated were their overriding concerns at the time they made their statements. "Why not attempt to distract attention from [themselves]" and attempt to receive some sort of leniency by fabricating evidence against Lightbourne? Peninsular Fire Ins. Co. v. Wells, 438 So. 2d 46, 54 (Fla. 1st DCA 1983). As noted in Peninsular, "[t]he theory supporting admissibility of declarations against penal interest, i.e., the inherent reliability of such statements by reason of the lack of motivation of the declarant to fabricate, is absent in this case." Id.

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30 Lightbourne's assertion that "Mr. Chavers'[s] belief that it was against his interest is the test" is an unsupported, conclusory statement refuted by case law.

Regarding Chavers's statements, the affidavit indicated its unreliable nature due to the conditions under which it was executed, and the letters showed their unreliability in Chavers's expressed hope to curry some favor on pending charges by making certain "threats."

Lightbourne finally claims that the trial court mechanistically applied this hearsay exception to his proffered evidence and denied him due process of law, relying on Chambers v. Mississippi, 410 U.S. 284 (1973). Chambers is distinguishable on several significant grounds. First, the trial court there wholly refused Chambers's request to cross examine McDonald, who had confessed to the crime and then repudiated his confession, based only on a common law rule that a party may not impeach his own witness. Second, the testimony there "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." Id. at 302. And third, the testimony was critical to Chambers's defense. Thus, under those facts, the United States Supreme Court understandably held that the hearsay rule had to yield to Chambers's constitutional right to due process. Here, however, the lower court considered all the evidence proffered by Lightbourne even though it technically did not admit it; the evidence bore no signs of reliability; and this evidence was not critical to

Lightbourne's defense, because the state had other significant evidence against Lightbourne besides Chavers's testimony, i.e., physical evidence, and because Lightbourne had previously covered this evidence at trial through adequate cross examination and vigorous closing argument. See Card v. State, 453 So. 2d 17, 21 (Fla. 1984) (this Court's similar disposition of a Chambers claim in the context of section 90.804(2)(c)).

The "Adversarial Testing" Claim

Under this claim, Lightbourne contends that the nondisclosure at trial of the information presented at the evidentiary hearing denied his right to confront witnesses, to effective assistance of counsel, and to a fair trial. While Brady provides that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, regardless of the good or bad faith of the prosecution, United States v. Agurs, 427 U.S. 97 (1976), qualifies Brady broad holding: "[T]he prosecutor will not have violation his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of a defendant's right to a fair trial." Id. at 108. Moreover, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not

establish 'materiality' in the constitutional sense." Id. at 109-10. As is immediately apparent from a reading of the state's statement of the case and facts, Lightbourne's counsel at trial fully and effectively explored impeachment areas with both Chavers and Carson, i.e., were known to the defense,[31] and any additional information in this vein brought out at the evidentiary hearing was not material in the constitutional sense.

Lightbourne argues that his conviction and sentence "hinged" on the credibility of Carson and Chavers. Brief at 44. Again, as the lower court showed in its written order, the testimony of Chavers and Carson, while certainly helpful, was not all the evidence the state had against Lightbourne. The state also had the following significant facts: Lightbourne had a gun in his possession; this gun and a casing found in Lightbourne's car matched the casing found at the scene; pubic hair and semen at the scene matched Lightbourne's pubic hair and blood; Lightbourne's sex and race matched the semen and hairs found at the scene; the victim's necklace was found in Lightbourne's possession; and Lightbourne worked at the stud farm where the victim lived, and it was common knowledge among the employees that

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[31] See Kelley v. State, 569 So. 2d 754 (Fla. 1990).

the victim's family would be out of town at the time of the murder.

Lightbourne contends that his jury never knew about the information presented at the evidentiary hearing which demonstrated that Chavers and Carson were not telling the truth and expected benefits for their testimony. Brief at 44. The original trial transcript shows, however, that Lightbourne's counsel fully covered the "benefits" aspect with Chavers, Carson, and LaTorre, and strenuously argued this aspect during closing argument. Chavers had no knowledge of whether anyone had worked on his behalf, but LaTorre acknowledged his efforts on Chavers's behalf. Carson flatly stated that he had received nothing from the state because he had reached a plea agreement about a week before he spoke with Lightbourne. LaTorre testified that he had done nothing on Carson's behalf because Carson had requested nothing from him.

As for Chavers and Carson allegedly not telling the truth at trial, the record shows the following. In 1982, Gallman a/k/a Carson wrote the following letter to the state attorney's office in Ocala:

> I James T. Gallman, AKA (Theophilus R. Carson) was a key witness in the homicide trial of Egin Lightbolt [sic], 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 [sic], in return I got nothing but frustration. I was s[u]ppose[d] to get a witness pay which I hav[e]n't rec[e]ive[d] yet. I was s[u]ppose[d] to have had a deal work[ed] 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 papers to present to Judge Harry Lee Coe III and state attorney office of Tampa. And the witness pay -- Sir, I am in very [sic] need of it. I would like to thank you for your time, and much needed consideration in this matter.
>
> Thank you kindly. P.S. In the name of God, please help me.

(PCR 1416). This letter in no way indicates that Carson had not told the truth at trial. At most, it shows that Carson had hoped to work a deal on some Hillsborough County charges by showing how he had cooperated with the state in Lightbourne's case. Both Carson and LaTorre acknowledged at trial that Carson had asked for no favors, and that Carson had reached an agreement on his then-pending Marion County charges long before Carson ever spoke with Lightbourne. Additionally, the trial transcript shows that LaTorre only spoke with the state attorney's office in Marion County regarding the then-pending Marion County charges against Carson.

Lightbourne also claims that Carson's trial testimony was impeached by Carnegia's testimony. As Carnegia could not remember anyone named Carson or Gallman in his cell, it is difficult to understand how his testimony impeached Carson's testimony.

Lightbourne also contends that Hall's affidavit shows that Chavers and Carson lied at trial. Hall's affidavit reflects the following averments: Hall was in a cell with Lightbourne the entire time he was in jail; Hall was the only inmate Lightbourne would talk to; shortly after Lightbourne's arrival, three trustees were moved into the cell, the only one of which Hall knew was Theodore Chavers; Lightbourne never spoke to any of the trustees; Hall heard Chavers say that he was going to tell police officers that Lightbourne told him all about the O'Farrell murder; Hall heard Chavers say this was the way to get out of jail, and that he had done this before; and Hall heard about Lightbourne's conviction based on Chavers's testimony, and "just couldn't sit [t]here and let any man die because of a bunch of lies." (PCR 1402).

This affidavit does not show that Chavers and Carson lied at trial. Hall never stated in his affidavit that he watched Lightbourne 24 hours a day, and that, as a result, he could conclusively state that Lightbourne never spoke to anyone but him. As Carnegia admitted about Chavers,

Lightbourne and Chavers, and Lightbourne and Carson, could have spoken while Hall was sleeping or out of the cell. Further, even though Hall may have heard Chavers say what he did to the other trustees, this statement in no way shows that Chavers fabricated the information he had about the murder. Again, Chavers and Lightbourne could have spoken while Hall was asleep or out of the cell, and Lightbourne could have related all the information Chavers had. Further, Hall remembered only Chavers of the three trustees, and thus his affidavit does not even address Carson's testimony.

Additionally, for the same reason that Chavers's affidavit (PCR 1396-99) is suspect, so is Hall's. Theresa Farley, an investigator with CCR, notarized, and was obviously involved in the making of, Hall's affidavit (PCR 421, 1402). Farley herself admitted, in the case of Chavers's affidavit, to editing Chavers's words and writing the affidavit as it seemed appropriate to her, i.e., changing the chronology, correcting the grammar, etc., and admitted that she was not sure if Chavers knew how to read at the time she wrote the affidavit for him (PCR 1013).

Chavers's affidavit provided:

> 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 LaTorre 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.

(PCR 1396-99).

Because of Farley's involvement in the writing of this affidavit, which admittedly was not a verbatim writing of Chavers's words, and Chavers's very apparent dislike of Farley's companion, David Mack, who was present at the time the affidavit was written and signed (PCR 1013, 1046-47, 1056; PCSR 123-25), the voluntary and truthful characteristics of this affidavit are highly questionable.

Further, the averments in the affidavit do not show that Chavers lied at trial. First, Chavers testified that LaTorre spoke with him shortly after he and Lightbourne were placed in the same cell. Second, LaTorre testified that LaTorre told Chavers to be attentive to anything Lightbourne might tell him. Third, although Chavers testified that he had no knowledge of whether LaTorre had intervened on his behalf on pending charges, LaTorre admitted to making some phone calls for Chavers's release. Fourth, while it is true that several charges against Chavers were dropped, Ridgway and Neufeld established that these clearances had nothing to do with the Lightbourne case.

Fifth, although it is true that Carson provided information to the state, Chavers never testified about Carson at trial. Thus, Chavers's statement that Carson was influenced by police officers to say that Lightbourne admitted to killing the victim does not show that Chavers lied on this point at trial. Moreover, Chavers never said anything about Carson at trial. Sixth, although Chavers stated that police officers pressed him for details and made him do what they wanted, Chavers never explained how police officers did so. Moreover, this statement does not contradict anything Chavers testified about at trial. Chavers admitted to contacting LaTorre and being told to listen carefully to anything Lightbourne might volunteer.

Seventh, Chavers's claim that various assistant state attorneys went over his trial testimony does not contradict anything Chavers said at trial. Further, Simmons admitted at the 3.850 hearings to a general practice of reviewing all state witnesses' testimony with them prior to trial, a practice in which he engaged with Chavers. However, Simmons stated that he never told Chavers how to testify at trial. Eighth, while LaTorre's trial testimony showed clearly that LaTorre had made efforts to have Chavers released in exchange for the information Chavers provided, LaTorre had nothing to do with any charges being dropped. Thus, Chavers's statement in his affidavit about "back-scratching" contradicts nothing Chavers said at trial. Ninth, although LaTorre acknowledged at trial that Chavers received the $200.00 reward, Chavers did not testify at trial about any $10,000.00 reward offered by the O'Farrell family. Accordingly, there is no contradiction with Chavers's trial testimony.

Other evidence presented at the evidentiary hearing included:

(1) A January 1985 letter to Gill, in which Chavers stated: "I have lied to help get you what you wanted, that black nigger on death row so please help me." (PCR 1478). Contrary to Lightbourne's assertion, Brief at 48, Chavers never stated in this letter that he lied <u>at trial</u>, what he

lied about, or to whom he lied. Further, Chavers stated during his January 1985 interview with Phillips that he made these "lying" assertions in his letters to various assistant state attorneys in hopes of prompting the state attorney's office to act favorably on Chavers's then-current charges (PCSR 102).

(2) An August 1985 letter to Gill, in which Chavers stated that he helped Gill in the past and: "Sir, everybody in prison know I have a guy on death row thanks to the inmates from Ocala." (PCR 1479). This letter indicates nothing that showed Chavers might have lied at trial.

(3) A January 1986 letter to Gill, in which Chavers wrote:

> Mr. Gill, while I was in jail Ronald Fox talk[ed] with me about the man I lied on and help[ed] 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 he was counselor for. Sir, Fox['s] address is P.O. Box 319, Umatilla, Florida 32784, phone no. (904)669-3228. Mr. Gill, Francis said the letters I wrote you everybody in your office laugh[ed] at. Well, I got busted at Lowell 6/1/85 and they was suppose[d] to take Fox['s] accused defendant to the chair. Mr. Gill, everyone said that happen[ed] to me because of that, it look[s] like I'll never get out of prison. Anyway so I hope your office never need[s] me in that case [or] I'll tell the truth and take whatever happ[ens] after that.

(PCR 1481-82). Again, Chavers never stated that he lied at trial, what he lied about, or to whom he lied. At any rate, this letter clearly represents yet another attempt by Chavers to gain leverage on then-pending charges against him.

(4) A January 1985 statement to Phillips, at which Phillips recalled Chavers being really "strung out on drugs." (PCR 2103). Chavers told Phillips he had lied at Lightbourne's trial (PCSR 102). Chavers also stated that the letters he had written to Gill were not true, and that he had said those things in the letters for leverage (PCSR 102). The reliability of the information related by Chavers during this conversation is nil, because Chavers was so obviously high on drugs.

(5) A June 1990 telephone conversation between Phillips and Chavers (PCSR 116-41), during which Chavers related nothing that indicated he had lied at trial.

(6) An October 1990 letter to Phillips, in which Chavers alluded to being killed if let out of jail due to his providing information against Lightbourne (PCR 2380). Other than relating common knowledge about the treatment of snitches, the letter contained no references that Chavers had lied at trial.

(7) A February 6, 1991 letter to Phillips, in which Chavers asked Phillips for help (PCR 2381). Again, Chavers stated nothing that indicated he had lied during Lightbourne's trial.

(8) A February 1991 letter to King, in which Chavers wrote: "Mr. King, I know everybody is mad at me about changing my story of Miss O['Farrell]." (PCR 2382). Chavers also said Phillips had come to see him about the Ray Williams murder, but, even though Chavers knew something about the murder, he would not tell Phillips because Phillips had told him he could not promise Chavers anything (PCR 2382). Chavers continued: "Mr. King, I'm going to close for now but tell Mr. Black I w[o]n[']t let him down on his case about Miss O['Farrell]." (PCR 2383). This letter showed that Chavers was cognizant of signing the affidavit drafted by Farrell, and intimated that perhaps the affidavit was not true, but in no way showed that Chavers lied at trial.

(9) A February 26, 1991 letter to Phillips, in which Chavers asked Phillips for help again, but made no reference to lying at Lightbourne's trial (PCR 2384)

(10) A March 3, 1991, letter to Phillips, in which Chavers opined: "The state [has] got too much animosity about [my] chang[ing] my story in the first murder that they

want to put me away for good." (PCR 2385). This letter only acknowledges that Chavers had changed his trial testimony through his signing of the affidavit, and in no way shows that Chavers lied at trial.

(11) A March 1991 letter to Judge Angel, in which Chavers asked for help, but made no reference to lying during Lightbourne's trial (PCR 2386-87).

(12) A March 10, 1991, letter to Phillips, in which Chavers stated: "So you're [sic] office is so made with me about changing my story in the other murder nobody wants to help me?" (PCR 2388). Like the March 3, 1991, letter to Phillips, Chavers made no reference to lying at trial.

(13) A March 11, 1991, letter to Angel, in which Chavers stated: "I know the state is mad with me about changing my story in that murder case, but I don't remember anything about it just like I don't know what I was doing the day I sold [drugs] to the police." (PCR 2390). This letter simply corroborates Chavers's testimony at the evidentiary hearings that he did not remember anything about Lightbourne's trial, and acknowledges his change of testimony without stating that he lied at trial.

(14) An April 3, 1991, letter to Phillips, in which Chavers asked Phillips for help, but stated nothing about lying at Lightbourne's trial (PCR 2392-93).

(15) An April 1991 letter to Phillips, in which Chavers wrote: "Jim, the reason I change[d] my story in the other murder case was because I did [not] want the man to die by my hand. Phillips in the other murder, the first murder trial I was told what happened, but [the] Ray Williams murder I saw what happen[ed]. . . . Jim, tell Mr. Black I'm ready to get that murder trial back the way it first was." (PCR 2220, 2394). Chavers continued: "Sir, is there that much animosity between what I d[id] in the first murder trial, that the state just do[esn]'t give a damn about me anymore? Look mostly all the blacks in Ocala wanted me to help get you know who off death row." (PCR 2221, 2395). This letter in no way helps Lightbourne's claim that Chavers lied at trial, and in fact, shows just the opposite, i.e., Chavers lied in the affidavit because he did not want Lightbourne to "die by his hand," and that Chavers wanted to testify at the evidentiary hearings to show that the affidavit was a lie.

(16) An April 14, 1991, letter to Simmons, in which Chavers said he would do his best at some trial to help and convict a killer. Chavers also stated that he included a letter from Lightbourne, who threatened his life (PCR 2398). This letter contains nothing to support Lightbourne's claim that Chavers lied at trial.

(17) An April 26, 1991, letter to Simmons, in which Chavers wrote that he hoped he had done a good job at trial; Chavers said he had told the truth. Chavers also stated that, upon his release, he had another job to do for Bray (PCR 2397). Again, this letter contains no evidence that Chavers had lied at Lightbourne's trial.

Lightbourne claims that, even if Chavers's affidavit and other evidence presented at the hearing were hearsay, it would not have been excluded during the penalty phase. Brief at 51. Although **Fla. Stat. §** 921.141(1) (1991) clearly permits the admission of hearsay evidence during penalty phase proceedings,[32] this Court further provided in King v. Dugger, 555 So. 2d 355, 359 (Fla. 1990), that a sentencing court could exclude, as irrelevant, evidence presented during sentencing that does not bear on a defendant's character, prior record, or circumstances of his offense. Here, the various evidentiary items from Chavers, Taylor, and Hall bear on none of the listed items. Arguably, these pieces of evidence could have borne on the circumstances of Lightbourne's offense, if they had stated that Chavers and Carson had lied at Lightbourne's trial and

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32 "[E]vidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant . . . . Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . . ."

had referenced precisely what events of Lightbourne's offense that Carson and Chavers had fabricated. However, as they stand, these evidentiary items only state in conclusory terms that Chavers lied at trial. In any event, Lightbourne's assertion that the state relied solely on Chavers's trial testimony to support the aggravating circumstances is unsupported by the record. The sentencing court found five aggravating factors -- murder committed during the course of a burglary and sexual battery; murder committed to avoid arrest; murder committed for pecuniary gain; murder committed in heinous, atrocious, or cruel manner; and murder committed in a cold, calculated and premeditated manner -- only one of which -- murder committed during the course of a sexual battery -- relied on Chavers's trial testimony.

Lightbourne argues that Lewis v. Erickson, 946 F.2d 1361 (8th Cir. 1991), supports his claim for relief. Lewis simply is unpersuasive precedent here, where recanted trial testimony is not at issue, but instead, evidence which was explored at trial. Thus, the evidence presented at the evidentiary hearing was cumulative. See Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987); Francis v. State, 473 So. 2d 672 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984).

Further, Lightbourne established no "ongoing relationship" or "ongoing agency" between Chavers and the state. Brief at 52-53. Chavers wrote all of the subject letters on his own; no one associated with the state requested these contacts. These self-initiated contacts by Chavers showed neither an agency relationship nor any indicia of reliability which would have warranted the admission into evidence of Chavers's affidavit. To the extent that Lightbourne attempts to have this Court examine once again the question of whether there was an agency relationship, Brief at 64 n.7, this Court should refuse the invitation, as it dispositively ruled on this point in Lightbourne's direct appeal: "Without some promise or guarantee of compensation, some overt scheme in which the state took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the state's actions in this case to an agency relationship with the informant Chavers." Lightbourne v. State, 438 So. 2d 380, 386 (Fla. 1983).

Issue III

WHETHER THE SENTENCING COURT PROPERLY INSTRUCTED THE JURY ON THE AGGRAVATING CIRCUMSTANCES.

Lightbourne claims that his jury received constitutionally inadequate instructions on the heinous, atrocious (HAC), and cruel, and cold, calculated, and premeditated (CCP) aggravating factors.[33] Regardless of the actual instructions below, it is clear that Lightbourne is procedurally barred from raising these claims at this juncture, because he failed to preserve these points for appellate review.

The following dialogue occurred at the charge conference for sentencing phase jury instructions:

> [Defense]: Yeah, that's fine. The next one is that the capital felony was especially heinous, atrocious or cruel.
>
> [Court]: That's a jury question.
>
> [Defense]: Well, Your Honor, as a matter of law, when -- when a shooting -- a murder by shooting, when it's ordinary in the sense that it's not

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[33] In Espinosa v. Florida, 120 L. Ed. 2d 854 (1992), the United States Supreme Court held that the HAC instruction given in that case was unconstitutionally vague. Although the United States Supreme Court has not specifically addressed Florida's CCP instruction, it did rule in Arave v. Creech, 123 L. Ed. 2d 463 (1993), that the phrase "utter disregard for human life," when used with the Idaho Supreme Court's limiting construction of "cold-blooded, pitiless slayer," met constitutional requirements.

set apart from the norm of premeditated murders, it's not especially heinous, atrocious or cruel. There's quite a few cases that indicate a single gunshot to the head is in fact not especially heinous, atrocious or cruel, and I'd like to cite Tedder versus State, 322 Southern Second 908, Florida, 1975; Cooper versus State, 336 Southern Second 1133, Florida 1976; cert. denied 431 U.S. 925, 1977; Lewis versus State, 377 Southern Second 640, Florida, 1979; Kampff versus State, 371 Southern Second 1007, Florida, 1979; also Fleming versus State, 374 Southern Second 922, Florida 1979. All of those stand for the proposition that a single gunshot to the head is not the type of thing that is separated from the norm of murders. To a layman any murder is especially heinous or atrocious, but the language that's required is the language that's in the instruction, unnecessarily tortuous, pitiless --

[Court]: How about pitiless?

[Defense]: That involves torture, Your Honor. Gunshots to the head have been considered to be especially heinous and atrocious when prior to the gunshot there has been, you're going to die, cutting with a knife up until the point where the shot is heard, strangulation by a rope --

[State]: How about rape?

[Court]: How about rape?

[Defense]: Your Honor, I don't believe that it was proved beyond a reasonable doubt that that occurred before or after.

[Court]: Well, the Jury thought that; so that's denied.

[Defense]: The capital felony was done in a cold, calculated and premeditated manner --

[Court]: That's denied.

[Defense]: Your Honor, I'd like to make the argument first. There's no evidence in this case as to whether or not that was cold or hot-blooded killing. The latter, certainly hot-blooded killing could be if -- if, as the evidence supposedly showed here, that the Defendant was surprised by someone. I'd like to cite Alvord versus State, 322 Southern Second 533 at Page 540, a Florida, 1975, case, where previously it used -- this is a new aggravating circumstance. There previously used to be a mitigating circumstance that if it was not cold and calculated and had some pretense of moral justification or legal justification, in trying to delineate what that previous mitigating factor meant in Alvord they said that cold, calculated and premeditated in found by strangulation by use of a rope as opposed to a single shot with a firearm. This language, cold and calculated, came from that early common law business about -- about murder with malice, pretense, cold, calculated, premeditation, the difference between first and second. The Jury here found felony murder and premeditated murder but it could have been as far as, you know, the murder part, could have been felony murder. We don't really know because they found both. So I'd ask for a directed judgment of acquittal with regard to that aggravating circumstance. Furthermore, I object to the objection to preserve a pretrial constitutionality motion that we made that said that now in Florida you have -- you have two aggravating circumstances, one in connection with the enumerated felony and also this last one, the new one, that's cold, calculated and premeditated; so in Florida any murder, then -- any first degree murder is then presumptively to be a death case, which is the exact opposite of what the United States Supreme Court said that murder is

not necessarily -- or first degree murder is not per se cruel and unusual and in violation of the Eighth Amendment, but I would say that Florida now has a mandatory death penalty, as all presumptive -- as all murders in Florida -- first degree murders presumptively get the penalty of death contrary to the Eighth Amendment standards which were to insure the reliability of the determination that death is the appropriate punishment in a specific case. For that I'd cite Woodson versus North Carolina, 428 U.S. 304, 96 Supreme Court 29,780, [sic] 49 Legal Edition Second 944. In other words, if the Court understands the argument --

[Court]: I do; I understand. That motion is denied. . . .

(OR 1448-51).[34]

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[34] During closing arguments, the prosecutor argued as following concerning HAC:

> Next, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Now, the Court will tell you, Ladies and Gentlemen, that heinous means extremely wicked or shockingly evil. It will tell you that atrocious means outrageously wicked and vile, and it will tell you that cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others; or pitiless. Now, note, Laides and Gentlemen, that the instruction is that the crime was especially heinous, atrocious or cruel, not heinous, atrocious and cruel. It's disjunctive.
>
> I honestly believe that cruel, in the meaning that we find it here in the infliction or the enjoyment of watching someone suffer through pain, may not be applicable here. Whatever type of

In sum, the record shows the following: (1) Although defense counsel objected to both aggravating factors at the

> mental suffering Nancy A. O'Farrell went through prior to ther death, whatever else you may think, may not find its way into the meaning of cruel in this sense, but I have no problem, Ladies and Gentlemen, with you[r] finding that the crime was heinous or atrocious. The how idea of taking someone's life merely because they can identify you is as shockingly wicked and vile and evil as anything you can imagine. You may find that it was cruel in the sense that it was pitiless. I would suggest, Ladies and Gentlemen, that you may very well find in your discretion that that aggravating circumstance is applicable here.

(OR 1461-62).

During closing arguments, the prosecutor argued as follows concerning CCP:

> And, lastly, that the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Can you think of circumstances, Ladies and Gentlemen, where they may be some pretense of moral justification or legal justification in a premeditated murder. I suppose you can. How about a hot-blooded murder as opposed to a cold-blooded murder, a crime of passion where tempers and emotions flare and, although you have your sanity about you, you're still in a moment of passion, decide I'm going to kill somebody. Is that what we have here? I would suggest that the evidence that we have in this case is that after the crimes had been committed an after the Defendant had finished his sport with Nancy A. O'Farrell he laid her out on a bed and in as cold and as calculated a manner as can be done, he

charge conference, he did so only on the ground that, based on the facts, they did not apply and that both factors were unconstitutional because they applied to all first degree murders; (2) although defense counsel objected to HAC in his written motion, he objected only on the grounds the circumstance applied to all capital felonies; and (3) defense counsel did not object to CCP at all in his written motion.

The most conspicuous absence from the record is an objection to the wording of the jury instructions concerning these two aggravating factors.[35] Thus, on the basis of Hodges v. State, 619 So. 2d 272 (Fla. 1993), Melendez v. State, 612 So. 2d 1366 (Fla. 1992), Kennedy v. Singletary,

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> executed her. He assassinated her, and he knew what he was doing and he knew why he was doing it. I would suggest, Ladies and Gentlemen, that you may very well find that to be in your discretion an aggravating factor applicable to this case.

(OR 1462-63).

[35] The sentencing court instructed the jury on HAC: "Or, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others, or pitiless." (OR 1489-90). The sentencing court instructed the jury on CCP: "Or, the capital felony, homicide, was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (OR 1490).

602 So. 2d 1285 (Fla. 1992), and Sochor v. State, 580 So. 2d 595 (Fla. 1991), this issue is procedurally barred. Further, in Sochor v. Florida, 119 L. Ed. 2d 326 (1992), the United States Supreme Court expressly honored this procedural bar, thereby conclusively putting to rest any notion that this claim is fundamental in nature.

Should this Court disregard the bar, any error committed by the sentencing court on this point was harmless. There is no reasonable possibility that the giving of the challenged instructions contributed to the jury's recommendation of death. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Under any definitions of the terms, these aggravating factors were established beyond a reasonable doubt. Slawson v. State, 619 So. 2d 255 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1993). The evidence in this case indicates that, during a burglary of her home, Lightbourne surprised the victim, forced her into acts of oral sex and intercourse as the victim begged him not to kill her. Lightbourne took the victim's money and necklace, and shot the victim because she could identify him, referring to the murder as "shooting a bitch" (OR 1176). Despite the victim's plea that he not kill her, Lightbourne fired a shot striking the victim on the left side of the head, causing her to bleed to death. The doctor who performed an autopsy on the victim testified that,

although the victim's pain would have ceased with her loss of consciousness, the track of the bullet into the victim's brain would not have caused an immediate loss of consciousness (OR 750). Compare Melendez v. State, 498 So. 2d 1258 (Fla. 1986); Francois v. State, 407 So. 2d 885 (Fla. 1981); Combs v. State, 403 So. 2d 418 (Fla. 1981); White v. State, 403 So. 2d 331 (Fla. 1981); Hoy v. State, 353 So. 2d 826 (Fla. 1978); Knight v. State, 338 So. 2d 201 (Fla. 1976).

Moreover, given that the three other aggravating circumstances were weighty -- murder committed during the course of a burglary and sexual battery; murder committed for witness elimination; and murder committed for pecuniary gain -- and the mitigation was weak -- age and no significant history of prior criminal activity, no reasonable possibility exists that the challenged instructions affected the jury's recommendation of death.[36] Compare Espinosa v. State, 18 Fla. L. Weekly S470 (Fla. Sept. 2, 1993); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993).

Finally, if this Court were to invalidate these two aggravating factors, three strong, valid aggravating circumstances remain to be weighed against two weak

[36] The actual number of votes for and against the death sentence are unknown (OR 182, 1501-03).

mitigating circumstances. Beyond a reasonable doubt, it is clear that elimination of HAC and CCP would have made no difference in Lightbourne's sentence. Sochor v. State, 619 So. 2d 285 (Fla. 1993); Maqueira v. State, 588 So. 2d 221 (Fla. 1991), cert. denied, 112 S. Ct. 1961 (1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied, 112 S. Ct. 955 (1992); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

A number of the cases relied upon by Lightbourne simply do not stand for the propositions he asserts. Notably, Lightbourne claims that, in Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991), this Court held that the CCP instruction was vague, in that, without a narrowing construction, the aggravator failed to perform a genuine narrowing function. However, Porter actually holds that, since premeditation is already an element of capital murder, the term as used in section 921.141(5)(i) must have different meaning or it would apply to every premeditated murder. Thus, this Court observed that the phrase "heightened premeditation" was adopted to distinguish the CCP aggravator from the premeditation element of first degree murder.

Additionally, contrary to Lightbourne's assertion in note eight on page 68 of his brief, the United States Supreme Court in Richmond v. Lewis, 121 L. Ed. 2d 411

(1992), addressed only the weighing issue and never reached the issue of narrowing instruction: "[W]e need not decide whether the principal opinion in Richmond II remained within the constitutional boundaries of the (F)(6) factor." Id. at 423.[37] In any event, in Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 113 S. Ct. 1619 (1993), and Hall v. State, 614 So. 2d 473 (Fla. 1993), this Court has held that the new HAC narrowing instructions pass constitutional muster because they track the language of the June 1990 amendments to the standard jury instructions. **Fla. Std. Jury Instr. (Crim.)** Penalty Proceedings -- Capital Cases 79-79a (1990).[38]

Lightbourne also claims that, because he can meet all of its prerequisites, he is entitled to the relief given in James v. State, 615 So. 2d 668 (Fla. 1993). Lightbourne, however, conveniently overlooks the facts that James objected to then-standard instruction at trial, asked for an

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[37] In Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993), this Court discussed Richmond, concluding that all it required was a narrowing construction as accepted in Sochor v. Florida, 119 L. Ed. 2d 326 (1992). Because Florida had done so regarding the HAC instruction, this Court refused to find the narrowing language invalid.

[38] Thus, in cases where Florida's 1990 narrowing instructions are used, there is no Shell v. Mississippi, 498 U.S. 1 (1990), problem. There, the United States Supreme Court found the narrowing instruction constitutionally vague because its definitions were too vague to provide any guidance to sentencer. Compare Atwater v. State, 18 Fla. L. Weekly S496 (Fla. Sept. 16, 1993); Foster v. State, 614 So. 2d 455 (Fla. 1992).

expanded instruction, and argued on appeal against the constitutionality of the instruction his jury received. "Because of this it would not be fair to deprive him of the Espinosa ruling." Id. at 669 (emphasis supplied). It is quite evident that the "this" referred to by this Court is James's complete efforts at preservation. Lightbourne did none of "this." Likewise, in Hitchcock v. State, 614 So. 2d 483 (Fla. 1993), Hitchcock requested the expanded HAC instruction, objected when the sentencing court denied his request, and raised that precise issue on appeal.

Finally, Lightbourne claims that, to the extent that defense counsel may not have properly preserved this point for appellate review, he was ineffective. Brief at 91 n.13. In so arguing, Lightbourne apparently has forgotten that he raised the issue of the effectiveness of his trial counsel in his first postconviction motion. Thus, new claims of ineffectiveness are inappropriately raised in this appeal from the denials of Lightbourne's second and third postconviction motions, Jones v. State, 591 So. 2d 911 (Fla. 1991); Spaziano v. State, 545 So. 2d 843 (Fla. 1989), and are, in any event, timebarred by **Fla. R. Crim. P.** 3.850.[39] Although Espinosa issued in 1992, Espinosa was based on

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[39] According to this Court in Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), the ineffective assistance of counsel at the penalty phase claim had been raised in Lightbourne's first postconviction motion and was procedurally barred by the time limits of rule 3.850.

Maynard v. Cartwright, 486 U.S. 256 (1988), which in turn was based on Godfrey v. Georgia, 446 U.S. 420 (1980). Because the Godfrey rationale existed in 1980, and Lightbourne's first postconviction motion was filed in May 1985, postconviction counsel could have raised this claim at that time.

Issue IV

WHETHER CONSIDERATION OF THE PRESENTENCE INVESTIGATION SOLELY BY THE SENTENCING COURT, AND NOT THE JURY, VIOLATED LIGHTBOURNE'S CONSTITUTIONAL RIGHT TO PRESENT MITIGATING EVIDENCE TO HIS JURY.

The first problem with this issue is the way that Lightbourne has phrased it in his brief. He claims that this Court erred in Lightbourne v. State, 471 So. 2d 27 (Fla. 1985), in concluding that, because the sentencing court reviewed the presentence investigation report, the mitigation raised on appeal was cumulative. Lightbourne then claims that, based on this Court's error in its 1985 Lightbourne decision, this Court caused the Eleventh Circuit Court of Appeals to err in Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987), and caused itself to err once again in Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Lightbourne raised this issue in his 1985 appeal from the denial of his first postconviction motion, and this Court ruled against him. Had Lightbourne wished to point out any alleged error in this Court's ruling, he could have moved for rehearing. Absent that, Lightbourne is not entitled to continue to challenge ad infinitum this Court's 1985 ruling. "Not only was this contention raised in Lightbourne's previous motion for postconviction relief, it is also procedurally barred by the time limits of rule 3.850." Id. at 1366.

In any event, Lightbourne contends that the jury, in addition to the sentencing court, should have been permitted to consider the mitigation presented in the presentence investigation report. Distilled, this claim replicates that raised in Lightbourne's petition for writ of habeas corpus filed in this Court, to which this Court responded:

> At the outset, Lightbourne cites no authority for the proposition that the presentence report is proper evidence to be submitted to the jury in a sentencing proceeding. In addition, the presentation of the evidence had already been concluded, and it was only after the jury had been instructed and the lawyers had made their closing arguments that defense counsel made the request. Finally, we note that there were certain portions of the presentence investigation that were unfavorable to Lightbourne and that Lightbourne, himself, had testified on some of the matters covered by the report.

Id. Again, because this claim was previously raised and addressed in Lightbourne's first two postconviction motions and in his habeas petition to this Court, any such claim here is successive and procedurally barred.

In apparent hopes of disguising this barred claim, however, Lightbourne casts it in the language of Espinosa v. Florida, 120 L. Ed. 2d 854 (1992), and Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993), claiming that, because the jury is a co-sentencer under Florida law, it must consider all the evidence considered by the sentencing

court.[40] Thus, Lightbourne claims that his death sentence is unconstitutional because the sentencing court did not permit the jury to consider the presentence investigation report. Once again, Lightbourne cites no supporting authority for his claim that the presentence report is proper evidence to be submitted to the jury. In fact, a presentence investigation report seems to be intended solely for use by the sentencing court, and is accessible to others only with specific authorization. **Fla. R. Crim. P.** 3.712 & 3.713. In any event, there is nothing improper in a sentencing court's consideration of information not provided to the jury. See Cochran v. State, 547 So. 2d 928, 931 (Fla. 1989) ("Under our law, it was proper for the trial court to take into consideration appellant's previous conviction in the Arbelaez case, even though that conviction was not presented to the jury."); Engle v. State, 438 So. 2d 803 (Fla. 1983) (the sentencing court "is not limited in sentencing to consideration of only that material put before the jury . . . . Prior cases make it clear that during sentencing, evidence may be presented as to any matters

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[40] This effort is similar to Lightbourne's previous attempt to "recycle" this claim under the cloak of Hitchcock v. Dugger, 481 U.S. 393 (1987). See State's Response to Lightbourne's Habeas Petition, Case No. 73,609 at 9 ("The state suggests that Lightbourne is now impermissibly seeking to "recycle" this claim under the cloak of Hitchcock. Cf. Daugherty v. State, 533 So. 2d 287 (Fla. 1988) (no need to relitigate issue of consideration of mitigating circumstances under Hitchcock, where issue already properly resolved in previous proceeding).").

deemed relevant . . . ."), cert. denied, 485 U.S. 924 (1984); see also Porter v. State, 429 So. 2d 293 (Fla. 1983) (deposition); White v. State, 403 So. 2d 331 (Fla. 1981) (presentence investigation report, prior conviction, and fact that White was on parole); Alvord v. State, 355 So. 2d 108 (Fla. 1977) (presentence investigation report); Swan v. State, 322 So. 2d 485 (Fla. 1975) (presentence investigation report).

Lightbourne also claims that, to the extent that postconviction counsel failed to adequately prepare Lightbourne's first postconviction appeal, he was ineffective. Brief at 91 n.14. There are two problems with this claim. First, ineffective assistance of appellate counsel claims may be raised only in habeas petitions, not on appeal from rule 3.850 denials. Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990). Second, as the United States Supreme Court has recognized, Lightbourne had no constitutional right to postconviction counsel. Murray v. Giarratano, 492 U.S. 1 (1989). Because there are no Florida cases which expressly recognize ineffective assistance of postconviction counsel, Lightbourne's claim in this regard does not appear to be cognizable.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm the lower court's denial of Lightbourne's motions for postconviction relief.

Respectfully submitted,

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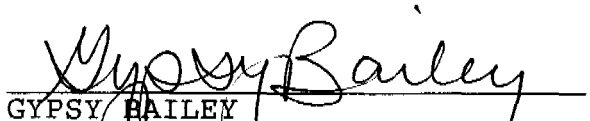
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John S. Summer, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 28th day of December, 1993.

Gypsy Bailey

GYPSY BAILEY
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