IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,366

IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lightbourne's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal:

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

"PC-R" -- record on 3.850 appeal to this Court;

"PC-R2." -- supplemental record on 3.850 appeal.

"Def. Ex. ____" -- exhibits submitted at the evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Mr. Lightbourne has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Lighbourne, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(s) MISSING

STATEMENT OF THE CASE

Mr. Lightbourne was convicted of first-degree murder in the Circuit court of the Fifth Judicial Circuit, Marion County (R. 1436), and was sentenced to death (R. 1500, 1509-07). This Court affirmed on direct appeal. Lighbourne v. State, 438 So. 2d 380 (Fla. 1983).

Mr. Lightbourne filed a Fla. R. Crim. P. 3.850 motion on May 31, 1985. The motion was denied, and this Court affirmed. Lightbourne v. State, 471 So. 2d 27 (Fla. 1985). Mr. Lightbourne filed a petition for a writ of habeas corpus in federal district court. That petition was denied, and the denial was affirmed on appeal. Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987).

On January 30, 1989, Mr. Lightbourne filed a second Rule 3.850 motion. That same date, Mr. Lightbourne also filed a habeas corpus petition in this Court. The Rule 3.850 motion was denied. However, this Court reversed the denial and remanded for an evidentiary hearing, but denied habeas corpus relief. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

Evidentiary hearings were conducted in the circuit court in 1990. On April 17, 1991, Mr. Lightbourne filed a motion to reopen the evidentiary hearing, which was granted. An additional evidentiary hearing was conducted. The circuit court denied relief on June 12, 1992, and Mr. Lightbourne appealed. After the issuance of Espinosa v. Florida, 112 S. Ct. 2926 (1992), Mr. Lightbourne filed a third Rule 3.850 motion. On February 1, 1993, this Court granted Mr. Lightbourne's request to relinquish

jurisdiction to allow the circuit court to consider this third Rule 3.850 motion. On March 15, 1993, the circuit court denied relief. This appeal, involving both this Court's prior remand and the third Rule 3.850 motion, followed.

STATEMENT OF THE FACTS

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

On January 24, 1981, Mr. Lightbourne was arrested on a charge of carrying a concealed weapon and placed in the Marion County Jail. On January 26, probable cause was found, and the Public Defender was appointed to represent Mr. Lightbourne.

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

> Q Do you know of any other people on the farm, any other workers out there that might tend to have kinda of a violent nature, or maybe carrying weapons out there that you've seen, heard about.
>
> A Most of em carry weapons; in fact the man I used to go out with, he's in jail now for that, cause they caught him; he was gettin pretty violent too.
>
> Q Who is that?
>
> A Eon Lightburn.
>
> Q How long has he been in jail?

A I think they picked him up Sunday morning.

Q What is his name, Eon?

A Um hum. IAN.

Q Lightburg.

A L I G H T B O U R N E.

Q And you think he was arrested last Sunday?

A Um hum.

Q Here in town?

A Um hum.

(Def. Ex. 6).

The very next day, January 29, jail inmate Theodore Chavers was transferred into the same cell as Mr. Lightbourne. According to his trial testimony, Chavers had been in another cell but was moved into a cell with Mr. Lightbourne on January 29, 1981, because he asked to be in a cell where he could watch television (R. 1107, 1121). There, Chavers and Mr. Lightbourne had conversations (R. 1107), and because Mr. Lightbourne "knew too much" about the homicide, Chavers contacted Detective La Torre of the Marion County Sheriff's Office (R. 1113). Chavers testified that he had not been promised anything (R. 1124), that everything he knew about the offense came from Mr. Lightbourne (R. 1144), and that he had not met with prosecutors except to discuss his own pending charges (R. 1165). Chavers further testified that he was released from jail on February 10, 1981, only nineteen days before his jail term was to expire (R. 1119). Although he had

three other charges pending when he was released, Chavers testified that he was released on recognizance on one of those charges, that he had posted $5,000 bond on the others, and that trial was still pending on all three of those charges (R. 1165).

The information the State provided to defense counsel pretrial was consistent with Chavers' trial testimony. In transcribed statements Chavers made to Detective La Torre, Chavers recited information he had supposedly heard from Mr. Lightbourne (Def. Exs. 4, 5), and stated that Detective La Torre had not talked to Chavers before Chavers' conversation with Mr. Lightbourne (Def. Ex. 5, p. 3). Likewise, Chavers' account at his deposition was that Mr. Lightbourne had made incriminating statements which prompted Chavers to contact Detective La Torre. Although trial counsel attempted to explore Chavers' relationship with the police and motivation for testifying at depositions and during pretrial hearings, Chavers' account remained consistent: no agency relationships, no promises, no rewards, no coaching. Mr. Lightbourne's trial attorneys testified that Chavers' testimony was the key evidence leading to Mr. Lightbourne's conviction and death sentence (See PC-R. 49-50 [Testimony of James Burke]; PC-R. 280-81 [Testimony of Ronald Fox]).

After Mr. Lightbourne's trial, Chavers tried to trade on his cooperation in Mr. Lightbourne's case, repeatedly writing to the State Attorney for assistance with his then current sentence. Those letters revealed:

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

(Def. Ex. 7).

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

(Def. Ex. 7).

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

(Def. Ex. 7).

At the evidentiary hearing, Chavers testified that when he was in the jail cell with Mr. Lightbourne, an inmate named Richard Carnegia was also in the same cell (PC-R. 443). Mr. Carnegia testified at the evidentiary hearing that he knew Chavers was a snitch when he entered the cell in late January or early February of 1981:

> Q. Did you know that Mr. Chavers was a snitch or a government informant?
>
> A. Yes, I had heard.
>
> Q. That was his reputation on the street?
>
> A. Yes.
>
> Q. And you knew that at the time you entered the cell in January or February of 1981?
>
> A. Yes, sir.

(PC-R. 553).

Mr. Carnegia feared Chavers trying to pin charges on him (PC-R. 555). Mr. Carnegia testified at the hearing that Chavers often supplied information to Mr. Bray (PC-R. 554), an Ocala police officer (PC-R. 380). Chavers, in fact, told Mr. Carnegia how to get himself out of jail:

> A. He asked me did I want to try to get myself out.
>
> Q. And what did you say?
>
> A. I said: "What I have to do?" And he said that just tell them that you heard Lightbourn say that he killed somebody.

(PC-R. 558). Mr. Carnegia also overheard Mr. Chavers attempt to recruit Mr. Emanuel, another cellmate, to do the same thing (PC-R. 561). Mr. Carnegia refused Chavers' offer. However, Mr. Carnegia remained in the same cell, and he was pulled out once to converse with Chavers, a police officer, and another inmate about Mr. Lightbourne (PC-R. 564). Mr. Carnegia told the officer that Mr. Lightbourne had denied committing the offense (PC-R. 597).

Mr. Carnegia specifically remembered Chavers trying to elicit information from Mr. Lightbourne and Mr. Lightbourne not knowing details of the killing:

> Q. And was Mr. Lightbourn answering?
>
> A. Told him he didn't know nothing about what he was talking about.
>
> * * *
>
> Q. Let me ask you maybe an easier question. Do you recall how and in what manner Mr. Chavers was asking Mr. Lightbourn questions?

A. Like in a friendly manner, like "You can trust me," you know. I never heard him [Lightbourne] saying anything.

(PC-R. 573).

Q. During the time that you were in the cell did you ever hear Mr. Lightbourn admit to the O'Farrell murder?

A. No, sir.

(PC-R. 559).

Mr. Carnegia even told law enforcement that Mr. Lightbourne denied involvement in the offense:

A. That I never heard him say anything to say that he had anything to do with the crime.

Q. Okay. Did you tell the officer that, in fact, you had heard Mr. Lightbourn deny that he had anything to do with the crime?

A. Yes.

Q. You did tell them that?

A. Yes, sir.

(PC-R. 597).

On January 23, 1989, Mr. Chavers signed an affidavit which stated:

I, THEODORE CLEVELAND CHAVERS, having been duly sworn, hereby depose and say:

1. My name is Theodore Cleveland Chavers and my nickname is "Uncle Nut". I was made to testify against Ian Lightbourne at his trial in 1981.

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

cell with Ian Lightbourne and several other inmates.

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

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

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

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

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

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

> family alone and not to talk to anyone about this or the case.
>
> 9. In the past, I refused to discuss this matter with anyone because the police wanted it to stay quiet. They told me to keep my mouth shut and I knew they'd give me heat if I didn't. Because I had been in so much trouble in the past, the police would make me cooperate with them whenever they wanted me to, just like in Lightbourne's case.
>
> 10. I am now willing to discuss these things because I no longer have any pending charges which could be held over my head.

(Def. Ex. 10; PC-R. 1396-99, 2441-44). Mr. Chavers testified that his signature was on the affidavit (PC-R. 799).

On January 30, 1989, one week after signing the affidavit, Chavers had a conversation with Assistant State Attorney James Phillips. This conversation was tape-recorded and later transcribed. In the conversation, Chavers stated:

> JP [Phillips]: We understand there's some affidavit you might have signed on the Lightborn [sic] case. You know anything about that? Did some people from some lawyers office come and talk to you about Lightborn [sic]? We just need to know what that is. We haven't got a copy of it yet. Do you remember signing anything?
>
> TC [Chavers]: Uh huh.
>
> JP: Was it true or was it not true? You know you got to go to
>
> TC: I rekon yeah, man. I don't know nothin' been happenin', man, I'm serious, yeah.
>
> JP: Well some man from the rep- lawyer from Mr. Lightborn [sic] has told us
>
> TC: Uh huh.
>
> JP: That you did an affidavit saying

TC: Right.

JP: That everything you said during Lightborn [sic] was a lie. Is that correct, it's a lie? Or is it not correct?

TC: Everything was a lie?

JP: Yeah, it said that the things you said that Lightborn [sic] told you was a lie.

TC: Yeah. Yeah, well I, the only thing I remember him saying was you know, uh, uh, I heard him talk talk you know, talkin' you know, 'bout what happened at the horse farm and stuff. Then I read the paper that he ...

JP: Uh huh. So you made up all that stuff that you testified before Judge Swaggart before at the trial?

TC: Yes sir. Besides that, all of that was just a lie.

JP: It was.

TC: Yes sir.

* * *

JP: Okay. So you've let Mr. Lightborn [sic] sit up there on death row for the last nine years

TC: I haven't, no I haven't

JP: Based on some lies

TC: I haven't

JP: Mr. Chavers?

TC: I haven't, I haven't I was - Why was it me? Why why why did it have to be - I never said Lightborn [sic] killed anybody.

JP: No. I know you didn't see 'em. No, what we were wondering about was the things that he told you, that you

repeated in court; were those true or not true? That's what we needed to know. The things that that were said during his trial

TC: Uh

JP: You remember, a long time ago. The things that he told you in the cell

TC: That's what I was tellin' the lady.

JP: Pardon me?

TC: That's what I was tellin' the lady.

JP: Okay.

TC: But see everybody under the impre- hey, I didn't - this guy happens come kinda way come up with the gun. You know, come up with the other stuff they talkin' 'bout 'bout 'bout- I don't know nothin' 'bout

JP: Well he did the killin', there's no question about that, Theodore, that

TC: I don't know.

JP: What happened is, you know he had the jewelry in his pr- the property that belonged to Mrs. O'Farrell

TC: Sure, I got one now.

JP: The gun that they took away from him is the gun that killed Mrs. O'Farrell.

TC: I wouldn't know.

(PC-R2. 101-04)(emphasis added).

At the evidentiary hearing, Mr. Lightbourne proffered the testimony of Ray Taylor, a jail inmate who was in the same cell as Chavers during the evidentiary hearing. Mr. Taylor had written his attorney a letter explaining that Chavers had said that Mr. Lightbourne did not commit the offense and that Chavers'

trial testimony was not true (PC-R. 1259). Mr. Lightbourne requested that Mr. Taylor be produced as a witness (PC-R. 1258), but the court denied the request (PC-R. 1259).[1]

In addition to the presentation of Chavers' affidavit and his other statements, Mr. Lightbourne attempted to present Chavers' live testimony. When he initially took the stand, Chavers appeared to have great difficult understanding questions (see, e.g., PC-R. 438-83). The court then inquired about whether Chavers was under the influence of drugs or alcohol and whether Chavers' recent car accident had affected his mental processes (PC-R. 492, et seq.), and order Chavers to remain in jail overnight to improve his condition (PC-R. 526). The next day, the court ordered Chavers evaluated by a mental health expert to determine Chavers' competency as a witness (PC-R. 608). The expert reported that Chavers was not competent to testify (PC-R. 636), and the court ordered Chavers to remain in custody until the next session of the hearing to be held on July 2, 1990 (PC-R. 652-53). At the July 2 hearing, experts reported Chavers was not competent to testify (PC-R. 679-80), and so his testimony was deferred until October 8, 1990. At the October 8 hearing, Chavers could not remember anything, including testifying at Mr. Lightbourne's trial (See, e.g., PC-R. 742-66, 799-871). The

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[1]Mr. Taylor was transferred out of the jail to a state prison just 15 minutes before Mr. Lightbourne requested his presence as a witness (PC-R. 1256). Mr. Lightbourne also requested to present the testimony of Mr. Taylor's attorney and her investigator regarding the letter Mr. Taylor had written (PC-R. 1257).

court believed Chavers' memory was "fine," and said to Chavers, "I believe you know something" (PC-R. 767). The next day, when Chavers continued to profess a lack of memory, the court held him in contempt (PC-R. 950). The court ultimately determined that Chavers was unavailable as a witness (PC-R. 1255, 1259).

Mr. Lightbourne also presented the affidavit of Jack R. Hall at the evidentiary hearing. That affidavit states:

> I, JACK R. HALL, having been duly sworn, hereby depose and say:
>
> 1. My name is Jackie R. Hall and I currently reside at the Marion Correctional Institute in Lowell, Florida. I am 48 years old.
>
> 2. In January and February of 1981, I was incarcerated at the Marion County Jail. I was in a cell with Ian Lightbourne the entire time I was at the jail.
>
> 3. Because Lightbourne spoke with a thick accent, he had a real hard time communicating with other inmates. I was the only inmate at the jail during this time that Lightbourne would talk to.
>
> 4. When Lightbourne was first brought to the Marion County Jail, he was placed in the same cell with me. Shortly after Lightbourne's arrival, three trustees were moved into our cell. One of these trustees was "Nut" Chavers, but I did not and do not know the name of the others. Neither Lightbourne nor I ever talked with them. They huddled in the corner talking together for awhile and then called for the guards to come and let them back out. Lightbourne never spoke to any of these guys the whole time they were in our cell.
>
> 5. These same trustees were placed in our cell several more times, and acted the same way each time. They would huddle up and whisper together like they were making a plan, and they would laugh a lot, too. A few

> times I overheard the things they were saying - they were talking about Lightbourne and a murder case. I specifically remember the guy called "Nut" talking about what they were going to tell the cops about Lightbourne. They said that they were going to say that Lightbourne told them all about the murder of the O'Farrell woman. I also heard them talking about getting out of jail and heard "Nut" telling the others that he had gotten out this way before.
>
> 6. Long after I was transferred back to the state prison system, I learned that at least one of the trustees who had been in the cell with me and Lightbourne - "Nut" Chavers - testified at Lightbourne's trial and said that Lightbourne had told him that he did the murder. I knew when I heard this that it was a lie -- Lightbourne and I were together the whole time, in the same cell, and neither of us spoke to those guys who were put in with us. Like I said, I had heard "Nut" and the others talking about what they were going to tell the cops, but I never thought they would or could actually get up in a court and say this like it was true.
>
> 7. I didn't know Ian Lightbourne before I met him in the Marion County Jail, and never saw him again after he left. I wouldn't say we were friends - I am about twenty years older than Lightbourne, white, and born and raised in Ocala, so we didn't really have a lot in common. We were cellmates and were together for about 24 hours a day for quite a while and so we naturally got to talking. I just couldn't sit here and let any man die because of a bunch of lies.

(PC-R. 1401-02). The circuit court would not admit the Hall affidavit substantively even though Mr. Hall is dead[2] (PC-R. 1372).

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[2]Mr. Lightbourne proffered evidence concerning his efforts to locate Mr. Hall and the fact that after locating Mr. Hall, but before talking with him, he died. Mr. Hall's death certificate was entered into evidence (PC-R. 2399).

In addition to the above evidence indicating that Chavers' trial testimony regarding Mr. Lightbourne's alleged confession was not true, Mr. Lightbourne presented evidence regarding the benefits Chavers received from the State in exchange for his assistance. As he testified, Chavers was in jail [serving a sentence for driving with a suspended license] at the time he came in contact with Mr. Lightbourne. He also had three other pending charges: escape, resisting arrest with violence, and grand theft (R. 1165). Chavers testified that on Feburary 10, 1981, he was released on recognizance on the escape charge, and posted a $5000 bond on the other two charges (R. 1165).

However, jail records demonstrate that on February 10, 1981, after Chavers had provided Detective La Torre with information regarding Mr. Lightbourne, Chavers was released from jail on his own recognizance on all three charges <u>at the direction of the State Attorney's Office</u> (Def. Ex. 3). Additionally, Mr. Chavers' bail bondsman testified at the evidentiary hearing that he did not post a $5000 bond for Chavers on February 10, 1981 (PC-R. 215). Further, although Chavers testified that these charges were still pending at the time of Mr. Lightbourne's trial, in fact the State had filed an "Announcement of No Information" on the escape charge before Mr. Lightbourne's trial (Def. Ex. 2A), despite the fact that a jail corrections officer was an eyewitness to the escape (PC-R. 358). Finally, five days after Mr. Lightbourne was sentenced to death, Chavers entered a plea agreement on the resisting arrest and grand theft charges and

received three years probation (Def. Ex. 9), although these charges carried a maximum possible sentence of ten years imprisonment (Id.).

Chavers' bail bondsman testified that he did post a bond for Chavers on March 5, 1981, on a charge of driving with a suspended liscence (PC-R. 218), but that he did not charge Chavers any money for posting this bond (PC-R. 221). Rather, the bondsman, who was previously the sheriff of Marion County, posted this bond for free because of Chavers' involvement in the O'Farrell murder case (PC-R. 220). In a 1985 statement to the police in another case, the bondsman stated he had "bonded [Chavers] before . . . for free for some of the city people . . . so he could do snitch work for 'em and . . . after he . . . blowed [sic] the whistle on the . . . murder . . . down there that time I bonded him out then . . . free and what not as a kind of a reward" (Def. Ex. 13).

Prior to Mr. Lightbourne's trial and between the guilty verdict and penalty phase, Chavers wrote letters to prosecutor Al Simmons (Def. Exs. 1A, 1B). Before the trial, Chavers wrote, "I hope and trust you get me out after the trial is over. . . . I will do my best at the trial" (PC-R. 2398). Between the guilty verdict and penalty phase, Chavers wrote, "I'm glad the trial is over, I hope I did a good job. Sir, I hope and trust in you that you will get me out of here. . . . Sir, I would like to be out before May first. . . . Sir, I will continue helping you " (PC-R. 2397).

Chavers initially provided Detective LaTorre a statement implicating Mr. Lightbourne on February 2, 1981 (Def. Ex. 4). This statement was vague and general, containing no details of the offense (Id.; see also PC-R. 116 [Testimony of James Burke]). In fact, LaTorre testified at the evidentiary hearing that in this first interview, Chavers "never made any indications that Lightbourn [sic] had told him he did the incident" (PC-R. 1129). Chavers provided LaTorre a second, more detailed statement on February 12, 1981, at 2:59 p.m. (Def. Ex. 5). At trial, Chavers testified that after his release from jail on Feburary 10, 1981, Marion County Sheriff Moreland had given Chavers $200. However, documents establish that Chavers received the $200 from Detective LaTorre on February 12, 1981, at 1:10 p.m. (PC-R. 204; Def. Ex. 12B), i.e., less than two hours before Chavers gave LaTorre the detailed second statement incriminating Mr. Lightbourne.

In addition to Chavers, another jail inmate named Theophilus Carson, a/k/a James Gallman, testified at Mr. Lightbourne's trial about incriminating statements Mr. Lightbourne had supposedly made. At the evidentiary hearing, Mr. Lightbourne presented a letter Carson wrote after the trial indicating the benefits he believed he was supposed to receive for testifying:

> STATE ATTORNEY OFFICE OF OCALA
>
> To Head State Attorney
>
> I James T. Gallman, AKA (Theophilus R. Carson) was a key witness in the homicide trial of Egin Lightbolt, the murder of the Ocala Stud Farm owner. I took the stand for the state, I put my life on the line concerning this matter, my testimony was a

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

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

Thank you kindly

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

James L. Gallman
AKA (Theophilus R. Carson)

(Def. Ex. 8; PC-R. 2439).[3] The Chavers and Hall affidavits, as well as Mr. Carnegia's testimony, also indicate that Carson's trial testimony was not true.

At trial, Mr. Lightbourne was represented by James Burke and Ronald Fox. At the evidentiary hearing, Mr. Burke testified that Chavers was critical to the State's case:

Q. Do you recall Mr. Chavers' testimony in effect -- well, Mr. Chavers' testimony at the trial?

A. Yes, I do.

Q. Did that testimony hurt Mr. Lightbourne's case?

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[3]Carson could not be located to appear at the evidentiary hearing. Mr. Lightbourne's counsel detailed their extensive efforts to locate Carson (See, e.g., PC-R. 420), and requested that the hearing be kept open so that Carson could be located.

A. In my opinion, most definitely.

Q. Was that testimony, in your view as one of the trial defense attorneys, something that was important or integral to the State's prosecution?

A. Extremely.

Q. Can you tell us why it is that you say that?

A. If my recollection is correct, the primary case prior to the introduction of those two witnesses was a circumstantial case. It was a bookend type of prosecution.

Mr. Lightbourne had been stopped prior to the offense and an offense -- not an offense report but a contact statement had been made by a police officer where he had legally possessed a gun, and then thereafter he was charged with carrying a concealed weapon. It turned out that the ballistics on that same weapon, both before and after, matched the bullet that had been fired into Mrs. O'Farrell, and that that was the nature of the case.

There were no fingerprints. There was some other scientific evidence, I believe, in the form of saliva, and therefore there was a strong circumstantial case, but there was no direct testimony implicating the defendant, and the direct testimony of Mr. Chavers had a dual impact, because not only was it out of the mouth of the defendant, purportedly, but it was very sensational type of testimony; rather horrible type of testimony, which immediately, in my opinion, turned the jury off to any consideration of the defense, because my recollection was that Mr. Chavers testified to the effect that he had called her the bitch.

He described her anatomical areas of her body; that he made her crawl around on her knees and have oral sex with him prior to the homicide and matters of that nature, which were extremely inflammatory and which obviously had a horrible impact upon a jury's consideration of the defense in the case.

Q. Now, these things were said by Mr. Chavers?

A. Yes.

(PC-R. 49-50).

Q. Who was more harmful, Chavers or Carson?

A. Chavers.

(PC-R. 70).

Mr. Chavers' testimony was important, but defense counsel lacked any proper impeachment tools. Mr. Burke testified:

Q. During this period of time do you recall being provided with information -- with any information about that, during this stage, during the pre-deposition stage where you were doing a Brady request?

A. Not specifically.

(PC-R. 59).

Q. But I mean, back at the time were you ever given any information by law enforcement or the state attorney's office that he requested anything [f]rom State?

A. No.

(PC-R. 172).

Q. Okay. Did Chavers ever indicate that he had an expectation, ever, during your and Mr. Fox's contact with him?

A. Not through the trial phase.

* * *

Q. But in terms of expectation, Mr. Chavers did not ever [ac]knowledge --

A. Not specific. He never acknowledged any specific program.

Q. Indeed, do you recall him acknowledging that he even had an expectation of reward or benefit or anything?

A. No. I can't recollect such an expectation on his part.

(PC-R. 69).

Defense counsel were not content with Mr. Chavers' and the State's responses to questions concerning a deal with Mr. Chavers. Mr. Burke testified:

A. Because the answer that we received, to my recollection, is that there was no formal deal, and we just didn't feel that to be credible.

* * *

Q. Did what you receive fit with what you and Mr. Fox believed really happened?

A. No.

(PC-R. 60).

A. Based on our beliefs and our track record with the state attorney's office in the Fifth Judicial Circuit, we felt that there was a possibility, in fact a probability, that something was amuck, and Ron and I both felt it was an important issue to be pursued and tried to develop a record on that.

(PC-R. 46).

Mr. Burke was adamant that if he had had any information that Chavers had cut a deal he would have used it:

Q. Had you had evidence of an expectation on the part of Mr. Chavers of what he himself may have wanted to get out of his testimony or explicit or implicit agreements that may have been reached with the State or with law enforcement, would you have used that evidence at Mr. Lightbourne's trial?

A. Most definitely.

(PC-R. 70).

Q. Had you had evidence that would have established an agency relationship, for example, between Mr. Chavers and law enforcement officers, or would have established any of the other predicate elements as set forth in Henry and Massiah, would you have used that evidence at the time of Mr. Lightbourne's proceedings?

A. Yes.

Q. Any question about that?

A. No.

Q. Would Mr. Fox have used it, as far as you know?

A. Absolutely.

Q. Any question about that?

A. None.

(PC-R. 47).

Q. You indicated that no -- to Mr. Black's questioning, nobody misrepresented anything except for what you've seen now.

What did you mean by that?

A. By that I meant we didn't have any evidence at the time to support our intuitive beliefs that Mr. Chavers had some broader deal. We didn't have any evidence to support our conclusion that this was a classic Henry kind of a situation. We didn't have the evidence to develop at trial or in pre-trial motions that exists currently.

(PC-R. 178).

Mr. Burke recalled in either the Motion to Suppress or In Limine that he had lacked any solid impeachment tools and was left groping against Detective LaTorre's and Chavers' testimony:

Q. Did you have any concrete evidence by which you could have pursued suppression of those statement?

A. No, we did not. It's my recollection that we had a hearing on a motion of some nature to -- either in limine or to suppress those statements, because we wanted to develop that record through the cross-examination of the Investigator LaTorre; the timing of the two statements that we had received from the State, and our instinctive beliefs as to the situation and therefore, I believe we did file some sort of motion and a hearing was held on that motion.

(PC-R. 45).

A. If I'm not mistaken, it was argued that this was more than a mere coincidence. We did not have either the testimony of Investigator LaTorre or of Theodore Chavers to confirm that.

They both, in effect, represented that the situation was just an innocent bystander who then called the authorities, and we failed to adequately make a claim other than through some circumstantial evidence regarding the nature of the statements, et cetera, more or less a strong hunch which we argued from the circumstances.

(PC-R. 150).

Mr. Burke did recall pre-trial problems in getting information from the State:

Q. Do you recall any trouble pre-trial in terms of developing information concerning Chavers and Carson that you and Mr. Fox ran into?

A. Vaguely I do. As I recollect, we combed o[u]r files. In other words, it wasn't provided by the State. We tried to put together Mr. Chavers' criminal history through a combination of means; going through the public defender's office files, going through the clerk's office files, and there come a point where in order to establish the

-- what actually was Mr. Chavers' rap sheet, we needed some input from the State, who uniquely has access to criminal history records through the NCIC. I believe Ron obtained such an order from Judge Swigert.

(PC-R. 103).

Q. And there were sufficient problems in obtaining information concerning Carson and Chavers pre-trial that you and Mr. Fox had to make a motion to Judge Swigert, do you recall that?

A. That is my recollection.

(PC-R. 105).

Mr. Burke testified that the information contained in the Chavers and Hall affidavits (Def. Exs. 10, 11), was invaluable impeachment and would have prompted additional investigation:

Q. Do you recall seeing in there an affidavit from a Theodore Chavers?

A. Yes.

Q. Was any of the type of information reflected in that affidavit provided to you at the time of the original proceedings in Mr. Lightbourne's case?

A. No.

Q. Any question that that information would have been used?

A. Absolutely. In effect, Mr. Chavers said that he perjured himself.

(PC-R. 136-37).

Q. Is there any question that the contents of [Defense Exhibits] 10 and 11, of the Chavers' affidavit and the Hall affidavit, would have been used by you as defense counsel at the time of Mr. Lightbourne's original proceedings?

A. Had I been made aware, or aware of the contents or evidence of that nature, there's no doubt in my mind that I would have used every legal means possible in an attempt to bring this evidence to the attention of both the Court and the jury for both the purposes of suppression and for purposes of proof at trial in an attempt to discredit Mr. Chavers and Mr. Gallman/Carson's testimony.

Q. Would you and Mr. Fox have investigated further because of what's reflected by those affidavits?

A. Had I been aware, again, of this evidence of this nature, it certainly would have been a ripe area for further investigation and probably would -- under the ABA rules of effective assistance of counsel, you have a duty to investigate a case.

Had there been some understanding that this was the case, I would have made further efforts. Based on even a small amount of evidence, I would have investigated further. We had no evidence to that effect at the time of the case.

(PC-R. 140-41).

At trial, Mr. Burke had no information to contradict Chavers' testimony that said he bonded out of jail:

Q. Do you recall him testifying that he had bonded himself out on the escape charge?

A. Yes.

Q. Did he ever indicate, during his testimony while Mr. Fox, and I think you yourself, asked him some questions about his record during the trial -- did he ever indicate that there was anything more to that escape charge than him bonding himself out?

A. Not that I recollect.

(PC-R. 92).

Mr. Burke described the contents of Defense Exhibits 2-A, 2-B and 2-C:

> A. They reflect a dismissal of the [escape] charge prior to an information being filed on April the 6th, 1981. That is a dismissal of the escape charge as to Theodore Chavers; the standard probable cause affidavit, which delineates the elements of an escape, which were signed by an affiant, Deputy Larry Spangler, and then there is what appears to be a sort of a jail report or police report on what occurred during the escape, although it doesn't reference -- it does reference Chavers and a date of January of '81, so I believe that connects up with -- it does connect up with the affidavit of probable cause.

(PC-R. 106).

Mr. Burke was explicit as to the value of piecing together all the information surrounding the disposition of Chavers' charges including the escape:

> A. My recollection, at first he said he had to put up bond when examined at the deposition or something or at the trial, and then later determined that there was an ROR situation.
>
> Q. Did he ever say that his charges were nol prossed about three weeks prior to Mr. Lightbourne's trial?
>
> A. No, he did not. He did not so testify.
>
> Q. Did the State ever provide to you the information reflected by those documents or those documents themselves?
>
> A. Not to my recollection.
>
> Q. As far as you know, were they ever provided to Mr. Fox?
>
> A. I can assure you Mr. Fox is an

attorney of such caliber that had he been provided that information he would have used it in his cross-examination.

* * *

Q. Given what Mr. Chavers said about the status of his escape charge, how would that information have been used at Mr. Lightbourne's trial?

A. Davis versus Alaska, pending charge during the time of cooperation with the State, that is impeachment material and would be used to show that has a deal that he received a quid-pro-quo and that therefore his testimony is suspect and not necessarily worthy of belief because he has a motive to lie.

There's the insinuation that a defense attorney, in doing his job, would try to get across to the jury, sometimes successfully, sometimes unsuccessfully.

Q. Given his actual testimony, would those documents and the information reflected therein have been used as a defense counsel cross-examining a state's witness to show that the state's witness flat out lied?

A. Absolutely.

Q. Can you tell us why you say that?

A. Well, it could be derelict not to use it, because given Mr. Chavers' testimony in trial, he did not indicate during his testimony that, in fact, his charges had been dismissed, and led the jury on a false impression thereby.

Q. From your perspective as defense counsel at the time, could that information have been used to then argue that Mr. Chavers was testifying falsely or inaccurately concerning other things that he said outside of the escape charge?

A. Yes. The jury instruction on credibility of witnesses, you point out to the jury in summation that if he lied on one

thing, what is there to prevent him from lying about something else. That's a standard technique employed by defense counsel.

(PC-R. 106-08).

A. It would certainly appear from the probable cause affidavit that [the escape charge] would be rather easy to prove. It appears, the writer advised Chavers to halt. It appears there was an eyewitness to the escape, that is Deputy Spangler, in which case it would be a readily provable offense, assuming the State could prove lawful custody, which I'm sure that it could, and therefore by giving a nol pros or a no information was a "gimmie." They didn't have to. That implies to me that this was in return for something, because it was the kind of case that was rather easy to prove.

Q. No question those documents and the information contained therein reflected thereby would have been used, is there?

A. Absolutely. It would be derelict not to have used them, in my opinion.

Q. Were Mr. Chavers' incarceration records ever provided to you by the state attorney's office?

A. Not to my recollection.

(PC-R. 109-10).

Regarding Chavers being released on recognizance on his charges of resisting arrest with violence and grand theft, Mr. Burke testified:

Q. Do you recall those documents [Def. Ex. 3] being provided to you by the state attorney's office prior to Mr. Lightbourne's trial?

A. No, I do not.

Q. And on the second page of that exhibit, there's a notation as to Mr. Chavers

being released. Can you tell us what that notation indicates to you?

A. Remarks. Released ROR by state attorney's office on three charges that are outstanding.

Q. And does it reflect what the charges are?

A. Reflects the numbers and also reflects under charges, FTA while driving while license suspended; improper tag; retail theft; obstruction of justice; driving while license suspended; retail theft; resisting arrest with violence.

* * *

Q. Was that type of information provided to you prior to Mr. Lightbourne's trial?

A. No.

Q. Would that type of information have been something that you and Mr. Fox could have used in representing Mr. Lightbourne, A, in terms of Chavers' credibility and testimony, and B, in terms of the Massiah-Henry issue that you discussed a while back?

A. Most definitely.

* * *

A. The reason I say that is that it's my recollection that he testified that he had posted some bail in a certain monetary amount. By so testifying, these documents directly contradict his trial testimony.

Had we been aware, notified of these facts that he was in fact ROR'd per the state attorney's office, once again, Mr. Chavers' truthfulness would have been subject to attack by direct records which would refute or contradict his trial testimony, thereby impugning his veracity in front of a jury.

(PC-R. 110-11).

Mr. Burke testified that information regarding the disposition of Chavers' charges was vital to challenge the credibility of Chavers' second statement that followed his February 10, 1981 release:

> Q. Now, in terms of Defense Exhibit 3 that we were discussing a moment ago, the February 10th note in the jail records, how would that -- how would that have been used, given this chronology?
>
> A. You would point out that the two statement surround the date of the ROR on the escape charge. You would try to show to the jury that there was a quid-pro-quo; that there was something going on.
>
> In other words, you would insinuate that there was some understanding with Mr. Chavers, even if he was not forthcoming about it in his testimony, and thereby try to undercut the value and strength of his testimony by pointing these things out to the jury.
>
> That's one of your primary functions.

(PC-R. 115-16).

> Q. If you had been provided with this jail log indicating that on February 10th, 1981, between the first statement and the second one, Mr. Chavers was released ROR per state attorney's office on three charges that are outstanding, with the numbers, how could that have been used in terms of suppressing?
>
> A. It would have bolstered our argument, circumstantially, yet again that Mr. Chavers was not simply a concerned citizen who volunteered his services to the law enforcement agents, but rather was someone who was deliberately eliciting statements from Mr. Lightbourne in order to further his own nest or serve his own purposes and ends, and that we were more in the area of Henry and that hopefully there would be suppression in this of those

statements and thus help the case of our client, Mr. Lightbourne.

(PC-R. 116-17).

Mr. Burke also testified that Chavers' plea agreement on the resisting arrest and theft charges was essential impeachment information:

> Q. Defense Exhibit 9 -- would that have been of assistance to the -- or its contents or what is reflected about what happened, would that have been of assistance to the defense under a Brady analysis or what we're calling a Massiah-Henry analysis?
>
> A. Both, I think. If there was an understanding to this effect that occurred prior in time to its being reduced to writing, and Mr. Chavers was aware of it and the State was aware of it, it would be my understanding that it should have been provided us to and it would have been important in -- another important piece to be used in the cross-examination of Mr. Chavers.
>
> Q. Any question that you and Mr. Fox would have used that information, both in terms of suppression and in terms of attacking Mr. Chavers' credibility at the trial?
>
> A. No.

(PC-R. 134).

Mr. Burke was shown the two letters Chavers wrote to prosecutor Simmons, and Mr. Burke explained their significance. As to the letter dated 4/26/81:

> Q. Would the same thing apply to 1-A, that it shows contact between Mr. Chavers and with the State and therefore it would be useful for that purpose?
>
> A. Yes. Now, this was after the trial, but for example, as part of a motion for new trial, the sentencing phase, newly

discovered evidence, for a variety of reasons it would be important even at that stage in the proceedings to have received this, because, for example, in this letter there is an -- an absolute request of doing another job for the county, and a request to be out May the 1st, and that may have been the basis of the quid-pro-quo with the State and it would have been something as a starting off point with which to cross-examine Mr. Chavers about his understanding and expectation of reward for his testimony, if any.

(PC-R. 90).

[The letter] indicates that he felt that he was going to be released in the not too distant future after this trial took place as a result of some understanding that he had with the State of Florida.

(PC-R. 91). As to the letter dated 4/16/81:

Q. Exhibit 1-B, was that provided to you prior to Mr. Lightbourne's trial?

A. Not to my recollection.

Q. Had it been provided -- just looking at just 1-B for a moment, does that document contain information that you and Mr. Fox could have used in defending Mr. Lightbourne?

* * *

A. Yes. Obviously, the more correspondence or documentation that you have that concerned Mr. Chavers, the happier you would be as defense counsel because you would establish a relationship between the State and Mr. Chavers.

Also in this particular document, sir, I will do my best at the trial to help convict this killer, there's language in there that -- that could be perceived as incurring favor with the State. That's why you would arguably use this at the trial.

(PC-R. 88-89). Mr. Burke testified that these letters were never provided to him (PC-R. 78-79, 92).

Mr. Fox was also one of Mr. Lightbourne's defense counsel and testified at the evidentiary hearing. Mr. Fox clearly stated that Chavers was the State's case:

> This was a totally circumstantial case, and I say that both in terms of the guilt-innocence phase, I think, and in terms of the penalty phase, and so that shaking Chavers was of utmost importance, and if at the time you asked around law enforcement circles off the record whether they would believe Theodore Chavers, probably 90 percent of them would have told you, hell no.
>
> So now when he files an affidavit that he lied then, that just confirms my worst fears; that he didn't -- the affidavit that Chavers filed that said you set me up to this, you put me up to this so I could get a good deal, that's like something that I would have imagined; something that in my wildest dream coming true he would have said on the stand; not something that I find unbelievable, mind you, but something that I sort of felt all along but had no way of doing anything about it.

(PC-R. 280-81; see also PC-R. 274, 236-38).

Mr. Fox remembered having no concrete evidence of Chavers being used by the State as a listening post (PC-R. 240), but was clear that there would have been no strategic reason for not presenting that kind of evidence (PC-R. 315).

Mr. Fox was aware of the $200 payment to Chavers but did not know any other details regarding the payment (i.e., when) or other benefits (PC-R. 286). Mr. Fox was surprised that Chavers' bail bondsman testified he had not posted bond for Chavers on February 10, 1981:

Q. Would you be surprised if he testified that that just -- the whole thing just never happened; there was no $5,000 bond; there was nothing like that?

A. Well, yeah.

(PC-R. 314). Mr. Fox would have certainly used this information at trial (PC-R. 269-70).

Before the evidentiary hearing, Mr. Fox was unaware of the State's no information on the escape charge and the release of Chavers on his own recognizance on February 10, 1981 (PC-R. 256). Mr. Fox stated that he was never provided Defense Exhibit 2 (announcement of no information), and that this exhibit clearly showed the State aiding Chavers. Mr. Fox stated:

Q. Had you had that information as reflected in Defense Exhibit 2 at the time of Mr. Lightbourn's trial, would you have used it?

A. Yes.

Q. Can you tell us why it is that you say that?

A. Yes. It's quite evident to me, from the probable cause affidavit and the diagram accompanying it, that this was in fact an escape, or at least there was certainly probable cause to do -- for the charge. An officer took him back into custody and to say there is insufficient evidence to support filing of a charge of escape is a legal fiction at best, I would say.

* * *

Q. Was his account at the trial truthful and accurate concerning those charges?

A. Not in light of this document here.

* * *

> A. Well, here the charges were, should I say, this procedure, the state attorney's office unilaterally exercised their discretion and chose not to prosecute him, for whatever reason, on a case based on the PC affidavit where they could have well proceeded and got a conviction, I would think.

(PC-R. 257-58).

Mr. Fox concluded that these documents showing the no information on the escape charge would have been valuable proof of Chavers being an agent of the State:

> A. Well, same sorts of things. It leads to the inference, the implication, the argument, however you want to present it, that he was operating as an agent for law enforcement, because they were certainly compensating him for some reason.
>
> The state attorney's office was certainly giving him benefits to which he would not have otherwise necessarily be entitled. He would not otherwise necessarily be entitled, so there has to be a reason for it, and of course my argument would have been the reason for it is that he's an agent of the police.

(PC-R. 261; see also PC-R. 262).

Mr. Fox knew Chavers' second statement to be the most damaging, and thus it was also important to challenge Chavers' motives or bias (PC-R. 244). Mr. Fox stated:

> A. Sure. I mean, it's a standard jury instruction that when evaluating the credibility of the witness; weighing the witness, deciding who to believe or not, one of the things the standard instructions say you can consider is if this witness been offered any benefit, payment, or other consideration. Well, this is classic of benefit payment or consideration.

He had been arrested much earlier on on these charges from the document, and then to have him ROR'd a considerable time later, further fuels my suspicions, would fuel my argument.

(PC-R. 262).

Q. Did anybody -- putting aside the document itself, or in addition to the document itself, did anybody ever provide you those documents or the information therein reflected from the State or from law enforcement at the time that you represented Mr. Lightbourn?

A. No.

Q. Can you tell us how that could have been used with Mr. Chavers in light of the colloquy that I just showed you a moment ago from the trial transcript?

A. Well, it's -- this consideration contained in dropping the escape charge is more valuable than $200 from the sheriff. In other words, I would use it to attack Chavers' credibility; that he had been given this consideration in exchange for his testimony.

(PC-R. 259).

Mr. Fox also never saw a note dated January 12, 1981 at 1:10 p.m. which indicated that Mr. Chavers received the $200 reward just prior to the second statement (PC-R. 246). Mr. Fox stated the importance of this note:

Q. And what does the note indicate; not the deposition, the note itself?

A. Oh, it indicates the sheriff gave the money to King who gave it to LaTorre who gave it to Chavers; would indicate -- yeah, that it contradicts that part of answer; yes, that he in fact got the money from LaTorre; deposition, he said he didn't.

Q. An hour and 49 minutes before the statement?

A. Oh, right.

Q. Had you had that information at the time of Mr. Lightbourn's trial, would you have used it?

A. Well, that again would just be another good piece of impeaching testimony; prior inconsistent statement at the very least, by Chavers. In addition, it would be a prior inconsistent statement about money he had been paid for his cooperation or participation in the case.

Q. You would have used it?

A. Oh, no doubt.

(PC-R. 253; see also PC-R. 247-48).

After being asked to review all the documents presented at the evidentiary hearing, Mr. Fox concluded that if he had had these documents he would have used them:

Q. -- is there a conceivable tactical strategic reason you can come up with for not using them if you had them, and given what you were trying to do in Mr. Lightbourn's case?

A. I'm trying to think of a conceivable reason for not using them. I can't imagine one.

(PC-R. 315).

Mr. Fox commented on Mr. Hall's affidavit (Def. Ex. 11):

Q. Let's look at the whole affidavit for a moment by itself. Why would that type of information have been something that you would have used?

A. Well, he was there present at the time Chavers said he obtained information, and it was in a strictly controlled, limited setting, and his testimony is that Chavers

must, and Carson both, must be lying because Lightbourn never conversed with them in any way. So I can't -- you can't do better impeachment than that; a witness who would directly contradict them.

(PC-R. 272).

Mr. Fox also commented on the importance to Mr. Lightbourne of the letters from Chavers to State Attorney Raymond Gill (Def. Exs. 7A, 7B, 7C) and Mr. Chavers' affidavit (Def. Ex. 10):

A. ...So there again, it's hard to imagine more valuable impeachment evidence than the witness himself testifying under oath he's a liar, and also with the Massiah issue coming in there suggesting that they rehearsed it all....

Q. Aside from the admission that false testimony was presented, does that affidavit also reflect that the witness expected to gain, had an interest, or bias, things along that nature?

A. Yes.

(PC-R. 273).

As for the letters from Chavers to Mr. Simmons (Def. Exs. 1A, 1B), Mr. Fox stated:

A. Well, yeah. The connection I make between the two is in the letter dated April 26th, Exhibit 1-A, Chavers said, I would like to be out before May 1st because Mary can get her check, and so on and so forth.

Then the no information of the escape charge is April of '81, which would go a long ways toward getting him released by the 1st. That would be my argument.

(PC-R. 309). Mr. Fox stated these letters were a valuable impeachment tool:

Q. Do those two documents contain information that you would have used in representing Mr. Lightbourn?

A. Yes, in the way that I've sort of generally referred to as I was going over the letters, just again to show these little pieces out of here of expected benefit and all; that he was in fact an agent of the State and that would have affected the weight to be given his testimony.

* * *

A. Yes, the same sort of way in that much of what Chavers said was not only damaging for the guilt-innocence phase, it was damaging for the penalty phase in proving aggravating circumstances. So there again, you bring out these matters which undermine his credibility as it relates to aggravating circumstances during the penalty phase.

(PC-R. 266-68).

Mr. Fox was surprised by the May 6, 1981, plea offer bestowed upon Chavers from State Attorney Phillips:

This one, particular one is signed by Jim Phillips. It's an offer to Theodore Chavers; deals with pleading; two offenses of resisting arrest with violence and grand theft.

* * *

A. Yeah. On this plea, May 6th is the date of the offer. If Chavers had come to court that day and taken this plea, he would have been out of jail that day.

* * *

Q. Were you ever provided with that information at the time that you represented Mr. Lightbourn?

A. I have no recollection of knowing this information until this litigation.

(PC-R. 268-69). Mr. Fox stated this would be useful Massiah-Henry and impeachment evidence (PC-R. 269), and that this evidence of the plea was not disclosed to Mr. Lightbourne (PC-R. 270-71).

SUMMARY OF ARGUMENT

1. The circuit court refused to consider some of the evidence which Mr. Lightbourne presented at the evidentiary hearing, including Chavers' affidavit, numerous letters and statements by Chavers saying that his trial testimony was not true, the Hall affidavit, the testimony or letter of Mr. Taylor, and Carson's 1982 letter. The court found that Chavers was an unavailable witness, and Mr. Lightbourne established that Mr. Hall is dead. In refusing to consider this evidence, the court denied Mr. Lightbourne a full and fair hearing. The court failed to consider that the question under Brady and a newly discovered evidence analysis is how the evidence would have affected the trial. The evidence was clearly admissible at trial, as evidence which defense counsel could ask Chavers and Carson about and/or could present as rebuttal to Chavers' and Carson's testimony. The trial court therefore should have considered the evidence. In failing to do so, the trial court failed to assess Mr. Lightbourne's claims fully and fairly. A remand for a full and fair determination of Mr. Lightbourne's claims is required.

2. The State's withholding of material exculpatory evidence, the State's presentation of false evidence, and newly discovered evidence establish that Mr. Lightbourne was denied an

adversarial testing of his guilt/innocence and of the propriety of the death sentence. The evidentiary hearing established that Chavers has stated numerous times that his testimony at Mr. Lightbourne's trial was not true and that Chavers received benefits from the State in exchange for his cooperation. This evidence is contrary to Chavers' trial testimony and was undisclosed by the State at trial. Mr. Hall's affidavit and Mr. Carnegia's testimony establish that Mr. Lightbourne did not discuss the murder with Chavers and Carson, that Mr. Lightbourne said he did not know anything about the murder, and that Mr. Lightbourne denied involvement in the murder. This evidence also was undisclosed by the State and contradicted Chavers' and Carson's trial testimony. Some of the evidence, such as Chavers' taped conversations with Assistant State Attorney Phillips, was newly discovered evidence revealed at the hearing. Under either a Brady or newly discovered evidence analysis, Mr. Lightbourne is entitled to a new trial and/or a new jury sentencing.

3. The aggravating circumstances listed in Florida's capital sentencing statute are facially vague and overbroad. This vagueness and overbreadth can be cured by the adoption of limiting constructions, which must be employed by the sentencers during the sentencing calculus. Here, the vagueness and overbreadth of the statutory language was not cured because Mr. Lightbourne's jury was not informed of the limiting constructions of aggravating factors. Under Richmond v. Lewis and Espinosa v. Florida, Mr. Lightbourne is entitled to relief.

4. Under Espinosa v. Florida, this Court erred in its prior disposition of Mr. Lightbourne's penalty phase ineffective assistance of counsel claim. Relief is proper.

ARGUMENT I

MR. LIGHTBOURNE WAS DENIED A FULL AND FAIR HEARING IN VIOLATION OF HIS DUE PROCESS RIGHTS BECAUSE THE CIRCUIT COURT APPLIED IMPROPER STANDARDS AND THUS FAILED TO CONSIDER MR. LIGHTBOURNE'S EVIDENCE.

This Court remanded Mr. Lightbourne's case to the circuit court for a full and fair evidentiary hearing regarding the "Brady violations with respect to Chavers and Carson." Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Although Mr. Lightbourne was given an evidentiary hearing, Mr. Lightbourne was not allowed to have his evidence considered. Instead of considering Mr. Lightbourne's evidence, the circuit court ruled that Mr. Lightbourne's evidence would be proffered only. Because of circumstances beyond Mr. Lightbourne's control (i.e. Mr. Chavers being unavailable--selective loss of memory, Mr. Carson being unavailable--unable to locate despite an ongoing diligent search, and Mr. Hall being unavailable--death), Mr. Lightbourne has been severely hampered in his defense. However, the final blow occurred when the circuit court would not consider Mr. Chavers' affidavit, Mr. Chavers' numerous letters and statements, Mr. Taylor's letter, Mr. Hall's affidavit, and Mr. Carson's letter as substantive evidence. In addition, the circuit court did not allow Mr. Taylor to testify.

Without considering any of this evidence, the circuit court's order stated:

> 1) No witnesses 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.

(PC-R. 2285-86). Rather than consider the evidence presented by Mr. Lightbourne, the circuit court relied upon trial evidence which the court believed was unrefuted and "proved" Mr. Lightbourne's guilt (PC-R. 2284-85). However, this Court had that very same trial evidence before it and ordered an evidentiary hearing on Mr. Lightbourne's Brady claim. The trial court's failure to recognize that the purpose of the hearing was to consider the Brady claim led the court to erroneously refuse to consider Mr. Lightbourne's evidence. For the same reason, the trial court failed to properly consider the evidence under a newly discovered evidence analysis. Without considering Mr. Lightbourne's evidence, the trial court simply concluded, "The Defendant has not presented any newly discovered evidence of such

a nature that would probably produce an acquittal on retrial" (PC-R. 2286).

Mr. Lightbourne's conviction and resulting sentence of death hinged on the credibility of jailhouse informants Chavers and Carson. Thus, any information revealing that their trial testimony was untrue, that they had made deals with the State, or that they had an agency relationship with the State would be material to Mr. Lightbourne's defense. Mr. Lightbourne's jury never knew about the information presented at the evidentiary hearing demonstrating that Chavers' and Carson's trial testimony was not true and that they expected and received benefits for their testimony. The improper withholding of information regarding a witness' credibility can be just as violative of the dictates of Brady as the withholding of information regarding a defendant's innocence. United States v. Bagley, 473 U.S. 667 (1985); See Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important state's witness is material evidence which must be disclosed by the prosecution. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). Mr. Lightbourne was precluded from effectively cross-examining important prosecution witnesses.

A Brady claim is assessed as follows:

> A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. See United States v. Burroughs, 830 F.2d 1574, 1577-78 (11th Cir. 1987), cert. denied, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988). Suppressed evidence is material when "there is a reasonable probability that . . . the result of the

> proceeding would have been different" had the evidence been available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987)(quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))(plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(en banc). Since the question under Brady is whether any withheld evidence was favorable and material, any questions regarding the admissibility of such evidence concern whether the evidence could have been used at trial. Thus, in Mr. Lightbourne's case, the question for the circuit court was whether any of the evidence could have been used at trial to impeach Chavers and Carson.

The question regarding admissibility under a newly discovered evidence analysis is the same. In Jones v. State, 591 So. 2d 911 (Fla. 1991), this Court ordered an evidentiary hearing, stating: "the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal." Id. at 916. Thus, the question is whether the evidence would be admissible at trial.

Clearly, the evidence presented at the evidentiary hearing which the circuit court refused to consider impeaches Chavers' and Carson's trial testimony. Chavers has given numerous statements (his 1981 statements to Mr. Carnegia, his 1985 letters to Mr. Gill, his 1989 affidvait, his 1989 statements to Mr. Phillips, his 1990 statements to Mr. Taylor) that his trial testimony that Mr. Lightbourne confessed was not true. Mr.

Hall's affidavit explains that Chavers never had a conversation with Mr. Lightbourne. Documentation and testimony demonstrate that Chavers received favors from the State in exchange for his testimony. All of this evidence is classic impeachment, and are matters which a defense attorney could ask Chavers about and/or which could be presented to rebut Chavers' trial testimony. The same analysis applies to Carson's testimony, which is impeached by his 1982 letter, the Hall affidavit, and Mr. Carnegia's testimony. Not allowing such evidence at a criminal trial would violate the Constitution. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 338 U.S. 14 (1967); Rock v. Arkansas, 107 S. Ct. 2704 (1987).

Mr. Lightbourne in good faith presented Mr. Chavers to the circuit court, and Mr. Chavers' refusal to testify was in no way the fault of Mr. Lightbourne. The circuit court determined that Mr. Chavers was an unavailable witness (PC-R. 1255, 1259, 1260). Mr. Lightbourne repeatedly moved the circuit court to enter Mr. Chavers' affidavit into evidence (PC-R. 332-33, 335-38, 775-76, 780-81, 913-16, 918-19, 921, 923-26, 927, 1263-64, 1274, 1355); however, the circuit court would not admit the affidavit (PC-R. 339 1259-61, 1267-68, 1272-73, 1274, 1357).

Mr. Chavers certainly was an uncooperative witness. For example, he stated "I don't know" or "I don't remember" 66 times in a row to questions asked of him (PC-R. 806-16). Out of desperation, the circuit court held Mr. Chavers in contempt of court. (PC-R. 950).

Mr. Lightbourne argued that Mr. Chavers' affidavit was admissible into evidence as not hearsay, and Mr. Lightbourne referenced Fla. Stat. sec. 90.804(2)(c) (1990).[4] Mr. Lightbourne also argued that the Constitution requires that his evidence be admitted. Chambers v. Mississippi, 410 U.S. 284 (1973), made clear that due process requirements supersede the application of state hearsay rules:

> [T]he testimony was ... critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers, 410 U.S. 294, 302 (emphasis added). See also Rock v. Arkansas, 107 S. Ct. 2704 (1987); Taylor v. Illinois, 108 S. Ct. 646 (1988). Where as here the testimony contains sufficient indicia of reliability, and directly affects the ascertainment of guilt or innocence, the strict application of an evidentiary rule cannot be employed to reject the evidence. Chambers.

In Chambers, the Supreme Court determined that due process overcame Mississippi's hearsay rule because the hearsay

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[4]The circuit court ruled that Mr. Chavers' statement was not against his interest because Mr. Chavers could no longer be prosecuted for perjury. At the time Mr. Chavers signed the affidavit, it was not for Mr. Chavers' benefit. Mr. Chavers knew that he didn't have any pending charges at that time to be used against him, but he certainly wasn't aware that any perjury charges would be barred due to the statute of limitations. In addition, Mr. Chavers knew that being a snitch was not popular on the streets and his life would be in jeopardy. Thus, Mr. Chavers, as the declarant, certainly believed that his affidavit was against his interest. Whether it in fact was is irrelevant, Mr. Chavers' belief that it was against his interest is the test.

statements bore indicia of reliability. The statements in Chambers were made spontaneously, were corroborated by other evidence, and were "unquestionably against interest." Chambers, 410 U.S. at 300-01. Significantly, in Chambers, the Supreme Court considered the declarant's availability as one of the conditions indicating whether or not the hearsay statements were reliable.

A great deal of evidence indicates that Chavers' 1989 affidavit is reliable. For example, in his 1985 letter to Assistant State Attorney Gill, Chavers said that he had lied at Mr. Lightbourne's trial (Def. Ex. 7). However, the circuit court ruled that it would not consider the letter as substantive evidence (PC-R. 1259-61). There were also other indicia of reliability to Mr. Chavers' affidavit besides the letters to Mr. Gill. For example, Mr. Chavers had taped conversations with Assistant State Attorney Phillips in which Mr. Chavers said he lied at Mr. Lightbourne's trial. However, the circuit court also would not consider this evidence (PC-R. 1260-61). During the October hearing, Raymond Taylor was Mr. Chavers' cellmate, and Mr. Taylor had written the local Public Defender's Office that Mr. Chavers had told him that Mr. Chavers had lied to the court during the hearing and at the trial. The court would not consider this evidence, or allow Mr. Taylor to testify. Chavers told Mr. Phillips that he signed the 1989 affidavit and never said that the affidavit was untrue. At the hearing, Chavers testified that his signature was on the affidavit (PC-R. 799).

Theresa E. Farley was present when Mr. Chavers dictated and signed the 1/23/89 affidavit. Ms. Farley did not believe Mr. Chavers was high the day he dictated and signed the affidavit (PC-R. 1052). Ms. Farley also testified at the hearing that Mr. Chavers did not have any problems on January 23, 1989, remembering Mr. Lightbourne's 1981 trial (PC-R. 1010-11). Ms. Farley also testified as to Mr. Chavers' understanding of the affidavit and the willingness of Mr. Chavers to testify:

> Q. Did Mr. Chavers at any time during the preparation of this affidavit ever indicate to you that he disagreed with what was in it, or that he didn't understand what you were asking him?
>
> A. No.
>
> Q. At any time during this hour conversation and during the preparation of this affidavit did you or Mr. Mack in any way threaten or coerce Mr. Chavers?
>
> A. No, not at all. In fact, at one point we did, after he signed the affidavit, explain to him that this was going to be submitted to the Court, and that if at some point in this case we were granted a hearing, he may need to testify.
>
> Q. What, if anything, did he say in response?
>
> A. He said, "That's no problem." He said, "I don't have anything to hide. They are not holding anything over me. It's not a problem."
>
> So he seemed at that time, to me, very assertive about the contents of this affidavit.

(PC-R. 1014-15).

When the affidavit was completed, Ms. Farley offered Mr. Chavers a copy but he refused because:

> And he said that -- he said, "I don't need a copy of it, I know what is in there. I know what the truth is. I don't need a copy of it."

(PC-R. 1016).

On June 8, 1990, Ms. Farley did talk to Mr. Chavers after his accident, and Ms. Farley believed Mr. Chavers not to have been stoned (PC-R. 1052). Ms. Farley testified at the hearing regarding Mr. Chavers' memory on that date:

> A. I didn't see, in the way he communicated or what he was talking about, there didn't seem to be any change to me between the first time I spoke with him and that day.
>
> Q. And he didn't express any concern that he couldn't remember or anything like that, did he?
>
> A. No.

(PC-R. 1022).

Chambers cautioned, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302. It would be constitutional error to "mechanistically" apply the hearsay rule to Mr. Lightbourne's case. The timing of the declarations, the numerous unrelated parties to whom they were made, the existence of corroborating evidence, and the fact that the declarations were indeed against Chavers' interest, precisely the factors noted in Chambers, demonstrate the reliability of the proffered testimony.

At a trial, Mr. Lightbourne would offer information such as that presented at the evidentiary hearing to raise a reasonable doubt. See Chambers; Washington v. Texas; Rock v. Arkansas, 107 S. Ct. 2704 (1987); Green v. Georgia, 442 U.S. 95 (1979); Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1976). Due process and the right to present a defense require that testimony with a significant indicia of reliability and directly affecting the determination of guilt or innocence be admitted. A defendant's right to due process and to present witnesses and a complete defense outweigh the State's interest in strict application of an evidentiary rule. Chambers, 410 U.S. at 298-99; see also Pettijohn v. Hall, supra. The exclusion of this evidence would violate the sixth, eighth, and fourteenth amendments. The circuit court erred in refusing to admit the evidence.

Further, even if Chavers' affidavit and other evidence presented at the hearing was hearsay, it would not have been excludable during penalty phase. Hearsay is admissible at penalty phase proceedings so long as the defendant's right of confrontation is protected. See Garcia v. State, 18 Fla. L. Weekly S382 (Fla. June 24, 1993). The State relied solely on Mr. Chavers' trial testimony to support aggravating circumstances. Mr. Chavers' affidavit is at the very least admissible as substantive evidence in relation to the penalty phase.

Mr. Lightbourne requested that the circuit court re-open the evidentiary hearing "to Order Mr. Chavers' presence and conduct a hearing at which he can take the stand and be subjected to

adversarial questioning." (PC-R. 2208). The circuit court re-opened the evidentiary hearing. (PC-R. 2223). The hearing was set for October 15, 1991. On October 15, 1991, Mr. Chavers denied remembering being incarcerated with Mr. Lightbourne or testifying in Mr. Lightbourne's trial or anything about Mr. Lightbourne's trial (PC-R. 1321-23). Mr. Chavers only remembered being present at the prior 3.850 hearings. Therefore, Mr. Chavers was still unavailable, and Mr. Lightbourne again asked the circuit court to consider Mr. Chavers' affidavit as substantive evidence.

Recently, a new trial was ordered in Lewis v. Erickson, 946 F.2d 1361 (8th Cir. 1991), because a State's witness in another case recanted her testimony against Mr. Lewis. The under oath statement in a completely different case was admitted and served as the basis for ordering a new trial:

> The Minnesota Court of Appeals concluded the recanted testimony would not produce a different result on retrial because the recantation could only be used to impeach the victim rather than to show Lewis's innocence. Recanted testimony, however, is grounds for relief from a conviction when it either bears on a witness's credibility or directly on the defendant's guilt. See Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir.1984)(quoting Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)).

946 F.2d at 1362.

Chavers has been in continuous contact with the state attorney's office. His letters to various prosecutors indicate a past and ongoing relationship with the state attorney's office. The state has disclosed letters and tapes of conversations

between the State and Chavers to Mr. Lightbourne. Thus, these communications are newly discovered evidence that show Chavers' agency relationship with the state (Brady), and, in the least, are indicia of reliability in support of admitting Chavers' affidavit as substantive evidence. Outside the courtroom, Chavers has talked openly about and written about his relationship with the state; however, he will not testify in open court. Mr. Lightbourne's circuit court was wrong to not consider this newly discovered evidence of Chavers' ongoing agency relationship with the state. Smith v. State, 565 So. 2d 1293 (Fla. 1990); Jones v. State, 591 So. 2d 911 (Fla. 1991).

At the October 15, 1991 hearing, Mr. Chavers did recall the many letters he had written to the State Attorney's Office and this Court. These letters not only corroborate the affidavit testimony that Mr. Chavers lied to get Mr. Lightbourne on death row, but also that Mr. Chavers was a state agent. Mr. Chavers has been in constant contact with the State Attorney's Office, but has been treated less favorably by the State Attorney's Office since signing the affidavit. Mr. Chavers testified that he had written the many letters. The letters from Mr. Chavers show Mr. Chavers was/is a state agent and Mr. Chavers lied at Mr. Lightbourne's trial.[5]

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

(PC-R. 1478, 2436).

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[5]All the letters quoted below were written by Mr. Chavers.

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

(PC-R. 1479-80, 2437-38).

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

(PC-R. 1481-82, 2434-35).

Mr. King, I know every body is mad at me about changing my story about the murder of Miss. OFarro!

* * *

I've never got a brake from you're officer, it's always have been that I had to tell on someone.

* * *

Mr. King I'm going to close for now but tell Mr. [Black] I want let him down on his case about Miss. OFFarro.

(PC-R. 2382-83).

. . ., if I go to prison this time I don't think I will come out alive sir, I know the state got animosity about the story I suppose to have change about the other murder, that's why they want to give me 20 years.

* * *

Sir, I have not murdered any one and the state act like I have if I had saw a Black guy kill a white kid the state would promise me something than. Sir, Black or white I don't like murder at all, the state want me

> to tell about Ray Williams murder and don't want to promise me anything! Why? because he is Black.

(PC-R. 2386-87).

> the state got so much animosity about I change my story in the first murder that they want to put me away for good. Phillips, I was told by Bill Miller today not to talk to you again with out him being there, if you can help me, in which you can, I don't care what he say.

(PC-R. 2385).

> I'm going to put all my trust in you with helping me get my time cut or something!
>
> * * *
>
> Jim, I will be you're key witness, I know it looks bad by me changing my story in the other wow murder. [sic] Phillips, I have been on the stand before and Miller lawyer want to mess me up, that I promise you!
>
> Jim, the reason I change my story in the other murder case, was because I did want the man to die by my hand. Phillips in the other murder, the first murder trial I was told what happen, but Ray Williams murder I saw what happen! and NO I will never change my mind about Ray Williams murdered or the first murder! Jim, tell Mr. Black I'm ready to get that murder trial back the way it first was!
>
> * * *
>
> Sir, is there that much animosity between what I done in the first murder trial, that the state just don't give a damn about me anymore?

(PC-R. 2394-95).

These letters corroborate Mr. Chavers' affidavit testimony that he struck a deal with the State in exchange for testimony against Mr. Lightbourne, that he was told by the State what to

say, and that he was a state agent. The circuit court ruled that these letters would not come in as substantive evidence (PC-R. 1353); therefore, Mr. Lightbourne was denied a full and fair hearing.

In addition to this Court's concern for Mr. Chavers' affidavit, this Court also was concerned with Mr. Hall's affidavit. The circuit court would not admit this affidavit even though Mr. Hall is dead[6] (PC-R. 1372). Mr. Hall is certainly unavailable, and Mr. Lightbourne is constitutionally entitled to a court's full consider of Mr. Hall's affidavit.

It cannot be said that the circuit court gave a full and fair consideration to Mr. Lightbourne's claims. Failure to consider the evidence violated the Eighth and Fourteenth Amendments, the Confrontation Clause, Mr. Lightbourne's rights to present a defense and to compulsory process, and fundamental fairness. Thus, a new evidentiary hearing is required.

ARGUMENT II

MR. LIGHTBOURNE WAS DENIED AN ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND PRESENTED FALSE EVIDENCE, AND BECAUSE OF NEWLY DISCOVERED EVIDENCE, IN VIOLATION OF MR. LIGHTBOURNE'S CONSTITUTIONAL RIGHTS.

Ian Lightbourne's case has persistently troubled members of this Court. See Lightbourne v. State, 471 So. 2d 27, 29 (Fla. 1985) (Overton, McDonald, and Shaw, JJ., dissenting from

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[6]Mr. Lightbourne proffered evidence concerning his efforts to locate Mr. Hall and the fact that after locating Mr. Hall, but before talking with him, he died. Mr. Hall's death certificate was entered into evidence (PC-R. 2399).

affirmance of trial court order denying Rule 3.850 motion); Lightbourne v. State, 438 So. 2d 380, 392 (Fla. 1983) (direct appeal) (Overton, J., dissenting from denial of new trial); id. at 392 (McDonald, J., dissenting as to sentence). This Court's unsettled feeling resulted in a remand to the circuit court for a full and fair evidentiary hearing regarding the "Brady violations with respect to Chavers and Carson." Lightbourne v. Dugger, 549 So. 2d 1364, 1367 (Fla. 1989).

This Court was troubled by Mr. Chavers' and Mr. Hall's affidavits, as this Court noted:

> However, in an affidavit dated January 29, 1989, attached to Lightbourne's motion, Chavers says that the sheriff's deputies and state attorney's personnel made it clear that they would drop several charges against him if he acted as an informant concerning Lightbourne, and that they pressed him to lie at the trial concerning what Lightbourne had said. Chavers further says that Carson, who was also in the cell, was working for the state, and the police got Carson to lie about what Lightbourne had said by dropping his charges. Lightbourne also submits and affidavit of Jack R. Hall dated January 20, 1989, who says that he was in the cell with Lightbourne the entire time and that he was the only inmate that Lightbourne would talk to. Hall refers to three trusties, including Chavers, being transferred into Lightbourne's cell and alleges he heard them discussing how they were going to get out of jail by telling the police that Lightbourne had made incriminating statements about the murder.

Lightbourne, 549 So. 2d at 1369. This Court ordered an evidentiary hearing on Mr. Lightbourne's claims:

> Accepting the allegations concerning Chavers and Carson at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing with

> respect to whether there was a Brady violation. Moreover, we cannot say that these allegations are procedurally barred. Lightbourne's first motion for postconviction relief did not address Chavers' and Carson's testimony, and the allegations of his current motion sufficiently demonstrate that "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence" contemplated by the exception to the time limits of rule 3.850.

Id. During the evidentiary hearing, the State disclosed new evidence establishing that Chavers' trial testimony was untrue and further impeaching Chavers' trial testimony.

Mr. Lightbourne's conviction and resulting sentence of death hinged on the credibility of jailhouse informants Chavers and Carson. Thus, any information revealing that their trial testimony was untrue or the existence of secret deals, intentions to commit perjury, or an agency relationship with the state would be material to Mr. Lightbourne's defense. Mr. Lightbourne's jury never knew the extent of the State's cooperation with the informants and thus the informants' motive for testifying against Mr. Lightbourne -- leniency. The jury never heard the evidence establishing these witnesses' testimony was not true. Of course, the truth of a witness' testimony and a witness' motive for testifying are material questions of fact for the jury. The improper withholding of information regarding a witness' credibility can be just as violative of the dictates of Brady as the withholding of information regarding a defendant's innocence. United States v. Bagley, 473 U.S. 667 (1985); See Ouimette v.

Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important state's witness is material evidence which must be disclosed by the prosecution. Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). Mr. Lightbourne was precluded from effectively cross-examining important prosecution witness and from effectively presenting a defense.

The prosecution's suppression of evidence favorable to Mr. Lightbourne violated due process. The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as occurred here renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated:

> A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. See United States v. Burroughs, 830 F.2d 1574, 1577-78 (11th Cir 1987, cert. denied, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988). Suppressed evidence is material when "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987)(quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))(plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(en banc). If the prosecution intentionally withholds materials relating to the truth of a witness' testimony or to their witnesses' prior

criminal records or deals cut with the State in exchange for testimony, then a strict standard of materiality is applied -- "'any reasonable likelihood' that this knowing prosecutorial suppression of evidence 'could have affected the judgement of the jury.'" Ouimette, 942 F.2d at 11. Under a newly discovered evidence analysis, the court is to "determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal." Jones, 591 So. 2d at 916.

Material evidence was withheld in Mr. Lightbourne's case or was not available at the time of trial. As is detailed in the Statement of the Facts, Chavers has stated numerous times that his trial testimony regarding Mr. Lightbourne's supposed confessioin was untrue. Chavers received benefits from the State in exchange for his testimony, although at trial he denied receiving such benefits. Carson also expected to receive benefits from the State. The Hall affidavit and Mr. Carnegia's testimony establishes that neither Chavers nor Carson spoke to Mr. Lightbourne about the offense but just made up their accounts, contrary to their trial testimony.

Fred LaTorre was a vital link in the "agency" relationship between Mr. Chavers and the State. Mr. LaTorre is a lieutenant with the Marion County Sheriff's Department, and Mr. LaTorre had spoken to Mr. Chavers regarding another homicide. On Sunday, February 1, 1981, Larry Spangler, who worked at the jail, arranged for Mr. Chavers to call Mr. LaTorre at Mr. LaTorre's home. This first conversation was crucial in building an agency

relationship. At the hearing Mr. LaTorre answered a question about the first conversation:

> Q. Now, on direct you testified that when you took the statement on the telephone from Mr. Chavers on 1, February that he really didn't provide you with any specifics as to the homicide? Is that correct?
>
> A. Yes.

(PC-R. 1155). Mr. LaTorre took notes from this first conversation; however, he testified at the hearing that he destroyed the notes (PC-R. 1144).

Mr. Chavers aided the State with two statements. The first statement taken was on February 2, 1981 (one day after talking to LaTorre on the phone) and a second statement on February 12, 1981. As for the first statement, Mr. LaTorre testified at the hearing:

> He didn't go into a lot of specifics and I tried on that initial interview to attain some background information about Mr. Lightbourn because he said that he had known him prior to being in the cell with him.
>
> * * *
>
> He had never made any indications that Lightbourn had told him he did the incident.

(PC-R. 1128-29). Mr. LaTorre recalls offering to talk to the State Attorney's Office in Mr. Chavers' benefit, <u>after</u> the first statement (PC-R. 1154). However, Mr. LaTorre destroyed his notes from the February 1, 1981 phone call and the tape reorder was not on when this benefit was offered (PC-R. 1154).

At the hearing Mr. LaTorre did recall the many benefits offered to Mr. Chavers prior to the second statement. One of the

benefits was a $200 reward from the Sheriff's Office. Mr. LaTorre suggested that Mr. Chavers learned of the reward from the newspaper which ran stories regarding the homicide (PC-R. 1176). Mr. LaTorre testified that the $200 went from Sheriff Moreland to Gerard King to Mr. LaTorre to Mr. Chavers per Sheriff Moreland's request (PC-R. 1132). This contradicted Mr. Chavers' trial testimony that the $200 had come from the sheriff (R. 792). Immediately after giving Mr. Chavers the $200 reward, Mr. LaTorre took the second statement (PC-R. 1160).

An additional benefit offered Mr. Chavers was that Mr. LaTorre promised to talk to the State Attorney's Office regarding Mr. Chavers' "cooperation" with the State (PC-R. 1135). The State Attorney's Office also worked closely with Mr. Chavers by promising Mr. Chavers' leniency if he would "confess" to several burglaries. Mr. Chavers confessed; however, he would not provide any other details including what happened to the stolen property. These ongoing investigations were then closed. An additional benefit was offered to Mr. Chavers:

> Q. As a matter of fact did you indicate to Mr. Chavers that you would try and talk to the Judge?
>
> A. I said I'd look into it and see what his bond was.
>
> Q. And you said: Well, I'll talk to the Judge?
>
> A. Uh-huh.

(PC-R. 1193). Mr. LaTorre had offered to talk to Judge McNeal, and Mr. LaTorre did this as he testified to at the hearing:

A. Investigator Roy Kugler and Bob Bray were working some investigation with Ocala Police Department and I went to Judge McNeal and told him how Chavers had cooperated with us and supplied information regarding the Lightbourn incident.

(PC-R. 1137). Mr. LaTorre stated that the State was aware of this contact with the Judge and the reward money (PC-R. 1139), but the defense attorneys were not provided this information. Prosecutor Simmons testified that although he was unaware of LaTorre's contact with Judge McNeal, this would have been discoverable information (PC-R. 1215).

These benefits are critical because they all influenced Mr. Chavers' second statement. Mr. LaTorre testified at the hearing that the second statement was far more detailed and "better" than the first statement (PC-R. 1163). It was "better" for the State because:

A. Well, in the second statement to the best of my recollection he indicated that Lightbourn had been involved in -- had been involved in some sexual conduct with the victim.

(PC-R. 1133). This sexual battery alleged by Mr. Chavers in detail at trial was not borne out by the investigation:

Q. When you arrived at the scene of the homicide was there any evidence that indicated to you at that time that the victim had been sexually battered?

A. Not that I would have been specifically cognizant of at that time.

Q. Okay. In fact, what was this -- was the victim clothed at the time you arrived at the scene?

A. Partially, yes.

Q. Okay. Could you explain to the Court what she was wearing?

A. She was wearing a bra and panties.

Q. Was there any indication at the scene that there had been a struggle?

A. Not really, no.

(PC-R. 1180).

This second statement was not only the most influenced statement but it was also the sole support for many of the State's penalty phase arguments focusing on the alleged sexual battery. Thus, Mr. Lightbourne was certainly prejudiced.[7]

Mr. Lightbourne presented evidence showing that the State has withheld evidence. This information was never disclosed to the defense. Thus, the first prong under Stano is met.

In its circuit court post-hearing memoranda, the State never challenged Mr. Lightbourne's claim that the undisclosed evidence was favorable to the Defendant. Further, the state cannot argue that the defense would not have used the undisclosed and newly discovered evidence to advance its theory of defense. Both trial attorneys emphatically stated that they would have used such evidence. The final question under Stano is whether the evidence was material. Material evidence is evidence of a favorable character for the defense which may have affected the outcome of

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[7]This Court must also consider that all these benefits and interactions between Mr. Chavers and the State also prove an agency relationship under United States v. Henry, 447 U.S. 264 (1980), and Massiah v. United States, 84 S. Ct. 1199 (1964). Thus, in addition to being material as impeachment tools challenging Chavers' credibility, these benefits go to the very suppression of Chavers' statements themselves.

the guilt-innocence and/or capital sentencing trial. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87.

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

Pursuant to Ouimette, materiality is established and reversal is required once the reviewing court concludes that there exists "'any reasonable likelihood' that this knowing prosecutorial suppression of evidence 'could have affected the judgement of the jury.'" Ouimette, 942 F.2d at 11. The undisclosed evidence establishes that Chavers' trial testimony was untrue, that he received benefits from the State, and that he was a state agent. He was a pivotal witness who could have been impeached with this evidence. Confidence in the outcome is undermined. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been

different." United States v. Bagley, 473 U.S. 667, 680 (1985). However, it is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here.

Mr. Lightbourne has established that there is a reasonable probability that the disclosure of the information presented at the evidentiary hearing would have resulted in a different outcome. Bagley; Brady. There is more than "any reasonable likelihood" that the State's use of false testimony at trial could have affected the judgment of the jury. Indeed, Mr. Lightbourne has shown that it is probable that the withheld evidence and/or newly discovered evidence would have resulted in an acquittal. Jones. The jailhouse informants were critical to the State's case against Mr. Lightbourne. The nondisclosure of this information denied Mr. Lightbourne his constitutional rights to confront his witnesses, to the effective assistance of counsel, and resulted in a failure of the adversarial process. Confidence in the outcome of the guilt and penalty phases is undermined. A new trial is required.

ARGUMENT III

THE JURY'S DEATH RECOMMENDATION WAS TAINTED BY VAGUE AND OVERBROAD AGGRAVATING CIRCUMSTANCES.

On direct appeal, Mr. Lightbourne challenged the application of the facially vague and overbroad Florida death penalty statute as to him since the jury was not instructed on the narrowing constructions of the aggravating factors and thus the jury was without guidance so as to know that the inapplicable aggravators should not be weighed against the mitigation which had been presented. At the time of Mr. Lightbourne's trial, sec. 921.141, Fla. Stat., provided in pertinent part:

> (5) AGGRAVATING CIRCUMSTANCES.-- Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> * * *
>
> (h) The capital felony was especially heinous, atrocious or cruel.
>
> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The United States Supreme Court recently said, "'there is no serious argument that [the language "especially heinous, cruel or depraved"] is not facially vague.'" Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). Clearly, Florida's statutory language

("especially heinous, atrocious, or cruel") is facially[8] vague and overbroad in violation of the Eighth and Fourteenth Amendments. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Additionally, this Court has held that cold, calculated, and premeditated is facially vague in that without a narrowing construction the aggravator fails to perform a genuine narrowing function. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990).[9]

"[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each

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[8]Perhaps it goes without saying that word "facially" refers to the statute itself without narrowing constructions as adopted in case law. Proffitt v. Florida, 428 U.S. 242 (1976), approved Florida's statute only because the narrowing construction adopted in State v. Dixon was sufficient to comport with the Eighth Amendment. However, it is now clear that simply adopting a narrowing construction is not enough. Where the statute is on its face vague and overbroad (which is the case in Florida), the narrowing constructions must be applied by the sentencer in order to cure the "facial" defect. Richmond v. Lewis, 113 S. Ct. at 535.

[9]As the United States Supreme Court explained in Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988):

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

In the words of the Supreme Court, the statutory language setting forth the "cold, calculated and premeditated" aggravating factor "fails to adequately inform juries what they must find," and thus results in "open-ended discretion." The statutory language is therefore facially vague and overbroad. Thus, the sentencer must know of the narrowing construction.

other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond, 113 S. Ct. at 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.[10] This analysis requires the reviewing court "to determine whether the state courts have further defined the vague terms and if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide some guidance to the sentencer." Walton v. Arizona, 497 U.S. 639, 654 (1990); Arave v. Creech, 52 Cr.L. 2373 (1993). In Mr. Lightbourne's case, the jury instructions did not cure the facially vague and overbroad statute. The jury did not receive instructions as to the narrowing constructions, also known as the elements, of the aggravating circumstances. The jury was left with "open-ended discretion" in violation of Maynard, the Eighth and Fourteenth Amendments, and in violation of due process.

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[10]This is the problem with Mr. Lightbourne's sentence of death. The Florida Supreme Court has adopted narrowing constructions to cure the "facial" defect with the statute. Unfortunately for Mr. Lightbourne, his jury never knew of these "narrowing constructions" and thus could not have applied them in order to cure the facially vague and overbroad statutory language.

In Florida, great weight is given to a jury's recommendation of death. "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992).[11] This indirect weighing of the facially vague and overbroad aggravator violates the Eighth and Fourteenth Amendment. Id. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing constructions. Id. at 2928. See Walton v. Arizona; Arave v. Creech. In other words, the jury must receive guidance "channeling and limiting" its discretion so as to "minimize the risk of wholly arbitrary and capricious action." Maynard, 486 U.S. at 362.

Before Mr. Lightbourne's trial, the defense filed a Motion to Declare Florida Statutes 775.082(1) and 921.141 Unconstitutional. In part, that motion argued that the "heinous, atrocious or cruel" aggravator was unconstitutionally vague because:

> Capital felonies by their very nature would appear to satisfy this requirement. Such criminal activity as pre-meditated murder and child rape were found by the legislature to be of an unusually serious nature based on penalty to be imposed upon

[11]Prior to the decision in Espinosa, the Florida Supreme Court repeatedly refused to apply Maynard, reasoning, "Maynard does not affect Florida's death sentencing procedures." Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990).

> conviction. Proof of the crime 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 pre-meditated 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.

(R. 34-35). At the charge conference preceding the penalty phase, defense counsel objected to the instruction regarding the "heinous, atrocious or cruel" aggravator because it failed to give the jury guidance:

> [BY MR. BURKE, DEFENSE COUNSEL:] The next one is that the capital felony was especially heinous, atrocious or cruel.
>
> BY THE COURT: That's a Jury question.
>
> BY MR. BURKE: 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 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 --

BY THE COURT: How about pitiless?

BY MR. BURKE: 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 knife up until the point where the shot is heard, strangulation by a rope --

BY MR. SIMMOMS: How about rape?

BY THE COURT: How about rape?

BY MR. BURKE: Your Honor, I don't believe that it was proved beyond a reasonable doubt that that occurred before or after.

BY THE COURT: Well, the Jury thought that; so that's denied.

(R. 1448-49).

Defense counsel also objected to the "cold, calculated and premeditated" aggravator and to the application of automatic aggravating factors:

BY MR. BURKE: The capital felony was done in a cold, calculated and premeditated manner --

BY THE COURT: That's denied.

BY MR. BURKE: 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 her, 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 is 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 factor. 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 -- of 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, 49 Legal Edition Second 944. In other words, if the Court understands the argument --

BY THE COURT: I do; I understand. That motion is denied.

(R. 1449-51).

On direct appeal, appellate counsel argued that the "heinous, atrocious or cruel" aggravator was not capable of being properly applied by jurors:

> (viii) "The capital felony was especially heinous, atrocious or cruel." Capital felonies are by their very nature would appear to satisfy 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 crime 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.

(Initial Brief of Appellant, p. 26)(emphasis added). Appellate counsel also argued that this aggravator did not apply under the facts of this case (Id. at 56-58). Counsel further argued, "while all killings are 'heinous' the facts of any given case must be especially heinous for the court to impose a sentence of death" (Id. at 56). Counsel pointed out that the Florida Supreme Court had invalidated this aggravator in other more heinous cases (Id. at 57-58), and counsel concluded, "Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under the requirements of Proffitt v. Florida, 428 U.S. 242 (1976) and Furman v. Georgia, 408 U.S. 238 (1972). See also Godfrey v. Georgia, ___ U.S. ___, 64 L.Ed.2d 398 (1980)." (Id. at 58).

Regarding the "cold, calculated and premeditated" aggravator, appellate counsel argued that this factor did not limit sentencing discretion because "all first degree murder is committed in a 'cold, calculated and premeditated manner' and thus the aggravating circumstance is doubled with the substantive crime" (Initial Brief of Appellant, p. 58), and that "cold, calculated and premeditated" could not be used to support "heinous, atrocious or cruel" (Id.).

Appellate counsel also argued that the felony murder aggravating factor constituted impermissible automatic aggravation which "leaves judges and juries with unfettered, unchanneled discretion, [and] provides no meaningful basis for distinguishing between those felony-murder cases which receive the ultimate penalty and those that receive life" (Initial Brief of Appellant, p. 53, citing Godfrey v. Georgia, 446 U.S. 420 (1980)). Appellate counsel further argued that application of the "avoiding arrest" aggravator constituted automatic aggravation and that the limiting construction of this factor had not been applied (Id. at 54). Finally, appellate counsel argued that the "pecuniary gain" aggravating factor constituted impermissible doubling (Id. at 54-55).

This Court erroneously rejected all these claims on the merits, specifically holding that the aggravating circumstances provided the jury with adequate guidance:

> [T]he defendant attacks the constitutionality of section 921.141, arguing that the aggravating and mitigating circumstances contained in the statute are

> impermissibly vague and overbroad. This Court has ruled on numerous occasions upholding the constitutionality of the section, finding that the statutorily prescribed circumstances were not vague but rather provided "[m]eaningful restraints and guidelines for the discretion of judge and jury." State v. Dixon, 283 So.2d at 9. Subsequent decisions buttress the constitutionality of the statute. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Alvord v. State.

Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983). See also id. at 390-91 (discussing individual aggravating factors and Appellant's arguments). In addition, the trial court found that the issue had been raised on direct appeal (PC-R2. 346)("On appeal, the Defendant repeated the same arguments [attacking the aggravators as vague and overbroad.]")

In Mr. Lightbourne's case, the jury received constitutionally inadequate instructions regarding the "heinous, atrocious, or cruel" and the "cold, calculated and premeditated" aggravating factors. James v. State, 615 So. 2d 668 (Fla. 1993); Espinosa v. Florida, 112 S.Ct. 2926 (1992); Shell v. Mississippi, 111 S.Ct. 313 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). Because a Florida penalty phase jury is a co-sentencer under Florida law, see Espinosa, the Eighth Amendment prohibition against weighing invalid aggravating circumstances applies with equal vigor to what the jury weighs in its deliberations. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). See also

Sochor v. Florida, 112 S.Ct. 2114, 2119 (1992) (there is Eighth Amendment error when the sentencer weighs an invalid aggravating circumstance in reaching the ultimate decision to impose a death sentence).

Mr. Lightbourne's jury was provided the following instruction regarding the aggravating circumstances that could be considered:

> 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.
>
> Atrichous 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, the capital felony, homicide, was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 1489-90).

The instruction on the "heinous, atrocious, or cruel" aggravating circumstance was the same type of instruction struck down by the United States Supreme Court in Shell v. Mississippi, 111 S. Ct. 313 (1990). Further, the instruction regarding "cold, calculated, and premeditated" which tracks the statutory language is equally defective. See Porter v. State, supra.

In James v. State, 615 So. 2d 668 (Fla. 1993), this Court held that claims made pursuant to Espinosa v. Florida were

cognizable in post-conviction proceedings. The Court premised this result upon notions of fairness: "Because of this it would not be fair to deprive him of the Espinosa ruling." James, 615 So. 2d at 669. Clearly, principles of fairness govern Mr. Lightbourne's case as well.

In James, relief was granted in a successor Rule 3.850 motion, precisely the posture in which Mr. Lightbourne finds himself. This Court wrote:

> While this appeal was pending, the United States Supreme Court declared our former instruction on the heinous, atrocious, or cruel aggravator inadequate. Espinosa v. Florida, 112 S.Ct 2926, 120 L.Ed. 854 (1992). Claims that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal. Melendez v. State, no. 75,081 (Fla. Nov. 12, 1992). James, however, objected to the then-standard instruction at trial, asked for an 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.

James, 615 So. 2d at 669(footnote omitted)(emphasis added). This Court went on to vacate Mr. James' death sentence.

James indicates that objecting and raising the issue on direct appeal defeat a procedural bar and make Espinosa claims cognizable in Rule 3.850 motions. Mr. Lightbourne can satisfy all of the James pre-requisites, and is entitled to similar relief.

As discussed above, trial counsel objected to the "heinous, atrocious or cruel" and "cold, calculated and premeditated"

instructions. Here, the State has not and cannot contest that the jury instructions given violated Espinosa v. Florida. Nor has the State contested that Mr. Lightbourne's appellate counsel adequately objected and preserved the Espinosa issue. Instead, the State has simply maintained that trial counsel did not adequately raise the issue. Accordingly, Mr. Lightbourne presented the testimony of Ronald Fox at the evidentiary hearing held on March 2, 1993, in circuit court. Mr. Fox was Mr. Lightbourne's trial counsel.

Attorney Ronald Fox testified at the March 2, 1993, hearing that he represented Mr. Lightbourne at trial. Mr. Fox testified that in reviewing the record of Mr. Lightbourne's trial, he was aware that the jury instructions on the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors were unconstitutionally vague (PC-R2. 167-69, 174-75). Mr. Fox believed that the trial court's overruling of his objections raised a meritorious issue which was properly raised in the direct appeal. Mr. Fox testified that he recognized that at the time of Mr. Lightbourne's trial, this Court had held that the standard jury instructions on aggravating factors were adequate (PC-R2. 172).[12] Mr. Fox also recognized that the jury

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[12]At the evidentiary hearing, Mr. Lightbourne's trial counsel testified:

> I'd remind you all that at the time, the Florida Supreme Court had said that these instructions were proper, so that the vehementness of our objection was tempered somewhat by case law to the contrary.

(PC-R2. 172)

instructions on these aggravating factors tracked the statutory language setting forth these factors. Thus, despite this Court's prior rulings that the jury instructions were adequate, Mr. Fox objected at Mr. Lightbourne's trial that the capital sentencing statute did not sufficiently define the aggravating factors for the jury's consideration (R. 34-35, 1448-51). Mr. Fox believed that this argument was all he could do and needed to do at the time to raise the issue regarding the sufficiency of the jury instructions on aggravating factors. Mr. Fox testified that he believed at the time that the issue should have been objected to at trial and believed that he in fact raised the issue at trial.

Mr. Fox testified that he certainly intended to raise the issue regarding the sufficiency of the jury instructions on aggravating factors, that Mr. Lightbourne did not waive the issue, and that he had no strategic or tactical reason for not raising the issue. Mr. Fox read Espinosa v. Florida, 112 S. Ct. 2926 (1992) prior to the hearing, and testified that he believes his trial court objection in Mr. Lightbourne's case raised the Espinosa issue (PC-R2. 167, 168). If he failed to raise that issue, Mr. Fox had no strategy reason for that failure.

Clearly, Mr. Fox's testimony establishes that to the extent that this Court finds the Espinosa issue was inadequately objected to at trial, it was due to Mr. Fox's ignorance as to what else was necessary to preserve the issue. Ignorance constitutes deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). The deficient performance prejudiced Mr.

Lightbourne under this Court's decision in James v. State, 615 So. 2d 668 (Fla. 1993). It was not until James was decided that Mr. Lightbourne had a claim to present that Mr. Fox rendered ineffective assistance during trial.

Mr. Lightbourne was denied constitutionally adequate instructions regarding aggravating factors because of this Court's law or ineffective assistance of counsel. In addition, on direct appeal this Court addressed the merits of Mr. Lightbourne's challenge to the instructions, and thus no procedural bar can now be applied.

As also discussed above, on direct appeal, appellate counsel raised issues regarding the jury's consideration of several aggravators. As his hearing testimony shows, Mr. Lightbourne's appellate counsel, Judge Lockett, raised an objection to the vagueness of Mr. Lightbourne's penalty-phase instructions:

> Q.[Mr. McClain] In the course of [Mr. Lightbourne's direct appeal brief], did you raise an issue regarding the guidance given the sentencers, the judge and the jury, with reference to aggravating factors?
>
> A.[Judge Lockett] In my opinion, I did so under the law as I understood it at the time. Page 23 of my brief, 3, it seems to me that I state very directly that a number of aggravating circumstances, as enumerated in Florida Statute 921.141, at the time were impermissibly vague and overbroad. I reahed the issue of heinous, atrocious or cruel on Page 26, VIII.
>
> Q. And at the time that you raised these issues, was it your understanding these issues had been preserved at the trial level?
>
> A. Absolutely so. In fact, I reviewed Mr. Fox's arguments in the trial court very

> carefully and I believe every issue that I raised, as I recall, qualifying the obvious that this was 12 years ago, I believe mr. Fox had preserved.
>
> Q. And do you recall whether or not the Florida Supreme Court addressed the merits of your issue?
>
> A. ... It seems to me like they did address it directly.

(PC-R2. 161-62).

This Court erroneously rejected all these claims on the merits, specifically holding that the aggravating circumstances provided the jury with adequate guidance:

> [T]he defendant attacks the constitutionality of section 921.141, arguing that the aggravating and mitigating circumstances contained in the statute are impermissibly vague and overbroad. This Court has ruled on numerous occasions upholding the constitutionality of the section, finding that the statutorily prescribed circumstances were not vague but rather provided "[m]eaningful restraints and guidelines for the discretion of judge and jury." State v. Dixon, 283 So.2d at 9. Subesequent decisions buttress the constitutionality of the statute. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Alvord v. State.

Lightbourne v. State, 438 So. 2d 380, 385 (Fla. 1983). See also id. at 390-91 (discussing individual aggravating factors and Appellant's arguments). In addition, the trial court found that the issue had been raised on direct appeal (PC-R2. 346)("On appeal, the Defendant repeated the same arguments [attaking the

aggravators as vague and overbroad.]") Thus, Mr. Lightbourne's claim has been properly preserved. The circuit court was wrong to apply a procedural bar to Mr. Lightbourne's properly preserved claim. This Court did not find a procedural bar and now this claim must be addressed on the merits or remanded to the circuit court to consider this claim on the merits.

It is clear that Mr. Lightbourne is entitled to Espinosa relief under this Court's recent decision in James v State. James indicates that Mr. Lightbourne's claim is not procedurally barred, is cognizable in a successive Rule 3.850 motion, and that he is entitled to relief.

Mr. Lightbourne's jury was given unconstitutionally vague aggravating circumstances to apply and weigh. No limiting constructions adopted by this Court were given to the jury, despite objections by defense counsel, nor was the jury provided with a proposed instruction which included the constitutionally-mandated limiting constructions. See Dixon v. State; Robinson v. State. The jury's death recommendation was tainted by the invalid aggravating circumstances. See Espinosa; Maynard; Shell.

Mr. Lightbourne has indisputably established that Espinosa error occurred in his case. The state must therefore establish beyond a reasonable doubt that the error was harmless. In Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990), the Supreme Court explained, "it would require a detailed explanation based upon the record for us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless."

In Hitchcock v. State, 614 So. 2d 483 (Fla. 1993), this Court granted relief based on Espinosa error, noting that defense counsel had requested an expanded instruction on that aggravator, objected when the court denied that request, and raised the issue on appeal. Hitchcock, 614 So. 2d at 484. Despite the fact that this Court had previously found that the "heinous, atrocious, or cruel" aggravator was properly found, the Court found that the error was not harmless beyond a reasonable doubt and required resentencing because "[w]e cannot tell what part the instruction played in the jury's consideration of its recommended sentence." Id. In dissent, Justice Grimes stated that the error should be found harmless because four aggravating factors had been found, as well as mitigation, and because the "heinous, atrocious, or cruel" aggravating factor properly applied. Id. Nonetheless, the majority of this Court ordered resentencing, applying the correct harmless error test, because the Court could not "tell what part the instruction played in the jury's consideration of its recommended sentence." Id.

This Court engaged in a similar analysis in James v. State, 615 So. 2d 668 (Fla. 1993). Noting that it had struck the "heinous, atrocious, or cruel" aggravator on appeal, it found that the trial court's consideration of the invalid factor was harmless error. As to the jury's consideration of the invalid factor, however, the Court could not say, beyond a reasonable doubt, "that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same

if the requested expanded instruction had been given." James, 615 So. 2d at 669.

In Mr. Lightbourne's case, as in Hitchcock and James, it cannot be said that the improper instruction had no effect upon the jury or that the jury would not have recommended a life sentence had the expanded instruction been given. The prosecutor in his closing argument relied upon the vague and overbroad language to urge a death sentence. There was no recognition in the prosecutor's argument that "heinous, atrocious or cruel" required "torture." The prosecutor argued "that the instruction is that the crime was especially heinous, atrocious or cruel, not heinous, atrocious and cruel. It's disjunctive" (R. 1461). In fact, the prosecutor argued "I honestly believe that cruel, in the meaning that we find in the infliction or the enjoyment of watching someone suffer through pain, may not be applicable here ... but I have no problem, Ladies and Gentlemen, with you finding that the crime was heinous or atrocious" (R. 1461-62). The prosecutor went on to argue "[y]ou may find that it was cruel in the sense that it was pitiless" (R. 1462). The prosecutor argued "cold, calculated and premeditated," but the prosecutor never acknowledged that this aggravator required heightened premeditation, i.e., a pre-existing plan to kill. But for the vague and overbroad language defining these aggravators, the jury may reasonably have concluded one or both of these aggravators were not present. "[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not

assume it would have made no difference if the thumb had been removed from the death's side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

Mr. Lightbourne's trial court found the two statutory mitigating circumstances of the defendant has no significant history of prior criminal activity and the age of the defendant at the time of the crime. There was also nonstatutory mitigation presented to the trial court only and a wealth of mitigation that could have been presented to the trial court and the jury. Thus, mitigation had been presented to Mr. Lightbourne's jury which would have provided a reasonable basis upon which the jury could have based a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989) (question whether constitutional error was harmless is whether properly instructed jury could have recommended life).

The jury was given unconstitutionally vague and improper instructions which resulted in improper aggravation to weigh against the mitigation. Under Espinosa, James, and Hitchcock, it is clear that Mr. Lightbourne's jury was improperly instructed on the "heinous, atrocious, or cruel" and "cold, calculated and premeditated" aggravating circumstances. Despite the fact that this Court upheld the trial judge's finding of these aggravators, "under Sochor and Espinosa, an error would exist if the jury was instructed improperly on the heinous, atrocious, or cruel factor, whether or not the trial court in its written findings found the same factor to be present." Johnson v. Singletary, 612 So. 2d

575, 576-77 (Fla. 1993). There is no question that Mr. Lightbourne's jury was improperly instructed, see Shell; Maynard, and that the error was harmful. See James; Hitchcock; Espinosa.

Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). "A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer v. Black, 112 S. Ct. 1130, 1139 (1992). Mr. Lightbourne's jury was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972). Application of the harmless beyond a reasonable doubt standard requires this Court to presume an error was harmful unless and until the state proves that there is no possibility that the jury's death vote would have changed but for the extra "thumbs" on the death side of the scale. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987). The state cannot make this showing in Mr. Lightbourne's case and, in fact, James and Hitchcock dictate that the error resulting from a jury that received an unconstitutionally vague instruction on an aggravating factor cannot be harmless beyond a reasonable doubt. Mr. Lightbourne is entitled to relief at this time.

Espinosa was a repudiation of this Court's prior decisions which held that the judge's consideration of the narrowing

construction cured the facially vague and overbroad statutory language. See Smalley v. State, 546 So. 2d 720 (Fla. 1989); Suarez v. State, 481 So. 2d 1201 (Fla. 1985); Deaton v. State, 480 So. 2d 1279 (Fla. 1985); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Espinosa was a change of "fundamental significance." Witt v. State, 387 So. 2d 922, 931 (Fla. 1980). It held that a Florida capital jury must be treated as a sentencer for Maynard and Eighth Amendment purposes.

Moreover, Richmond and Espinosa, taken together, have established that Mr. Lightbourne's sentence of death rests on fundamental error. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Lightbourne's jury was so instructed. Florida law also establishes that narrowing constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Lightbourne's

jury received no instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. The jury did not know that in order to consider the "heinous, atrocious or cruel" aggravator, it must find the "pitiless or conscienceless infliction of torture." Richardson v. State, 604 So. 2d 1107 1109 (Fla. 1992). See Clark v. State, 609 So. 2d 513, 514 (Fla. 1992) ("We have defined this aggravating factor to be applicable where the murder is 'accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim'"). Without this limitation, i.e., this element of the aggravator, "we must presume," Espinosa, 112 S. Ct. at 2928, that the jury placed this extra, improper "thumb" on the death side of the scale.

There was no recognition in the prosecutor's argument that "heinous, atrocious or cruel" required "torture." The prosecutor argued "that the instruction is that the crime was especially heinous, atrocious or cruel, not heinous, atrocious and cruel. It's disjunctive" (R. 1461). In fact, the prosecutor argued "I honestly believe that cruel, in the meaning that we find in the infliction or the enjoyment of watching someone suffer through pain, may not be applicable here ... but I have no problem, Ladies and Gentlemen, with you finding that the crime was heinous or atrocious" (R. 1461-62). The prosecutor went on to argue "[y]ou may find that it was cruel in the sense that it was pitiless" (R. 1462). In fact, Mr. Lightbourne's jury was told

by the prosecutor that he would "have no problem, Ladies and Gentlemen, with you finding that the crime was heinous or atrocious" (R. 1462).

The jury did not know that to find cold, calculated, and premeditated it must find heightened premeditation, i.e., a pre-existing plan to kill. "[T]he evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990).

This failure to instruct the jury on the "elements" of the aggravating factors was fundamental error. Robles v. State, 188 So. 2d 789, 793 (Fla. 1966) ("We hold that since proof of these elements was necessary in order to convict appellant under the felony-murder rule, the court was obligated to instruct the jury concerning them, whether or not requested to do so."). "It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony." State v. Jones, 377 So. 2d 1163 (Fla. 1979). Clearly, the logic of this rule applies with equal force to Mr. Lightbourne's penalty phase where the jury was clearly left to "its own devices" to decide what aggravating factors to place on the death side of the scale.

Without instructions regarding the elements of the aggravating factors, the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. It impinges upon a liberty interest. Thus, the application of the

statute violated due process and constituted fundamental error. State v. Johnson, 18 Fla. L. Weekly at 56. Accordingly, this fundamental error is cognizable in post-conviction proceedings since Espinosa and Richmond are decisions of "fundamental significance" revealing fundamental error. Witt v. State, 387 So. 2d at 931. James v. State, 18 Fla. L. Weekly 139 (March 4, 1993). Since the errors were objected to at trial and raised on appeal,[13] fairness requires that Mr. Lightbourne be afforded the benefit of Richmond and Espinosa.

ARGUMENT IV

IN LIGHT OF JOHNSON V. SINGLETARY, 612 SO. 2D 575 (FLA 1993), THIS COURT ERRED IN DENYING MR. LIGHTBOURNE'S PENALTY-PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS TO MR. LIGHTBOURNE'S JURY.

Mr. Lightbourne raised a penalty-phase ineffective assistance of counsel claim in his first postconviction motion.[14] This Court incorrectly denied Mr. Lightbourne relief on his claim that his jury was deprived of substantial evidence

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[13]To the extent that the State argues counsel failed to adequately object, his performance was deficient under the sixth amendment and Mr. Lightbourne was prejudiced.

[14]Mr. Lightbourne's initial postconviction counsel, Mr. Crawford, agreed to take Mr. Lightbourne's case under the exigencies of a warrant and the fear that an unrepresented Mr. Lightbourne would be executed. At the time, Mr. Crawford was practicing civil appellate litigation in a Philadelphia law firm. With his only support being a second-year law student, Mr. Crawford had less than one week to learn Florida criminal law and Mr. Lightbourne's record on appeal. Mr. Crawford did not have the time or the money to hire a mental health expert. To the extent that Mr. Crawford failed to adequately prepare Mr. Lightbourne's 1985 postconviction appeal, there was a state impediment or ineffective assistance of counsel.

in mitigation, deciding that because the trial judge reviewed a confidential pre-sentence investigation report, the mitigation raised on appeal is "merely cumulative." Lightbourne v. State, 471 So. 2d 27, 28 (Fla. 1989).[15] In Lightbourne v. State, 471 So. 2d 27 (Fla. 1985), this Court denied Mr. Lightbourne's ineffective assistance of counsel claim because:

> Counsel was not ineffective for failing to present mitigating evidence at sentencing. The trial record clearly indicates that the sentencing judge was in fact aware of many of the mitigating factors that counsel on appeal is now presenting to the Court. The lower court was fully aware of the fact that Lightbourne was raised in a "lower socioeconomic home environment," his educational history and religious background.

Lightbourne, 471 So.2d at 28 (emphasis added). The Eleventh Circuit Court of Appeals likewise failed to consider Mr. Lightbourne's substantial mitigation because the **sentencing court** had reviewed much of the mitigation:

> Petitioner asserts that counsel could have, but failed to present evidence of other mitigating circumstances through the testimony of petitioner's friends and family. In support of this contention, petitioner has offered the affidavits of twenty-seven relatives and acquaintances. According to the affiants, petitioner was one of ten illegitimate children raised in a very modest environment. Despite the fact that petitioner was allegedly subjected to severe physical and psychological abuse by an older brother, petitioner was perceived as a happy, well-behaved and popular person. Regardless

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[15]The trial court incorrectly ruled that the pre-sentence investigation report could not be presented to the jury because it was hearsay (R. 1495-96). Hearsay is admissible in penalty phase. Garcia v. State, 18 Fla. L. Weekly S382 (Fla. June 24, 1993).

> of the economic hardships and social disadvantages associated with his home environment, petitioner was purported to be a good student, an excellent athelete and a devoted Catholic. Petitioner alleges that had the judge and **jury** been apprised of these facts, a reasonable probability exists that the result of the sentencing proceeding would have been different.
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> [The Court then relies upon this Court's ruling in Lightbourne, 471 So. 2d at 28.]
>
> [The Court then quotes from the district court's opinion]:
>
> Most of the evidence that Petitioner claims his counsel should have obtained and introduced at the sentencing phase was considered by the **trial judge** before Petitioner was sentenced. The presentence investigation report revealed that Petitioner was an illegitimate son, born and raised in a lower socioeconomic home environment, who had almost no relationship with his father because his father separated from the family when Petitioner was a small child. The comprehensive report also set forth Petitioner's marital and family status, educational background, religious affiliation, interest in riding horses, and employment history. Although the report did not reflect that Petitioner's friends and neighbors described him as a loving, non-violent individual, it did indicate that Petitioner lacked a significant record of prior criminal activity. Essentially, the only evidence now proffered by Petitioner that was not considered by the **trial judge** at sentencing is the testimony of family and friends regarding Petitioner's physical abuse by his older brother and Petitioner's apparent compassionate character.

Lightbourne v. Dugger, 829 F.2d 1012, 1024-25 (11th Cir. 1987)(emphasis added). Mr. Lightbourne re-raised this claim in his January 31, 1989, initial brief to this Court. This Court

again erroneously denied Mr. Lightbourne's claim as previously raised. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

In Espinosa v. Florida, 112 S. Ct. 2926 (1992), the United States Supreme Court ruled:

> echoing the State Supreme Court's reasoning in Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989), the State argues that there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authourity, because, in the Florida scheme, the jury is not "the sentencer" for Eighth Amendment purposes. ... [in] that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation ... Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circmstances.

Espinosa, 112 S. Ct. at 2928. In Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993), this Court ruled:

> Because the Florida penalty-phase jury is a co-sentencer under Florida law, id.; Espinosa v. Florida, ___ U.S. ___, ___, 112 S.Ct. 2926, 2928, 120 L.Ed. 854 (1992), the Eighth Amendment prohibition applies with equal vigor to what the **jury** actually weighs in its deliberations.

Johnson, 612 So. 2d at 576 (emphasis added). Thus, it is not enough that only Mr. Lightbourne's trial judge had been presented mitigation in a pre-sentence investigation report. Mr. Lightbourne was constitutionally entitled to the presentation of mitigation to his jury. Mr. Lightbourne is entitled to Rule 3.850 relief.

CONCLUSION

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

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 24, 1993.

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