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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT I

In response to Mr. Lightbourne's argument that he was denied a full and fair hearing by the trial court's refusal to consider his evidence, the State argues, "the lower court considered [Mr. Lightbourne's evidence] regardless of whether it technically 'admitted' these items into evidence" (Answer at 50; see also Answer at 54 ["the lower court considered all the evidence proffered by Lightbourne even though it technically did not admit it"]). The State thus appears to concede that if the lower court had not considered Mr. Lightbourne's evidence, the hearing was not full and fair. The State's argument reflects a fundamental misunderstanding of the rules of evidence[1] and misrepresents what occurred at the evidentiary hearing. Mr. Lightbourne was denied a full and fair hearing.

That the lower court refused to admit the evidence--and refused to consider the evidence--is clear from the record, notwithstanding the State's misrepresentations. For example, the State's argument relies on the lower court's statement that "[i]f that's all that Mr. Taylor would be testifying about, I'll consider that as a proffer of what he would say" (Answer at 50,

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[1]The State's argument that the lower court "considered" the evidence "proffered" by Mr. Lightbourne reflects a misunderstanding of the difference between "evidence" and a "proffer." A "proffer" is an offer of the proof that would be presented if a court would allow it. A proffer is made in order to inform the court what the evidence would be and to preserve the record for appeal. See C. Ehrhardt, Florida Evidence, Sec. 104.3 (2nd ed. 1984). The purpose of the proffer is to convince the lower court to admit the evidence or to establish on appeal that the lower court erred. Id. That is, a proffer is made only when the lower court refuses to admit the evidence.

quoting PC-R. 1261).[2] The State conveniently ignores the rest of the lower court's statement: "And even if that is what he would testify about, it would seem to me that is not going to be admissible as substantive evidence" (PC-R. 1261).

The State also ignores the numerous times the lower court stated that it would not consider Mr. Lightbourne's evidence. Regarding Chavers' numerous statements,[3] the lower court stated, "[I]t seems to me that none of this evidence that you are offering is admissible" (PC-R. 1261). After more objections and argument regarding this ruling (PC-R. 1262-75), the court then asked how Mr. Lightbourne was going to prove his claims:

> What evidence do you have that false evidence was used, excluding these statements from Mr. Chavers? His conversations? His affidavit? His letters?
> This testimony from Mr. Taylor? Excluding that as substantive evidence, what evidence do you have that there was any false evidence used at the trial?

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[2]During the evidentiary hearing, Mr. Taylor shared a jail cell with Theodore Chavers. Mr. Taylor wrote 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).

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). The State argues that this transfer occurred because Mr. Lightbourne's counsel did not inform the jail that Taylor "was scheduled to testify on that particular day" (Answer at 51). However, Mr. Lightbourne's counsel had just learned of Mr. Taylor's potential as a witness the previous evening and thus had not been able to speak to Mr. Taylor until that morning (PC-R. 1254, 1256).

[3]These statements include Chavers' affidavit, his letters to the prosecutors, his conversation with Mr. Taylor, and his taped conversations with the prosecutors.

(PC-R. 1276) (emphasis added). Of course, the lower court's erroneous rulings did not allow Mr. Lightbourne to prove his claims. The court later again refused to admit Chavers' affidavit (PC-R. 1357).

After Mr. Lightbourne's counsel questioned Chavers about his numerous letters to the prosecutors, Mr. Lightbourne moved that these letters be admitted in evidence. Counsel argued that Chavers had admitted writing the letters, had acknowledged that the letters were in his handwriting, had remembered writing the letters, and had explained parts of the letters (PC-R. 1352-53). Counsel also pointed out that the State had been given the opportunity to cross-examine Chavers about this testimony but had waived cross-examination (PC-R. 1353). The court nevertheless refused to admit the letters into evidence (Id.). Notwithstanding the State's misrepresentations, it is clear that the lower court not only excluded Mr. Lightbourne's evidence but also refused to consider that evidence.

While arguing that the lower court considered Mr. Lightbourne's evidence, the State also argues that it was proper for the lower court not to admit Mr. Lightbourne's evidence. The State's argument simply ignores the purpose of the evidentiary hearing. In his Rule 3.850 motion, Mr. Lightbourne alleged certain facts. Some of the facts alleged by Mr. Lightbourne were that contrary to his trial testimony Chavers had admitted that his trial testimony was untrue, that he had been recruited by law enforcement to obtain statements from Mr. Lightbourne and that he

expected benefits in exchange for his cooperation. On the basis of these allegations, this Court ordered an evidentiary hearing. The purpose of the hearing was to establish whether or not Chavers had made the statements alleged in the Rule 3.850 motion. At the hearing, Chavers acknowledged that his signature was on the affidavit (PC-R. 799); the State provided tape recordings on which Chavers acknowledged signing the affidavit, described how the affidavit was produced,[4] and stated that his trial testimony was untrue (PC-R2. 101-04, 107-08); the defense presented Chavers' numerous letters to the prosecutors saying he had lied in Mr. Lightbourne's case; and the defense tried to present evidence from Mr. Taylor that Chavers had told Taylor he lied at Mr. Lightbourne's trial. In short, Mr. Lightbourne established that Chavers had made the statements saying that his trial testimony was untrue. This was the purpose of the evidentiary hearing and the lower court should have considered the evidence.

The State's argument also ignores the fact that the evidence which Mr. Lightbourne attempted to present at the evidentiary hearing would unquestionably have been admissible at Mr. Lightbourne's trial. At trial, the State presented Chavers' testimony regarding incriminating statements allegedly made by Mr. Lightbourne. Had Chavers' numerous statements indicating

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[4]On the tape Chavers says that he was "straight" when he spoke to Mr. Lightbourne's representatives (PC-R2. 107). He talked to the investigator, who "collected everything I said" (Id.), and "put it on paper" (PC-R2. 108). After what he said was on paper, the investigator "asked me was this this or that, that there right there" (Id.).

that this testimony was untrue been available at trial, the defense could have cross-examined Chavers about these statements. For example, regarding Chavers' affidavit, the defense could have asked Chavers whether he signed a statement saying that his trial testimony was untrue. Had Chavers denied signing such a statement, the statement could have been admitted into evidence. See Fla. Stat. sec. 90.614. The defense could have asked Chavers whether he told Mr. Taylor that his testimony was untrue. Had Chavers denied this, Mr. Taylor could have testified to Chavers' statement. Id. The defense could have asked Chavers whether he had told the prosecutors that his testimony was untrue. Had Chavers denied this, the tape recording of Chavers' conversation with the prosecutors could have been admitted. Id.

The question is whether any withheld evidence was favorable and material, see United States v. Bagley, 473 U.S. 667 (1985); Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990) (en banc), or whether there is "any reasonable likelihood" that the State's use of false and misleading testimony at trial could have affected the judgment of the jury. Bagley. Thus, any questions regarding the admissibility of such evidence concern whether the evidence could have been used at trial. Therefore, in Mr. Lightbourne's case, the question for the lower court was whether any of the evidence could have been used at trial. Clearly, the evidence could have been used at trial and therefore should have been considered by the lower court.

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. It clearly was.

A comparison of some of the evidence the lower court did admit with the evidence the court refused to admit illustrates that the court's refusal to admit and consider much of Mr. Lightbourne's evidence was erroneous. The court refused to admit Chavers' affidavit, Chavers' letters to the prosecutors, Chavers' taped conversation with the prosecutor, and Mr. Taylor's testimony regarding his conversations with Chavers on the grounds that this evidence was hearsay. However, the court admitted the testimony of Richard Carnegia, who testified that he had heard Chavers planning to make up stories about Mr. Lightbourne in order to get out of jail (PC-R. 558, 561, 573). The lower court also admitted Theophilus Carson's letter to prosecutor Gill asking for money and assistance with his Tampa charges (PC-R. 131-32, 2439). This evidence was properly admitted, as it clearly could have been used as impeachment at trial. The lower court's refusal to admit other evidence which could also have been used as impeachment at trial was illogical and erroneous.

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 affidavit, his 1989 statements to Mr. Phillips, his 1990 statements to Mr. Taylor) that his trial testimony 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 argued that Mr. Chavers' affidavit was admissible into evidence as not hearsay, and Mr. Lightbourne referenced Fla. Stat. sec. 90.804(2)(c) (1990).[5] Mr.

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[5]The argument that the affidavit and Chavers' other statements are not hearsay is that they were not offered for the truth of the matter asserted but to show that Chavers had made statements which differed from his trial testimony. As to Fla. Stat. sec. 90.804(2)(c), the argument is that the statements were against Chavers' interest. Regardless of the statute of limitations, Chavers could certainly have believed he could be prosecuted for perjury. Additionally, as Chavers' numerous (continued...)

Lightbourne also argued that the Constitution requires that his evidence be admitted. The State, however, argues that the evidence should not have been admitted because it "bore no signs of reliability [and] was not critical to Lightbourne's defense" (Answer at 54-55).

The State has ignored the indicia of reliability discussed in Mr. Lightbourne's initial brief. 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 acknowledged signing the affidavit, never said the affidavit was untrue, and 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

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[5](...continued)
letters to the prosecutors clearly reflect, Chavers knew that retreating from his trial testimony would result in harsh treatment by the State. See, e.g., PC-R. 2385 ("the state got so much animosity about I change my story in one first murder that they want to put my away for good"); PC-R. 2388 ("So you're office is so mad with me abut changing my story in the other murder no body wants to help me"). Mr. Chavers clearly believed that changing his testimony was against his interest, whether his statements were technically against interest or not. The purpose of the statements against interest exception is to assure reliability. That purpose is served here, where Chavers believed his statements were against interest.

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. At the hearing, Chavers testified that his signature was on the affidavit (PC-R. 799).[6]

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.

The State also argues that the evidence was not admissible because it was not "critical" to Mr. Lightbourne's defense (Answer at 54-55). The State completely ignores the fact that without Chavers and Carson, the State's case at trial was entirely circumstantial. After the State rested at trial, the defense argued that Mr. Lightbourne should be acquitted because

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[6]As Mr. Lightbourne's initial brief explained (pp. 49-50), investigator Theresa Farley was present when Chavers reviewed and signed the affidavit. The State argues that the affidavit is not reliable because of Ms. Farley's participation (Answer at 60-62). When the State made this argument at the hearing, the lower court expressly refused to find that CCR did anything improper in obtaining the affidavit (PC-R. 1267).

the State's case was circumstantial. The court replied that the State did have direct evidence from Chavers and Carson: "Now, the case isn't all circumstantial. I heard two witnesses up here testify that the Defendant made two statements against interest" (R. 1277). During closing argument at trial, the State relied on Chavers' and Carson's testimony to argue that the evidence was not all circumstantial. "Don't let anybody throughout the rest of this trial try to convince you that this is a purely circumstantial case" (R. 1382A); "We've got some direct testimony . . . by two jailmates of the Defendant" (R. 1383). The only direct evidence that Mr. Lightbourne committed murder came from Chavers and Carson.[7] The only direct evidence that Mr. Lightbourne committed burglary came from Chavers and Carson.[8] The only direct evidence of sexual battery came from Chavers and Carson.[9] At the penalty phase, the only direct evidence of the felony murder, pecuniary gain, avoiding arrest, heinous, atrocious or cruel, and cold, calculated and premeditated

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[7]There was no physical evidence such as fingerprints. The evidence upon which the State's brief relies -- the gun, pubic hair, semen, and the victim's necklace -- was all circumstantial, as the court's and prosecutor's statements at trial establish.

[8]The only other evidence of burglary was a broken window screen, which of course revealed nothing about who broke the screen.

[9]Other than Chavers and Carson, there was no evidence of sexual battery, only evidence indicating the victim had recently had sexual relations.

aggravating factors came from Chavers and Carson.[10] Thus, without Chavers and Carson, the State would have had to prove that its circumstantial evidence was inconsistent with any reasonable hypothesis of innocence. See Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). Evidence impeaching Chavers and Carson was clearly "critical" to Mr. Lightbourne's defense, at both the guilt/innocence and penalty phases.

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

Regarding Mr. Lightbourne's claims that the State withheld material, exculpatory evidence, that the State presented false and misleading evidence at trial, and that newly discovered evidence entitles Mr. Lightbourne to a new trial, the State argues only that the evidence is not material. Contrary to the

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[10]Chavers and Carson provided the only direct evidence of the felony murder and pecuniary gain aggravators because they provided the only direct evidence that Mr. Lightbourne committed burglary and sexual battery. Carson's testimony that Mr. Lightbourne said he killed the victim because she could identify him is the only direct evidence of the avoiding arrest aggravator. As to the heinous, atrocious or cruel and cold, calculated and premeditated aggravators, Chavers and Carson were the only witnesses who provided information about Mr. Lightbourne's intent at the time of the murder, about the victim's fear and pleading not to be killed, and about how the offense occurred. Without this testimony, the evidence showed only that the victim had been shot once in the head.

State's arguments, the evidence is material to Mr. Lightbourne's defense, and Mr. Lightbourne is entitled to a new trial and/or resentencing.

The State concedes that the State possessed exculpatory evidence. The State points out that the first step in analyzing a Brady claim is determining whether the government possessed evidence favorable to the defendant (Answer at 49, citing Hegwood v. State, 575 So. 2d 170 (Fla. 1991)). The State then argues, "although the first requirement enunciated in Hegwood is applicable to all the evidence adduced by Lightbourne at the hearing, none of the other requirements are applicable because Lightbourne knew about and adequately explored at trial each ground on which he now claims a Brady violation" (Answer at 49-50) (emphasis added). The State thus concedes that the government possessed the evidence and that the evidence was exculpatory.[11] The remainder of the State's argument addresses only the materiality of the evidence.

The State's materiality argument greatly oversimplifies the evidence presented at the hearing and its significance. That evidence showed that Chavers' trial testimony that Mr. Lightbourne made incriminating statements was not true, that Chavers was an agent of the State attempting to deliberately elicit incriminating statements from Mr. Lightbourne, and that Chavers expected and received benefits in exchange for his

[11]The State's brief does not once refer to the newly discovered evidence aspect of Mr. Lightbourne's claim.

assistance to the State. Regarding Carson, the evidence presented at the hearing showed that Carson's trial testimony that Mr. Lightbourne spontaneously made incriminating statements was not true and that Carson expected to receive benefit in exchange for his assistance to the State. The evidence showed that Chavers was telling other inmates in Mr. Lightbourne's jail cell that he knew how he and they could get out of jail--by telling the police that Mr. Lightbourne had confessed. The evidence showed that Mr. Lightbourne denied committing the offense to others in the cell and that at least one inmate told the State that Mr. Lightbourne had denied committing the offense. The evidence showed that Chavers lied at trial regarding the basis for his release from jail and regarding his expectation that the State would assist him with his pending charges. The evidence showed that Carson lied at trial when he said he did not expect or ask for any assistance from the State when in fact Carson believed that the State was going to give him money and assist him with his pending Tampa charges. The State's brief simply does not mention these facts.

Rather than address the evidence that really came out at the hearing, the State makes a general argument that defense counsel fully explored everything at trial through cross-examination (Answer at 56, 57). For example, the State argues that "Lightbourne's counsel fully covered the 'benefits' aspect with Chavers, Carson, and LaTorre" (Answer at 57). The State simply does not understand that just because defense counsel <u>asked</u> the

witnesses if they expected any benefits is not the same as counsel having concrete information that the witnesses indeed did expect and receive benefits, particularly when the witnesses denied having any expectation of benefit. Thus, although able to bring out that Chavers had been facing an escape charge (R. 1165), defense counsel was not able to present evidence that the State had dismissed the escape charge prior to Chavers' testimony (Def. Ex. 2A), despite the fact that a jail corrections officer was an eyewitness to the escape (PC-R. 358). Rather, Chavers testified that he had been released on recognizance on the escape charge (R. 1165). Additionally, when Chavers testified that he had put up a $5000 bond through bondsman Baillie on two of his charges (R. 1165), defense counsel had not been told and thus could not bring out that this testimony was false, as Baillie testified at the hearing (PC-R. 215), and that Chavers really was released on recognizance at the direction of the State Attorney's Office (Def. Ex. 3). Although the State brought out that Chavers received $200 from the sheriff (R. 1119), defense counsel had not been told and thus could not bring out that this money was paid to Chavers by detective LaTorre less than two hours before Chavers gave his second and most detailed statement regarding Mr. Lightbourne's supposed statements (PC-R. 204; Def. Ex. 12B). When Carson testified that he had not asked for and did not expect any benefit from the State (R. 856), defense counsel had not been told and thus could not bring out that Carson indeed did expect money and assistance with his Tampa charges from the State

(PC-R. 2439). Defense counsel was also unable to elicit testimony that after Mr. Lightbourne's trial, prosecutor Simmons told the Hillsborough County State Attorney's office about Carson's cooperation in Mr. Lightbourne's case, as Simmons testified at the evidentiary hearing (PC-R. 1232). The State's argument that cross-examination adequately covered any benefits the witnesses expected is thus patently erroneous.

The State's argument that cross-examination fully explored all matters presented at the evidentiary hearing (Answer at 56) is simply a broad generalization with no support in the record. Because the State did not disclose the information, cross-examination certainly did not explore the fact that Chavers had told others in the cell that the way to get out of jail was to tell the State that Mr. Lightbourne confessed (PC-R. 558, 561). Because the State did not disclose the information, cross-examination certainly did not explore the fact that Chavers had told a cellmate that his testimony at Mr. Lightbourne's trial was false (PC-R. 1259). Cross-examination certainly did not explore the numerous letters Chavers wrote the State saying he had lied to help the State in Mr. Lightbourne's case (PC-R. 1478, 1481-82, 2434-35). Cross-examination certainly did not explore the taped conversation with the State in which Chavers stated that his trial testimony was false (PC-R2. 101-04).

The State next argues at length that each individual piece of evidence presented at the hearing does not show that the witnesses' trial testimony was untruthful (Answer at 57-70).

This argument omits mentioning some of the evidence entirely, ignores what the evidence the State bothers to discuss does show, demonstrates a total ignorance of how evidence functions, and fails to consider the cumulative effect of the evidence.

The State argues that Chavers' statements do not say that he lied at Mr. Lightbourne's trial. However, this argument does not mention significant evidence. In his taped conversation with the State, Chavers acknowledged signing the affidavit and never said that the affidavit was untrue (PC-R2. 101-04). In that conversation Chavers stated that his testimony at Mr. Lightbourne's trial was untrue (PC-R2. 102) ("[Q]: So you made up all that stuff that you testified before Judge Swaggart before at the trial? [A]: Yes sir. Besides that, all of that was just a lie"). Likewise, the State's argument does not mention the proffered testimony of jail inmate Taylor, who would have testified that Chavers had said that he lied at Mr. Lightbourne's trial and that Chavers knew that Mr. Lightbourne did not commit the offense (PC-R. 1259).

Regarding the evidence it does discuss, the State simply ignores what that evidence shows. For example, the State argues that Carson's letter to the prosecutors does not show that Carson lied (Answer at 57-58). The State simply neglects to mention that this letter says that Carson expected money from the State and expected assistance with his Tampa charges (PC-R. 2439). At trial Carson testified that he neither asked for nor expected anything from the State (R. 856). The letter shows that this

testimony was not truthful.

The State argues that Mr. Carnegia's testimony does not impeach Carson (Answer at 59). At the hearing, Mr. Carnegia testified that while he was in Mr. Lightbourne's cell, Mr. Lightbourne consistently denied committing the offense (PC-R. 559, 597). Perhaps more significantly, Mr. Carnegia testified that while in Mr. Lightbourne's cell, Chavers was trying to recruit other inmates in the cell to tell the State that Mr. Lightbourne had confessed (PC-R. 558, 561). The State's argument ignores the obvious inference a jury could draw from this evidence--i.e., that Chavers and the others in the cell, including Carson, believed they could get out of jail by assisting the State and that they therefore made up their stories about Mr. Lightbourne's supposed statements. Clearly, this evidence impeaches the truthfulness of Carson's trial testimony.

Similarly, the State argues that Mr. Hall's affidavit does not show that witnesses lied at trial (Answer at 59-60). The State ignores the facts that Mr. Hall's affidavit states that he observed other inmates huddling together conferring in the cell, that the other inmates were talking about Mr. Lightbourne and a murder case, that he had heard Chavers talking about what the inmates were going to tell the police about Mr. Lightbourne, that he heard Chavers say they were going to say that Mr. Lightbourne told the inmates all about the murder, and that he heard Chavers say that he had gotten out of jail this way before (PC-R. 1401-02). Again, the obvious inference from Mr. Hall's affidavit--

which the State totally ignores--is that Chavers and the other inmates were going to make up stories about Mr. Lightbourne in order to get themselves out of jail. Again, this inference impeaches the truthfulness of Chavers' and Carson's trial testimony.

In the same vein, the State argues that Chavers' affidavit does not show that he lied at trial (Answer at 63). The short answer to this argument is that this Court relied in part on Chavers' affidavit when the Court remanded Mr. Lightbourne's case for an evidentiary hearing. If the affidavit had no impact upon Chavers' trial testimony, this Court surely would not have ordered a hearing. The State's argument simply ignores the fact that Chavers' affidavit calls into question all of Chavers' testimony. The affidavit says that Chavers expected assistance from the State in exchange for his cooperation; the affidavit says that detective LaTorre's testimony that Chavers was not an agent who was sent in to elicit statements from Mr. Lightbourne was not truthful; the affidavit says that Carson's trial testimony that Mr. Lightbourne admitted to the offense was not true; the affidavit says that the State pressed Chavers for details about what Mr. Lightbourne said even though Chavers did not know any details (PC-R. 1396-99, 2441-44). Again, contrary to the State's rather simplistical argument, the affidavit indicates that everything Chavers said is questionable.

Finally, the State argues that none of Chavers' numerous letters to the prosecutors say that Chavers lied at trial (Answer

at 64-70). Contrary to the State's argument, the letters say things such as "I have lied to help get what you wanted, that black nigger on death row" and refer to "the man I lied on and help your office put on death row" (Def. Ex. 7). How else could Chavers have helped get Mr. Lightbourne on death row except by lying at trial? The letters say, "I hope and trust you get me out after the trial is over. . . . I will do my best at the trial" (PC-R. 2398), and "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" (PC-R. 2397). These statements certainly contradict Chavers' trial testimony that he expected nothing from the State in exchange for his cooperation.

Individually and cumulatively the evidence presented at the hearing casts substantial doubt upon Chavers' and Carson's trial testimony. The evidence indicates that they both expected the State to help them get out of jail and expected to obtain assistance on pending charges, matters which they both adamantly denied at trial. The evidence indicates that the stories these witnesses told at trial were untrue. Contrary to the State's broad generalizations and oversimplification, the evidence was material to Mr. Lightbourne's case.

The State falls back on arguing that Chavers and Carson were not important to the State's case at trial and therefore evidence impeaching their trial testimony has no significance (Answer at 56). This Court knew about the evidence at trial when it ordered an evidentiary hearing and did not find that evidence overcame

Mr. Lightbourne's claim. In order to receive an evidentiary hearing, a defendant must plead allegations which, if true, establish a basis for relief. Mr. Lightbourne pled evidence indicating that Chavers' and Carson's trial testimony was not truthful. In ordering an evidentiary hearing, this Court thus recognized that if these allegations were true, Mr. Lightbourne would be entitled to relief. Thus, in ordering an evidentiary hearing, this Court has already recognized that Chavers' and Carson's trial testimony was important.

Moreover, the State's case at trial was not anywhere near as strong without Chavers and Carson as the State would now have the Court believe (Answer at 56). In fact, at the evidentiary hearing, trial counsel testified that without Chavers and Carson, the State's case was entirely circumstantial with no direct evidence linking Mr. Lightbourne to the offense (PC-R. 49-50, 280-81, 274, 236-38). At trial, when defense counsel argued that the court should enter a judgment of acquittal because the State's case was entirely circumstantial, the court responded that Chavers and Carson had provided direct evidence: "Now, the case isn't all circumstantial. I heard two witnesses up here testify that the Defendant made two statements against interest" (R. 1277). In closing argument at trial, the State relied on Chavers and Carson to argue that the State's case was not entirely circumstantial: "Don't let anybody throughout the rest of this trial try to convince you that this is a purely circumstantial case" (R. 1382A); "We've got some direct testimony

. . . by two jailmates of the Defendant" (R. 1383). Thus, without Chavers and Carson, the State would have had to prove that its circumstantial evidence was inconsistent with any reasonable hypothesis of innocence. See Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

The State argues that other "significant" evidence was presented at trial which rendered Chavers and Carson unimportant (Answer at 56). However, the State ignores that the only direct evidence that Mr. Lightbourne committed murder came from Chavers and Carson. The only direct evidence that Mr. Lightbourne committed burglary came from Chavers and Carson. The only direct evidence of sexual battery came from Chavers and Carson. At the penalty phase, the only direct evidence of the felony murder, pecuniary gain, avoiding arrest, heinous, atrocious or cruel, and cold, calculated and premeditated aggravating factors came from Chavers and Carson. Without Chavers and Carson, the State had no direct evidence, much less "significant" evidence.

The evidence presented at the hearing establishes that Mr. Lightbourne is entitled to relief. The evidence establishes that Chavers' trial testimony about Mr. Lightbourne's supposed statements was untrue, that Chavers expected and received benefits from the State in exchange for his testimony, and that Chavers was a state agent sent into Mr. Lightbourne's cell to deliberately elicit statements from Mr. Lightbourne. The evidence also establishes that Carson's trial testimony about Mr. Lightbourne's supposed statements was untrue and that Carson

expected and received benefits from the State in exchange for his testimony. Chavers and Carson provided the only direct evidence against Mr. Lightbourne at both the guilt/innocence and penalty phases. They were critical witnesses whose testimony would have been substantially impeached--if not conclusively rebutted--by the evidence presented at the evidentiary hearing.

Regarding the exculpatory evidence not disclosed by the State, a new trial is required if 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). A reasonable probability is one that undermines confidence in the outcome. Id. Here, where the only direct evidence against Mr. Lightbourne came from Chavers and Carson, and where substantial evidence indicates their testimony was not truthful, confidence in the outcome must be undermined. This is particularly true of the penalty phase, where the testimony of Chavers and Carson was necessary to support all of the aggravating circumstances found by the court. Additionally, had the truth about Chavers' agency status been disclosed, it is reasonably probable that Chavers' testimony would have been suppressed under United States v. Henry, 447 U.S. 264 (1980).[12]

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[12]The State's argument that the Henry aspect of Mr. Lightbourne's claim cannot be considered because it was raised and ruled upon on direct appeal is incorrect. On direct appeal, this Court did not have the evidence which has now been disclosed that Chavers was acting as a state agent when he was placed in Mr. Lightbourne's cell.

Regarding the State's use of false and misleading testimony at trial, a new trial is required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Bagley, 473 U.S. at 678, quoting, United States v. Agurs, 427 U.S. 97, 103 (1976). This standard requires relief unless the State's failure to disclose that false testimony was used to convict the defendant is harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679-80. Here, it cannot be said that the failure to disclose that Chavers' and Carson's testimony was false was harmless beyond a reasonable doubt. Again, Chavers and Carson provided the only direct evidence against Mr. Lightbourne, their testimony was necessary to support all of the aggravating factors found by the court, and Chavers falsely testified that he was not a state agent. In light of the new evidence there is every "reasonable likelihood" that the false and misleading evidence affected the guilt/innocence phase, the penalty phase, and the motion to suppress Chavers' testimony under Henry.

The evidence presented at the evidentiary hearing which was previously undisclosed by the State substantially impeaches Chavers' and Carson's testimony and thus undermines confidence in the outcome of Mr. Lightbourne's trial. Certainly the State cannot show--and has not shown--that the false and misleading evidence presented at Mr. Lightbourne's trial was harmless beyond a reasonable doubt. 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. A new trial and/or resentencing is required.

ARGUMENT III

The State argues that Mr. Lightbourne's claim is procedurally barred because "he failed to preserve these points for appellate review" (Answer at 73). However, the State recognizes that at trial the defense argued that the aggravating factors at issue "were unconstitutional because they applied to all first degree murders" (Answer at 78). The State appears not to understand that the argument made at trial is a vagueness argument -- i.e., in arguing that the aggravators could be applied to all first degree murders, defense counsel was arguing that the aggravators were not sufficiently defined to narrow their application. Mr. Lightbourne's claim is before this Court on the merits. See James v. State, 615 So. 2d 668, 669 (Fla. 1993)("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")(emphasis added).

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.

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 also recognized that the jury instructions on these aggravating factors tracked the statutory language setting forth these factors. Thus, 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 raised 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 of the law constitutes deficient performance. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Mr. Fox's performance was deficient in that he failed to know basic principles regarding how to preserve an objection to a jury instruction.[13]

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. Had Mr. Fox properly preserved the issue, Mr. Lightbourne would be entitled to relief under James.

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:

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[13]The deficient performance was not a failure to anticipate a change in the law but a failure to know how to preserve an issue. Mr. Fox testified that he believed the jury instructions violated constitutional requirements that a capital sentencer's discretion be narrowed and channeled. His failure, if any, was not knowing how to preserve this objection.

> 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 reached 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).

On direct appeal, 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.]") 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.

The state must therefore establish beyond a reasonable doubt that the errors were 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. 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. at 484. 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 proper instructions 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. Moreover, as the State's brief demonstrates, application of these aggravators depended heavily upon the testimony of Chavers and Carson, the only witnesses who provided any information about Mr. Lightbourne's state of mind at the time of the offense or about how the murder actually occurred (See Answer at 79).

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. This Court has held that these are the two "most serious" aggravators. See Maxwell v. State, 603 So. 2d 490, 493 and n.4 (Fla. 1992). "[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.[14] Despite the fact

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[14]The State argues that Porter v. State, 564 So. 2d 1060 (Fla. 1990), does not establish that the cold, calculated and premeditated aggravator is vague (Answer at 81). However, the State recognizes that Porter holds that "heightened premeditation" has been adopted as the definition of this aggravator to so that the aggravator would not be applied to (continued...)

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.

Mr. Lightbourne is entitled to resentencing.

CONCLUSION

Based upon the foregoing and upon his Initial Brief, Mr. Lightbourne respectfully urges that this Court reverse the lower court, order a new trial and/or resentencing, and grant all other relief which the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing reply brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 28, 1994.

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[14](...continued)
every first degree murder. Recognizing that the aggravator must be further defined in order to assure rational and limited application is the same as recognizing that without the definition the aggravator is vague and overbroad.

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