IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

Appellant,

v. Case #: **89,526**

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK S. DUNN
Assistant Attorney General
Florida Bar #0471852

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-4580

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

I. Procedural History

A. *Lightbourne I*[1]

At Lightbourne's 1981 trial, Theodore Chavers testified on direct examination that he, Lightbourne, Rick Carnegia, Larry Emanuel, and others shared a jail cell (OR/1107).[2] Chavers recalled that Lightbourne told him that investigators had spoken with him about the O'Farrell murder, that he might be the one who killed her, and that the gun Lightbourne had might be the one that killed the victim (OR/1108). Chavers later discovered that no investigators had spoken with Lightbourne (OR/1108-09). Lightbourne told Chavers that, when police officers stopped him, they found a gun in his jacket pocket (OR/1109). Chavers recalled

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[1] *Lightbourne v. State*, 438 So.2d 380 (Fla. 1983). Lightbourne's "Introduction" to the Statement of the Facts in his initial brief at p.3 is argumentative, and provides grounds for at least that portion to be struck from his brief. In fact, it sets the tone for the remainder of his rendition of the facts.

[2] Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Lightbourne" or Defendant. Appellee will be identified as the "State". "OR" will designate the Record on Direct Appeal. "PCR" will designate the Record for Lightbourne's first post-conviction evidentiary hearing. *See Lightbourne v. State*, 644 So.2d 54 (Fla. 1994). "PCSR" represents the supplemental record to the first post-conviction evidentiary hearing. References to the instant Record shall be to Volume and page number. Thus, I/23 represents Volume I, p.23 of the instant record. "SR" designates the supplemental volume in this cause. SR/4 represents the supplemental record in this appeal, p.4. The symbol "p" refers to pages of Richardson's brief. All emphasis is supplied unless otherwise indicated.

Lightbourne pacing the floor and acting like something was bothering him (OR/1110). Lightbourne told Chavers that the police had no suspect, no fingerprints, and no bullet, and that the telephone wire had been cut (OR/1112). Chavers said he called Deputy Sheriff LaTorre after this conversation with Lightbourne (OR/1112-13).

After the police charged Lightbourne with the crime, Lightbourne and Chavers discussed the murder again, and this time Lightbourne related that he had been in the victim's house and surprised the victim who was in the shower (OR/1115). Lightbourne said he did not want to hurt the victim, and that they had performed various sexual acts; Lightbourne described the acts and the victim's anatomy (OR/1115-16). Lightbourne never said why he went to the O'Farrell house (OR/1116), and never said he killed the victim (OR/1117).

On cross-examination, Chavers admitted to resisting arrest and theft charges, but stated that no one had his bond reduced (OR/1120). Chavers stated that he had been moved into Lightbourne's cell because Chavers told prison authorities that he wanted to be in a room with a television (OR/1121).[3] Lightbourne told Chavers about the O'Farrell family being in Hialeah for a race show (OR/1125, 1142). Lightbourne said the murder might have been

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[3] The TV in Chavers' previous cell, holding cell G-2, was in the repair shop (OR/1121-22).

a "hit job" and Mike O'Farrell, the victim's brother, might have been involved; Chavers recalled Lightbourne's statement that, if the "old man passed," the property would be split between the victim and her brother (OR/1143).

Chavers admitted to three convictions -- accessory after the fact, possession of marijuana, and contempt of court (OR/1163). Chavers stated that, although he used to be a trustee, he was not one when he spoke with Lightbourne because Chavers had been charged with escape (OR/1165). Chavers stated that he was released on his own recognizance on the escape charge (OR/1165). Chavers recalled posting a $5,000.00 bond to Baillie on other charges (OR/1165-66). Chavers said he had no knowledge whether LaTorre spoke with the state attorney's office on his behalf (OR/1166).

Theophilus Carson[4] testified that he was housed with Lightbourne in the same cell (OR/1174-75). Lightbourne related to Carson that he was in jail for shooting a "bitch" (OR/1176). Lightbourne told Carson he had "messed up" the crime by taking her necklace and forgetting to take the pendant off; he also stated that he had sex with the victim and taken some money and "something silver"[5] from her (OR/1176, 1178). Lightbourne called the victim by name -- O'Farrell (OR/1179). Lightbourne told Carson that he

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[4] Carson testified at trial his real name was James T. Gallman (OR/1184).

[5] When LaTorre searched Lightbourne's car, he observed, but did not seize, a silver Bicentennial piggy bank (OR/1005-06).

had shot the victim because she could identify him, and that he had bought the gun from a black male ex-foreman at the Ocala Stud Farm (OR/1179-80, 1192).[6] Lightbourne said he worked at the stud farm where the victim was killed (OR/1189).

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

Deputy Sheriff Frederick LaTorre testified that Chavers never stated that he expected something in return for the information he relayed to LaTorre (OR/1017). However, LaTorre acknowledged that Chavers probably wanted "to try to make [himself] look better

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

before [he went] to court ... ." (OR/1017). LaTorre also admitted that, subsequent to his conversations with Chavers, he contacted someone from the State Attorney's Office and Judge McNeal about having Chavers released from custody (OR/1026). Chavers was released, and LaTorre acknowledged that the release was in exchange for the information provided by Chavers (OR/1026). LaTorre also acknowledged the $200.00 reward received by Chavers (OR/1026).

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

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

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

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

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

Defense counsel also commented on Carson during closing argument:

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

> he'd already served in the County Jail, after a plea of no contest to an offense he said he didn't do and the State couldn't prove. He didn't get anything in return. He'd been there for ninety days and not moved off dead center but eight days after this statement he's on the street. He had hit the proverbial bricks, as the saying goes, and he was out. Well, you say, that -- that's just -- that can very well just be coincidental. You know, his lawyer happened to go down the day before and just happened to get out a week later. That -- that doesn't convince me too much. Well, how about this. How about his testifying incorrectly under oath. How about the first thing that came out of his mouth, what's your name? Theophilus Carson. On Cross Examination, what's your real name? James Gallman. Well, damn; his name, he got that wrong. He told you that. He in effect said, yeah, I just testified under oath; my name is Theophilus Carson. The truth of the matter is my name is James Gallman. Did he forget it, a slip of the tongue? If you can spit out Theophilus Carson, you can spit out just about anything. What else, then, would he have testified about that was incorrect? If you can't believe him when he tells you what his name is, what can you believe about him? (OR/1354-56).

Defense counsel reviewed Carson's recollection of what Lightbourne had told him, and concluded:

> A more likely explanation of the testimony of Chavers and Carson might be this, that, yes, Ian Lightbourn[e] was in the cell with both of those persons and had occasion to discuss being charged with the murder, being a suspect in her murder, having discussed that he worked out there, that the family would be out of town in Hialeah. Ian Lightbourn[e] knew all that stuff; talking about the case, nervous, a charge of first degree murder, facing the ultimate penalty -- sure, he's nervous, and Lightbourn[e] suggesting, well, there's no evidence; I mean, they've got no evidence to tie me to it.
>
> Carson and Chavers say, well, now this sounds kind of good. There's a big case pending here, an unsolved murder. The community is very concerned

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

Let me suggest one other thing to you about these two persons' testimony. I don't know if it was Chavers or Carson or Gallman or both or all three, or which one, but I recall one of them saying that Ian Lightbourn[e] was bragging about how clean a job it was, professional job, no prints, cut phone wires, took nothing, slick, clean. Okay, if you believe those guys, then you've got to believe that Ian Lightbourn[e] told them that, and if you believe that he was bragging on how slick and clean this job was, then how in the world can you believe that somebody who would do such a slick, clean professional job would tell somebody the likes of Theodore Chavers and Theophilus Carson about it? Thank you. (OR/1360-61)

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

Mr. Simmons'[s] an[a]logy that Theodore Chavers opened up this case for law enforcement just leads me to the next statement that -- and as a result of that, law enforcement opened up the jail for Theodore Chavers. He's suggesting to you the case was shaky and that Theodore Chavers comes on the scene and it's solved. Think about that when you're evaluating the case and Theodore Chavers. Makes much of the fact that Theodore got two hundred dollars for this information, but you all remember Sonny Boy Oats and you all remember going to the Jiffy store and seeing the thousand dollar reward out there for Sonny Boy Oats. You all remember that? Do you also remember that Theodore

> Chavers tried to collect on that, too? LaTorre told you that Theodore Chavers called him with some information on Sonny Boy Oats. He couldn't confirm it. Theodore Chavers might be classified as the new Steve McQueen, the new bounty hunter, as it were. A reward is out and Theodore has the answer. He's got some information.
>
> Carson, he didn't care. He was getting out. No deal; he didn't need nothing. He's just -- just a good old concerned thief, but Investigator LaTorre told you, I went to the State Attorney's Office to see what was going on, why he was there, what he was charged with, things like that; just out of idle curiosity, you are to presume, and then a week thereafter he's hitting the bricks. He's on the street; he's gone, and he still ain't sure where the man is. Theophilus Carson -- well, he didn't say where he shot her; he didn't say how he shot her. He also didn't say who he shot. The fact that Carson -- Mr. Simmons suggests that Theophilus Carson didn't know what was going on in this case and he -- he cites as evidence of that, he called the wrong police officers. Well, he was looking for LaTorre. He called the wrong Department. So because of that Mr. Simmons argues, based on his ignorance that gives more believability to his testimony. It's an[a]logous to pulling yourself up by your boot straps. You know it's a neat trick if you can do it, but it don't last long. (OR/1407-09).

The jury convicted Lightbourne of first degree murder and recommended death (OR/123, 182). The sentencing court followed the jury's recommendation, finding five aggravating factors: (1) the murder was committed during the commission of a burglary and sexual battery; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, and cruel; and (5) the murder was committed in a cold, calculated

and premeditated manner (OR/176-78). The court also found two statutory mitigating factors -- no significant history of prior criminal activity and age -- and no nonstatutory mitigation (OR/177).

Lightbourne appealed, raising the following issues: (1) The trial court erred in denying Lightbourne's motion to dismiss the indictment and in finding that the indictment sufficiently alleged the time of the offense; (2) the trial court erred in denying Lightbourne's motion to dismiss the indictment or to declare that death is not a possible penalty; (3) the trial/sentencing court erred in not granting Lightbourne's motion to declare section 775.082(1), 921.141, and 782.04(1) unconstitutional; (4) the trial court erred in denying Lightbourne's motion to quash the jury venire; (5) the trial court erred in denying Lightbourne's motion in limine and his motion to suppress statements; (6) the trial court erred in denying Lightbourne's motion to suppress items taken from him at the time of his arrest; (7) the trial court erred in denying Lightbourne's motion to suppress all of the items listed in the March 31, 1981, motion; (8) the trial court erred in denying Lightbourne's motion to suppress his videotaped statements to LaTorre; (9) the trial court erred in denying Lightbourne's motion to impose sanctions; and (10) the sentence of death was inappropriate as it was based on improper aggravating circumstances, the sentencing court failed to consider an

"unenumerated" mitigating circumstance, and the mitigating circumstances outweighed the aggravating circumstances. This Court affirmed Lightbourne's conviction and death sentence in *Lightbourne v. State* [*Lightbourne I*], 438 So.2d 380 (Fla. 1983).

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

B. *Lightbourne II*[7]

After the signing of Lightbourne's first death warrant, Lightbourne filed a motion, which the lower court construed as a post-conviction motion, raising the following points: (1) Lightbourne was denied a fair trial by the State's impermissible use of peremptory challenges; (2) the sentencing court improperly considered various aspects of the presentence investigation report in determining Lightbourne's sentence; (3) the evidence was

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[7] *Lightbourne v. State*, 471 So.2d 27 (Fla. 1985).

insufficient to support the conviction and sentence; and (4) Lightbourne did not receive effective assistance of trial counsel. This Court found that the first three issues were procedurally barred in that they either were or could have been raised on direct appeal. *Lightbourne II*, at 28. As to the last issue, this Court found nothing in the record to indicate ineffectiveness. *Id.* Finally, this Court determined the motion and record conclusively demonstrated Lightbourne was not entitled to relief, and that he was not entitled to an evidentiary hearing on any of his claims. *Id.*

C. Federal Habeas

Lightbourne sought federal habeas corpus relief in the Middle District, presenting the following claims: (1) His rights under the Fifth, Sixth, and Fourteenth Amendments were violated by the admission into evidence of a custodial statement elicited by law enforcement after Lightbourne had indicated his desire to stop questioning; (2) his right to counsel was violated by the actions and testimony of Lightbourne's cellmate, who related various statements made by Lightbourne; (3) trial counsel were ineffective at trial based on their failure to obtain experts to rebut state experts and for inadequately challenging the testimony of a jailhouse informant because of an alleged conflict of interest; (4) trial counsel were ineffective at sentencing in their failure to investigate Lightbourne's background, in their failure to prepare

adequately for sentencing, and in their permitting the sentencing court to consider prejudicial evidence at sentencing; (5) the sentencing court considered evidence which was prejudicial and did not support any aggravating circumstance, and trial counsel did nothing to exclude this improper evidence; (6) the prosecutor impermissibly used peremptory challenges to strike black jurors; and (7) Lightbourne was entitled to the aid of experts and was denied same through ineffective trial counsel. The Middle District denied the petition, and the Eleventh Circuit affirmed this denial in *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir. 1987). Lightbourne appealed the Eleventh Circuit's decision to the United States Supreme Court, which denied his petition for writ of certiorari in *Lightbourne v. Dugger*, 488 U.S. 934 (1988).

D. *Lightbourne III*[8]

After the governor signed Lightbourne's second death warrant, Lightbourne filed his ***second*** post-conviction motion, raising the following claims: (1) The State's deliberate use of false and misleading testimony from Chavers and Carson, and the intentional withholding of material exculpatory evidence, violated Lightbourne's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments; (2) the State's unconstitutional use of jailhouse informants Chavers and Carson to obtain statements violated Lightbourne's rights under the Fifth, Sixth, Eighth, and Fourteenth

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[8] *Lightbourne v. Dugger*, 549 So.2d 1364 (Fla. 1989)

Amendments; (3) Judge Swigert, the trial and sentencing judge, was not impartial; and (4) Lightbourne received ineffective assistance of trial counsel at the sentencing phase.

The lower court denied this motion, reasoning that it was successive and Lightbourne had failed to demonstrate why the claims had not been raised before January 1, 1987, as required by Fla.R.Crim.P. 3.850. Lightbourne appealed to this Court. *Lightbourne III*. This Court determined an evidentiary hearing was required on the allegations concerning Chavers and Carson, and that those claims could not be considered procedurally barred because the first post-conviction motion did not address the current allegations and the facts upon which the claims were predicated were unknown and could not have been ascertained by the exercise of due diligence.[9] This Court found the claim that Judge Swigert was not impartial was procedurally barred, in that his financial disclosures had been of record for many years, and Lightbourne waited until 1989 to raise the claim. Finally, this Court held that the ineffectiveness of trial counsel claim had been raised in the previous post-conviction motion and was procedurally barred by the time limits of rule 3.850.

In conjunction with his appeal of the denial of his second post-conviction motion, on January 30, 1989, Lightbourne also filed

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[9] On this point, this Court remanded the case for an evidentiary hearing.

a petition for writ of habeas corpus with this Court, in which he claimed: (1) ineffective assistance of appellate counsel for his failure to brief a claim that the sentencing court allegedly failed to allow Lightbourne to present evidence in mitigation, in addition to a claim on the merits based on *Hitchcock v. Dugger*, 481 U.S. 393 (1987); (2) ineffective assistance of appellate counsel for his failure to brief a claim that the judge had failed to weigh aggravating and mitigating circumstances independently before imposing sentence; (3) the judge improperly instructed the jury on a duplicative aggravating circumstance; (4) the heinous, atrocious, or cruel aggravating factor was applied arbitrarily in violation of *Maynard v. Cartwright*, 486 U.S. 256 (1988); (5) the cold, calculated, and premeditated aggravating circumstance was applied arbitrarily in violation of *Maynard*; (6) the jury was misled as to its role in sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985); (7) the penalty phase instructions could have been read as requiring the mitigating circumstances to be proven beyond a reasonable doubt in violation of *Hitchcock* and *Mills v. Maryland*, 486 U.S. 367 (1988); (8) the jury instructions unconstitutionally shifted the burden to the defense to prove mitigation in violation of *Caldwell* and *Mills*; and (9) the jury instructions did not expressly state that only six votes were required for a life recommendation in violation of *Caldwell* and *Mills*.

This Court found that issues two through nine were

procedurally barred for not having been argued on appeal, and denied those claims dealing with the ineffectiveness of appellate counsel "for lack of merit." *Lightbourne III*, at 1366 n.2. As regards the first issue, this Court found no ineffectiveness, rejecting Lightbourne's *Hitchcock* claim because the judge and the jury were aware that nonstatutory mitigating evidence could be considered in the sentencing proceeding.

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

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[10] The evidentiary hearing was continued pending certiorari determination (PCR/1998A).

E. *Lightbourne IV*[11]

On remand,[12] the lower court conducted several evidentiary hearings, at which Lightbourne called James Burke, David Baillie, Ronald Fox, Larry Spangler, Robert Bray, Theodore Chavers, Richard Carnegia, Dr. Mills, and Theresa Farley as witnesses. The State called James Phillips, Guy McWilliams, Patricia Lumpkin, Richard Ridgway, Tom Neufeld, and Fred LaTorre as witnesses. Subsequent to the hearings, the parties filed memoranda of law (PCR/2064-85, 2129-204, 2237-83). Defense counsel moved to reopen the hearings and to compel the production of Chavers (PCR/2205-10). The lower court[13] granted this motion (PCR/2223), but eventually denied relief as follows:

> In this 3.850 proceeding, the Defendant attacks the truth of evidence admitted against him, the integrity of the process by which the evidence was obtained, and the suppression of material evidence.
>
> The Defendant says the State knowingly admitted false and misleading evidence. To support that charge the Defendant says two witnesses recanted their trial testimony.
>
> The Defendant does not attack the truth of evidence proving the following facts: while the Defendant was in jail on unrelated charges, at a

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[11] *Lightbourne v. State*, 644 So.2d 54 (Fla. 1994).

[12] Lightbourne refers to this remand at p. 10 of his initial brief as "THE 1990 EVIDENTIARY HEARINGS", which he determined should be "discussed in some detail because ultimately the circuit court ruled, and this Court affirmed, that much of the evidence was not admissible because it lacked indicia of reliability."

[13] Judge Angel presiding.

time when the Defendant was not a suspect in this crime, one cellmate fortuitously picked out a man in the county jail who had the following facts associating him with this crime (which facts of identification were not known to anyone prior to this fortuitous selection): he had purchased and had in his possession, both before and after the murder, the gun which shot the bullet which killed the victim; his pubic hair and blood matched hair and semen stains taken from the crime scene; he was the same sex and race as the person who left semen stains and hairs at the crime scene, he had in his possession a gold necklace and pendant taken from the victim at the time of the crime; he had worked at the farm where it was common knowledge among employees that the owners would be out of town at the time of the murder; an empty metal cartridge case was found in his car after the crime similar to the case which housed the murder bullet. The man the cellmate fortuitou[s]ly selected, who coincidentally and these associating factors, was the Defendant.

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

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

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

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

3) The Defendant has not shown that the State suppressed any material evidence, that is any

> evidence which, if it had been available to the Defendant at trial, would raise a reasonable probability that the result of the trial would have been different.
>
> 4) The Defendant has not presented any newly discovered evidence of such a nature that would probably produce an acquittal on retrial. (PCR/2284-86)

Lightbourne's second 3.850 motion was denied (PCR/2286).

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

This denial was one of Lightbourne's claims in *Lightbourne IV*. (PCR/2372). After *Espinosa* issued, Lightbourne filed his ***third*** Rule 3.850 motion, claiming that, based on *Espinosa*, the jury instructions on the heinous, atrocious, or cruel, and cold, calculated, and premeditated aggravating factors were unconstitutionally vague (PCR/2328-53). The State responded as follows: (1) it did ***not*** contest the allegation that the heinous, atrocious, or cruel jury instruction was unconstitutionally vague; (2) it did ***not*** contest that this error was properly preserved, because, although Lightbourne did not object in a timely manner to the instruction, he did offer an alternative instruction and argued its merits to the court; (3) it ***did*** contest the allegation that the

instruction on the cold, calculated, and premeditated aggravating factor was unconstitutionally vague; (4) any error committed on this point was ***harmless***, as it was clear that the jury would have made the same recommendation with any jury instruction; (5) a harmlessness conclusion was supported further by two other remaining aggravating factors and no mitigation; and (6) the challenge to the cold, calculated, and premeditated jury instruction was barred by the two-year time limit of rule 3.850 and because it had been raised on direct appeal (PCR/2354-67).

This Court relinquished jurisdiction to permit the lower tribunal to consider his third post-conviction motion (PCSR/144, 349, 354). On March 15, 1993, the lower court denied the third motion (PCSR/346-48). Lightbourne moved for rehearing (PCSR/350-53), which the lower court also denied (PCSR/369-70).

On appeal to this Court, Lightbourne raised four claims. This Court addressed the first two claims as follows:

> In his Brady claim,[14] Lightbourne alleged that Theodore Chavers and Theophilus Carson, both of whom testified at the trial regarding incriminating statements made by Lightbourne while in the county jail, were acting in concert with the State to obtain the statements and that the State withheld information regarding its agency relationship with Chavers and Carson. Lightbourne also claimed that Chavers and Carson both lied at the trial about what Lightbourne told them and that the State deliberately used this false and misleading testimony.

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[14] *Brady v. Maryland*, 373 U.S. 83 (1963).

Lightbourne IV, at 55.

This Court recounted the facts regarding these claims as follows:

> At the evidentiary hearing, Lightbourne attempted to introduce an affidavit made by Chavers in 1989, almost eight years after the trial, in which he stated that the investigators in the case made it clear to him that several charges against him would be dropped if he acted as an informant. He further stated that the state attorneys pressed him to lie at the trial about what Lightbourne said in the cell. He said that Carson, who was also in the cell, worked for the State as well and that Carson lied about Lightbourne's statements in exchange for having his charges dropped. Lightbourne also tried to introduce several letters purportedly written by Chavers to the state attorney's office and two taped telephone conversations between Chavers and an assistant state attorney in 1989 and 1990, all intended to show that Chavers was working for the State and that he lied at trial.
>
> Further, Lightbourne sought to admit into evidence an affidavit made by Jack R. Hall in 1989 who claimed that he was in the cell with Lightbourne the whole time that Chavers was there and that Hall was the only inmate that Lightbourne would talk to. He stated that he heard Chavers and two other inmates discussing how they were going to get out of jail by telling the police that Lightbourne made incriminating statements about the murder. Lightbourne also wanted to introduce a letter written by Carson in 1982 which intended to prove that Carson expected certain benefits for his testimony. Finally, Lightbourne tried to introduce a letter written by Ray Taylor who was in a cell with Chavers during the evidentiary hearing. Taylor stated in his letter that Chavers told him he lied at Lightbourne's trial and that Lightbourne did not commit the murder.
>
> The trial court refused to admit any of the evidence, ruling that it was hearsay which did not fall under any exception to the hearsay rule. We reject Lightbourne's argument that the evidence

should have been admitted.

> Chavers, Hall, and Carson were all unavailable witnesses at the time of the evidentiary hearing. Hall had died and Carson could not be located despite a diligent search. At the hearing, Chavers appeared to testify but demonstrated great difficulty answering questions. After a medical and psychological evaluation, he was found incompetent to testify. His testimony was deferred, and when he testified three months later, he professed to have a lack of memory and refused to answer questions. Chavers was found in contempt of court and declared unavailable as a witness.

Lightbourne IV, at 56.

This Court addressed §90.804 of the Florida Evidence Code which applies to those hearsay exceptions whereby an unavailable declarant's statements can be admitted at trial. It determined that "none of the evidence qualified as former testimony, statements under belief of impending death, or statements of family or personal history." *Id.*, at 56-57. As to the statement against interest, this Court determined:

> ***Hall's*** affidavit clearly was not contrary to his pecuniary or proprietary interest, nor did the evidence expose him to criminal liability. ***Carson's*** letter likewise was not a statement against his pecuniary, proprietary, or penal interest because his letter does not contradict anything he said at trial. Although ***Chavers*** states in his affidavit and in one of the letters that he lied at trial, it cannot be said that a reasonable person would believe they were subject to a perjury penalty eight years after providing testimony at a trial. As the lower court pointed out, the statute of limitations had run so that ***Chavers*** could no longer be prosecuted for perjury. See Secs. 775.15(2)(b) and 837.02, Fla.Stat. (1991).
>
> In any event, ***the hearsay evidence relating to***

> ***Chavers lacks the necessary indicia of reliability.*** First, Chavers' statements were made several years after the trial. More importantly, at the evidentiary hearing Chavers feigned a memory loss and would not answer questions pertaining to his statements, thereby severely undermining the credibility of his statements. Further, some of the statements made by Chavers in the letters are contradictory and indicate that he told the truth at trial.(FN3)[15] Therefore, the trial court correctly refused to admit the hearsay statements into evidence.
>
> As for Taylor, we doubt that he was unavailable as a witness. Taylor was transferred from the county jail to a prison facility in another locality before he was called to testify at the evidentiary hearing because defense counsel failed to inform jail personnel of their intent to call him as a witness. In any event, Taylor's letter does not fall within any of the exceptions for hearsay, regardless of his availability. See Secs., 90.803, 90.804, Fla. Stat. (1993).

Lightbourne's argument pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973), was also rejected by this Court, which distinguished that cause as follows:

> In addition to being critical to the defendant's defense, the statements in Chambers bore indicia of reliability, were made spontaneously, were corroborated by other evidence, and were unquestionably against interest. Id. at 300-01, 93 S.Ct. at 1048-49. As the evidence in the instant case does not meet the Chambers hearsay criteria, (FN4)[16] Chambers does not control in this case.

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[15] This Court's FN3 was as follows: "It should be noted that the letters were written by Chavers in an attempt to manipulate the State so that he could get out of jail." *Id.*, at 59.

[16] FN4 was as follows:

> The only evidence introduced at the evidentiary hearing corroborating ***Lightbourne's*** proffered

Id., at 57.

Lightbourne's alleged *Brady* violation, regarding the payment of $200.00 to Chavers by Detective LaTorre, was addressed by this Court as follows:

> A Brady violation occurs where the State suppresses evidence favorable to an accused if that evidence is material to guilt or punishment. Brady, 373 U.S. at 87, 83 S.Ct. at 1197. Evidence is material, however, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667 (1985). At the trial ***Chavers*** testified that he received a payment of $200 from the sheriff's office sometime after his February 10, 1981, release from jail. Detective LaTorre also testified at the trial that he made a $200 payment to ***Chavers*** after ***Chavers*** was released form jail. We do not find that defense counsel's failure to ask questions about the timing of the payment with relation to the second

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> hearsay evidence was testimony by Richard ***Carnegia*** who also shared a cell with Lightbourne and Chavers at the county jail. Carnegia testified that Chavers approached him and told him that if he wanted to get out of jail, he should say he heard Lightbourne say he killed somebody.
>
> Further, unlike the prosecution in Chambers, the State in the instant case had significant evidence to prove its case against the defendant including: (1) Lightbourne was in possession of the gun used in the murder; (2) a casing in Lightbourne's possession matched a casing found at the murder scene; (3) pubic hair and semen at the scene matched that of Lightbourne; (4) the victim's necklace was found in Lightbourne's possession; (5) Lightbourne worked at the victim's family's horse farm where it was common knowledge among employees that the family would be out of town at the time of the murder. *Id.*, at 59.

> statement indicates that the State withheld this information. Further, we fail to see where evidence showing that the payment was made to ***Chavers*** before he made the more incriminating second statement would have benefitted Lightbourne. If anything, the fact that the payment was made before rather than after the second statement was made only lends credibility to the statement. Therefore, we find that the evidence regarding the $200 payment would not have affected the result of the trial and does not constitute a Brady violation.

Id., at 58.

As to Lightbourne's allegations concerning ***Chavers'*** treatment by authorities subsequent to his cooperation with the State, this Court found:

> Lightbourne further points out that he was not notified by the State when Detective LaTorre contacted the judge regarding ***Chavers'*** early release from jail in return for his cooperation with the State. He also introduced evidence that the escape charge pending against ***Chavers*** at the time of his incarceration with Lightbourne was dismissed before the trial. Evidence was also presented that, contrary to ***Chavers'*** testimony at trial, ***Chavers*** was not bonded out on the charges on which he was being held at the time he made his statements to police but rather was released on his own recognizance. In addition, testimony at the hearing indicated that ***Chavers*** was released on bond on a charge that occurred between his February 10 release and the trial and that the bondsman did not charge him for the bond. Lightbourne argues that the State did not provide him with any of this information and, therefore a Brady violation occurred.
>
> We reject this argument for several reasons. First, the record shows that LaTorre's contacts with the judge about ***Chavers'*** release were fully covered at the trial. Next, all of the information in question was a matter of public record which was

> discoverable at the time of the trial. Finally, pursuant to Bagley, none of this evidence is sufficient to constitute a Brady violation, because even if the evidence had been disclosed, we do not find that it would have affected the outcome of the trial.(FN5)[17]

Id., at 58. Alternatively, Lightbourne argued this evidence constituted newly discovered evidence. *Id.* Based upon an analysis pursuant to *Jones v. State*, 591 So.2d 911 (Fla.1991), this Court held: "[W]e do not find that evidence in question constitutes newly discovered evidence."(FN6)[18] *Id.*, at 59.

Lightbourne's third claim alleged incorrect jury instructions on the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances. *Id.*, at 59. This Court held:

> ...although Lightbourne did object to these aggravating circumstances, he did so only on the grounds that the evidence did not support the instructions. Because Lightbourne did not make a specific objection as to the validity of the instructions, the claim is not preserved for appeal. (citations omitted)

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[17] FN5 was:

> We note that the evidence from the trial and the evidentiary hearing shows that Lightbourne was in jail on unrelated charges and was not a suspect in the murder when Detective LaTorre got an unsolicited call from Chavers. The evidence also shows that Chavers and Carson relayed details about the murder to police that were fully corroborated by other evidence. *Id.*, at 59.

[18] FN6: "Much of the evidence could not even be characterized as newly discovered because it has been know or should have been known for many years." *Id.*

Id. Finally, this Court disposed of his remaining claims as follows:

> We reject without discussion Lightbourne's claim that the death penalty statute is unconstitutional and his claim that this Court previously incorrectly denied his claim that the jury was improperly deprived of a copy of the presentence investigation report.

Id.

II. ***Lightbourne V***[19]

On November 7, 1994, Lightbourne filed his ***fourth*** motion for post-conviction relief (V/681-763), based upon the location of James Gallman, a.k.a./Theophilius Carson,[20] imprisoned in Hillsborough County, Florida, and Larry Emmanuel, imprisoned in Houston, Texas. Lightbourne's claims below were as follows:

> I. Lightbourne was denied an adversarial testing when critical, exculpatory evidence was not presented to the jury during the guilt or penalty phases of his trial. (V/712-40)
>
> II. The State's unconstitutional use of Jailhouse Informants to obtain statements violated Lightbourne's 5th, 6th, 8th and 14th Amendment rights. (V/741-55)
>
> III. Noncompliance with Chapter 119 requests prevented Lightbourne from preparing an adequate

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[19] Lightbourne's rendition of "The 1995 Evidentiary Hearing," commencing on p. 30 of his initial brief, is argumentative, inaccurate in its portrayal of the facts, and repeatedly relates excluded evidence throughout.

[20] In keeping with the trial court's "Order Denying Fourth Motion for 3.850 Relief," henceforth the State will refer to Carson as Gallman (II/282-289). The order is attached as an exhibit hereto.

Rule 3.850 motion.

IV. Lightbourne is innocent of the death penalty. (V/756-62)

On December 19, 1994, the State filed its response to Lightbourne's fourth motion for post-conviction relief (V/777-81). As to *Claim I*, the State recommended the trial court "hold an evidentiary hearing on the issue of the trial testimony of" Gallman. (V/777) The State pointed out that Gallman's own case disposal antedated his being housed with Lightbourne (V/777).

On the matter of Larry Emanuel, the State argued the motion should be summarily denied for three reasons. First, there was no showing Emanuel was previously unavailable, and therefore, he should have been produced by Lightbourne at his 3.850 evidentiary hearings in 1990 (V/777-78). Second, Emanuel's affidavit offered nothing new, and was essentially cumulative to Carnegia's testimony in 1990 (V/778). Third, Emanuel did not testify at trial, which meant his affidavit had no relevancy to any prior trial testimony (V/778).

The State further argued any matters related to Chavers had been thoroughly exhausted as a potential source of evidentiary value, and no further exploration was necessary (V/778). The prosecutor observed: "His original trial testimony, his credibility, and his availability have been litigated and re-litigated by this Court and on appeal for more than five years." (V/778) There was nothing new as to Chavers; "everything alleged

has been previously fully developed and to go further with him would be cumulative, redundant and successive." (V/778)

As to *Claim II*, the State argued the attempt to establish an agency relationship between the witnesses and the State, was nothing new either. The issues were unsuccessfully raised in *Lightbourne I*, and were procedurally barred from further consideration. The new twist as to Lightbourne not being represented by counsel, and the State circumventing such a relationship was not raised in *Lightbourne I*, and was, therefore, procedurally barred.

Claim III was without merit as to 119 requests because it raised no litigable issues (V/779). Except for a request of a "copy of a tape recorded conversation with Chavers conducted on January 14, 1991...," Lightbourne merely made a vague reference to "some public records requests..." to FDLE. As to the Chavers' tape, that was a dead issue; all of his recorded statements were previously provided to Lightbourne, and the entire matter had been exhaustively litigated (IV/780).

The State argued as to *Claim IV*, that within the context of the entire motion, it failed to demonstrate that he was "innocent of the death sentence." (V/780) None of the physical evidence against Lightbourne at trial depended upon the testimony of either Chavers or Gallman, rather it corroborated their testimony (V/780). This included: 1) Lightbourne having the murder weapon in his

possession; 2) His gun and a shell casing (found in his car) matched a shell casing found at the murder scene; 3) Lightbourne's pubic hair and semen at the murder scene; 4) Nancy O'Farrell's jewelry was found in Lightbourne's possession; 5) Witnesses other than Chavers and Gallman testified that Ms. O'Farrell's family was expected to be absent from the premises at the time of the murder; that Lightbourne was once employed on the premises; and he was known to the victim and her family as well as others on the premises (V/780).[21]

All of this evidence, the State argued, which was not dependent upon Chavers' and Gallman's testimony, proved "the aggravating circumstances of murder committed (1) to avoid identification and arrest, (2) pecuniary gain, and (3) during the course of a felony." It also proved some aspects of the sexual battery and heinous, atrocious, or cruel. Finally, Lightbourne's jury instruction challenges were procedurally barred (V/781). On December 30, 1994, Lightbourne filed his reply to the State's Response (V/784-90).

On October 23 and 24, 1995, the trial court conducted an evidentiary hearing pursuant to Lightbourne's fourth motion for post-conviction relief (III/355-IV/680). Lightbourne's first witness was Gallman [Carson], who recanted his trial testimony,

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[21] As previously delineated, this Court noted these five factors in *Lightbourne IV*, 644 So.2d at 59, FN4. Further, all this evidence was found by this Court in *Lightbourne I*.

alleging it was false (III/375).[22] Gallman alleged he was pulled out of his cell by two officers, who were given his name by "Nut" Chavers (III/367). These officers told him they were investigating a murder involving Lightbourne; Chavers was cooperating; and there was "a weapon, a necklace with a pendant on it." (III/368). They told him to go into Lightbourne's cell and "start a conversation up with him about these items and things pertaining to the case." (III/369) He was placed in Lightbourne's cell (III/369). However, when asked to identify Lightbourne in the courtroom, he testified he was not sure that Lightbourne was the one they put him in the cell with (III/369).

Gallman played chess with Lightbourne, which allowed him to gain his confidence (III/371). However, despite his attempts to elicit incriminating information from him, Lightbourne said nothing (III/370). He told the officers as much (III/372). They told him "to say that [Lightbourne] did confess to [him] and he did kill the woman." (III/372) These officers told him if he did not cooperate "they would make it hard on [him], they would give [him] 5 to 7 years, max out." (III/372) If he cooperated, he would get "time served" (III/371). Gallman testified these officers had him "in a do-or-die situation." (III/372) He did not remember providing

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[22] In FN10 of his brief, at p. 31, Lightbourne relates "the State conceded that [he] had been diligent in trying to locate him." In fact, the State remarked: "So the State is not arguing -- is not making the strenuous diligence argument it made regarding Mr. Emanuel with regard to Mr. Carson." (IV/671)

these officers with an official statement of what he heard from Lightbourne (III/374). On October 24, 1982, he wrote a letter to the Ocala State Attorney's Office from a Hillsborough County jail requesting assistance for his cases there in return for the testimony he gave in Lightbourne's trial (III/375-76; VI/907). At the time of this hearing Gallman was 40-years-old, which made him 25 when he testified at Lightbourne's trial (III/378).

Under cross-examination, Gallman testified he could not remember the officers' names who he dealt with, nor could he describe them (III/379). He said there were "several of them," three, maybe four (III/379). The first time he spoke with two white, male officers, but he could not remember if they were tall or short (III/379-80). Two weeks later he spoke with two new officers, who he also could not identify other than that they were white males (III/381). The day before the trial he met with a prosecutor, couldn't remember his name, and could not identify him (III/381, 410).

Gallman did not remember his interview with, and subsequent statement he provided to, Investigators LaTorre and McWilliams, nor did he remember them (III/394-96, 410-11; VI/897-901). He could not remember what he meant by a witness fee in his letter to the State Attorney's Office (III/396; VI/907). He could not remember whether he had a lawyer back then, and if he did he could not identify him (III/398). In his deposition taken on October 16,

1995, he never divulged he dealt with two sets of officers prior to testifying at trial (II/327-352).

Albert Simmons, former prosecutor, who was the lead prosecutor in Lightbourne's trial, testified that if he had learned Gallman had been placed in Lightbourne's cell as an agent of the police, and that he had fabricated statements Lightbourne had made, Simmons would have turned such over to defense counsel as impeachment evidence (III/413). He further testified he doubted he would have placed Gallman on the stand if he knew Gallman had fabricated information (III/417).

Under cross-examination, Simmons testified he never received any information from any source that Gallman provided "perjured testimony against" Lightbourne (III/434). He did not authorize any such action (III/434-35). No one ever told him Gallman was planted as a "listening post" in Lightbourne's cell (III/435). ***When it was all over***, it seem[ed] to [Simmons] that it was brought to [his] attention that [Gallman] had pending charges in Hillsborough County." (III/435) Simmons was reminded that after Lightbourne's trial was over he made a phone call on Gallman's behalf (III/435). There was some confusion as to what Gallman meant by witness pay, and that may have been the reason he called Tampa (III/437). He had nothing to do with the disposition of Gallman's case on March 2, 1981, and doubted he even knew of him at that time (III/437-38). He "was not aware of any ongoing proceedings in ... [Gallman's]

cases in Marion County. If anything [he] was going to help him with his cases in Tampa." (III/438)

James Burke, Lightbourne's co-counsel at trial, was called, as he was in 1990, to testify as to what effect Gallman's recantation would have on his trial, much of which was cumulative to his testimony in 1990 (III/439-494).[23]

The State called ***Tim Bradley,***[24] Gallman's counsel in 1981, who testified he met with him on February 23, 1981, in view of his interview notes of the same (III/497-99).[25] The next day, February 24th, Mr. Bradley filed a motion for an adversary preliminary hearing, his normal practice to get a client out of jail as quickly as possible (III/500). Mr. Bradley felt that the filing of this motion was instrumental to Gallman's plea to a lesser-included offense, and a sentence of time served (III/502-03).

Mr. Bradley had no memory of Gallman ever telling him he had already worked out a deal for time served in return for his testifying against Lightbourne at the latter's trial (III/503). Mr. Bradley further testified: "And I think I would have recalled

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[23] Burke spoke of Chavers and Carnegia, two witnesses disposed of in *Lightbourne IV*, which the State provided as grounds for its objections thereon (III/441-42, 453, 457-61).

[24] The State's witnesses are emphasized to distinguish them from Lightbourne's witnesses.

[25] At the outset, Mr. Bradley testified he had no independent recollection of Carson's representation given the passage of time since it had occurred (III/496).

that if he would have because I would have been aware that our office was representing Lightbourne." (III/503) He knew the Public Defender's Office he worked for was representing Lightbourne at that time, and he could not have continued representing Gallman if he knew Gallman was a Lightbourne State witness (III/503). No police officer or prosecutor ever spoke of Gallman as a Lightbourne witness in his presence (III/503). Gallman's plea was taken on March 2, 1981, and his routine practice in similar cases would be to briefly converse with Gallman regarding the disposition of the case just before (III/508).

James Crawford was called by Lightbourne to testify as to attempts which were made to locate Gallman while he was representing him on a death warrant in the middle 1980's (III/517-523). Ronald Fox, Lightbourne's lead trial counsel was called for the same purpose as co-counsel Burke, and previous discussion of Burke's testimony is equally applicable to Fox (III/525-531).[26]

Lightbourne's current appellate counsel, Martin McClain, testified as to efforts to locate Gallman when he began to represent Lightbourne in 1989 when his second Death Warrant was signed (IV/558-63). When Mr. McClain was asked about a request for an NCIC printout from FDLE, he responded: "I'm not sure that NCIC is made available to CCR because we're not considered a law

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[26] That is testimony on moot matters such as Chavers and Carnegia.

enforcement agency. For that ***we would have to rely on the State Attorney's Office to provide it."*** (IV/567-68) ***Mr. McClain admitted that CCR had made such a request on more than one occasion*** (IV/568). Thomas Dunn also began representing Lightbourne in 1989, and he testified as to CCR's attempts to locate Gallman (IV/576-598).

James T. Reich was the prosecutor who handled the disposition of Gallman's case, which culminated in a plea on March 2, 1981 (IV/610, 615). This disposition was "routine" (IV/614). He had no recollection of anyone from the State Attorney's Office, Sheriff's Department, or the Public Defender's Office ever linking Gallman with Lightbourne (IV/615).

Karen Combs testified as to Larry Emanuel's whereabouts from September, 1990 through 1995 (IV/621-23).[27] The only record of CCR requesting an NCIC printout occurred on September 22, 1994 (IV/623).

Bob Joyner, an Ocala Police Officer in 1981, testified Gallman contacted him and told him he had information regarding the O'Farrell murder (IV/647). Joyner told Gallman he would have someone from the Marion County Sheriff's Office contact him

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[27] The State disagrees with Lightbourne's representation of the facts regarding the Larry Emanuel matter as seen on pp. 39-48, particularly as it impugns the integrity of Mr. Black. A correct and complete rendition of the facts surrounding this matter will be provided in its argument as to Lightbourne's first claim.

(IV/647). He hung up with Gallman, and immediately contacted Investigator LaTorre (IV/648). He had no further contact with Gallman (IV/648). Joyner neither offered or arranged any benefit for Gallman in exchange for his information, nor did such ever come up in any discussion in his presence (IV/648).

Captain LaTorre testified he was the lead homicide investigator in the Nancy O'Farrell murder (IV/652). He received a phone call from Officer Joyner about Gallman (IV/653). Subsequently, he interviewed Gallman and took a formal statement from him on February 24, 1981 (IV/653-54). He never offered Gallman any reward or benefit for his information regarding Lightbourne, nor for his being a witness at trial (IV/654). Captain LaTorre never told Gallman to manufacture statements made by Lightbourne that he had not made (IV/656). He had no knowledge of anyone else from the Sheriff's Department, State Attorney's Office, or Ocala Police Department instructing Gallman in such a fashion (IV/656). Other than himself and Sgt. McWilliams, he knew of no two Marion County Deputies who interviewed Gallman about Lightbourne (IV/657).

Guy McWilliams testified he was Captain LaTorre's partner on the Nancy O'Farrell homicide investigation (IV/661). McWilliams testified he was contacted by Joyner and provided information Gallman had related regarding the murder (IV/661). That led to the interview of Gallman by Captain LaTorre and himself (IV/661).

After that interview the two officers located Gallman at the Hillsborough County Jail for a suppression hearing, and that was the last contact they had with him (IV/662-63). McWilliams never promised Gallman anything for testifying against Lightbourne, nor did he ever advise him to perjure himself while testifying against Lightbourne (IV/663). He had reviewed Gallman's affidavit, and he never heard Gallman say anything in 1981 like what he alleged in that document (IV/663-64). He never heard of any other investigators or officers contacting Gallman regarding his being a witness in Lightbourne's case except Captain LaTorre and himself (IV/664).

Under cross-examination McWilliams testified that within his small department in 1981 "...***it would've been out of character for another person to conduct an investigation when it's assigned to the lead investigator without knowledge of that person; or [himself], for that matter.***" (IV/666) On redirect, he testified he never interviewed Gallman without Captain LaTorre, and neither of them initiated contact with Gallman prior to February 24, 1981 (IV/667).

On January 29, 1996, Lightbourne filed his Post-Hearing Memorandum (SR/38-53). The State filed its Post-Hearing Memorandum on February 13, 1996 (SR/82-103). On February 20, 1986, Larry Emanuel was deposed in prison in Houston, Texas (SR/111-175). On February 26, 1996, Lightbourne filed a "Motion to Disqualify the

Fifth Judicial Circuit State Attorney's Office or in the Alternative, ... Reginald Black." (SR/105-108) On that same day, he filed a "Reply to the State's Post-Hearing Memorandum" (SR/176-86). Also, on February 26, 1996, Lightbourne filed a "Motion to Reopen Evidentiary Hearing to Hear and Consider the Testimony of Larry Emanuel or, in the alternative, Admit into Evidence the Deposition of Larry Emanuel and Consider it Substantive Evidence." (I/1-3). The State's Response to the last motion was filed on March 1, 1996 (I/70-76).

A Hearing was conducted on these motions on March 15, 1996 (II/169-270). The trial court accepted Emanuel's 2/20/96 deposition for the limited purpose of viewing it as an adjunct to ruling on his motion to reopen evidentiary hearing. (II/207) In the afternoon session, the trial court denied Lightbourne's motion to disqualify the State Attorney, and his motion to reopen the evidentiary hearing (II/231). It allowed the State to call two witnesses, Ken Raym and Edward Scott, "for the limited purpose of rebutting evidence in the record in the depo of Emanuel..." (II/231-32).

Ken Raym testified he was a Marion County Deputy in 1981, and he knew of Emanuel because his name had come up during his investigation of a string of burglaries (II/235). Raym had nothing to do with the investigation of the O'Farrell murder, or with the arrest of Lightbourne (II/236). He never had Emanuel placed in

Lightbourne's cell as a "listening post," or to interrogate him (II/237, 241).

Edward Scott was a Marion County Deputy in 1981 as well (II/243). He was Raym's partner and involved in the burglary investigations (II/243). He thought he had charged Emanuel with a couple of burglaries (II/244). He had no connection to the investigation and arrest of Lightbourne for the O'Farrell murder (II/244). He never placed Emanuel in Lightbourne's cell as a listening post, nor was it ever done in his presence (II/244).

A *Huff*[28] hearing was conducted on April 3, 1996 (I/87-167). On June 19, 1996, the trial court issued its "Order Denying Fourth Motion for 3.850 Relief." (II/282-304) It found in that Order as follows:

> All of Lightbourne's claims rest on the recanted testimony of Gallman. Lightbourne's Post-Hearing Memorandum limited his claims to violations of Brady, Giglio, and Henry[29], all based on Gallman's testimony.
>
> Recanted testimony is considered newly discovered evidence.[30] The trial court must evaluate the weight of the newly discovered evidence and the

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[28] *Huff v. State*, 622 So.2d 982 (Fla.1993).

[29] The trial court's FN7 was: *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Henry*, 447 U.S. 264 (1980) (II/283).

[30] FN8: *Roberts v. State*, 21 FLW S245 (Fla.1996); *Cammarano v. State*, 602 So.2d 1369 (Fla. 5th DCA 1994) (II/283).

> evidence introduced at trial.[31] To grant relief, the trial court must believe the recanted testimony and must believe that the changed testimony would probably result in a different verdict in the new trial.[32] It should be remembered that a new trial with recanted testimony includes the witness's prior testimony as substantive evidence. (footnote omitted) It is not as if the new trial excludes prior false testimony. (II/283)

The trial court tested the weight of Gallman's "new" testimony in three ways:

> First, what about his oath to tell the truth, his respect for and regard for the truth? He took the same oath at trial. He now changes his testimony. His oath failed at trial. He told the trial jury his name was Theophilus Carson. He also said it was James Gallman. Not much reliability in his oath, at trial or in October 1995.
>
> Second, what about the threat of perjury prosecution for lying at trial? That threat expired 19 April 1988, three years after the perjury. (§775.15, Fla. Stat.)
>
> Third, what about the substance of his testimony 23 October 19[9]5? Is it consistent, reasonable, reliable, and confirmed by other evidence? The substance of Gallman's testimony can be considered in two parts. (II/284)

Those two parts were: "Part One. The State/Law Enforcement Told Gallman What To Say," and "Part Two. Law Enforcement Coerced/Forced Gallman Into Lying and/or Rewarded Gallman for

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[31] FN9: *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991) (II/283).

[32] FN10: *Scott v. Dugger*, 646 So.2d 4792 (Fla. 1993); *Phillips v. State*, 608 So.2d 778 (Fla. 1992); *Jones v. State*, 591 So.2d 911 (Fla. 1991). The trial court also cited two 2nd DCA cases (II/283).

Lying." (II/284-288) In this part of its Order, the trial court provided an in-depth analysis of Gallman's testimony in view of other evidence introduced at the hearings in October, 1995 (II/284-88). Ultimately, it concluded:

> For the foregoing reasons, the Court finds that Gallman's testimony at the hearing 23-24 October 1995 ***is not believable***. Furthermore, the Court makes the following findings:
>
> 1) False testimony was not presented at the Lightbourne trial.
>
> 2) The State did not knowingly use false testimony at trial.
>
> 3) The State did not violate any requirements of Brady, Giglio, or Henry.
>
> 4) A new trial in this case would not result in a different verdict.
>
> 5) The Defendant received a fair trial.
>
> 6) None of the Defendant's rights were violated at trial.
>
> 7) Confidence in the jury's verdict and recommendation are not undermined.
>
> 8) The Defendant is not innocent of the death penalty. (II/289)

Accordingly, the trial court denied Lightbourne's fourth motion for post-conviction relief (II/289).

On July 5, 1996, Lightbourne filed a "Motion for Reconsideration." (VI/853-63) A hearing was conducted on said motion on October 31, 1996 (VI/881-90). On November 15, 1996, the trial court denied the "Motion for Reconsideration" (VI/880). This

appeal follows.[33]

[33] The Record on Appeal provided the State does not contain a Notice of Appeal. It does have a copy of the same in its personal file, which reflects it was filed on December 11, 1996.

SUMMARY OF THE ARGUMENT

I.

The trial court correctly exercised its discretion in determining Lightbourne's counsel did not exercise due diligence in securing Larry Emanuel as a witness, and in finding his testimony was procedurally barred. Lightbourne received a full and fair hearing on due diligence, in which three collateral counsel testified to the same. The trial court properly allowed the State to rebut Emanuel's deposition, which was taken months after it had ruled his testimony was procedurally barred and he had entered the deposition into the record presently before this court. Emanuel's proffered information was not credible.

II.

The trial court correctly found that Gallman's recanted testimony was not believable; that false testimony was not presented at Lightbourne's trial; that the State did not knowingly use false testimony at trial; and that it did not violate any of the requirements of *Brady*, *Giglio* or *Henry*.[34] It also found that a new trial would not result in a different verdict; Lightbourne received a fair trial; none of his rights were violated; confidence in the jury's verdict and recommendation were not undermined and that he was not innocent of the death penalty. It properly applied

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[34] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Henry*, 447 U.S. 264 (1980).

the correct standard for newly discovered evidence as to Gallman's recantation.

III.

The trial court correctly determined Gallman's recanted testimony was not believable. Therefore, his testimony did not undermine confidence in the outcome and would not have produced an acquittal on retrial. This Court has recognized the evidence warranting Lightbourne's capital conviction and sentence on more than one occasion. Even though Lightbourne argues matters which were not evidence below, in addition to that which was, he fails to exonerate himself from Nancy O'Farrell's murder.

IV.

The trial court was entirely correct in denying Lightbourne's fourth motion for post-conviction relief. The cumulative effect of unreliable hearsay from the 1990 hearing, combined with the unreliable Emanuel proffer and unbelievable Gallman testimony fails to demonstrate a new trial is warranted.

V.

Lightbourne's claim concerning the disqualification of Assistant State Attorney Reginald Black is controlled by *Scott v. State*, 23 Fla. L. Weekly S175 (Fla. March 26, 1998).

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY DETERMINED EMANUEL'S AFFIDAVIT AND DEPOSITION WERE PROCEDURALLY BARRED, AND EMANUEL WAS NOT CALLED AS A WITNESS AT LIGHTBOURNE'S TRIAL, RENDERING SUCH INFORMATION IRRELEVANT.

At the October 24, 1995, evidentiary hearing, Karen Combs, State Attorney Investigator in Ocala, testified:

> I talked to FDLE, who does the criminal histories, and Mr. John Booth there researched their dissemination log, which goes back to 1980. And on September 22nd, 1994, was the first and only time that CCR applied for a criminal history on Larry Emanuel. (IV/623)

After her testimony was completed, Brent Strand, CCR co-counsel, stated for the record:

> [I]n October of last year we got an affidavit from Larry Emanuel and filed it with the Florida Supreme Court.
>
> And I had -- at that time I had went and spoke with Mr. Emanuel in Texas, personally, and talked to him. And then from that time -- at that time, you know, I didn't -- after talking to him, you know, and I knew he was on parole. I went out there and he told me his situation and so forth.
>
> And kept track of him until a few months ago; and then right before the hearing, determined that he wasn't where he was supposed to be and found out that he had this warrant out for his arrest on the parole.
>
> And then right before the hearing, we immediately started looking again very -- looking really hard

to find him, because we knew the hearing was coming up.[35]

Mr. Black rejoined:

> Your Honor, as to Larry Emanuel's prior availability to the Defendant as a witness in these proceedings, specifically in the calendar years 1990 and 1991, when this Court was sitting in a series of several hearings in these regards and over these matters, I think the most significant testimony that Ms. Combs gave was when she told the Court that she discovered that on September the 22nd of 1994 was the only time that the Capital Collateral Representative had asked for and obtained an NCIC printout on Larry Emanuel from the Florida Department of Corrections, the only time that such a request had been made by CCR to FDLE and they got a reply.
>
> And less than a month later, October the 13th, 1994, they came into possession of this affidavit from Larry Emanuel, clearly demonstrating at that time their ability to obtain his affidavit and his subsequent testimony, had they been more careful. Now, he was on parole at that time, according to Ms. Combs' testimony.

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[35] At the outset of the hearing, October 23, 1995, the prosecutor, Mr. Black, commented for the record that the State had not had the opportunity to depose Emanuel (III/359). On that same day, Lightbourne attempted to introduce Emanuel's 10/13/94 affidavit as evidence through his trial co-counsel, James Burke, and Mr. Black objected (III/464-54). Ms. Anderson, Lightbourne's CCR co-counsel, represented to the trial court that Emanuel was "scheduled to come in on a plane tonight." (III/465) Mr. Black expressed his doubts as to that occurrence, but he withdrew his objection with the caveat that if Emanuel did not show, all testimony related to him and his affidavit be stricken (III/471). Ms. Anderson agreed (III/461). Mr. Burke was allowed to proffer testimony regarding the affidavit, which commenced with his admission that Emanuel was not called to testify at his client's trial (III/471-482). Lightbourne again attempted to introduce the affidavit through Ron Fox, his lead trial counsel (III/533). Again, Mr. Black objected, then withdrew it on the same condition as before (III/533). Mr. Fox, too, was allowed to proffer his testimony regarding the affidavit (III/534-48).

Now, if we go back to the calendar year 1990 and 1991, Judge, when this Court was in session over perhaps the third 3.850 motion and subsequently a reopening of that -- those evidentiary hearings in 1991, if we go back to those dates, even while we were in court, Larry Emanuel, according to the dates that Ms. Combs just gave us, the Court will see that he was in the Harris County Jail in Texas, he was in the Texas Department of Corrections and on parole.

And at any time during the calendar years 1990 and 1991, if the Capital Collateral Representative had exercised due diligence on behalf of Mr. Lightbourne, they would have been able to do the very same thing they did on September the 22nd day of 1994, as apply to the Florida Department of Corrections for an NCIC hit on Larry Emanuel, and they would have discovered his presence and availability in either of those Texas institutions.

And according to the testimony of Mr. Dunn, had they found him locked up out there, he, Mr. Dunn, would have certainly secured his presence before Your Honor in these proceedings at that time.[36]

So, it's manifestly obvious from the record, Your Honor, that when we were laboring in this vineyard in 1990 and 1991, and there was discussion, as counsel has already put on the record, about wanting Larry Emanuel, if they had only done that one thing, they would have had him. He was available, but they didn't do it.

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[36] Mr. Dunn admitted under cross-examination that no request was made of Mr. Black to assist in finding either Gallman or Emanuel (IV/598-99). Further, Mr. Dunn testified that Mr. Black never acted as an obstructionist or was uncooperative (IV/599). Finally, Mr. Dunn testified that if he had determined Emanuel had such information as was in his affidavit and he had been located outside Florida, he would have used "the interstate witness subpoena" to secure his presence at the hearings in 1990 (IV/601). It was at the conclusion of Mr. Dunn's testimony on October 23, 1995, that Mr. Strand announced that Emanuel had been located in the Harris County Jail, Houston, Texas (IV/603).

> And now, some four years later after the fact, he is -- the Defendant is barred from presenting the testimony of Emanuel. (IV/630-32)

The trial court took "judicial notice of [Emanuel's] files: 81-108, 80-568 and 77-1169." (IV/636; VII/908-91) These records culminated in the trial court's observations which follow, and which were the basis for its ruling on the matter:

> THE COURT: Based on the record that I have here, it seems to me that this witness was easily available to the Defendant to have obtained his testimony not only since 1990, September of 1990, but since before this trial in 1981.
>
> And I haven't had any explanation of any -- why the records that were available to the Defendant prior to trial about Mr. Emanuel were not pursued and why they came up with a dead-end or didn't result in anything.
>
> So I will have to sustain the State's objection to calling this witness. This witness should be barred -- ***the defense should be barred from presenting testimony from this witness.***
>
> ***He has clearly been available, so far as I can see, since before this trial from public records that anybody could have gotten, or certainly through means of discovery that were readily available to the defense.*** (IV/641-42; VII/908-91)

Based upon this ruling, the State requested as follows:

> MR. BLACK: Your Honor, upon the Court's ruling, I now move that the Court strike those portions of the testimonies of the Witness Burke and the Witness Fox as they relate to the subject matter of Larry Emanuel, and strike the references to the affidavit that is postured as an exhibit for identification of Larry Emanuel.
>
> THE COURT: ***I will grant the motion to strike the portions, those portions of Mr. Burke's testimony***

and Mr. Fox's testimony and any reference or use of the affidavit from Mr. Emanuel. (IV/642)

Mr. Strand remarked for the record that Emanuel was available to testify, that he was incarcerated in Texas, and his client "needed the assistance of this Court to issue an order making the Texas authorities let him come here." (IV/644) The trial court rejoined:

> THE COURT: Also in Case Number 77-1169, ***Ron Fox on March 18 of 1981, also as a public defender, withdrew from representing Larry Emanuel because of a conflict of interest with Mr. Lightbourne.***
>
> In that particular case, the Public Defender's Office had represented Mr. Emanuel since being appointed to represent him on January 9 of 1978. And Mr. Emanuel was -- based on written plea agreement signed on August the 14th of 1978, was placed on probation on August 14, 1978 for five years for dealing in stolen property.
>
> And it was when he came back before the court for a violation of that probation that the public defender continued to represent him. And at that time ***the attorneys assigned were James Burke and Ron Fox.***
>
> Okay. ***And Mr. Fox withdrew from representing Mr. Emanuel on that violation of probation because Mr. Fox knew that Mr. Emanuel was a witness against Ian Lightbourne. That was on March the 18th of 1981.*** All right. (IV/645; VII/955)

On January 29, 1996, Lightbourne filed his Post-Hearing Memorandum (SR/38-53). The State filed its Post-Hearing Memorandum on February 13, 1996 (SR/82-103). On February 20, 1986, Larry

Emanuel was deposed in prison in Houston, Texas (SR/111-175).[37] On February 26, 1996, Lightbourne filed a "Motion to Disqualify the Fifth Judicial Circuit State Attorney's Office or in the Alternative, ... Reginald Black." (SR/105-108) On that same day, he filed a "Reply to the State's Post-Hearing Memorandum" (SR/176-86). Also, on February 26, 1996, Lightbourne filed a "Motion to Reopen Evidentiary Hearing to Hear and Consider the Testimony of Larry Emanuel or, in the alternative, Admit into Evidence the Deposition of Larry Emanuel and Consider it Substantive Evidence." (I/1-3). The State's Response to the last motion was filed on March 1, 1996 (I/70-76).

A Hearing was conducted on these motions on March 15, 1996 (II/169-270). In the deposition, Emanuel alleged Mr. Black had represented him and stated as follows:

> Q. Well, my name is Reginald Black and I practiced law here back then. Do you think that we're the same person?
>
> A. Yes, sir, I think so.
>
> Q. Let's assume for the moment that we're the same person. Did you ever tell me about Ian Lightbourne?
>
> A. Yeah, I believe I told you. ***We was in the courtroom*** and I told you, I said I had did some work for Eddie Scott and them and they was trying to cross me out. And you told me "I can't do

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[37] Lightbourne represented at p. 42 of his brief that "Reggie Black attended the deposition on behalf of the State." In fact, Mr. Black's appearance was via telephone (I/7; VII/994; SR/113).

> nothing on that case right now. I have to get back with you." (I/36; VII/1023; SR/142)

This assertion became the basis of Lightbourne's motion to disqualify the State Attorney's Office, or in the alternative Mr. Black. At the March 15th hearing, Mr. Black asserted on the record:

> In his deposition, beginning on page -- first mentioned on page 32 and then mentioned thereafter, Mr. Emanuel claims that while I represented him, he told me about his involvement with the Defendant Lightbourne in the jail cell.
>
> I have researched the records of the Clerk of the Court in Marion county, Florida, covering all of these times, and I can tell you without any hesitation that these records clearly demonstrate and prove that Larry Emanuel is a liar in this particular regard. The Court does not have to rely on my representation of that fact. (II/195; VII/908-91)

Mr. Black further argued:

> The record of this case, ***77-1169***, clearly shows that I was ***never even in court with Mr. Emanuel***. The record of the second case -- excuse me. The record of the second case, ***80-568***, clearly shows I was ***never even in court with Mr. Emanuel***.
>
> And the ***last case*** that's on the public record of Marion County, Florida, wherein Larry Emanuel was charged with burglary, I was ***never even a party*** to that case, Your Honor, as an attorney. Paul Rothstein, once again, was appointed to represent Larry Emanuel.
>
> Now, it's important to note that all of these dates wherein I was appointed to represent Larry Emanuel in these burglary charges, and I exited these case -- and I might point out quite successfully on the part of Mr. Emanuel, because apparently after I was appointed to represent him and filed an appearance and a demand for the

> discovery, the State Attorney's Office exited those cases that I was involved in -- all of that happened before Nancy O'Farrell was even raped and murdered.
>
> So there's no possible way that Larry Emanuel could have conveyed to me any knowledge about Ian Lightbourne having been charged with those terrible crimes.
>
> I get this information, Judge, from the Court's own records. And I have here certified copies of those records, certified by the Clerk, which I ask the Court to make a part of the this record in response to the Defendant's motion to disqualify me and the State Attorney's Office. (II/196-97; VII/908-91)

The trial court accepted Emanuel's 2/20/96 deposition for the ***limited purpose*** of viewing it as an adjunct to ruling on his motion to reopen evidentiary hearing. (II/207) In the afternoon session, the trial court denied Lightbourne's motion to disqualify the State Attorney, and his motion to reopen the evidentiary hearing (II/231).

The trial court allowed the State to call two witnesses, Ken Raym and Edward Scott, "for the ***limited purpose*** of rebutting evidence in the record in the depo of Emanuel..." (II/231-32). Just before the trial court's ruling, Mr. Black explained the necessity of their testimony as follows:

> ...if the Court rules that Larry Emanuel's testimony in any fashion is procedurally barred, this deposition is still attached, although for

> very limited purposes, in support of the argument on this motion to reopen.[38]
>
> It's still attached to the record here. And I will guarantee you, Judge, if this record goes up on appeal with this deposition attached even for that limited purpose, CCR will argue and some appellate judge reading this deposition will say: "These are pretty serious matters and the State back then did not discover this to the Defendant. We're sending this back for other and further evidentiary hearings." So we'll be back in this court before you next year, perhaps a year after that.
>
> I think we ought to be allowed for the purpose -- for the same purpose, supporting our opposition to the motion to reopen, to have the evidence of Deputies Raym and Scott as to the substance of this deposition.[39] (II/230-31)

Ken Raym testified he was a Marion County Deputy in 1981, and he knew of Emanuel because his name had come up during his investigation of a string of burglaries (II/235). Raym had nothing to do with the investigation of the O'Farrell murder, or with the arrest of Lightbourne (II/236). He never had Emanuel placed in Lightbourne's cell as a "listening post," or to interrogate him (II/237, 241).

Edward Scott was a Marion County Deputy in 1981 as well (II/243). He was Raym's partner and involved in the burglary investigations (II/243). He thought he had charged Emanuel with a

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[38] In fact, Emanuel's deposition appears ***three*** different times in the record (I/5-69; VII/992-1056; SR/111-175).

[39] Given CCR's track record of piecemeal litigation, the State was well-advised to make a record when it could. *See e.g., Jones v. State*, 23 Fla. L. Weekly S137 (March 17, 1998).

couple of burglaries (II/244). He had no connection to the investigation and arrest of Lightbourne for the O'Farrell murder (II/244). He never placed Emanuel in Lightbourne's cell as a listening post, nor was it ever done in his presence.

A. <u>There was a Full and Fair Hearing on Counsels' Attempts to Locate Emanuel</u>.

First, the trial court determined that Emanuel was "easily available to the Defendant to have obtained his testimony not only since 1990, September of 1990, but since before the trial in 1981." (IV/641-42) Accordingly, the trial court ruled "the defense should be ***barred*** from presenting testimony from this witness," and granted the State's motion to strike Mr. Burke's and Mr. Fox's proffered testimony as to Emanuel's affidavit (IV/641-42).

Fla.R.Crim.P. 3.850 provided, in 1995, that a post-conviction motion in a capital case could be filed outside the two-year time limitation if "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence."[40] Lightbourne was unable to meet either requirement. *See Stano v. State*, 23 Fla. L. Weekly S178 (Fla. March 20, 1998); *Mills v. State*, 684 So.2d 801 (Fla. 1996). Emanuel was known to the defense before Lightbourne's 1981 trial, in that they shared a cell.[41] The State demonstrated

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[40] R. 3.850 now imposes a one-year limitation.

[41] Although Emanuel did not testify at Lightbourne's trial, Theodore Chavers, who had been deposed by defense trial counsel,

that Emanuel's whereabouts could have been determined through due diligence by requesting his criminal history from FDLE before September, 1994, or from the State Attorney's Office.

Lightbourne argues at p. 51 that the trial court violated his due process rights by refusing to consider relevant testimony regarding counsel's efforts to locate Emanuel. Although he never specifically identifies exactly what that relevant testimony was, the State assumes he is referring to that of Emanuel himself as to his whereabouts, as seen in his deposition. Yet, James Crawford, Lightbourne's present counsel, Martin McClain, and Thomas Dunn testified as to their attempts to locate Emanuel (III/517-23; IV/558-63; IV/576-98).

However, Lightbourne, contrary to his assertion at p. 54 of his brief, did not present unrebutted evidence at the October, 1995, hearing and through Emanuel's deposition, "that collateral counsel had exercised due diligence and that Mr. Emanuel was unavailable." In fact, Mr. McClain testified that to obtain a NCIC printout, "we would have to rely on the State to provide it." (IV/567-68) He further admitted, that CCR had made such a request on more than one occasion (IV/568). Despite these admissions, Lightbourne argues that he "has proved that, contrary to the State's assertions, NCIC records are not available to CCR."

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testified that he, Rick Carnegia, Larry Emanuel, and others shared a cell (OR/1107).

Lightbourne's repeated assertions, both below and now, that he did not have access to NCIC information, is refuted by Mr. McClain's admission that he could obtain such information from the State, and that he had in fact made such requests in the past.

Mr. McClain's admissions echoed Mr. Black's argument below:

> MR. BLACK: They can -- well, they make public records demands all the time for all kind[s] of records. And they can certainly do it of the Florida Department of Law Enforcement, which is a government agency. They can do it of the State Attorney's Office, which is a government agency.
>
> THE COURT: To get NCIC records?
>
> MR. BLACK: If we have them, yes, sir. Yes, sir.
>
> MR. STRAND: Judge, if I--
>
> MR. BLACK: We had them.[42]
>
> MR. STRAND: If I could, ***there's no evidence on the record that we made a request for NCIC records and, in fact, it never happened.*** We asked for the FDLE rapsheet, which is the only thing available to us.
>
> MR. BLACK: Your Honor, ***in addition*** to the process I just described, ***at any time any defense can move the court to order an exposition of any potential witness' criminal record.***
>
> And upon good grounds and good cause shown, the Court can order that material to be produced by the Florida Department of Law Enforcement or any other police agency, including the State Attorney's Offices.

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[42] Mr. Black's representation here, when viewed in light of his subsequent argument (II/220), was not that the State Attorney's Office specifically had Emanuel's NCIC printout, rather that such printouts were available to it.

> And it would clearly show not only disposition of cases against such individuals, but their location, where they are, where they were, where they're housed in some type of custodial facility. And they didn't do any of that over those years. (IV/638-39).

In fact, Mr. Dunn admitted that no request was ever made of Mr. Black to assist in finding Emanuel, nor did Mr. Black ever act as an obstructionist or in an uncooperative fashion (IV/598-99). Counsel now attempts to lay the blame on Mr. Black for not providing collateral counsel with Emanuel's whereabouts in 1990.[43] The fact was, as admitted by Mr. McClain, and Mr. Dunn, Emanuel was not a top priority witness back in 1990 because he did not testify at Lightbourne's trial (IV/572, 582). Understandably, Mr. Black's interest in Emanuel was even less than that expressed by Mr. McClain and Mr. Dunn:

> But, Judge, counsel argues that we had all this information back in 1991, 1990 and 1991.[44] No, sir, we did not. We were not out looking for Larry Emanuel. We could care less about him back then and we could care less about him right now because he was never a witness in the Lightbourne case.
>
> He had nothing to do with the Lightbourne case. We weren't looking for him and they never asked us to help them find him either. So we didn't have any of the information about where he was back in 1990 and 1991. We only gathered that together

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[43] "While the state cannot withhold material evidence favorable to the accused, it is not the state's duty to actively assist the defense in investigating the case." *Hansbrough v. State*, 509 So.2d 1081, 1084 (Fla. 1987). This is especially true of an individual who was not even a witness in Lightbourne's trial.

[44] That which was provided by Karen Combs.

> after they postured him as a witness here beginning in late 1994 and 1995.
>
> Then we went to work to find out where he had been, and we found that he was available to them had they simply asked: "See if you can find him for us." And they did ask FDLE in August of 1994. (II/220)

Lightbourne incorrectly represents on pp. 54-55 of his brief that the trial court "did not specifically resolve" the availability of Emanuel to collateral counsel in 1990, "relying instead upon its conclusion that trial counsel was not diligent." In fact the trial court found as follows:

> THE COURT: Based on the record that I have here, it seems to me that ***this witness was easily available to the Defendant to have obtained his testimony not only since 1990, September of 1990, but since before this trial in 1981***. (IV/641-42)

Therefore, Lightbourne's argument pursuant to *State v. Gunsby*, 670 So.2d 920 (Fla. 1996), found at pp. 54-55 of his brief, as to the trial court's conclusion that Emanuel was known to both Mr. Burke and Mr. Fox at the time of Lightbourne's trial, is moot because collateral counsel as well did not exercise due diligence in attempting to locate Emanuel, and there is no constitutional right to effective collateral representation. In addition, *Gunsby*, of which this Court observed contained "unique circumstances" of cumulative error, is clearly distinguishable from this cause.

The fact that Emanuel was not a witness negates Lightbourne's contention that Mr. Burke and Mr. Fox were ineffective as well.[45] Effective representation by them would not have included investigating a non-testifying witness. However, even if Lightbourne's trial counsel were deficient in failing to interview Emanuel in 1981, which the State does not concede, he still must pass muster under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and prove prejudice. This he can't do because the jury had "ample information from which to assess [Chavers' and Gallmans'] credibility and weigh [their] testimony accordingly, *see Chandler v. State*, 702 So.2d 186, 198 (Fla. 1997)." *Robinson v. State*, 23 Fla. L. Weekly S85, S87 (Fla. February 12, 1998).

Nonetheless, the trial court was entirely correct in finding Emanuel's availability to both Mr. Burke and Mr. Fox in 1981, given Mr. Fox's withdrawal from his representation, ostensibly because he was a potential witness in Lightbourne's trial (VII/955). In short, Lightbourne failed to demonstrate Emanuel was previously unavailable, both in 1981, and in 1990.

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[45] This claim of ineffectiveness is procedurally barred.

> Through the exercise of due diligence, [Lightbourne] could have raised them in prior proceedings in which [he] raised ineffective assistance claims, and [he] cannot continue to raise such claims in a piecemeal fashion. *Pope v. State*, 702 So.2d 221 (Fla. 1997); *Jones v. State*, 591 So.2d 911 (Fla. 1991).

Buenoano v. State, 23 Fla. Law Weekly (March 26, 1998).

Lightbourne was allowed, and did present evidence, as to collateral counsel's attempts to locate Emanuel. Therefore, he received a full and fair hearing on this matter. Emanuel's deposition is merely cumulative to their testimony. It says nothing to refute the facts that back in 1990, he was not a high priority witness to them, and that they failed to request from the State a NCIC printout to determine his whereabouts, which Karen Comb's testimony demonstrated that they could have done. Given these facts, justice would not be served by remanding this cause for an evidentiary hearing on due diligence as Lightbourne requests. Such would only serve to further delay this cause.

Even if the trial court erred, it would be harmless beyond a reasonable doubt, given the cumulative nature of Emanuel's deposition, and evidence demonstrating his availability in 1981 and 1990. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). Further, any information Emanuel provided was cumulative to that which Rick Carnegia testified to in 1990. *See Lightbourne IV*, 644 So.2d at 59, n.4. Finally, even if the trial court erred in not allowing Emanuel's deposition as substantive evidence on the issue of his availability, any information Emanuel provided is irrelevant to Lightbourne's trial because he never testified as a witness, as the record demonstrates and as acknowledged by Mr. Burke (OR; III/472).

B. <u>After The Trial Court Ruled Emanuel was Barred as a Witness, His Deposition was Taken and Made Part of the Record</u>.

On October 24, 1995, the trial court found Emanuel "was easily available to [Lightbourne] to have obtained his testimony not only since 1990, September of 1990, but since before his trial in 1981," therefore, "the defense should be barred from presenting testimony from this witness." (IV/641-42) Since Lightbourne could not establish that Emanuel's testimony qualified as newly discovered evidence, it was unnecessary for the trial court to reopen the evidence to hear his live testimony or to admit his deposition.

Lightbourne's assertion on p. 55 of his brief that "he was not provided adequate notice of the nature" of the March 15, 1996, hearing is belied by his own action in deposing Emanuel on February 20, 1996, in spite of the trial court's order that he was barred as a witness; and his February 26, 1996, "Motion to Reopen Evidentiary Hearing to Hear and consider the Testimony of Larry Emanuel ***or, in the Alternative, Admit into Evidence the Deposition of Larry Emanuel and Consider it Substantive Evidence.***" (I/1-3) In short, Lightbourne knew Emanuel's testimony was barred as of October 24, 1995, so he deposed him ostensibly as a proffer, but really for the purpose of presenting substantive evidence to this Court. He got through the back door that which he could not through the front.

He knew the State had to rebut the deposition which he placed in the record, and which he wanted the trial court to consider as substantive evidence. That was the whole purpose of the March 15, 1996, hearing. The rulings below were that the deposition was part

of the record only as a proffer, and the testimony of Ken Raym and Eddie Scott was proffered for the limited purpose of rebutting the deposition. The trial court did ***not*** reopen the evidentiary hearing.

The facts which follow demonstrate Lightbourne had every opportunity to call witnesses for the March 15, 1996, hearing, and that he was given adequate notice as to the substance of it. His motion established the parameters of the hearing when he requested in the alternative that the trial court allow Emanuel to testify or consider the deposition as substantive evidence, which the State was prepared to oppose on March 15th. Two weeks before that hearing Lightbourne knew the State intended to call Raym and Scott because he objected to their testifying (II/206-08).

It was his choice not to come prepared for that hearing, not the trial court's. *See Scott v. State,* 23 Fla. L. Weekly S175 (Fla. March 26, 1998). Lightbourne's argument as to the State's adoption of inconsistent positions as cause for his failure to be prepared for the March 15th hearing is spurious. The State called Ken Raym and Eddie Scott as a proffer rebuttal to Emanuel's deposition, which he took after the trial court had ruled Emanuel was procedurally barred from testifying as a witness, and of whom he knew two weeks in advance of the hearing. In addition, Lightbourne never represented below, or in his brief, who he would have called to rebut their proffer.

In spite of the trial court's ruling that Emanuel was barred from testifying, collateral counsel deposed Emanuel in prison in Houston, Texas, on February 20, 1996 (SR/111-175). Mr. Black appeared telephonically (SR/113). The deposition concluded as follows:

> MR. BLACK: Well, I'm going to object to even filing it for identification purposes until we have a hearing on it. That's my understanding of what we agreed upon.
>
> MR. STRAND: Well, that's not my understanding. I'm going to file it and you can have a hearing as to whether you want it to be removed from the record. And the court may let it sit in the file, but say that "I'm not going to consider it."
>
> But I am going to file it. If you want to object and call it up for a hearing to have the judge take it out of the file, that's fine, Reggie. I'm admitting it as to a proffer. So that's what I'm going to do. And it's up to the judge whether he considers it or not. But I will fax you whatever motion right away, so that you'll have an opportunity to prepare your objections and ask for a hearing or whatever.
>
> MR. BLACK: All right. That's not our agreement, but you do what you've got to do. (SR/170-71)

On February 26, 1996, Mr. Strand used Emanuel's deposition as the basis for a Motion to Disqualify Mr. Black, and as the basis for Reopening the Evidentiary Hearing (I/1-3). A Hearing on these matters was conducted on March 15, 1996 (II/169-274). Mr. Strand argued:

> I would object to having Mr. Scott and Mr. Raym testify prior to the ruling on the Motion to Disqualify and prior to the ruling on whether or not due diligence has been shown.

Mr. Black rejoined:

> Judge, that's the most ridiculous posture I've ever heard. The Court has already ruled on the due diligence question.[46] And the Court found at the last substantive evidentiary hearing that the testimony of Larry Emanuel was barred because the Defendant had all of 1989 and 1990 and 1991, when we were litigating those issues, had all of that time to find Larry Emanuel in the Texas prison system. The Court's already ruled that.
>
> We reminded the Court of all of that in the motion that we filed -- in the response[47] we filed to the Motion to Reopen the Evidentiary Hearing. ***We sat in you chambers barely two weeks ago on their motions and they raised an objection about Mr. Scott and Mr. Raym testifying then and there.***
>
> And Your Honor set this hearing today for the purpose of that testimony. And counsel is now telling you that he's not prepared to cross-examine those people?
>
> That's an affront to this Court, Judge. We are here now and we are not interested in any process that delays the final litigation of this case.
>
> THE COURT: Let me ask the State your position on this. If the evidence is not reopened to consider Mr. Emanuel's testimony or his deposition, would you still want to go ahead with the testimony of these witnesses, either for discovery for the Defendant or for preserving their testimony for whatever future reason it may be?
>
> Or do you just want to consider the matter closed and unnecessary to go into any further because they cannot reopen to present Mr. Emanuel's testimony?
>
> MR. BLACK: No, sir. I tell you what should be done here, Judge. The Court ought to rule once again -- because the matter has been brought before

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[46] October 24, 1995 (IV/641-42).

[47] (I/40-74)

> the Court on the Motion to Reopen the Evidentiary Hearing to allow this deposition to be considered as substantive evidence.
>
> The Court ought to rule, as it already did before, because it's the same set of facts, the same time-line, the same circumstances, the Court ought to rule that the testimony of Larry Emanuel is barred because of the lack of diligence on the part of the Defendant Lightbourne in obtaining that testimony back in 1990 and 1991.
>
> But in addition there to, the Court ought to allow the State -- ***the Court has accepted this deposition for the limited purpose of viewing it as an adjunct to ruling on this motion. So it will be part of the case file.***
>
> ***The Court ought to allow the State to produce the evidence of these two witnesses, Raym and Scott, that refutes the -- destroys the credibility of Larry Emanuel in his deposition and refutes the proposition that he is in anywise a meaningful, relevant, material witness in these proceedings.***
>
> And that ought -- ***we ought to be allowed to attach those testimonies for that limited purpose alone.*** And then the case is ripe for Your Honor's order out of the last evidentiary hearing.
>
> THE COURT: And so the State does want to preserve and/or present the testimony of these witnesses?
>
> MR. BLACK: Yes, sir; and we're prepared to do that today, sir. ... (II/206-08)

The trial court conducted a full and fair hearing in the fall of 1995, and properly determined at that time that Emanuel's testimony would not qualify as newly discovered evidence.[48] As of

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[48] Even if the trial court had found the evidence qualified as newly discovered, it would not satisfy the *Jones* standard for the same, i.e. that had it been introduced at trial, it probably would have resulted in an acquittal. *Jones v. State, supra.*

October 24, 1995, Lightbourne did not present any evidence or argument, other than Emanuel's deposition, which would warrant reversing the trial court's procedural bar determination. *See Stano v. State*, 23 Fla. L. Weekly S178 (Fla. March 20, 1998); *Mills v. State*, 648 So.2d 801.

The fact that Emanuel's deposition did not constitute newly discovered evidence and did not exonerate Lightbourne, distinguishes this cause from *Johnson v. Singletary*, 647 So.2d 106 (Fla. 1994), which he relies upon in his brief at pp. 58-59. This cause is really more akin to *Scott v. State*, 23 Fla. L. Weekly S175 (Fla. March 26, 1998). *Jones v. Butterworth*, 695 So.2d 679 (1997) is inapposite, although *Jones v. State*, 23 Fla. L. Weekly S137 (Fla. March 17, 1998) is pertinent. Lightbourne was not denied the opportunity to present witnesses at the March 15th hearing, rather he did nothing to secure any "and used this as a basis for seeking a delay."[49] *Scott v. State, supra*, at S176.

Even if the trial court erred, which the State does not concede, Emanuel's deposition was cumulative to the testimony of Mr. Crawford, Mr. McClain, and Mr. Dunn regarding due diligence, rendering it harmless. Substantively, Emanuel's deposition was

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Emanuel's deposition relates to discrediting the trial testimony of Chavers and Carson/Gallman; it does not exonerate Lightbourne.

[49] To the extent Emanuel may have signed an agreement to be a witness in the Sonny Boy Oats cases, no such agreement is seen here, and such bears no relevance to the fairness of Lightbourne's trial.

cumulative to Carnegia's testimony at the 1990 hearing. *Lightbourne IV*, 644 So.2d at 59 n.4. Even if the proffered evidence met the first prong of *Jones v. State, supra*, in that it only relates to potential impeachment of Chavers and Gallman, who underwent rigorous cross-examination concerning bias relative to plea-bargaining, it is not probable that it would produce an acquittal on retrial. *See Stano v. State*, 23 Fla. L. Weekly S178 (Fla. March 20, 1998).

ISSUE II

THE TRIAL COURT CORRECTLY FOUND THAT THE STATE DID NOT VIOLATE ANY REQUIREMENTS OF *BRADY*, *GIGLIO* OR *HENRY*, AND CORRECTLY APPLIED THE NEWLY DISCOVERED EVIDENCE STANDARD OF *JONES V. STATE* TO GALLMAN'S RECANTED TESTIMONY.

The essence of Lightbourne's second claim is found on p. 62 of his brief:

> Mr. Lightbourne's claim is a Brady claim, not a newly discovered evidence of innocence claim. Judge Angel improperly analyzed Mr. Lightbourne's evidence under the standard established by this Court in Jones v. State which imposes a greater burden on a defendant seeking a new trial.

In fact, the trial court analyzed Lightbourne's evidence under *Brady* finding Gallman's testimony failed to demonstrate the State withheld exculpatory evidence because it was "not believable":

> For the foregoing reasons, the Court finds that Gallman's testimony at the hearing 23-24 October 1995 ***is not believable***. Furthermore, the Court makes the following findings:
>
> 1) False testimony was ***not*** presented at the Lightbourne trial.
>
> 2) The State did ***not*** knowingly use false testimony at trial.
>
> 3) The State did ***not*** violate any requirements of Brady, Giglio, or Henry.
>
> 4) A new trial in this case would ***not*** result in a different verdict.
>
> 5) The Defendant received a ***fair trial***.
>
> 6) ***None*** of the Defendant's rights were violated at trial.

7) Confidence in the jury's verdict and recommendation are ***not*** undermined.

8) The Defendant is ***not*** innocent of the death penalty. (II/289)

For Gallman's testimony to qualify as *Brady* material, it had to be believable, but the trial court found it ***unbelievable***, and competent, substantial evidence supports this finding. *See Phillips v. State*, 608 So.2d 778, 780 (Fla. 1992). Therefore, there was ***no*** *Brady* violation. *Id.* The trial court's conclusion that the State did not violate any of the requirements of *Brady*, demonstrates Gallman's testimony was evaluated upon that standard, and that Lightbourne's argument thereupon is devoid of merit.

To establish a *Brady* claim, Lightbourne had to establish:

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

Hegwood v. State, 575 So.2d 170, 172 (Fla. 1991); *Accord, Robinson v. State*, 23 Fla. L. Weekly S85, S86 (Fla. Feb. 12, 1998); *Jones v. State*, 23 Fla. L. Weekly S137, S139 (Fla. March 17, 1998). Lightbourne was incapable of satisfying any of the *Brady* requirements.

First, nothing in Al Simmons' testimony indicated any knowledge by the State that Gallman fabricated his testimony or

that he expected a benefit from testifying (III/413, 417, 434-35, 437-38). Second, Lightbourne's counsel could have discovered information pertaining to Gallman, in view of the fact that the Public Defender's Office represented Gallman in March 1981, and represented Lightbourne at trial just one month later. As the trial court noted, Ron Fox withdrew as Gallman's counsel because he ostensibly was a potential witness in Lightbourne's trial (IV/641-42, 645; VII/955). Third, since the State had no knowledge of any fabrication by Gallman, it hardly could have suppressed such information.

Fourth, Lightbourne could not show a reasonable probability that the outcome of his trial would have been any different without the testimony of Gallman. *See Sawyer v. Whitley*, 120 L.Ed.2d 269, 286 (1992)("This sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness'] account of [a defendant's] actions."); *Lightbourne IV, supra*, at 58 (As it relates to Chavers:[50] "Finally pursuant to *Bagley*,[51] none of this evidence is sufficient to constitute a *Brady* violation, because even if the evidence had been

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[50] To the extent Lightbourne argues Chavers in his second claim, this Court resolved that matter in *Lightbourne IV*, and there is no need to revisit it.

[51] *United States v. Bagley*, 473 U.S. 667 (1985).

disclosed, we do not find that it would have affected the outcome of the trial." [footnote omitted]).

As concerns the guilt phase of Lightbourne's trial, this Court has carefully reviewed the available evidence several times, finding in *Lightbourne IV*, at 59 n.4, as follows:

> (1) Lightbourne was in possession of the gun used in the murder; (2) a casing in Lightbourne's possession matched a casing found at the murder scene; (3) pubic hair and semen at the scene matched that of Lightbourne; (4) the victim's necklace was found in Lightbourne's possession; (5) Lightbourne worked at the victim's family's horse farm where it was common knowledge among employees that the family would be out of town at the time of the murder.

As concerns the penalty phase, Lightbourne's argument on p. 69 that without Chavers' and Gallman's testimony, "none of the aggravating factors would have been proved and he would have been ineligible for a death sentence," is also devoid of merit. Since Chavers was disposed of in *Lightbourne IV*, the State will only address Gallman's testimony. Without his testimony, the State proved at trial as follows.

As regards the avoid arrest aggravator, witnesses testified that Lightbourne worked at the victim's family horse farm, knew the victim's family, and was known by the family (OR/872). *See Lightbourne IV*, at 59 n.4. Pecuniary gain was proven by the $150.00 that was missing from a personal check Nancy O'Farrell had cashed the day she was murdered, and her necklace which was found in Lightbourne's possession (OR/628, 851, 865, 884). *Id.* Capital

murder during a burglary was shown by a broken window, cut screen, and severed telephone wires (OR/621, 662, 676, 1037). Capital murder during a sexual battery was proven by semen in Nancy's vagina and on her bedspread, as well as pubic hair, which matched that of Lightbourne (OR/715-16, 1092-93). *Id.* Heinous, atrocious or cruel was shown by burglary, sexual battery and "execution style" murder, factors indicative of the victim's mental anguish and sheer terror (OR/705, 715-16, 736, 1092-93). Cold, calculated and premeditated was demonstrated by common knowledge the O'Farrell family was out of town when the murder was committed, and that Nancy was killed "execution style" by using a pillow between her head and the murder weapon (OR/694, 736, 860, 876-77). *See Lightbourne I*, 438 So.2d at 391.

Under *Sawyer v. Whitley*, Lightbourne had to show a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of the facts required under state law for the imposition of the death penalty. *Id.*, 120 L.Ed.2d at 284. This, he could not do. In view of the aforementioned weighty aggravation, there were only two statutory mitigators -- no significant history of prior criminal activity and his age of 21-years -- and no nonstatutory mitigation (OR/177). *Id.*, at 286-87.

Lightbourne also alleges, at p. 67 of his brief, State misconduct in knowingly presenting false testimony. To establish

a *Giglio* violation, Lightbourne had to prove that: (1) Gallman's testimony was false; (2) the prosecutor knew his testimony was false; and (3) his statement was material. *Routly v. State*, 590 So.2d 397, 400 (Fla. 1991). If the alleged perjured testimony could "in any reasonable likelihood have affected the judgment of the jury," a new trial is required. *Giglio*, 405 U.S. at 154. The trial court in this cause found no false testimony was presented at Lightbourne's trial; the State did not knowingly use false testimony at trial; and the State did not violate *Giglio*. *See Phillips v. State, supra*, at 781. The facts which follow demonstrate the correctness of those findings.

First, although Gallman testified at the 1995 hearing that he lied at trial, the State presented the testimony of Officer Joyner, Lt. McWilliams and Captain LaTorre that Gallman never requested any favors, and that he contacted them first about information he had procured from Lightbourne (IV/647-667). Tim Bradley, Gallman's lawyer in 1981 testified his action in filing for an adversarial hearing and the weak facts of the State's case prompted Gallman's time-served plea (IV/497-503). Mr. Bradley had no memory of Gallman getting the deal in exchange for testifying at Lightbourne's trial, and would have recalled as much if it were true because his office [the Public Defender] was representing Lightbourne (III/503, 508).

Second, Al Simmons, Lightbourne's prosecutor, testified that at the time of Lightbourne's trial he had no knowledge that Gallman testified falsely (III/434-35).

Third, although Gallman's testimony was relevant, it was not material given the physical evidence of his guilt, which also served to prove aggravation during the penalty phase. Thus, there was no reasonable probability of a different result in either phase.

The trial court found there was no violation of *United States v. Henry*, 447 U.S. 264 (1985). *See Phillips v. State, supra*, at 781. Just as the trial court's finding regarding Gallman's credibility determined his *Brady* claim, so to does this matter dispose of his *Henry* claim. The threshold inquiry for a *Henry* claim is whether Gallman was acting as an agent of the State. *Lightbourne I*, 438 So.2d at 386. Gallman's testimony in this regard was unbelievable, and refuted by several witnesses. (See Trial Court's Order Attached; II/285-88) The only evidence supporting it was his own. In *Lightbourne v. Dugger*, 829 F.2d 1012, 1020 (11th Cir. 1987), the Court opined:

> We must not confuse speculation about [the] motives for assisting police for evidence that the police promised consideration for help or, otherwise, bargained for active assistance. [M]otives alone cannot make [one] an agent of the police even if the police knew and understood that [the] motives probably were self-serving and related to getting police cooperation in [one's] own case.

Contrary to Lightbourne's assertion in his brief, the trial court applied the *Brady* standard, and found there was no violation. Similarly, the trial court found, as this Court did in *Lightbourne I*, that there were no *Giglio* or *Henry* violations as to Gallman. There is no merit to Lightbourne's second claim. *See Phillip v. State, supra*, at 780-81.

ISSUE III

THE TRIAL COURT CORRECTLY DETERMINED GALLMAN'S RECANTED TESTIMONY WAS NEWLY DISCOVERED EVIDENCE, THAT IT WAS UNBELIEVABLE, AND, THEREFORE, PROBABLY WOULD NOT PRODUCE AN ACQUITTAL ON RETRIAL.[52]

The trial court found that Gallman's testimony at the hearing October 23 and 24, 1995, was "***not believable***" (II/289). As to Emanuel, the trial court found his testimony was procedurally barred, therefore, he never testified; rather, he was deposed subsequent to the trial court's order barring him from testifying. It determined all of Lightbourne's claims in his fourth motion for post-conviction relief rested on the recanted testimony of Gallman, and that his "Post-Hearing Memorandum" limited his claims to violations of *Brady*, *Giglio*, and *Henry* also based upon Gallman's testimony (II/283).

The trial court understood and correctly applied the standard regarding newly discovered evidence pursuant to *Jones v. State*, 591 So.2d at 916 (II/283-89). *See also, Jones v. State*, 23 Fla. L. Weekly S137 (Fla. March 17, 1998); *Stano v. State*, 23 Fla. L. Weekly S177, S178 (Fla. March 20, 1998). That standard, as delineated by this Court in *Stano*, is as follows:

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[52] The State would note the inapposite positions maintained by Lightbourne in Claims II and III of his brief. In Claim II, at p. 61 of his brief, he argued "the circuit court applied the wrong standard to [his] claims." At p. 62 he professes: "[His] claim is a Brady claim, not a newly discovered evidence of innocence claim." Eight pages later he argues "Newly discovered evidence establishes that [his] death sentence is unreliable."

> In order to qualify as newly discovered evidence, "the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Robinson v. State*, 23 Fla. L. Weekly S85, S85 (Fla. Feb. 12, 1998). If the proffered evidence meets the first prong, to merit a new trial the evidence must substantially undermine confidence in the outcome of the prior proceedings or the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Id.*

Stano v. State, supra, at S178. As concerns Emanuel, the trial court found Lightbourne failed to pass the first prong; therefore, he was procedurally barred from using his affidavit and deposition.

As regards Gallman's recanted testimony, the trial court concluded false testimony was not presented at Lightbourne's trial; the State did not knowingly use false testimony at trial; nor did it violate any of the requirements of *Brady*, *Giglio*, or *Henry* (II/289). It further concluded that a new trial would not result in a different verdict; Lightbourne received a fair trial; none of his rights were violated at trial; confidence in the jury's verdict and recommendation were not undermined; and Lightbourne is not innocent of the death penalty (II/289).

This Court has opined: "We have previously held that recanted testimony is 'exceedingly unreliable.' *Spaziano v. State*, 660 So.2d 1363, 1365 n.1 (Fla. 1995)." *Stano v. State, supra*, at S178. As in *Stano*, "the questionable reliability" of Gallman's recanted testimony [and Emanuel's for that matter], when compared to what

this Court determined as "significant evidence" of Lightbourne's guilt, "it is not probable that this evidence would produce an acquittal on retrial." *Id.*, at S178; *Lightbourne IV*, at 59 n.4.

A. Emanuel's Affidavit and Deposition Are Not Evidence.

This matter was sufficiently argued regarding Lightbourne's first claim. The trial court found Emanuel "was easily available to the Defendant to have obtained his testimony not only since 1990, September of 1990, but since before his trial in 1981." (IV/641-42). Therefore, pursuant to F.R.Crim.P. 3.850, Lightbourne was "barred from presenting testimony from this witness." (IV/641-42) The State has previously demonstrated in this brief that Lightbourne's NCIC printout argument is fallacious, and, therefore, he failed to exercise due diligence in procuring Emanuel's testimony.

The credibility of Emanuel's deposition was demonstrated by documentation consisting of his court files, which showed he could not have told the prosecutor, Mr. Black, back in 1981, ***in a courtroom***, that he had information on Lightbourne and that he was crossed up by Eddie Scott (II/195; VII/908-91). Deputies Raym and Scott testified they never had anything to do with the O'Farrell homicide investigation, and never place Emanuel in Lightbourne's cell to gain incriminating information from him (II/235-37, 241, 243-44).

Lightbourne's own brief casts doubt on the veracity of Emanuel's deposition. At p. 15 of his brief, Lightbourne published the affidavit of Jack Hall.[53] In paragraph 4 of Hall's affidavit he alleged:

> 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.*** (PCR/1401-02)

At p. 43 of his brief, Lightbourne quotes Emanuel's deposition, which read in its entirety as follows:

> Q. All right. Now, after they spoke with you about Mr. Lightbourne, what did you do?
>
> A. Well, I went back to my cell. And my bunk was about two bunks over from his. And I always was right there by the window and I was always right in the area by him. And they stuck another person off in that cell with us, ***Theodore Chavers***, known as "Nut." They stuck him in there. And ***he got sort of a little closer to Lightbourne. And I was always there when he would be asking Lightbourne questions about -- you know -- about stuff pertaining to him. And I never did hear Lightbourne say that he killed no one. But Chavers always was sitting there talking to him*** -- you know

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[53] In *Lightbourne IV*, at 57, this Court found: "Hall's affidavit clearly was not contrary to his pecuniary or proprietary interest, nor did the evidence expose him to criminal liability." Therefore, it was unreliable hearsay.

-- and I don't think he knew Chavers -- you know -- at the time.

Q. Now, after you were placed back in the cell after you spoke with the Marion County law enforcement officials, did you ever speak with Mr. Lightbourne?

A. ***I talked to him a couple of times.*** (I/13-14)

Thus, either Hall or Emanuel was lying, probably both. Hall said: "Lightbourne never spoke to any of these guys the whole time they were in our cell." They stood huddled up talking among themselves. Emanuel said Chavers got close to Lightbourne and asked him questions, and that he spoke with Lightbourne a couple of times as well.

Beyond the contrived nature of Emanuel's deposition, what he said is cumulative to that which Rick Carnegia testified to in 1990. *See Lightbourne IV*, 644 So.2d at 59, n.4. Further, Emanuel's deposition is irrelevant because he never testified at Lightbourne's trial.

B. <u>Lightbourne Is Not Entitled to a New Sentencing</u>.

After a detailed analysis demonstrating why Gallman's recanted testimony was not to be believed (II/284-89), the trial court concluded:

1) False testimony was ***not*** presented at the Lightbourne trial.

2) The State did ***not*** knowingly use false testimony at trial.

3) The State did ***not*** violate any requirements of Brady, Giglio, or Henry.

4) A new trial in this case would ***not*** result in a different verdict.

5) The Defendant received a ***fair trial***.

6) ***None*** of the Defendant's rights were violated at trial.

7) Confidence in the jury's verdict and recommendation are ***not*** undermined.

8) The Defendant is ***not*** innocent of the death penalty. (II/289)

Even if Gallman's recanted testimony was believable, and Emanuel's proffer was admissible, it is not probable that this evidence would negate Lightbourne's capital sentence if the cause was remanded for resentencing. There was substantial evidence from both the guilt and penalty phases of Lightbourne's 1981 trial which was independent of Chavers' and Gallman's testimony, and in fact "fully corroborated" the same. *Lightbourne IV*, at 59 n.4.

Evidence at the guilt phase included:

> (1) Lightbourne was in possession of the gun used in the murder; (2) a casing in Lightbourne's possession matched a casing found at the murder scene; (3) pubic hair and semen at the scene matched that of Lightbourne; (4) the victim's necklace was found in Lightbourne's possession; (5) Lightbourne worked at the victim's family's horse farm where it was common knowledge among employees that the family would be out of town at the time of the murder.

Id.

Applicable to Lightbourne's penalty phase, as regards the avoid arrest aggravator, witnesses testified that he worked at the victim's family horse farm, knew the victim's family, and was known by the family (OR/872). *See Lightbourne IV*, at 59, n.4. Pecuniary gain was proven by the $150.00 that was missing from a personal check Nancy O'Farrell had cashed the day she was murdered, and her necklace which was found in Lightbourne's possession (OR/628, 851, 865, 884). *Id.* Capital murder during a burglary was shown by a broken window, cut screen, and severed telephone wires (OR/621, 662, 676, 1037).

Capital murder during a sexual battery was proven by semen in Nancy's vagina and on her bedspread, as well as pubic hair, which matched that of Lightbourne (OR/715-16, 1092-93). *Id.* Lightbourne asserts at p. 77, n.32, of his brief that "[t]he State conceded at the 1995 hearing that there was no other evidence, aside from Mr. Chavers and Mr. Gallman/Carson, proving a sexual assault (PC-R2. 672)." On October 24, 1995, Ms. Bailey argued: "We did have evidence of a sexual battery from Mr. Carson and Chavers, but we're still left with the burglary being established by totally different evidence." In her post-hearing memorandum she commented at p. 15, fn.6, the testimony of Gallman (and Chavers) was the only evidence of sexual battery. However, on the next page she stated "there was some independent evidence (sperm found in vagina and on bedspread matched Lightbourne OR/715-16, 1092-93). At the hearing on

Lightbourne's Motion for Reconsideration, conducted October 31, 1996, undersigned counsel voiced a correction for the record regarding Ms. Bailey's comments on the sexual battery proof, citing this Court's language in *Lightbourne I*:

> Viable sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death. The Defendant's blood type was consistent with semen and blood tests and factors present therein as testified by experts. Pubic hair found at the crime scene microscopically matched with those of the Defendant's.

Id., at 391. This evidence was recognized again in *Lightbourne IV*, at 59 n.4.

Heinous, atrocious or cruel was shown by burglary, sexual battery and "execution style" murder, factors indicative of the victim's mental anguish and sheer terror (OR/705, 715-16, 736, 1092-93). Cold, calculated and premeditated was demonstrated by common knowledge the O'Farrell family was out of town when the murder was committed, and that Nancy was killed "execution style" by using a pillow between her head and the murder weapon (OR/694, 736, 860, 876-77). *See Lightbourne I*, 438 So.2d at 391.

C. *Chambers v. Mississippi*

Lightbourne's argument at p. 70 n. 28, and pp. 78-80 of his brief, as to Chavers' affidavit and Gallman's recanted testimony "should now be admitted" pursuant to *Chambers v. Mississippi*, 410 U.S. 284, (1973), is not well taken. Recently, in *Jones v. State*,

23 Fla. L. Weekly at S142, this Court addressed the limited applicability of *Chambers* as follows:

> In *Gudinas v. State*, 693 So.2d 953, 965 (Fla. 1997), *cert. denied*, 118 S.Ct. 345 (1997), we recently characterized *Chambers* as "limited to its facts due to the peculiarities of Mississippi evidence law which did not recognize a hearsay exception for declarations against penal interest.
>
> The Supreme Court stated in *Chambers* that it was establishing no new standards of constitutional law, nor was it diminishing the authority of the states over their own trial rules. *Chambers*, 410 U.S. at 302. Rather, "under the specific facts of [*Chambers*], where the rejected evidence bore persuasive assurances of trustworthiness, its rejection denied the defendant a trial in accordance with due process standards." *Card*, 453 So.2d at 21 (citing *Chambers*, 410 U.S. at 302)

Id., at S142.

In *Lightbourne IV*, at 57, this Court addressed a similar *Chambers'* argument to that made in this cause as follows:

> Lightbourne argues that Chambers ... controls his case and requires that the evidence be admitted regardless of section 90.804. We disagree. In Chambers, the United States Supreme Court determined that due process considerations overcame Mississippi's hearsay rule when the hearsay statements in question involved a third person who orally confessed to the murder for which the defendant was charged. (citation omitted) In addition to being critical to the defendant's defense, the statements in Chambers bore indicia of reliability, were made spontaneously, were corroborated by other evidence, and were unquestionably against interest. (citation omitted) As the evidence in the instant case does not meet the Chambers hearsay criteria (footnote omitted) Chambers does not control in this case.

Id. As to Chavers' hearsay evidence this Court found:

> Although Chavers states in his affidavit and in one of the letters that he lied at trial, it cannot be said that a reasonable person would believe they were subject to a perjury penalty eight years after providing testimony at a trial. As the lower court pointed out, the statute of limitations had run so that Chavers could no longer be prosecuted for perjury.[54] See Secs. 775.15(2)(b) and 837.02, Fla. Stat. (1991).
>
> In any event, the hearsay evidence relating to Chavers lacks the necessary indicia of reliability. First, Chavers' statements were made several years after the trial. More importantly, at the evidentiary hearing Chavers feigned a memory loss and would not answer questions pertaining to his statements, thereby severely undermining the credibility of his statements. Further, some of the statements made by Chavers in the letters are contradictory and indicate that he told the truth at trial.[55] Therefore, the trial court correctly refused to admit the hearsay statements into evidence.

Id., at 57.

Given the ***totally unreliable*** Chavers' hearsay, and the fact that Gallman's recanted testimony is ***exceedingly unreliable***, Lightbourne's *Chambers* argument is without merit. Recently, this Court opined:

> Moreover, unlike the confessions in Chambers, the alleged confessions in this case lack indicia of trustworthiness. The fact that more inmates have

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[54] The trial court in this cause determined similarly as to Gallman's new testimony: "[W]hat about the threat of perjury prosecution for lying at trial? That threat expired 19 April 1988, three years after the perjury. Sec. 775.15, F.S.A." (II/284)

[55] This Court's FN3 was: "It should also be noted that the letters were written by Chavers in an attempt to manipulate the State so that he could get out of jail. *Id.*, at 59.

> come forward does not necessarily render the confessions trustworthy.

Jones v. State, 23 Fla. L. Weekly at S142. Similarly, Gallman's unbelievable recanted testimony, and Emanuel's procedurally barred proffer, which also was unbelievable, does not necessarily render Chavers' unreliable hearsay trustworthy.

The trial court was correct. Lightbourne received a fair trial; none of his rights were violated; confidence in the jury's verdict and recommendation were not undermined; and he was not innocent of the death penalty (II/289). Lightbourne's evidence is no more reliable than it was in 1990. It fails to substantially undermine confidence in the outcome of either his guilt or penalty phases.

ISSUE IV

THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN DENYING LIGHTBOURNE'S FOURTH MOTION FOR POST-CONVICTION RELIEF.

At pp. 80-81 of his brief, Lightbourne argues "[t]he circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Lightbourne's trial," and that *State v. Gunsby, supra*, is exactly on point and should have been followed by the circuit court." To him, *Gunsby* created a standard which the trial court failed to adhere to. However, as the State previously delineated in its argument to Lightbourne's first claim, this Court limited *Gunsby* to the "unique circumstances of this case." *Id.*, at 924. Unlike *Gunsby*, this cause contains ***no*** *Brady* violations, ***no*** reliable newly discovered evidence, or valid ineffective assistance of counsel claims. The only thing *Gunsby* has in common with this cause is that it comes from the same jurisdiction.

In this cause, the trial judge, who was the same judge in *Lightbourne IV*,[56] determined that Gallman's recantation was not believable (II/289). It further found:

> 1) False testimony was ***not*** presented at the Lightbourne trial.
>
> 2) The State did ***not*** knowingly use false testimony at trial.
>
> 3) The State did ***not*** violate any requirements of Brady, Giglio, or Henry.

---

[56] Judge Angel

4) A new trial in this case would ***not*** result in a different verdict.

5) The Defendant received a ***fair trial***.

6) ***None*** of the Defendant's rights were violated at trial.

7) Confidence in the jury's verdict and recommendation are ***not*** undermined.

8) The Defendant is ***not*** innocent of the death penalty. (II/289)

On p. 81 of his brief, Lightbourne alleges the circuit court failed to examine all of the evidence he presented throughout the his capital proceedings. He further argues on p. 82 of his brief "[h]ad the jury heard all the evidence presented in [his] post-conviction proceedings, the outcome of his trial and penalty phase would probably have been different." He commences to relate what he considers as such evidence, much of which is not evidence at all, but unreliable hearsay.

First, at p. 82-83 he speaks of Mr. Chavers statements, which this Court determined as being unreliable hearsay in *Lightbourne IV*:

> In any event, the hearsay evidence relating to Chavers lacks the necessary indicia of reliability. First, Chavers' statements were made several years after the trial. More importantly, at the evidentiary hearing Chavers feigned a memory loss and would not answer questions pertaining to his statements, thereby severely undermining the credibility of his statements. Further, some of the statements made by Chavers in the letters are contradictory and indicate that he told the truth

> at trial.[57] Therefore, the trial court correctly refused to admit the hearsay statements into evidence.

Id., at 57. This Court further addressed Chavers' feigned memory loss in *Robinson v. State, supra*, as follows:

> As in *Lightbourne*, we find that the hearsay evidence presented in this case does not expose Fields to criminal liability (footnote omitted) and lacks the requisite indicia of reliability for admission under section 90.804(2)(c), Florida Statutes (1993). (footnote omitted) As stated by Professor Ehrhardt, this requirement "insures that a confession by a third party will not be admissible when there are serious questions as to its reliability." Charles W. Ehrhardt, Florida Evidence §804.4, at 749 (1997 ed.). Fields' belated change of story and his repeated refusal to expose himself to cross-examination on this issue severely erode the reliability of his 1993 affidavit and bars its admission as competent evidence.

Id., at S86; Lightbourne IV, at 57.

At p. 83 Lightbourne argues Hall's affidavit, which this Court also determined was unreliable hearsay. *Lightbourne IV*, at 57. Emanuel's proffered affidavit and deposition are only proffers, not evidence. They were procedurally barred and not admissible. Substantively, his statements are not credible, and irrelevant in view of the fact he did not testify at Lightbourne's trial.

Even if Emanuel's statements were admissible, they are cumulative to the ***only*** admissible evidence on this matter

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[57] This Court's FN3 was: "It should also be noted that the letters were written by Chavers in an attempt to manipulate the State so that he could get out of jail. *Id.*, at 59.

recognized by this Court in *Lightbourne IV*, the testimony of Carnegia that Chavers approached him and told him if he wanted to get out of jail, he should say he heard Lightbourne say he killed somebody. *Id.*, at 59, n.4. However, Carnegia's testimony is found wanting when viewed in light of Chavers' unreliable hearsay, and Gallman's unbelievable recantation. The trial court's conclusions in this cause that a new trial would not result in a different verdict, and that the jury's verdict and recommendation were not undermined, are supported by competent substantial evidence. *See Remeta v. State*, No. 92,670 (Fla. March 29, 1998); *Buenoano v. State*, No. 92,522 (Fla. March 26, 1998); *Jones v. State*, 23 Fla. L. Weekly S137; *Stano v. State*, 23 Fla. L. Weekly S177; *Robinson v. State*, 23 Fla. L. Weekly S85.

As a final note, in 1981, after the trial court had pronounced Lightbourne's capital sentence, the following exchange took place:

> LIGHTBOURNE: What Mr. O'Farrell didn't know, whether him -- as far as anybody's business or not, it doesn't matter any more, but I had nothing to do with the death of his sister. I'll take that to my grave.
>
> THE COURT: Mr. Lightbourne, I disagree with you. I think you did it beyond every reasonable doubt; no question in my mind that you did it. I'm convinced beyond any reasonable doubt, any doubt whatsoever, you did it. Go ahead and read the balance of the sentence. (OR/1509)

ISSUE V

SCOTT V. STATE, 23 FLA. L. WEEKLY S175 (Fla. March 26, 1998), IS DISPOSITIVE OF LIGHTBOURNE'S CLAIM CONCERNING DISQUALIFICATION OF ASSISTANT STATE ATTORNEY REGINALD BLACK.

At p. 85 of his brief, Lightbourne argues Mr. Black should have been disqualified by the trial court from participating in his evidentiary hearing because he was a material witness to [a] *Brady* claim. Recently, this Court addressed the matter of a prosecutor placed in a dual role as advocate and witness as follows:

> While Rule Regulating the Florida Bar 4-3.7 prohibits a lawyer from acting as an advocate and witness in the same trial,[58] a purpose of the rule is to prevent the evils that arise when a lawyer dons the hats of both an advocate and witness *for his or her own client*. (footnote omitted, emphasis this Court's) Such a dual role can prejudice the opposing side (footnote omitted) or create a

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[58] Rule Regulating the Florida Bar 4-3.7 provides in relevant part: RULE 4-3.7 LAWYER AS WITNESS

> (a) When Lawyer May Testify. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
>
> (3) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (4) disqualification of the lawyer would work substantial hardship on the client.

> conflict of interest. (footnote omitted) These concerns are not implicated in the present case where the state attorney was called as a witness for *the other side* on a *Brady* claim in a postconviction evidentiary hearing before a judge. (emphasis this Court's)
>
> As for Scott's contention that because of Selvig's dual role, Selvig "was determined to exonerate himself from any alleged misconduct and protect his reputation: and that he had "the opportunity to manipulate the proceedings in order to deny Mr. Scott a full and fair hearing," the record shows that Selvig served appropriately as an advocate for the State during the evidentiary hearing and that his conduct comported with the Rules of Professional Conduct with this Court's rules of procedure. (footnote omitted) ***To hold otherwise on this issue would bar many trial level prosecutors -- who may be the most qualified and best prepared advocates for the State -- from representing the State in a Brady claim in a subsequent postconviction evidentiary hearing.*** (footnote omitted) We find no error.

Scott v. State, 23 Fla. L. Weekly S175 (Fla. March 26, 1998).

This Court's determination of Lightbourne's fifth claim should be in accordance with *Scott*. That is, there was no error concerning Mr. Black. As a matter of note, if one accepts Lightbourne's argument at pp. 85-88 of his brief, then his current post-conviction counsel should have been disqualified because he served as a material witness below regarding due diligence, a matter repeatedly argued by him in Lightbourne's brief.

CONCLUSION

Based upon the foregoing facts, authorities and reasoning, the State respectfully requests this Honorable Court to affirm the trial court's denial of Lightbourne's fourth motion for post-conviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

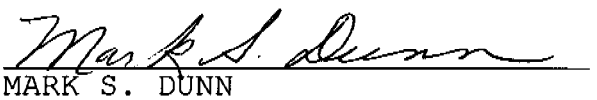
MARK S. DUNN
Assistant Attorney General
Florida Bar #0471852

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300 Ext. 4580

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **ANSWER BRIEF** has been furnished by U.S. Mail to, Martin J. McClain, Counsel for Lightbourne, Office of the Capital Collateral, Regional Counsel-Southern Region, 1444 Biscayne Boulevard, Ste. 202, Miami, Florida 33132, this 20th day of April, 1998.



MARK S. DUNN

IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

Appellant,

v. CASE NO. **89,526**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK S. DUNN
ASSISTANT ATTORNEY GENERAL
Florida Bar #0471852

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 414-4580

COUNSEL FOR APPELLEE

INDEX TO APPENDIX

IN THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT,
MARION COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

IAN DECO LIGHTBOURNE,
Defendant.
_____/

CASE NO. 81-170-CF-A

FILED
95 JAN 19 PM 4:
CLERK CIRCUIT COURT
MARION COUNTY, FL

ORDER DENYING FOURTH MOTION FOR 3.850 RELIEF

Nancy A. O'Farrell was murdered 16 or 17 January 1981. The Defendant, Ian Deco Lightbourne, hereafter Lightbourne, was arrested for her first degree murder 3 February 1981, tried and convicted 20-25 April 1981, and sentenced to death 1 May 1981. He appealed. The Florida Supreme Court affirmed 15 September 1983.[1] The U. S. Supreme Court denied review 21 February 1984.[2]

On 31 May 1985 Lightbourne filed for an emergency stay. It was denied. The Florida Supreme Court affirmed 3 June 1985.[3]

Lightbourne sought relief in federal court. It was denied 20 August 1986. The U. S. Supreme Court denied review 31 October 1988.[4]

In 1989 Lightbourne filed a second motion for Rule 3.850 relief. It was denied. The Florida Supreme Court reversed 20 June 1989 for an evidentiary hearing.[5] Hearings were held in 1990 and 1991. Rule 3.850 relief was denied a second time 12 June 1992.

A third motion for Rule 3.850 relief was filed. It was denied. The Florida Supreme Court affirmed denial of the second and third motions 16 June 1994.[6]

On 7 November 1994 Lightbourne filed a fourth motion for Rule 3.850 relief because:

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[1] Lightbourne v. State, 438 So. 2d 380 (Fla. 1983)

[2] Lightbourne v. Florida, 465 U.S. 1051 (1984)

[3] Lightbourne v. State, 471 So. 2d 27 (Fla. 1985)

[4] Lightbourne v. Dugger, 109 S.Ct. 329 (1988)

[5] Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989)

[6] Lightbourne v. Dugger, 644 So. 2d 54 (Fla. 1994)

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1. Theophilus Carson aka James Gallman, hereafter Gallman, lied at trial.
2. New evidence that Theodore Chavers lied at trial.
3. Lightbourne did not and could not know of the lies until 4 August 1994.
4. The State knew of and did not correct these lies at trial.
5. New evidence that Chavers and Gallman got confessions from Lightbourne as State agents.
6. New evidence that the State did not disclose these agents.
7. This new evidence, of lies and non-disclosure, prevented a fair trial. Lightbourne lost his rights: to cross examine witnesses; to assistance of counsel; to due process. There is a reasonable likelihood the false testimony affected the verdict. Confidence in the verdict is undermined. Confidence in the jury's recommendation is undermined. The sentence is unreliable.
8. Lightbourne is innocent of the death penalty.

All of Lightbourne's claims rest on the recanted testimony of Gallman. Lightbourne's Post-Hearing Memorandum limited his claims to violations of Brady, Giglio, and Henry[7], all based on Gallman's testimony.

Recanted testimony is considered newly discovered evidence.[8] The trial court must evaluate the weight of the newly discovered evidence and the evidence introduced at trial.[9] To grant relief, the trial court must believe the recanted testimony and must believe that the changed testimony would probably result in a different verdict in the new trial.[10] It should be remembered that a new trial with recanted testimony includes the witness's prior testimony as substantive evidence.[11] It is not as if the new trial excludes prior false testimony.

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[7] Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); United States v. Henry, 447 U.S. 264 (1980).

[8] Roberts v. State, 21 FLW S245 (S.Ct. 1996); Cammarano v. State, 602 So.2d 1369 (Fla App. 5 Dist. 1992).

[9] Jones v. State, 591 So.2d 911, 916 (Fla. 1991).

[10] Scott v. Dugger, 646 So.2d 4792 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); Jones v. State, 591 So.2d 911 (Fla. 1991); Jackson v State, 646 So.2d 792 (Fla. App. 2 Dist. 1994); Williams v. State, 582 So.2d 143 (Fla. App.2 Dist. 1991).

[11] Florida Evidence, 1996 Edition, Charles W. Ehrhardt, Sec. 801.7

Gallman's deposition was 16 October 1995. He testified 23 October 1995.[12] He said he lied at trial.[13] How do we know he tells the truth now?

The weight of Gallman's new testimony may be tested in three ways.

First, what about his oath to tell the truth, his respect for and regard for the truth? He took the same oath at trial. He now changes his testimony. His oath failed at trial. He told the trial jury his name was Theophilus Carson. He also said it was James Gallman. Not much reliability in his oath, at trial or in October 1995.

Second, what about the threat of perjury prosecution for lying at trial? That threat expired 19 April 1988, three years after the perjury.[14] Not much help there.

Third, what about the substance of his testimony 23 October 1985? Is it consistent, reasonable, reliable, and confirmed by other evidence? The substance of Gallman's testimony can be considered in two parts.

PART ONE. THE STATE/LAW ENFORCEMENT TOLD GALLMAN WHAT TO SAY. (T, p.13, L. 9) "...Could you tell the Judge how you ended up meeting Mr. Lightbourne? Well, I was, I was in a cell there and I was pulled out of the cell by two law enforcement officers... (p. 13, L.16) And I was given Mr. Lightbourne's name and the officers told me certain things about the individual pertaining to a case that they were investigating... (p.14, L.6) first they say they was investigating a murder -- a "homicide" they called it -- concerning Mr. Lightbourne... (p. 14, L. 10) And they told me certain things pertaining to the case... (p. 14, L. 16) Do you recall what those certain things were? About a weapon, a necklace with a pendant on it. And prior to the time that these law enforcement officers told you about a necklace and a weapon, and the necklace with a pendant, had you ever heard about the necklace or the weapon or this case at all, Mr. Lightbourne's case? No, sir. Now, after they gave you this information concerning the facts of Mr. Lightbourne's case, what did they ask you to do? Well, they told me to go in there. And the information they had gave me, they told me to go in there and inquire, like start a conversation up with him about these items and things pertaining to the case... (p. 15, L. 22) Now, after the law enforcement officials placed you back in the cell with Mr. Lightbourne with the information that they had given you concerning the homicide investigation, what did you do? Well, first of all, we played

---

[12] Reference to the October 1995 evidentiary hearing will be cited as "T.--". Direct, T. pp.12-24, Cross pp.24-51, Re-direct pp.51-56, Re-cross pp. 56-57.

[13] T. p. 20 L.25-p. 21 L.7, p. 53 L.22-p. 55 L. 2, p.56 L.4-8.

[14] Sec. 775.15, F.S.A.

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chess... (p. 16, L. 3), and we had conversation. And did you ask Mr. Lightbourne any questions concerning his involvement with the homicide the detectives were referring to? Well, asked around -- in a roundabout way, I asked questions. Were you attempting to elicit information or get information from Mr. Lightbourne concerning the alleged homicide? That was what I was told to do. And were you doing that? Yes, I was trying to do that. And did Mr. Lightbourne, in fact, tell you anything that -- did he admit that he had committed this homicide or had been involved in it? No, he didn't. Did he tell you anything at all? Did he admit in any way that he had committed this homicide? No, he didn't... (p. 17, L. 1) And what did you tell the law enforcement officials? I told them just what I told you: He didn't tell me anything. And what was their response to that? Well, they told me certain things to say that he did;...."

Saying someone told you to lie and you did is easy. Maybe children do . It is unreasonable to believe that a sane, competent adult would lie to a jury, subject yourself to perjury, and subject an innocent person to death because someone told you to. That is not reasonable or believable. Some people in trouble with the law will do most anything, eager to please. Others refuse the simplest request, even to the point of unlawfully resisting, even with violence. Gallman does not present the innocent lamb easily lead astray. He got into trouble in Tampa and left town, whether under bond or not, he has not shown. He went to Ocala, where he was a stranger, with no family (T, p. 17, L. 25.), and got into more trouble, even arrested.[15] In jail, he pressed his attorney to get him out. Looks more the image of a street wise person using and abusing the system, than vice versa.

PART TWO. LAW ENFORCEMENT COERCED/FORCED GALLMAN INTO LYING and/or REWARDED GALLMAN FOR LYING. (T, p. 17, L. 9) "Okay. I would like to take you back now, Mr. Gallman, back to the beginning, when -- the first time that you met with the law enforcement officers. At the time that you met those law enforcement officers, did you have pending charges here in Marion County? Yes, I did. And if I'm correct, your testimony was that it was accessory to grand theft? Accessory to grand theft. Did those officers that -- in that first meeting, did they tell you -- make any promises relating to your charges if you could produce this evidence concerning Mr. Lightbourne? Yes. They told me they would get me time served. And what did they tell you if you didn't cooperate with them in this? Well, by me being from out of town, I didn't have any family here; and with accessory to a grand theft charge, they told me they would make it hard on me, they would give me five to seven years, max out. All right. So now we'll go back to the second time that you met with the law enforcement officers after you've had your conversation with Mr. Lightbourne. If I'm

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[15] At the October 1995 hearing the Court took judicial notice of Marion County Circuit Court Case No. 80-1595-CF-A-01. A certified copy of that entire court file is incorporated herein and attached.

correct, your testimony was that you told them that, in fact, Mr. Lightbourne had said nothing -- Yes. --about the homicide? Yes. And what did they tell you after you told them this? Well, they told me to say that he did confess to me and he did kill the woman. And did they -- was there any threats involved in that? Towards me? Yes. Yes, It was. And what was that threat? Well, the police officers has -- they have their own way of throwing their weight around when they have you cornered up. You know, they have me in a do-or-die situation. Now, was part of the agreement also that -- or strike that. Isn't it true that part of the inducement to get you to do this was that not only would they help you with your charges herein Marion County, but they would help you with some charges somewhere else? Yes. And where was that somewhere else? Where were those charges? Hillsborough County. The second time that you met with these law enforcement officials and they had made this threat to you, as you said, did you agree to cooperate with them? Yes, I did. Okay. And, now, did there come a -- after you made the agreement that you would cooperate with them, did they promise you something? They promised me time served. Okay. And did they make you any promises relative to the Hillsborough case? They said they would take care of that, would resolve the cases down there. Now, after this occurred, did there come a time later when you made an official statement to law enforcement officers? An official statement? What do you mean? I mean a statement that maybe was recorded with a tape recorder or a written statement. I can't remember that... (p. 21, L. 8) Now, after you testified at Mr. Lightbourne's trial, what happened to your charges here in Marion County? They were dropped...."

It is believable that law enforcement could threaten or reward someone under prosecution for false testimony. Did it happen here?

The prosecuting attorney denied it. (T, p. 80, L. 11 to p. 83, L. 6). Every investigating officer denied it.

The defense attorney, Tim Bradley, did not know of a deal to help or reward Gallman for testimony, true for false. (T, p. 148, L. 17 to p. 150, L. 9)

That leaves one witness to prove fabrication--Gallman--the very witness the defense says is not believable, sometimes. How do we know Gallman tells the truth this time? Look at the substance of what he said.

He said they threatened to max him out at seven years. That is not true. The maximum sentence for accessory after the fact to grand theft, the offense charged, was five years.[16] The maximum sentence for conspiracy to commit grand theft, the lesser

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[16] Sec. 777.03, F.S. 1981.

offense to which he pled, was one year in the county jail.[17] Gallman surely knew or could have known those facts. He pled to the lesser charge 2 March 1981. Lightbourne's trial was 20 April 1981. At the time Gallman testified, there was no way the State could add one day to his time in jail because of Marion County charges and Gallman must have known that fact. For him to say in October 1995 that he was threatened with seven years in prison unless he gave false testimony against Lightbourne is not just unbelievable. The record affirmatively shows that it is patently false. If the threat was made, he had to know when he testified that the State could not carry it out.

He said they had him "...cornered up...in a do-or-die situation..." What does the court file show? Gallman was arrested 25 November 1980. The Rules of Criminal Procedure provided then, and now, that if an information is not filed twenty one (21) days after arrest, a defendant is automatically entitled to an adversary preliminary hearing.[18] In common practice, the State Attorney files before twenty one (21) days to avoid a preliminary hearing, absent good cause to delay. No good cause has been suggested for delay in this case. Failure to file in 21 days is a signal the State has problems with its case, or lacks motivation to prosecute. Lightbourne was arrested for carrying a concealed firearm 24 January 1981. Gallman was in jail for sixty (60) days with no charges filed against him before he could have met Lightbourne. Thirty one (31) more days went by with no charges filed. On 24 February 1981 Gallman's attorney, Tim Bradley, moved for a preliminary hearing. The State filed charges 27 February 1981, ninety four (94) after Gallman's arrest. Such filing delay indicates problems in the State's case, or a lack of desire to prosecute, a desire to make a deal to dispose of the case. It does not appear as a case that the State had Gallman "...cornered up...in a do-or-die situation...."

Gallman said that after he testified against Lightbourne, his charges in Marion County were dropped. That is false. Nothing happened to his Marion County charges after he testified. His charges were not dropped. Before he testified, he pled no contest to a first degree misdemeanor and was sentenced to credit time served.

Tim Bradley said Gallman wrote several letters complaining about the length of his incarceration. (T, p.146, L. 9-16). It is not consistent that someone "cornered up...in a do-or-die situation", about to be maxed out at seven years, would press the State to get out of jail. A cornered up defendant benefits from delay, not from hurrying up. Pressing to get out of jail indicates knowledge the State was not filing due to a weak case or little desire to prosecute.

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[17] Sec. 777.04(4)(d), F.S. 1981.

[18] Fla.R.Crim.P. 3.133

Gallman says he worked the deal for credit time served and help on his Tampa charges. Tim Bradley disputes it. Bradley claims to have made the deal and it did not include any threat or reward to testify against Lightbourne. Bradley knew nothing about Gallman testifying against Lightbourne. Gallman never told Bradley anything about it. (T, p. 148, L. 17 to p. 149, L. 12.)

On 2 March 1981 Theophilus Carson pled no contest to the first degree misdemeanor of conspiracy to commit grand theft and was sentenced to credit time served. Carson, his attorney, and the State Attorney signed a Plea Agreement. The Plea Agreement and the transcript of the plea show there was no agreement for Carson to testify against Lightbourne. In common practice such terms are included in plea agreements. The Court takes judicial notice of the Plea Agreement And Waiver of Right To Appeal in Marion County Case No. 80-1706-CF-A-01, State v. James David Miller, signed 3 March 1981, copy attached hereto, which included the provision that the Defendant "cooperate with State in case of Dora Dillinger." Lightbourne's attorney, Ronald Fox, a Public Defender, also represented and signed the agreement for Mr. Miller. He was familiar with this procedure.

With respect to Marion County charges, failure to include any reference to Gallman's deal does more than prove there was no deal. If everything Gallman said 23 October 1995 was true, that there was a deal or threats made, all deals, threats, coercions, and rewards ended 2 March 1981 by failure to include them in the Plea Agreement. Gallman got all he wanted 2 March 1981--credit time served. Failure to include any of it in the plea agreement meant there was nothing the State could do 20 April 1981--by way of threats, coercions, rewards, intimidation--to reward Gallman for lying or punish him for telling the truth. Gallman must have known that fact when he testified at trial.

It is not believable that law enforcement would fabricate false testimony and position itself to do nothing to force Gallman to carry out the deceit.

With respect to charges pending in Tampa, the Court has no records of any such case and very little evidence on which to evaluate Gallman's testimony in that regard.

The letter Gallman wrote the State Attorney in 1982[19] never said he lied at the Lightbourne trial. It just said I helped you in the Lightbourne trial, now you help me with my charges in Tampa. With no records of anything from Tampa to relate to this letter and Gallman's testimony, any comment on charges in Tampa is pure speculation.

Gallman presumably left the Marion County jail 2 March 1981 and went to the

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[19] PCR, p. 1416. References to Lightbourne's most recent post conviction appeal will be designated "PCR".

Hillsborough County jail. He had forty eight (48) days before he testified in the Lightbourne trial to assure any deal for his testimony was confirmed with the Hillsborough County prosecutor. He has not explained why he failed to verify the alleged deal before he testified.

Prosecutor Al Simmons was unaware Gallman had charges in Hillsborough County until after the Lightbourne trial. He called on Gallman's behalf after the trial. (T, p. 81, L. 15-23.)

For the foregoing reasons, the Court finds that Gallman's testimony at the hearing 23-24 October 1995 is not believable. Furthermore, the Court makes the following findings:

1) False testimony was not presented at the Lightbourne trial.
2) The State did not knowingly use false testimony at trial.
3) The State did not violate any requirements of Brady, Giglio, or Henry.
4) A new trial in this case would not result in a different verdict.
5) The Defendant received a fair trial.
6) None of the Defendant's rights were violated at trial.
7) Confidence in the jury's verdict and recommendation are not undermined.
8) The Defendant is not innocent of the death penalty.

Therefore, it is ORDERED that the Defendant's Motion To Vacate Judgment And Sentence With Special Request For Leave To Amend, filed 7 November 1994, as amended, be and is hereby DENIED.

The Defendant is advised that any appeal from this Order must be taken within thirty (30) days after 19 June 1996.

DONE and ORDERED this 19 June 1996.

CARVEN D. ANGEL
CIRCUIT JUDGE

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S.Mail this 19 June 1996 to:

Reginald Black, Assistant State Attorney, 19 NW Pine Ave., Ocala, Fl. 34475
Gail E. Anderson, Asst. CCR, 1533-C South Monroe St., Tallahassee, Fl. 32301

Judicial Assistant

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

STATE OF FLORIDA

vs

JAMES DAVID MILLER

CASE # 80-1706-CF-A-01

PLEA AGREEMENT AND WAIVER OF RIGHT TO APPEAL

The State, and the Defendant, individually, and joined by his attorney of record hereby enters into the following agreement:

1. Guilty to Ct. 2
Sentenced to time served.
Nolle Prosse Ct. 1
Probation 3 years
Cooperate with State in case of Donna Dellinger

_____Defendant waives and gives up his right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but not his right to review by appropriate collateral attack.

_____That the above is the complete terms of the plea agreement entered into by the State and Defendant, including all obligations the defendant will incur as a result thereof. No additional agreements have been made between the Defendant, his attorney, the State Attorney's office, any law enforcement personnel, the Court, or anyone else.

DATED: this 3rd day of March, 1981

James David Miller
Defendant

Attorney for Defendant

James C. Tribble, Jr.
State Attorney

CERTIFIED A TRUE COPY
THOMAS P. KLINKER, CLERK
BY: L Gandy D.C.

Filed in Open Court
This 3 day of Mar 1981
FRANCES C. THIGPEN
BY Ruth Ewart D.C.

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CRIMINAL PROGRESS DOCKET — In Circuit Court, Marion County, Florida

STATE OF FLORIDA

vs.

26-583 THEOPHILUS R. CARSON

Case No. 80-1595-CF-A-01 Date Filed: Nov 25.1980

Charge: Accessory After the Fact

Plea: No Contest to Lesser included offense of Conspiracy to Commit Grand Theft W/H Adjudication:

Sentence: Sentenced to time served

Prosecuting for State of Florida: Gordon G. Oldham, Jr.

Attorney for Defendant: Public Defender

DATE	DOCKET ENTRIES
March 2, 1981	Information or Indictment
	Capias issued & delivered Sheriff
	Capias returned ..... served
March 2, 1981	Appearance
March 2, 1981	Arraignment
March 2, 1981	Plea
Feb 2, 1981	Public Defender Appointed
	Verdict by Jury
	Judgment
March 2, 1981	Sentence 66-458
	Pre-Sentence Investigation Ordered
	Commitment Papers Received
	Application for the Setting of Bail
	Order Setting Bail at
Nov 25, 1980	Complaint, Booking Desk Advisory, Bail Recommendation
Nov 25, 1980	First Appearance Order, Agreement to Appear
Nov 25, 1980	Affidavit and Order of Probable Cause in County Court
	Appointment of Public Defender in County Court
Nov 25, 1980	Waiver of Counsel in County Court
Feb 2, 1981	Affidavit of Indigency & Line
Feb 25, 1981	Motion for Adversary Preliminary Hearing
March 2, 1981	Plea Agreement & Waiver of Right to Appeal

CERTIFIED A TRUE COPY
THOMAS P. KLINKER, CLERK
BY: [signature] D.C.

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IN THE CIR[illegible]T COURT of the Fifth Judicial Circu[illegible]f the State of Florida, in and for .....arion.....County, in the year of Our Lord, on[illegible]ousand nine hundred and ~~seventy~~ eighty-one

THE STATE OF FLORIDA
vs.
THEOPHILUS R. CARSON

Case No. 80-1595-CF-A-01
INFORMATION FOR:
ACCESSORY AFTER THE FACT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

James T. Reich, Assistant To GORDON G. OLDHAM, JR., State Attorney for the Fifth Judicial Circuit of the State of Florida, in and for Marion County prosecuting for the State of Florida, in the said County, under oath, information makes that:

THEOPHILUS R. CARSON

of the County of Marion and State of Florida, on the 24th day of November in the year of Our Lord, one thousand nine hundred and ~~seventy~~ eighty in the County and State aforesaid:

did give the offender aid, knowing that he had committed a felony or been an accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, in violation of Florida Statute 777.03;

contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Florida.

GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit of Florida
By James T. Reich Assistant State Attorney

STATE OF FLORIDA, COUNTY OF MARION

Personally appeared before me, James T. Reich Assistant To GORDON G. OLDHAM, JR., State Attorney for the Fifth Judicial Circuit, State of Florida, in and for Marion County, State of Florida, who first being duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense therein charged. Prosecution instituted in good faith and subscribed under oath, certifying he has received testimony under oath from the material witness or witnesses for the offense.

James T. Reich
Assistant to GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit of Florida

Sworn to and subscribed before me this 27th day of February 1981.

Notary Public My Commission expires 12/12/83

Presented and filed in the Circuit Court this 2nd day of MARCH 1981

CERTIFIED A TRUE COPY
THOMAS P. KLINKER, CLERK
BY: Ruth Ernst

Clerk of Circuit Court
By: Ruth Ernst D.C.

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STATE OF FLORIDA
VS.

THEOPHILUS R. CARSON

COUNTY COURT OF
MARION COUNTY, FLORIDA
CASE NO 80-11-2081
80-1595-CFAN

COMPLAINT

BEFORE ME, a Notary Public, personally appeared PFC L.G. MATHENA who being duly sworn says that on the 24 day of NOVEMBER, 1980 in Marion County, Florida the above named Defendant did AID AND ASSIST A SUBJECT IN STEALING A DIAMOND RING FROM KAY JEWELERS 3100 SW COLLEGE RD. PADDOCK MALL

in violation of Section _____ of the Laws of the State of Florida.

Sworn to and subscribed before me this 25 day of Nov, 19 80

Notary Public, State of Florida
My Commission Expires Oct. 13, 1984
Bonded thru Troy Fain Insurance Inc.

Notary Public (Seal)

L Mathena PFC
Affiant

of: OCALA POLICE DEPT.
Name of Arresting Agency

BOOKING DESK ADVISORY

I HEREBY CERTIFY that the above named Defendant was advised by me at the Marion County Jail on Nov 24 1980 at 2330 o'clock, P M. that he has a right to counsel, and if unable to afford counsel that one will be provided immediately at no charge. He advised me that (✓) he is over 18 years of age; ( ) that he is _____ years of age and his parents name, address and telephone number is as follows: _____

Booking Officer's Signature

Released at _____ o'clock, _____ .M., _____, 19_____, on ( ) own recognizance; or ( ) $_____ cash bond; ( ) or $_____ surety bond, returnable at Courtroom _____ of the Marion County Courthouse in Ocala, Florida, on the _____ day of _____, 19_____, at _____ o'clock _____ .M., and at such other times as the Court may order.

Bondsman

BAIL RECOMMENDATION FOR BAILABLE OFFENSES

The undersigned hereby recommends to the Court that the above defendant be ( ) released on his own recognizance; (✓) admitted to bail in the amount of $1050.00, as set by the Bail Schedule approved by the Chief Judge; or ( ) admitted to bail in the amount of $_____, and if more than the amount set forth in the Bail Schedule, the undersigned must attend the First Appearance Hearing and give his reason for his recommendation for an increase in the amount of bail. Bail is recommended of the defendant because of one or more of the following reasons:

( ) he refused or was unable to properly identify himself.
( ) he refused to sign a citation or agreement to appear.
( ) his detention is necessary to prevent imminent bodily harm to himself or to others.
(✓) he has no binding ties to the County reasonably sufficient to assure his appearance and there is a substantial likelihood he will refuse to respond to a citation or appear if released on his own recognizance.
( ) he has previously failed to respond to a citation, summons, an order to appear, or an agreement to appear.

Dated this 25 day of NOVEMBER, 1980, at 12:15 o'clock A .M.

L Mathena O.P.O.
Signature and Identification of Arresting Officer

FIRST APPEARANCE ORDER

The above named Defendant was brought before the undersigned on this date at 0900 o'clock, A .M. for a first appearance hearing and the undersigned thereupon informed him of the charge against him and provided him with a copy thereof and also adequately advised him that (1) he was not required to say anything and that anything he did say might be used against him, (2) if he was financially unable to afford an attorney that the Court would appoint one to represent him, and (3) he had the right to communicate with his attorney, his family, or his friends, and if necessary, reasonable means would be provided to enable him to do so; and the undersigned having considered all available relevant factors necessary to determine whether bail is necessary to assure Defendant's future appearance, and found that same is _____ necessary, it is upon consideration thereof ORDERED AND ADJUDGED that Defendant:

will get his own attorney

( ) Be released on his own recognizance upon the condition that he appear at Courtroom _____ of the Marion County Courthouse, in Ocala, Florida, on the _____ day of _____, 19_____, at _____ o'clock, _____ .M., and at such other times as the Court may order.

(✓) Be admitted to bail in the amount of $ 1650.00 upon the condition that he appear at Courtroom Circuit of the Marion County Courthouse in Ocala, Florida, on the 8 day of December, 1980 at 0900 o'clock, A M., and at such other times as the Court may order.

DONE AND ORDERED this 25 day of Nov, 19 80, at Ocala, Marion County, Florida.

in Fla one week - Baltimore resident

Judge

AGREEMENT TO APPEAR

I hereby acknowledge receipt of a copy of the above and I agree and promise to appear at Courtroom _____ of the Marion County Courthouse, in Ocala, Florida, on the _____ day of _____, 19_____, at _____ .M., and at such other times as the Court may order, and also agree to notify the Clerk of the Court, in writing, of my new address if I move from the address below.

CERTIFIED A TRUE COPY
THOMAS P. KLINKER, CLERK

Defendant's Attorney BY: _____ D.C.

Theophus R. Carson
Signature of Defendant

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920 EIGHT AVE SOUTH

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

CASE NO. 80-11-2180

Offense. PRINCIPAL IN THE FIRST DEGREE - TO GRAND LARCENY.

STATE OF FLORIDA

vs.

THEOPHILUS R. CARSON

AFFIDAVIT

BEFORE ME, a Notary Public, personally appeared PFC L. S. MATHENA who being duly sworn alleges, on information and belief, that on the 24 day of NOVEMBER 19 80 in Marion County, Florida, the above named defendant did AID AND ASSIST ANOTHER B/M SUBJECT IN COMMITTING A THEFT OF A LADIES DIAMOND RING VALUED AT $4250.00 AT KAY'S JEWELERS 3100 SW COLLEGE RD STORE #971. THE OFFENSE TOOK PLACE AT ABOUT 8:45 PM THIS DATE. THE ABOVE DEF. DID DISTRACT STORE EMPLOYEE TERRY KETCHUM WHILE AN UNKNOWN B/M REMOVED THE RING FROM THE COUNTER TOP. EMPLOYEE TERRY KETCHUM ADVISED WRITER THAT TWO B/M'S CAME INTO THE STORE TOGETHER. THE B/M DRESSED IN BIEGE CLOTHING ASKED TO SEE A RING FROM UNDER THE COUNTER. SHE HANDED HIM THE RING TO LOOK AT. HE GAVE THE RING BACK BY HANDING IT TO HER. HE THEN ASKED TO SEE ANOTHER RING FURTHER AWAY. TO HIM THEN ASKED TO SEE THE FIRST RING AGAIN. SHE HANDED HIM THE RING, A LADIES SOLITARE DIAMOND RING, TO HIM LAYING IT ON THE GLASS COUNTER TOP, TO THE OTHER B/M IN THE MAROON JOGGING SUIT (THEOPHILUS R. CARSON) ASKING HER TO SHOW HIM A RING THAT WAS AWAY FROM THE OTHER B/M. SHE SHOWED THE RING TO HIM AND THEN PUT IT AWAY. SHE TURNED AND SAW THE B/M IN THE BIEGE CLOTHES RUNNING OUT OF THE STORE AND THAT THE RING WAS GONE ALSO. THE OTHER B/M (CARSON WALKING OUT OF THE STORE. SONNY KETCHUM STOPPED CARSON OUTSIDE AND OBSERVED HIM WALKING WITH THE OTHER B/M (BIEGE CLOTHING) WHO RAN OFF. WRITER READ CARSON HIS RIGHTS AND QUESTIONED HIM. HE TOLD WRITER HE KNEW THE B/M AND THEY HAD CAME TO THE MALL AND KAY'S JEWELERS TOGETHER.

Sworn to and subscribed before me this 25 day of Nov., 1980.

Notary Public, State of Florida
My Commission Expires Oct. 13, 1984
Bonded Thru Troy Fain Insurance Inc.

Sonny McDonald
(Notary Public)

SEAL

L. S. Mathena PFC
Affiant

of: OCALA POLICE DEPT.
Name of Arresting Agency

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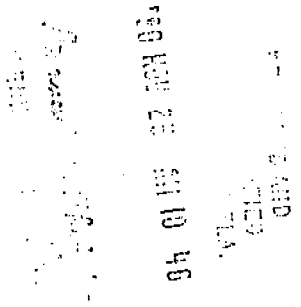
IN THE COUNTY COURT OF
MARION COUNTY, FLORIDA

CASE NO. _____

STATE OF FLORIDA)
)
VS)
)
)
)

Theophilos Rene Carson



WAIVER OF COUNSEL

The undersigned, having been first fully informed of my right of counsel, and having been further fully informed of the charges against me and the possible consequences thereof, do hereby understandingly waive counsel at any and all proceedings held hereunder.

I further state that I have read and understand this waiver.

DONE this 25 day of Nov A.D. 19 96.

x Theophilos R. Carson
DEFENDANT

The undersigned hereby attest that the above Waiver of Counsel was signed by the above named Defendant voluntarily and in our presence on the above date.

Ron Goodman
Witness

A. Nelson
Witness

FINDING BY THE COURT

The undersigned Judge finds that the above named Defendant signed the above Waiver of Counsel and that said Defendant understood what he was doing and was able to make an intelligent and understanding choice in the waiver of his right to counsel.

COUNTY JUDGE

CERTIFIED A TRUE COPY
THOMAS P. KLINKER, CLERK
BY: _____ D.C.

CIRCUIT COURT FOR TH FIFTH JUDICIAL CIRCUIT, M ION COUNTY

DEFENDANT Theophilus R. Carson CASE # 80-1595-CF-A-

AFFIDAVIT OF INSOLVENCY AND ORDER FOR APPOINTMENT OF PUBLIC DEFENDER OR COUNSEL

C032-456

Affidavit

I, the defendant, in a case now pending in the above court, and having been duly sworn by the Judge of the Court, swear the following statements to be true:

1. I desire the assistance of an attorney in this proceeding.

2. I am without money or means with which to employ an attorney and request the appointment of an attorney in my defense.

3. I authorize this court to set a fee and impose a lien against me for the fee for services of an attorney and waive any notice of hearing for such purposes. I further state that if at any time in the future I become possessed of adequate funds to hire private counsel, I will promply advise the Court.

Feb 2, 1981 Theophilus R. Carson

Date Signature

ORDER

In reliance upon the sworn statements of the above named defendant, the following is hereby ordered, as authorized by Florida Statutes:

The above named defendant is declared to be insolvent within the meaning of the law in such cases, and the attorney indicated below is appointed to represent the defendant during initial and subsequent proceedings in this case:

[xxxx] The Public Defender, an attorney practicing in this Circuit.

[ ] _____, a member of the Florida Bar.

It is further ordered that the above insolvency affidavit is declared to be a lien on the real or personal property, presently owned or after acquired, as security for the debt created for the value of services rendered on behalf of the defendant.

Feb 2, 1981

Date

Circuit Judge

CERTIFIED A TRUE COPY
THOMAS P. KLINKER, CLERK
BY: _____ D.C.

Filed in Open Court
2 Feb, 1981
P.A. Cuellar

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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR MARION COUNTY

THE STATE OF FLORIDA,)

vs.)

THEOPHILUS R. CARSON, Marion County Criminal

_____,) Case # 80-1595

Defendant)

FILED
FEB 25 7 05 AM '81
CLERK CIRCUIT COURT
MARION COUNTY, FLA.

MOTION FOR ADVERSARY PRELIMINARY HEARING

THE DEFENDANT moves for an adversary preliminary hearing under Rule 3.131 (b) (1) for the reason that defendant has not been charged in an information or indictment within twenty-one (21) days from date of his arrest (or the service of the capias upon him).

I HEREBY CERTIFY that a copy of this motion has been furnished to the Office of the State Attorney, County Office Building, 19 N.W. Pine Ave. Ocala Florida, and to the defendant named herein, this 24th day of February, 1981.

Assistant Public Defender

CERTIFIED A TRUE COPY
THOMAS P. KLINKER, CLERK
BY: _____ D.C.

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80-1595

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

STATE OF FLORIDA :

vs : CASE # 80-1595-CF-A-01

THEOPHILUS R. CARSON :

PLEA AGREEMENT AND WAIVER OF RIGHT TO APPEAL

The State, and the Defendant, individually, and joined by his attorney of record hereby enters into the following agreement:

1. Pleads No Contest to lesser Incl. Offense of Conspiracy to Commit ~~Grand Theft~~ Grand Theft
2. withheld adj. Guilty
3. Sentenced to time Served

_____ Defendant waives and gives up his right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but not his right to review by appropriate collateral attack.

_____ That the above is the complete terms of the plea agreement entered into by the State and Defendant, including all obligations the defendant will incur as a result thereof. No additional agreements have been made between the Defendant, his attorney, the State Attorney's office, any law enforcement personnel, the Court, or anyone else.

DATED: this 2nd day of March, 1981

X Theophilus R. Carson
Defendant

James T. Reith
State Attorney

Timothy J. Bradley
Attorney for Defendant

CERTIFIED A TRUE COPY
THOMAS P. KUNKEL, CLERK
BY Anita Ernst D.C.

Filed in Open Court
This 2nd day of March, 1981
FRANCES E. THIGPIN
BY P. A Carlund D.C.
Assistant Clerk

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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARION COUNTY.

CASE NO. 80-1595-CF

STATE OF FLORIDA :

vs. :

THEOPHILUS CARSON, :

Defendant. :

PROCEEDINGS:	Change of Plea and Sentencing
BEFORE:	Honorable William T. Swigert Circuit Judge Fifth Judicial Circuit In and For Marion County, Florida
REPORTED BY:	Charles E. Brandies (Deceased) Official Court Reporter
TRANSCRIBED BY:	Kelly L. Owen
DATE:	March 2, 1981
PLACE:	Courtroom A Marion County Courthouse Ocala, Florida
APPEARANCES:	JAMES T. REICH, Esquire Assistant State Attorney Ocala, Florida
	TIMOTHY BRADLEY, Esquire Assistant Public Defender Ocala, Florida

P R O C E E D I N G S

MR. REICH: The State would now call Theophilus Carson. It's Case 80-1595-CF.

MR. BRADLEY: Your Honor, before the Court is Theophilus Carson, who is represented by the Public Defender's Office. At this time on behalf of Mr. Carson, I would tender a plea of no contest to the stipulated lesser included offense of conspiracy to commit a felony, specifically, the offense of grand theft, which is a first degree misdemeanor.

The negotiations that I have entered with Mr. Reich of the State Attorney's Office are that, in consideration for Mr. Carson's no contest plea to that misdemeanor, that he would be adjudicated and would be sentenced to the time that he has served in the Marion County Jail, which is a period that commenced on November the 25th of last year.

MR. REICH: That's the State's understanding.

THE COURT: What did he do?

MR. BRADLEY: Your Honor, a traveling companion of Mr. Carson's went into one of the stores, a jewelry store at the Paddock Mall, and there was some feeling that he stole a ring or a watch or some item of that nature. There was a little bit of a commotion and Mr. Carson followed him out of the store.

The State originally filed accessory after the fact on some theory that he assisted this traveling companion to elude detection, capture. The misdemeanor offense of conspiracy to commit grand theft would be a misdemeanor offense.

The facts are -- I think the plea takes into consideration some very sketchy facts. It's in Mr. Carson's best interest not to contest those facts.

MR. REICH: As to this Defendant, Your Honor, the case isn't as strong as (inaudible).

THE COURT: Mr. Carson, did you hear and agree with everything said about your case?

THE DEFENDANT: Yes, sir.

THE COURT: You plead no contest freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Adjudicated guilty?

MR. BRADLEY: Technically, we did not want to adjudicate him on the misdemeanor. I think where somebody's, in fact, getting sentenced to time, even though it would be time served, I think it, unfortunately, has the effect of being an adjudication.

MR. REICH: I would request adjudication, Your Honor.

THE COURT: Do you have a prior record?

MR. BRADLEY: No, he does not.

THE COURT: How old are you?

THE DEFENDANT: Twenty-seven.

MR. BRADLEY: I would request that he not be adjudicated, Your Honor, in view of the --

THE COURT: What were you doing out there? You and your buddy were trying to rip off a jewelry store?

THE DEFENDANT: Well, I had come down with my cousin. I had just got in town from (inaudible), from Baltimore. And the guy was supposed to be showing me where my cousin lived at, at Citra (sic) County.

THE COURT: Citra?

THE DEFENDANT: Yes.

THE COURT: Did you say Citra County? Oh, Citrus County?

THE DEFENDANT: Right. And we stopped by the mall, going by to pick up me a shirt, buy me a shirt. And the guy who run off with the ring, just --

MR. BRADLEY: He ran off with the gentleman's rented car and he ran off with the gentleman's wallet. What he had left in his personal possession are three credit cards that are issued in his own name and are not stolen.

THE COURT: Return the car?

THE DEFENDANT: Yes, sir.

THE COURT: Where did you leave that at?

THE DEFENDANT: Down in Tampa.

THE COURT: What were you doing in Tampa?

THE DEFENDANT: Well, I have a sister down in Tampa.

THE COURT: Withhold adjudication, credit time served.

(No further proceedings were had.)

- - -

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF MARION)

I, KELLY L. OWEN, Notary Public, State of Florida at Large, do hereby certify that the foregoing proceedings were taken by Charles E. Brandies, Former Official Court Reporter, Fifth Judicial Circuit; that Charles E. Brandies is deceased; that the foregoing transcript was transcribed by me using both the audiotape and Gregg shorthand notes as produced by Charles E. Brandies; and that the foregoing pages, numbered 1 through 5, inclusive, constitute a true and correct record of same to the best of my ability.

WITNESS MY HAND AND SEAL this 20th day of October 1995, at Ocala, Marion County, Florida.

/s/

KELLY L. OWEN
Notary Public
State of Florida at Large

My commission expires: 8/26/96