IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,526

IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Lightbourne's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The following symbols will be used to designate references to the record in this appeal:

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

"PC-R" -- record on 3.850 appeal to this Court following the 1990-91 evidentiary hearings;

"PC-R2" -- record on 3.850 appeal to this Court following the 1995-96 evidentiary hearings;

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

"Def. Exh. ___" -- defense exhibits.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

Mr. Lightbourne was convicted of first-degree murder in the circuit court of the Fifth Judicial Circuit, Marion County (R. 1436), and was sentenced to death (R. 1500). This Court affirmed on direct appeal over two dissenting votes. Lightbourne v. State, 438 So. 2d 380 (Fla. 1983). Justice McDonald dissented from the affirmance of the death sentence without a written opinion. Justice Overton dissented from the affirmance of the conviction on the basis of United States v. Henry, 447 U.S. 264 (1980). Justice Overton wrote:

> A jailhouse informer was placed in a cell adjacent to appellant's and was requested to keep his ears open. The investigating officer understood that the informant expected something in return for his information, and the informant was paid two hundred dollars in cash, in addition to being released nineteen days early in return for his services.

438 So. 2d at 392. The majority rejected Justice Overton's position: "Without some promise or guarantee of compensation, some overt scheme in which the State took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the State's actions in this case to an agency relationship with the informant Chavers." 438 So. 2d at 386.

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

On January 30, 1989, Mr. Lightbourne filed a second Rule 3.850 motion and petition for writ of habeas corpus in this Court. The Rule 3.850 motion was denied. This Court reversed and remanded for an evidentiary hearing on Mr. Lightbourne's claim that the State had violated Brady v. Maryland, but denied habeas relief. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The majority found Mr. Lightbourne's judicial bias claim procedurally barred. This claim was premised upon the sentencing judge's undisclosed receipt of in-kind gifts from the victim's family which exceeded $2000 in value. Justices Barkett, Shaw, and Kogan dissented as to this issue.

Evidentiary hearings were held in circuit court in 1990. On April 17, 1991, Mr. Lightbourne filed a motion to reopen the evidentiary hearing, which was granted. An additional evidentiary hearing was conducted. The circuit court denied relief on June 12, 1992, and Mr. Lightbourne appealed. After the issuance of Espinosa v. Florida, 505 U.S. 1079 (1992), Mr. Lightbourne filed a third Rule 3.850 motion. On February 1, 1993, this Court granted Mr. Lightbourne's request to relinquish jurisdiction to allow the circuit court to consider the Rule 3.850 motion. On March 15, 1993, the circuit court denied relief. This Court affirmed. Lightbourne v. State, 644 So. 2d 54 (Fla. 1994).

On November 7, 1994, Mr. Lightbourne filed his fourth Rule 3.850 motion requesting another evidentiary hearing to present additional evidence in support of his Brady claim. A hearing was held on October 23 and 24, 1995. On February 23, 1996, Mr. Lightbourne filed a motion to reopen the hearing to present additional testimony and a motion to disqualify the state attorney. The circuit court held a hearing on these motions on

March 15, 1996, and denied both motions. The circuit court denied relief on June 19, 1996. Mr. Lightbourne filed a motion for reconsideration which was denied. This appeal followed.

STATEMENT OF THE FACTS

A. INTRODUCTION

Mr. Lightbourne was convicted and sentenced to death largely on the basis of the testimony of two jailhouse informants: Theodore "Uncle Nut" Chavers and Theophilus Carson, aka James Gallman. Both of these inmates, according to their trial testimony, contacted law enforcement officials on their own initiative after Mr. Lightbourne made spontaneous, unsolicited incriminating statements. Both Mr. Chavers and Mr. Gallman/Carson testified that they had not received any benefits in exchange for their testimony and that they had not been instructed by the police or prosecution prior to their meetings with Mr. Lightbourne. The State presented its witnesses as concerned citizens who were fortuitously present when Mr. Lightbourne made incriminating admissions and were then prompted by their consciences to contact the authorities and ultimately testify.

Evidence has been discovered since Mr. Lightbourne's trial indicating that Mr. Chavers and Mr. Gallman/Carson were agents of the State who were deliberately placed in Mr. Lightbourne's cell and instructed to elicit incriminating statements from him. Both were promised assistance on their pending charges in exchange for their cooperation. Both have indicated that Mr. Lightbourne never made the statements to which Mr. Chavers and Mr. Gallman/Carson testified and that these witnesses were briefed on the case before they even attempted to elicit admissions from Mr. Lightbourne. In short, the State failed to disclose

material exculpatory evidence, and in fact, the State used this false testimony to mislead the jury and obtain a conviction and sentence of death.

The State withheld material exculpatory evidence regarding the benefits received by Mr. Chavers and Mr. Gallman/Carson that would have allowed the defense to impeach their credibility by showing the jury why they were testifying against Mr. Lightbourne. In addition, the State withheld evidence that other pretrial cellmates told law enforcement officials that Mr. Lightbourne denied any involvement in the O'Farrell murder and that Mr. Chavers was actively soliciting other cellmates to provide false evidence against Mr. Lightbourne. As a result of the State's misconduct, the jury that convicted Mr. Lightbourne and sentenced him to death was misled by false testimony and deprived of relevant impeachment evidence that would have explained these witnesses' true motivation for testifying against Mr. Lightbourne.[1]

B. THE TRIAL RECORD

Mr. Lightbourne was convicted and sentenced to death for the murder of Nancy O'Farrell. Ms. O'Farrell was found shot to death in her home at the Ocala Stud Farm on January 17, 1981.[2] Law enforcement investigated her death but developed no apparent

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[1]Also as a result of the State's misconduct, Mr. Lightbourne's attorney on direct appeal was deprived of evidence necessary to support his claim that the State had committed a Henry violation. A majority of this Court on direct appeal erroneously rejected Justice Overton's dissenting position that United States v. Henry was violated.

[2]It was from this stud farm that the sentencing judge received the undisclosed gifts at issue in this Court's 1989 opinion; by a four to three vote, this Court found the judicial bias issue procedurally barred.

leads. On January 24, 1981, Mr. Lightbourne was arrested on a charge of carrying a concealed weapon and was placed in the Marion County Jail. On January 26, 1981, the public defender's office was appointed to represent Mr. Lightbourne.

On January 28, 1981, Lieutenant Fred La Torre, the lead investigator in the O'Farrell homicide, interviewed Cathleen Gifford, an employee of the Ocala Stud Farm. Ms. Gifford was asked whether any of the farm workers carried weapons. She responded that most of the workers carry weapons and that her former boyfriend, Ian Lightbourne, was currently in jail on a weapons charge (PC-R. 2428-29). The very next day, Theodore Chavers was transferred into Mr. Lightbourne's cell. Mr. Chavers testified at Mr. Lightbourne's trial that he was transferred because he asked to be in a cell where he could watch television (R. 1107).[3]

Mr. Chavers testified that he and Mr. Lightbourne talked about the O'Farrell murder case and, because Mr. Lightbourne "knew too much" about the case, Mr. Chavers contacted Lieutenant La Torre of the Marion County Sheriff's Office and suggested that Mr. Lightbourne might be guilty (R. 1113). Mr. Chavers insisted that he did not speak with law enforcement agents before talking to Mr. Lightbourne, yet he stated that he initially suspected that Mr. Lightbourne was guilty because he knew more than the investigators, implying that Mr. Chavers had already spoken to the police (R. 1112). Defense counsel tried to explore this inconsistency on cross-examination but was frustrated by Mr. Chavers' evasive and nonresponsive answers:

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[3]It was on the basis of this testimony and the absence of any contradictory evidence that the majority of this Court rejected Mr. Lightbourne's United States v. Henry claim on direct appeal.

Q You said that you became suspicious because Mr. Lightbourne knew more than the investigator; right?

A He told me every detail.

Q How did you know what the details were?

A From him.

Q How did you know what the investigators knew?

A How did I know what the investigators knew?

Q Yes.

A I didn't know; Lightbourne said.

Q Okay. How did you know, then, he knew more than they did?

A Wait a minute; say what?

(R. 1124-25). When asked directly whether the investigators knew the details he allegedly learned from Mr. Lightbourne, Mr. Chavers responded: "I do not know. I'm not no investigator." (R. 1125).

Mr. Chavers testified that Mr. Lightbourne did not confess to killing Ms. O'Farrell but that he was in her house that night:

A He said that Ms. O'Farrell was coming out of either the shower and by him being in and her being alone and not knowing anyone was in the house, it was -- he surprised her and she surprised him, you know, and --

Q Let me back up a second. Did he tell you how he got in the house?

A No, he didn't tell me how he got in.

Q All right, but he just mentioned he was in the house and he surprised her?

A Yes, sir.

Q All right; go on. What did he tell you after that?

A He told me about -- he told her that he wasn't going to hurt her, and he performed sex acts with her, and he also told me about -- you know, well, after Mr. LaTorre done formally charged him that afternoon and took his picture and fingerprinted him, he came back in the cell and made a statement as Ms. O'Farrell having a big vagina. So I asked him how would you know that Ms. O'Farrell had a big vagina, not unlessen you had intercourse with her.

Q And what did he say about that?

A Wasn't nothing he could say.

Q All right. Did he describe for you any portion of the sexual act?

A Yeah, about when he had her on the floor.

Q Did he tell you what happened on the floor?

A Well, he had oral sex.

Q All right. How did he describe that to you?

A Well, he just described it to me that she was -- she begging him not to kill her, and he told her he wasn't going to kill her, and they had sex. He told her to get on the bed. She -- they had oral sex, you know, over and over.

(R. 1115-16).

Mr. Chavers testified that everything he knew about the offense came from Mr. Lightbourne (R. 1124, 1144) and that he had not met with prosecutors except to discuss his own pending charges (R. 1165). Mr. Chavers also testified that he was not promised anything (R. 1124) and that he was released on February 10, 1981, only nineteen days before completing his sentence (R. 1119). Although Mr. Chavers had three other charges pending

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

The evidence provided by the State to defense counsel pretrial was consistent with Mr. Chavers' trial testimony. In transcribed statements given to Lieutenant La Torre, Mr. Chavers recited information that he had supposedly gotten from Mr. Lightbourne (Def. Exhs. 4, 5) and stated that he had not spoken to Detective La Torre before his conversations with Mr. Lightbourne (PC-R. 2418). At his deposition, Mr. Chavers similarly testified that he was prompted to approach Lieutenant La Torre after Mr. Lightbourne made incriminating statements (R. 1421-22). Mr. Lightbourne's attorneys attempted to explore Mr. Chavers' relationship with the police and his motivation for testifying against Mr. Lightbourne, but Mr. Chavers' account was that there was no agency relationship, no promises, no rewards, no coaching.

Theophilus Carson, aka James Gallman, testified at Mr. Lightbourne's trial that he also had been in the same cell with Mr. Lightbourne, though not at the same time as Mr. Chavers, and that he heard Mr. Lightbourne confess to the O'Farrell murder (R. 1179). Mr. Gallman/Carson provided additional details: "he had took some money from the lady and he had sex with her. He made her have sex with him" and that "she screamed, hollered" when he entered the house (R. 1176-78). Mr. Gallman/Carson also testified that Mr. Lightbourne said he shot Ms. O'Farrell because she could identify him (R. 1180). Mr. Gallman/Carson contacted the Ocala Police Department and was referred to Bob Joyner who referred him to Lieutenant La Torre (R. 1181). Mr. Gallman/Carson testified that he was arrested in

November on an accessory to grand theft charge and that he was released on March 3, 1981, because the State had insufficient evidence against him (Id.). Significantly, after more than three months in jail, Mr. Gallman/Carson was suddenly released approximately one week after providing evidence against Mr. Lightbourne (R. 1195). However, he testified that he had worked out a plea agreement by which he would receive time served before providing information against Mr. Lightbourne; he explained that "we had a plea bargain before all this occurred. All right. This was about -- before I talked to Lightbourn[e]. This was about a week -- they had come to me with time served." (PC-R. 1180-81).

Together, Mr. Chavers and Mr. Gallman/Carson provided the only evidence supporting the aggravating factors used to sentence Mr. Lightbourne to death, as well as highly prejudicial details that made a guilty conviction more likely. During his opening statement, Assistant State Attorney Albert Simmons reviewed the physical evidence and then provided a preview of Mr. Chavers and Mr. Gallman/Carson:

> Now, so far all we've got is circumstantial, scientific type evidence, but we have several other witnesses, Ladies and Gentlemen, and I certainly haven't made reference to all of the witnesses that we're going to have. We're going to have several other very interesting witnesses. These individuals consist of people who were cell mates of the Defendant while he was incarcerated. One of those individuals, Ladies and Gentlemen, will tell you that the Defendant made statements and admissions to him not only about his involvement in this matter but he will tell you that the Defendant told him how he had Miss O'Farrell crawling around on the floor and sucking his penis.
>
> Another individual will tell you that not only did the Defendant admit his participation in this matter to him but that Lightbourn[e] described how she was screaming and hollering.

(R. 603-4). During the guilt/innocence phase closing argument, Mr. Simmons relied on Mr. Chavers and Mr. Gallman/Carson to reject any inference that the State's case was circumstantial and to reject defense attempts to question whether the State had proved the commission of a burglary and/or robbery (R. 1383-90). Mr. Simmons again relied on Mr. Chavers and Mr. Gallman/Carson during the penalty phase closing statement to support the following aggravating factors: during the commission of a felony; avoiding arrest; pecuniary gain; heinous, atrocious or cruel; and cold, calculated and premeditated (R. 1459-63).

C. THE 1990 EVIDENTIARY HEARINGS[4]

On July 20, 1989, this Court ordered an evidentiary hearing on Mr. Lightbourne's Brady claim regarding Mr. Chavers and Mr. Gallman/Carson. The circuit court held three separate proceedings: June 11-14, 1990; July 2, 1990; and October 8-11, 1990. Mr. Lightbourne's key witness at these hearings was to have been Mr. Chavers who would have testified consistently with his affidavit that he had been recruited by law enforcement agents to elicit incriminating statements from Mr. Lightbourne; that he received benefits in exchange for his testimony; and that his trial testimony was false (PC-R. 1396-99).

When he initially took the stand on June 13th, Mr. Chavers appeared to have great difficulty understanding questions (See, e.g., PC-R. 438-83). He explained that "[t]here's a lot of things I remember and a lot of things I don't." (PC-R. 469). During extensive and

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[4]These hearings are 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. In light of the evidence presented in 1995 and 1996, that ruling must be reconsidered.

often repetitive questioning, counsel for Mr. Lightbourne was able to establish only that Mr. Chavers had been in the jail cell with Mr. Lightbourne, that he had spoken to Lieutenant La Torre, and that he had been returned to the cell with Mr. Lightbourne (PC-R. 456-57, 483). The court inquired whether Mr. Chavers was under the influence of drugs and/or alcohol and whether Mr. Chavers' recent car accident had affected his mental processes (PC-R. 492, et seq.). The court then ordered Mr. Chavers to remain in jail overnight to improve his condition (PC-R. 526). The next day, the court ordered a mental health evaluation to determine Mr. Chavers' competency to testify (PC-R. 608). The expert concluded that Mr. Chavers was not competent to testify (PC-R. 639), and the court ordered that he remain in custody until the next session of the hearing to be held on July 2, 1990 (PC-R. 652-53).

At the July 2nd hearing, experts reported that Mr. Chavers was suffering from post-concussion syndrome and was not competent to testify (PC-R. 679-80). His testimony was again deferred, this time until October 8, 1990. At the October 8th hearing, Mr. Chavers claimed an inability to remember anything, including testifying at Mr. Lightbourne's trial, giving a deposition, and signing an affidavit (See, e.g., PC-R. 742-66, 799-871). The court believed Mr. Chavers was being intentionally uncooperative, stating that his memory and ability to testify were "perfectly fine" and that he was "playing games;" the court also told Mr. Chavers directly: "I believe you know something, and we want to hear it. We want to know what you know." (PC-R. 767, 772). The next day, when Mr. Chavers continued to profess a lack of memory, the court held him in contempt (PC-R. 950) and ultimately determined that Mr. Chavers was unavailable as a witness (PC-R. 1255, 1259).

Mr. Chavers was again called to testify on October 15, 1991, after the circuit court granted Mr. Lightbourne's motion to reopen the evidentiary hearing. Mr. Chavers had written several letters to the State Attorney's Office and Judge Angel revealing that Mr. Chavers felt that the State was angry at him for recanting his trial testimony against Mr. Lightbourne and that the State was not treating him fairly as a result (See, e.g., PC-R. 1326-47). These letters also reveal that Mr. Chavers was trying to assist the State in solving the Ray Williams murder case in exchange for a reduced sentence. For example, on April 9, 1991, Mr. Chavers wrote to State Attorney Jim Phillips:

> I'm ready to help you with Ray Williams murder! I'm going to put all my trust in you with helping me get my time cut or something! Sir, I can't lie to you any-more about what happen the night Ray Williams got murdered! I did see Miller kill Ray Williams! Jim, I will be your key witness, I know it looks bad by me changing my story in the other murder. Phillips, I have been on the stand before and Miller attorney [won't] mess me up, that I promise you!

(PC-R. 2217)(emphasis added). Despite his offer to be the State's "key witness," Mr. Chavers admitted at the hearing that he knew nothing about the Williams case and that he was "fabricating" evidence in order to improve his own situation (PC-R. 1337, 1339-40, 1348-50). Mr. Chavers referred to this as a "cat and mouse game" that he was playing with the State Attorney's Office (PC-R. 1348).

Although these letters reveal Mr. Chavers' independent memory of testifying for the State in Mr. Lightbourne's trial, the other murder case on which he helped the State, Mr. Chavers insisted at the hearing that he had no memory of Mr. Lightbourne or his trial (PC-R. 1321). While he admitted that he remembered being evaluated at the direction of Judge Angel and being held in contempt in 1990, Mr. Chavers professed no understanding of why

he had been called to court or any memory of his testimony in 1990 (PC-R. 1322-23). The circuit court refused to hold Mr. Chavers in contempt and excluded both his letters to the State and his affidavit (PC-R. 1355-57).

In 1990, Mr. Chavers did admit that an inmate named Richard Carnegia was also in the cell with him and Mr. Lightbourne in 1981 (PC-R. 443). Mr. Carnegia confirmed this and testified that he knew Mr. Chavers was a snitch when he entered the cell (PC-R. 553). He knew that Mr. Chavers frequently supplied information to Mr. Bray, an Ocala police officer, and he had heard that Mr. Chavers had a relationship with the State Attorney's Office (PC-R. 554). Mr. Carnegia testified that he "respected" Mr. Chavers because of his position as a State informant. He explained:

> A Because he, you know, he had -- he was in a position where sometime he could say things, you know, and they would be believable, you know. And by me being on parole and stuff, you know, I would give him respect because I didn't want to get crossed.
>
> Q You didn't want to get crossed?
>
> A No.
>
> Q What do you mean by that?
>
> A Be put in a jam for something I didn't do or didn't know about it.
>
> Q And that was based upon your knowledge of Mr. Chavers as an informant?
>
> A Yes, sir.

(PC-R. 555). Significantly, Mr. Carnegia also testified that Mr. Chavers had given him advice about how to get out of jail:

A He asked me did I want to try to get myself out.

Q And what did you say?

A I said: "What I have to do?" And he said that just tell them that you heard Lightbourn[e] say that he killed somebody.

(PC-R. 558). Mr. Carnegia explained why he refused to do what Mr. Chavers had suggested: "I didn't want to say something that I didn't hear. You know, it wasn't true." (PC-R. 558-59). He also overheard Mr. Chavers attempt to recruit Larry Emanuel, another cellmate, to do the same thing (PC-R. 561). Mr. Carnegia explained that Mr. Chavers said he was recruiting other cellmates to provide evidence against Mr. Lightbourne because "it would have been more believable if he had a little more support [for] his word." (PC-R. 559). Mr. Carnegia remained in the same cell with Mr. Lightbourne and was pulled out once to speak with Mr. Chavers, a police officer, and another inmate about Mr. Lightbourne (PC-R. 564). Mr. Carnegia told the officer that Mr. Lightbourne had denied killing Ms. O'Farrell (PC-R. 597).

Mr. Carnegia also testified that Mr. Chavers attempted to elicit information from Mr. Lightbourne but that Mr. Lightbourne did not know any details of the crime:

Q When you overheard Mr. Chavers talking with Mr. Lightbourn[e] about the O'Farrell murder was Mr. Chavers asking Mr. Lightbourn[e] questions?

A Yes, sir.

Q And was Mr. Lightbourne answering?

A Told him he didn't know nothing about what he was talking about.

Q Did you hear him provide any details in response to Mr. Chavers' questions?

A No, sir.

(PC-R. 573). Mr. Carnegia never heard Mr. Lightbourne tell Mr. Chavers anything about the O'Farrell murder (PC-R. 559-560). Mr. Carnegia explained that Mr. Chavers was asking Mr. Lightbourne questions "in a friendly manner, like 'You can trust me,'" (PC-R. 573), and that he was "trying to make him feel relaxed, you know; [saying] 'You know this ain't going to go no further than here.'" (PC-R. 578).[5]

Mr. Lightbourne also presented the affidavit of Jack Hall, another inmate who was in the holding cell with Mr. Chavers and Mr. Lightbourne in 1981.

> 1. My name is Jackie R. Hall and I currently reside at the Marion County Correctional Institution in Lowell, Florida. I am 48 years old.
>
> 2. In January and February of 1981, I was incarcerated at the Marion County Jail. I was in a cell with Ian Lightbourne the entire time I was at the jail.
>
> 3. Because Lightbourne spoke with a thick accent, he had a real hard time communicating with other inmates. I was the only inmate at the jail during this time that Lightbourne would talk to.
>
> 4. When Lightbourne was first brought to the Marion County Jail, he was placed in the same cell with me. Shortly after Lightbourne's arrival, three trustees were moved into our cell. One of these trustees was "Nut" Chavers, but I did not and do not know the name of the others. Neither Lightbourne nor I ever talked with them. They huddled in the

[5]Mr. Fox and Mr. Burke both testified at the 1995 evidentiary hearing that Mr. Carnegia's testimony provides corroboration for the allegation that law enforcement agents were recruiting inmates to elicit information from Mr. Lightbourne and that those inmates who cooperated expected a benefit from the State in return (PC-R2. 460, 463-64, 532-33). Mr. Fox explained the importance of this information provided by Mr. Carnegia: "I would have had a field day with it. It's the kind of thing that we would have hoped to have found to undermine the credibility of the jailhouse snitches." (PC-R2. 533).

> corner talking together for awhile and then called for the guards to come and let them back out. Lightbourne never spoke to any of these guys the whole time they were in our cell.
>
> 5. These same trustees were placed in our cell several more times, and acted the same way each time. They would huddle up and whisper together like they were making a plan, and they would laugh a lot, too. A few times I overheard the things they were saying - they were talking about Lightbourne and a murder case. I specifically remember the guy called "Nut" talking about what they were going to tell the cops about Lightbourne. They said that they were going to say that Lightbourne told them all about the murder of the O'Farrell woman. I also heard them talking about getting out of jail and heard "Nut" telling the others that he had gotten out this way before.
>
> 6. Long after I was transferred back to the state prison system, I learned that at least one of the trustees who had been in the cell with me and Lightbourne - "Nut" Chavers - testified at Lightbourne's trial and said that Lightbourne had told him that he did the murder. I knew when I heard this that it was a lie -- Lightbourne and I were together the whole time, in the same cell, and neither of us spoke to those guys who were put in with us. Like I said, I had heard "Nut" and the others talking about what they were going to tell the cops, but I never thought they would or could actually get up in a court and say this like it was true.

(PC-R. 1401-02). The circuit court would not admit Mr. Hall's affidavit although counsel for Mr. Lightbourne offered evidence proving that Mr. Hall is dead (PC-R. 1305, 1372). His death certificate was accepted into evidence (PC-R. 2399).

In addition to the above evidence indicating that Mr. Chavers' trial testimony that Mr. Lightbourne had confessed was false, Mr. Lightbourne presented evidence regarding the benefits Mr. Chavers received in exchange for his assistance in convicting Mr. Lightbourne. At the time Mr. Chavers was in jail with Mr. Lightbourne, he was serving a sentence for driving with a suspended license. He also had charges pending for escape, resisting arrest

with violence, and grand theft (R. 1165). Mr. Chavers testified that on February 10, 1981, he was released on his own recognizance on the escape charge and posted a $5000 bond on the other two charges (Id.).

However, jail records show that on February 10, 1981, after he provided Lieutenant La Torre with information incriminating Mr. Lightbourne, Mr. Chavers was released from jail on his own recognizance on all three charges at the direction of the State Attorney's Office (PC-R. 2410). In addition, David Bailie, Mr. Chavers' bail bondsman, testified at the evidentiary hearing that he did not post a $5000 bond for Mr. Chavers on February 10, 1981 (PC-R. 215). Mr. Bailie did post a bond for Mr. Chavers on March 5, 1981, on the suspended license charge, but Mr. Chavers did not put up any money for this bond (PC-R. 218, 221).[6] Further, although Mr. Chavers testified that these charges were still pending at the time of Mr. Lightbourne's trial, in fact the State had filed an "Announcement of No Information" on the escape charge before Mr. Lightbourne's trial (PC-R. 2400), despite the fact that three jail corrections officers were eyewitnesses to the escape (PC-R. 358). Finally, five days after Mr. Lightbourne was sentenced to death, Mr. Chavers entered a plea agreement on the resisting arrest and grand theft charges and received three years probation

[6]Mr. Baillie posted the bond for free because of Mr. Chavers' involvement with the O'Farrell murder case (PC-R. 220-21). He explained his motivation: "I'm a law and order person, and the fact that I bonded him out at the suggestion or request or what not of the authorities was on my own . . . I felt like that that [sic] was part of my contribution to society at that time." (PC-R. 221). In a 1985 statement to the police in another case, Mr. Baillie stated that he had "bonded [Chavers] before . . . for free for some of the city people . . . so he could do snitch work for 'em and . . . after he . . . blowed [sic] the whistle on the . . . murder . . . down there that time I bonded him out then . . . free and what not as a kind of reward" (PC-R. 2449-50).

although these charges carried a maximum possible sentence of ten years imprisonment (PC-R2. 2440).

Mr. Chavers initially provided Lieutenant La Torre a statement implicating Mr. Lightbourne on February 2, 1981 (PC-R. 2412-15). This statement was vague and general, containing no details of the offense (PC-R. 1128, see also, PC-R. 116 [Testimony of James Burke]). In fact, Lieutenant La Torre testified at the evidentiary hearing that in this first interview, Mr. Chavers "did not go into a lot of specifics" and "never made any indications that Lightbourn[e] had told him he did the incident" (PC-R. 1128-29). Mr. Chavers provided Lieutenant La Torre a second, more detailed statement on February 12, 1981, at 2:59 p.m. (PC-R. 2416-23). Lieutenant La Torre described the second statement: "it was in more detail and encompassed more particular points that the first statement did." (PC-R. 1163). Specifically, the first statement contained nothing about a sexual assault (PC-R. 1176).

At trial, Mr. Chavers testified that after his release from jail on February 10, 1981, Marion County Sheriff Moreland gave him $200 (R. 1119). However, documents establish that Mr. Chavers received the $200 from Detective La Torre on February 12, 1981, at 1:10 p.m. (PC-R. 204), i.e., less than two hours before he gave the detailed second statement incriminating Mr. Lightbourne. Lieutenant La Torre confirmed that he gave Mr. Chavers the money on February 12, 1981 (PC-R. 1133).

In addition, Mr. Chavers wrote letters to the State Attorney after testifying at Mr. Lightbourne's trial revealing that he lied at Mr. Lightbourne's trial and then sought assistance from the State in exchange for his role in convicting Mr. Lightbourne. He

repeatedly wrote to the State Attorney's Office for help with his then current charges. Those letters reveal the following information that directly contradicts Mr. Chavers' trial testimony:

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

(PC-R. 2436).

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

(PC-R. 2437).

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

(PC-R. 2434-35). Letters written by Mr. Chavers to Al Simmons, the prosecutor, confirm that he was promised assistance on his pending charges in exchange for his testimony. Before the trial, Mr. Chavers wrote, "I hope and trust you get me out after the trial is over . . . I will do my best at the trial" (PC-R. 2398). Between the guilt and penalty phases, Mr. Chavers wrote, "I'm glad the trial is over, I hope I did a good job. Sir, I hope and trust in you that you will get me out of here . . . Sir, I would like to be out before May first . . . Sir, I will continue helping you" (PC-R. 2397).[7] The circuit court did not admit these letters as they were hearsay and lacked sufficient indicia of trustworthiness.

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[7]Certainly, these letters provide the evidence that a majority of this Court found missing on direct appeal and support Justice Overton's dissenting view that the State violated Henry.

Finally, Mr. Chavers' own affidavit, which the court excluded although Mr. Chavers was declared unavailable to testify, is consistent with all the other evidence proving both that he was a state agent and that he lied at Mr. Lightbourne's trial:

> 1. My name is Theodore Cleveland Chavers and my nickname is "Uncle Nut". I was made to testify against Ian Lightbourne at his trial in 1981.
>
> 2. In 1981, I was very familiar to the local law enforcement officers because of numerous arrests and charges made against me in Ocala. When I was in Marion County Jail in January of 1981, I was placed in a cell with Ian Lightbourne and several other inmates.
>
> 3. Shortly after being put in the cell with Lightbourne, Detective La Torre took me out and talked to me at length. He make it clear to me that it was in my best interest to find out all I could from Lightbourne about the O'Farrell murder. I in fact did this and then several charges pending against me were dropped.
>
> 4. Theophilus Carson, who was also in the cell with Lightbourne and me, worked for the state too. Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial by dropping his charges. I know that he lied on Lightbourne to get out of trouble.
>
> 5. The officers pressed me for details about what Lightbourne was saying even though there was not anything really to say. I told them I didn't want to get involved since they had other evidence but with all they had on me they could make me do what they wanted.
>
> 6. The state attorneys went over and over what they wanted me to say at the trial. They told me the things they wanted me to say to the jury at Lightbourne's trial. They came at me and rehearsed everything I should say.
>
> 7. When the investigators involved me in this case, they made it clear that if I scratched their backs, they'd scratch mine - but if I didn't cooperate, they could bring me even more

trouble than I already have. In fact, what really happened in my conversations with Lightbourne and the way they made me say it was very different. I knew I had to make things look good for the way they wanted the investigation to go.

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

(PC-R. 1396-99).

One week after signing the affidavit, Mr. Chavers had a taped conversation with State Attorney James Phillips. Mr. Chavers confirmed that his affidavit was true and that he had lied at Mr. Lightbourne's trial:

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

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

TC: Everything was a lie?

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

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

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

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

JP: It was.

TC: Yes sir.

(PC-R. Sup. 101-02). During this conversation, Mr. Chavers explained that he had lied in his letters to the State Attorney's Office: "I was just, you know like sorta like using that for sorta like lenience" (PC-R. Sup. 102). Again, the circuit court refused to admit this taped statement as not support by sufficient indicia of trustworthiness.

Mr. Lightbourne proffered the testimony of Ray Taylor, Mr. Chavers' cellmate during the evidentiary hearing. Mr. Taylor had written his attorney a letter stating that Mr. Chavers had said that Mr. Lightbourne did not commit the offense and that Chavers' trial testimony was not true (PC-R. 1259). Mr. Chavers also told Mr. Taylor that he was

feigning incompetency in order to avoid testifying (Id.). Mr. Lightbourne requested that Mr. Taylor be produced as a witness, but the court denied the request (PC-R. 1258-59).[8]

Mr. Lightbourne also presented evidence regarding Mr. Gallman/Carson who could not be located at the time of the 1990 hearings. Mr. Lightbourne presented a letter Mr. Gallman/Carson wrote to the State Attorney's Office after Mr. Lightbourne's trial, indicating that, contrary to his trial testimony, he also expected to receive assistance from the State in exchange for his role in convicting Mr. Lightbourne:

> STATE ATTORNEY OFFICE OF OCALA
>
> To Head State Attorney
>
> I James T. Gallman, AKA (Theophilus R. Carson) was a key witness in the homicide trial of Egin Lightbolt, the murder of the Ocala Stud Farm owner. I took the stand for the state, I put my life on the line concerning the matter, my testimony was a key in convicting Lightbolt, in return I got nothing but frustration. I was suppose to get a witness pay which I haven't received yet. I was suppose to have had a deal worked out with the state attorney office here in Tampa, but they tell me they have no records of it, and wasn't contacted.
>
> Sir, I am writing this letter in regards and hoping to get some response and a positive reply. I need some legal documents showing that I was a state witness for Marion County, involvement with this trial. I need these appears to present to Judge Harry Lee Coe, III and state attorney office of Tampa. And the witness pay -- sir, I am in very need of it. I would like to thank you for your time, and much needed consideration in the matter.
>
> Thank you kindly

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

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

James L. Gallman
AKA (Theophilus R. Carson)

(PC-R. 2439). Counsel for Mr. Lightbourne detailed their extensive efforts to locate Mr. Gallman/Carson and requested that the hearing be kept open so that his testimony could be presented if he were found (See, e.g., PC-R. 420). Counsel for Mr. Lightbourne also informed the court that Larry Emanuel, another pretrial cellmate of Mr. Lightbourne, had not been located and that the search was continuing (PC-R. 427-28). Counsel offered to present CCR investigator Theresa Farley to testify about her efforts to locate Mr. Emanuel; the court responded that such testimony was "[n]ot necessary at this point." (PC-R. 428).

Mr. Lightbourne also presented the testimony of James Burke and Ronald Fox, his trial attorneys. They agreed that Mr. Chavers and Mr. Gallman/Carson were crucial to the State's case against Mr. Lightbourne. Mr. Burke explained its impact:

> [T]he primary case prior to the introduction of those two witnesses was a circumstantial case . . . there was no direct testimony implicating the defendant, and the direct testimony of Mr. Chavers had a dual impact, because not only was it out of the mouth of the defendant, purportedly, but it was very sensational type of testimony; rather horrible type of testimony, which immediately, in my opinion, turned the jury off to any consideration of the defense.

(PC-R. 50). Mr. Fox agreed that "shaking Chavers was of utmost importance" because aside from his and Mr. Gallman/Carson's testimony, the case was entirely circumstantial (PC-R. 280). In addition, Mr. Chavers' testimony was crucial to the State's case at both phases of Mr. Lightbourne's trial:

> Q Would it be fair to say that Mr. Chavers' account was critical to the State's case at the sentencing as far as the aggravating factors go?
>
> A I don't think there's any -- who am I to say, but I don't think there's any doubt about that. I mean, the testimony that came out from him was aggravating, not only in the legal sense but in the practical sense, and I'm certain that it would have had significant impact on the jury's decision as to what sentence to recommend.
>
> A Would and did Chavers' testimony have a devastating effect on the defense case? Was it very important to the State at guilt-innocence as well?
>
> Q If you take this case without Chavers, it's just a purely circumstantial case. So therefore you have -- you retain all of those great legal factual circumstantial arguments, as well as the evidentiary support for some of the things.
>
> The State's evidence was not so clear without Chavers that they could prove some of these aggravating features of the case. His testimony just solidified, let's say, those things that the State might have argued by innuendo.

(PC-R. 274).

Mr. Burke and Mr. Fox also testified about their suspicions that Mr. Chavers had received some benefit in exchange for assisting the State. Mr. Burke explained:

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

(PC-R. 46). Mr. Fox described the information in Mr. Chavers' affidavit regarding the deals he made with the State as "something that I sort of felt all along but had no way of doing anything about" (PC-R. 281). Mr. Lightbourne's trial attorneys were unable to find any evidence to support their suspicions that Mr. Chavers had received benefits in exchange

for his testimony and that he was in fact an agent of the State (PC-R. 60, 69, 172, 178, 240, 286).

Mr. Burke remembered that he and Mr. Fox had difficulty obtaining information from the State when they sought records to support their suspicions about Mr. Chavers (PC-R. 103-05). Mr. Burke testified that he and Mr. Fox lacked evidence to disprove Mr. Chavers' assertions that he had bonded out of prison and that charges were still pending at the time of Mr. Lightbourne's trial. According to Mr. Burke, the evidence withheld by the State proved that Mr. Chavers was released on his own recognizance at the direction of the State Attorney's office on three charges (theft, driving with a suspended license, resisting arrest) and that the State Attorney filed an announcement of "No Information" on the escape charge despite the availability of three jail employee witnesses. In addition, the testimony of Mr. Baillie conflicted with Mr. Chavers' trial testimony that he posted money for his bond (PC-R. 218, 221). Mr. Burke explained how this information could have been used to impeach Mr. Chavers:

> A Davis versus Alaska, pending charge during the time of cooperation with the State, that is impeachment material and would be used to show that as a deal that he received a quid-pro-quo and that therefore his testimony is suspect and not necessarily worthy of belief because he has a motive to lie.
>
> There's the insinuation that a defense attorney, in doing his job, would try to get across to the jury, sometimes successfully, sometimes unsuccessfully.
>
> Q Given his actual testimony, would those documents and the information reflected therein have been used as a defense counsel cross-examining a state's witness to show that the state's witness flat out lied?
>
> A Absolutely.

(PC-R. 107-08). Mr. Burke explained that this information would have been used to demonstrate not only that Mr. Chavers had a motive to fabricate evidence against Mr. Lightbourne, but also that he actually lied about the disposition of his own charges, thereby implying that other aspects of his testimony were also false (PC-R. 108). Mr. Fox agreed that this information demonstrates a "classic [situation] of benefit payment or consideration" that would have been used to support the implication that Mr. Chavers had a motive to lie (PC-R. 262). In addition, this same information could have been used to support the defense attorneys' suspicions that an agency relationship existed between Mr. Chavers and the State; Mr. Fox explained:

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

(PC-R. 261).

Regarding the State's filing of a "No Information" on the escape charge, Mr. Burke testified that the new evidence showed this was a benefit Mr. Chavers received in exchange for his cooperation:

> It appears there was an eyewitness, that is Deputy Spangler, in which case it would be a readily provable offense . . . and therefore by giving a nol pros or a no information was a "gimmie." They didn't have to. That implies to me that this was in return for something, because it was the kind of case that was rather easy to prove.

(PC-R. 109). Mr. Fox agreed that the "No Information" announcement indicates that "the state attorney's office unilaterally exercised their discretion and chose not to prosecute him, for whatever reason, on a case based on the PC affidavit where they could have well proceeded and got a conviction." (PC-R. 258). Mr. Burke also explained the importance of evidence proving that Mr. Chavers had been released on his own recognizance on the driving with a suspended license, theft, and resisting arrest charges:

> It's my recollection that he testified that he had posted some bail in a certain monetary amount. By so testifying, these documents directly contradict his trial testimony.
>
> Had we been aware, notified of these facts that he was in fact ROR'd per the state attorney's office, once again, Mr. Chavers' truthfulness would have been subject to attack by direct records which would refute or contradict his trial testimony, thereby impugning his veracity in front of a jury.

(PC-R. 111). Trial counsel testified that Mr. Chavers' plea agreement on the theft and resisting arrest charges was also essential impeachment information that they would have presented to the jury if they had known about it (PC-R. 134).

Both attorneys emphasized their goal of challenging the second, more detailed statement of Mr. Chavers and the importance of the withheld information in that endeavor. Mr. Lightbourne's attorneys never received a note dated January 12, 1981, at 1:10 p.m., indicating that Mr. Chavers received the $200 reward just prior to making the second statement (PC-R. 246). Mr. Fox emphasized the importance of this note:

> []It indicates the sheriff gave the money to King who gave it to La Torre who gave it to Chavers; would indicate -- yeah, that it contradicts that part of answer; yes, that he in fact got the money from La Torre; deposition, he said he didn't.

(PC-R. 253). Mr. Fox explained that "the timing of it would be particularly telling for the jury to have known this detail, or detailed damaging type statement followed within an hour-and-a-half of the sheriff having provided him with $200." (PC-R. 247-48). Mr. Burke similarly testified about the importance of the timing of Mr. Chavers' release on his own recognizance on February 10, 1981, between the two statements he gave to Lieutenant La Torre:

> It would have bolstered our argument, circumstantially, yet again that Mr. Chavers was not simply a concerned citizen who volunteered his services to the law enforcement agents, but rather was someone who was deliberately eliciting statements from Mr. Lightbourne in order to further [sic] his own nest or serve his own purposes and ends, and that we were more in the area of Henry and that hopefully there would be suppression in this of those statements and thus help the case of our client, Mr. Lightbourn[e].

(PC-R. 117).

Mr. Chavers' letters to Mr. Simmons at the State Attorney's Office were also withheld from Mr. Lightbourne's trial attorneys (PC-R. 78-9, 92). Mr. Burke explained the importance of the April 16, 1981, letter:

> Obviously, the more correspondence or documentation that you have that concerned Mr. Chavers, the happier you would be as defense counsel because you would establish a relationship between the State and Mr. Chavers.
>
> Also in this particular document, ["]sir, I will do my best at the trial to help convict this killer,["] there's language in there that -- that could be perceived as incurring favor with the State. That's why you would arguably use this at the trial.

(PC-R. 89). Regarding the second letter to Mr. Simmons, dated April 26, 1981, Mr. Burke explained that it could have been used at the penalty phase or as newly discovered evidence

to support a motion for new trial because it revealed Mr. Chavers' expectation of a benefit in exchange for assisting the State:

> [I]n this letter there is an -- an absolute request of doing another job for the county, and a request to be out May the 1st, and that may have been the basis of the quid-pro-quo with the State . . . [the letter] indicates that he felt that he was going to be released in the not too distant future after this trial took place as a result of some understanding that he had with the State of Florida.

(PC-R. 90-1). Mr. Fox agreed that the first letter revealed "an inference of an expected benefit as well as a statement that could be construed that he is fabricating his testimony" and that the second letter shows "that [Mr. Chavers] was in fact an agent of the State and that would have affected the weight to be given his testimony." (PC-R. 266).

This Court affirmed the circuit court's denial of relief which resulted after the circuit court refused to admit Mr. Chavers' 1989 affidavit, Mr. Chavers' letters to the State Attorney, the taped telephone conversation between Mr. Chavers and Assistant State Attorney Phillips, Mr. Hall's affidavit, Mr. Taylor's letter, and the 1982 letter from Mr. Gallman/Carson. This Court found the evidence lacked sufficient circumstantial guarantees of trustworthiness because the only corroborating evidence was the testimony of Richard Carnegia. See Lightbourne v. State, 644 So. 2d at 57.

D. THE 1995 EVIDENTIARY HEARING

On November 7, 1994, Mr. Lightbourne filed his fourth Rule 3.850 motion presenting more newly discovered evidence proving that law enforcement officials recruited inmates to elicit incriminating evidence and that the State withheld material exculpatory

evidence and knowingly presented false evidence at Mr. Lightbourne's trial.[9] The evidence presented in this motion corroborated Mr. Chavers' affidavit and other documents that were not admitted at the 1990 hearings after he was deemed incompetent to testify. Mr. Lightbourne sought to rely upon the testimony of two witnesses he had indicated in 1990-91 that he was looking for but could not find -- Mr. Gallman/Carson and Mr. Emanuel.

At the October 1995 evidentiary hearing, Mr. Lightbourne presented Mr. Gallman/Carson whom counsel for Mr. Lightbourne could not locate prior to the 1990 hearings.[10] In contrast to his trial testimony that Mr. Lightbourne had made incriminating statements to him and that he received no benefit in exchange for his testimony, Mr. Gallman/Carson testified in 1995 that law enforcement officers supplied the information that formed the basis of his trial testimony and that he felt coerced into becoming an agent for the State.

He testified that he had not yet spoken to Mr. Lightbourne when he was pulled from the cell and briefed on the case (PC-R2. 367). He explained what happened at this meeting:

> A Well, first they say they was investigating a murder -- a "homicide" they called it -- concerning Mr. Lightbourne. And they said that Mr. Chavers, he was cooperating, and he had told them that I would cooperate for them, I would be a fine candidate for them. And they told me certain things pertaining to the case.
>
> Q And you --

---

[9]Specifically, Mr. Lightbourne claimed violations of Brady, Giglio, and Henry. He also presented a claim of newly discovered evidence of innocence of the death penalty.

[10]As to Mr. Gallman/Carson, the State conceded that Mr. Lightbourne had been diligent in trying to locate him (PC-R2. 671).

A They was going to send me in the cell with the individual to inquire about it, to try to get some information from him.

Q Do you recall what those certain things were?

A About a weapon, a necklace with a pendant on it.

Q 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?

A No, sir.

(PC-R2. 368).[11] Mr. Gallman/Carson's testimony reveals both that he lied at Mr. Lightbourne's trial and that he was made an agent of the State:

Q And did you ask Mr. Lightbourne any questions concerning his involvement with the homicide the detectives were referring to?

A Well, I asked around -- in a roundabout way, I asked questions.

Q Were you attempting to elicit information or get information from Mr. Lightbourne concerning the alleged homicide?

A That was what I was told to do.

Q And were you doing that?

A Yes, I was trying to do that.

Q 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?

---

[11]This testimony constitutes the evidence that a majority of this Court said on direct appeal was missing from Mr. Lightbourne's Henry claim in explaining why Justice Overton's dissent was erroneous.

A No, he didn't.

(PC-R2. 370). Mr. Gallman/Carson testified that he told law enforcement officials that Mr. Lightbourne did not say anything about the O'Farrell murder but that he was coerced into testifying against Mr. Lightbourne.

> A I told them just what I told you: He didn't tell me anything.
>
> Q And what was their response to that?
>
> A Well, they told me certain things to say that he did; and if I didn't go along with what they was saying, that they would make it real hard for me.

(PC-R2. 371). Mr. Gallman/Carson explained that "the police officers has -- they have their own way of throwing their weight around when they have you cornered up. You know, they had me in a do-or-die situation." (PC-R2. 372). At the time he was being held in the jail, Mr. Gallman/Carson had pending charges as an accessory to grand theft (Id.). He was asked whether he was promised any benefit in exchange for his cooperation:

> A Yes. They told me they would get me time served.
>
> Q And what did they tell you if you didn't cooperate with them in this?
>
> A 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.

(PC-R2. 371-72). He explained that he was only twenty-five at the time and could not make bail or post a bond (PC-R2. 378). In direct contradiction of his trial testimony, in which Mr. Gallman/Carson testified that the disposition of his Marion County charges was worked

out before he talked to Lieutenant La Torre (R. 1180, 1183), he testified in 1995 that his charges were dropped in exchange for his cooperation (PC-R2. 375). In addition, he was promised assistance on pending charges in Hillsborough County, specifically he was told that they would "resolve the charges" (PC-R2. 373). On October 24, 1982, he wrote to the State Attorney's Office; he explained his motivation for writing the letter: "the State Attorney's Office in Hillsborough didn't have the knowledge of me cooperating with the State down here in Marion County" and he was attempting to get the State to fulfill its promise of assistance on the Hillsborough charges (PC-R2. 376-77).

Timothy Bradley, the public defender who represented Mr. Gallman/Carson on the Marion County charges, confirmed that his notes from his first meeting with Mr. Gallman/Carson on February 23, 1981, do not reflect a discussion of a plea bargain (PC-R2. 506). He testified that he did not negotiate a plea agreement and that he did not know why his client was offered time served (Id.). Mr. Bradley testified that he did not know that Mr. Gallman/Carson was assisting the State in Mr. Lightbourne's case and that he would have been forced to discontinue his representation because of the conflict of interest created by his office's representation of Mr. Lightbourne (PC-R2. 503). Assistant State Attorney Simmons, who received Mr. Gallman/Carson's request for help in Hillsborough County, acknowledged calling Hillsborough County on Mr. Gallman/Carson's behalf (PC-R2. 435). Although he was unaware of the Marion County charges, Mr. Simmons admitted that he "was going to help him with his cases in Tampa" (PC-R2. 438).

Mr. Lightbourne's trial attorneys also testified in 1995 that they had no information at the time of the trial that Mr. Gallman/Carson expected a benefit in exchange for his

testimony and that they would have used such evidence had it been available to them (PC-R2. 448, 527-28). Mr. Burke and Mr. Fox agreed that Mr. Gallman/Carson's letter to Mr. Simmons reveals that he expected assistance from the State in exchange for his testimony (PC-R2. 446, 527). Mr. Burke remembered the difficulty he and Mr. Fox faced in gathering impeachment evidence against Mr. Gallman/Carson:

> The addition of Mr. Carson, or Mr. Gallman, to the witness list had changed the nature of the evidence, because you not only had Mr. Chavers, but now you had an x-factor, someone who we did not know a lot about, who we took his deposition, who there was no reported deal that we could use to impeach him, whose criminal history was from another judicial circuit, basically the Tampa-Hillsborough County area.

(PC-R2. 442). He explained that the information contained in the letter to Mr. Simmons "would have been an avenue for further impeachment or perhaps real impeachment" (PC-R2. 445). Mr. Fox agreed that the information contained in the letter "would be great to undermine [Gallman/Carson's] credibility" (PC-R2. 528). Mr. Burke explained the importance of informing the jury that a witness expects a deal "to be able to show from your perspective why that witness is biased and would have a motive to manufacture or fabricate or state what he does, and in that manner to undercut the weight and probative value of the evidence that that witness gave at the trial" (PC-R2. 447). He admitted that he and Mr. Fox did not successfully impeach Mr. Gallman/Carson because "there really was nothing to work with" (PC-R2. 446).

Mr. Lightbourne's trial attorneys also suspected, but were unable to prove, that Mr. Gallman/Carson was an agent of the State. Mr. Burke testified that their motion on this issue was denied because they were unable to develop any evidence in support: "we had no

evidence that they [Gallman/Carson and Chavers] were listening posts as individuals. We had made an effort by filing a motion that proves that we were concerned about that issue" (PC-R2. 453-54). Mr. Burke and Mr. Fox agreed that they would have used information indicating that law enforcement agents had recruited Mr. Gallman/Carson to elicit statements from Mr. Lightbourne had it been available to them at the trial (PC-R2. 454). Mr. Fox explained how he could have used such information: "I would have argued it pre-trial in an effort to exclude the testimony; at trial in an effort to discredit him in the guilt-innocence phase; and in the penalty phase to undermine the evidence that he supplied to support the aggravating circumstances" (PC-R2. 529).

Because of the testimony of Mr. Chavers and Mr. Gallman/Carson, the nature of the State's case changed from one consisting wholly of circumstantial evidence to a direct evidence case, including highly inflammatory and incriminating statements allegedly made by the defendant. Mr. Burke testified that Mr. Gallman/Carson's testimony was "extremely important" to the State's case because, in addition to changing the nature of the evidence, it provided the only evidence supporting the aggravating factors. He explained:

> There were elements of his testimony -- I believe he was the witness that indicated that the purpose -- or that he testified and was the only witness that testified that the purpose of the murder was witness elimination, which led to, at least in my judgment, to the --
>
> That was the whole aggravating argument made by the State at the penalty phase. They could get four or so aggravating factors from that one little snippet of testimony alone.

(PC-R2. 443).

> So the role that those two witnesses [Gallman/Carson and Chavers] played was a crucial one because it changed the nature of the case from being bookended with a murder weapon that was used to inflict the deadly shot, to being one where there was [sic] now two people saying that, from the Defendant's own mouth, that he had, in fact, committed not only this homicide, but had done other actions which constituted the bases of the indictment or, in this case, which was the sexual battery and/or burglary theft.
>
> And it also introduced the aggravating factor of pecuniary gain in connection with another felony; and by saying that it was to eliminate a witness, throwing in another aggravating factor, potentially cold, calculated and premeditated, to avoid a lawful arrest.
>
> So many of the aggravating factors in this case, as well as the judgment of acquittal phase, all of those things were greatly enhanced by the testimony of these two witnesses, and, in fact, were probably the only evidence as to those factors.

(PC-R2. 473-74). Mr. Fox agreed with Mr. Burke that Mr. Gallman/Carson's testimony was "very important to the State's case, in both the guilt-innocence phase as well as the penalty phase" (PC-R2. 526). Mr. Fox testified to another way in which Mr. Gallman/Carson's testimony was critical to the State's case: he was the only witness who testified that Mr. Lightbourne had confessed to killing Ms. O'Farrell and that he had done so to eliminate her as a witness against him (PC-R2. 526-27). Mr. Fox remembered that the State argued that Mr. Lightbourne's alleged motive of eliminating a witness also supported the heinous, atrocious or cruel aggravating factor (PC-R2. 540). Both attorneys remembered that the trial judge explicitly relied on Mr. Chavers and Mr. Gallman/Carson when denying the defense motion for acquittal (PC-R2. 473, 535) and that the State relied heavily on these two witnesses in arguing for the death penalty (PC-R2. 443, 538).

In addition, Mr. Gallman/Carson provided corroboration for Mr. Chavers' testimony (PC-R2. 444). And because Mr. Gallman/Carson's testimony against Mr. Lightbourne arose from similar circumstances, i.e., that both were cellmates of Mr. Lightbourne who allegedly approached the police with incriminating evidence, information impeaching Mr. Gallman/Carson's credibility and motives would have had a similar effect on Mr. Chavers. Mr. Burke testified that he would have used information about Mr. Gallman/Carson's agency status to argue that Mr. Chavers should be similarly disbelieved (PC-R2. 456). Mr. Fox agreed:

> I think you could call into question Mr. Chavers' testimony by analogizing Gallman's situation to Chavers', and say if they solicited Gallman, they solicited Chavers.
>
> Additionally, when the officers denied on the stand that they solicited both of these witnesses, to undermine the officers' credibility by saying: We have evidence here that what you say is not true.
>
> So I could undermine the Chavers' credibility, Gallman's credibility and the police officers' credibility as well.

(PC-R2. 530-31; see also PC-R2. 542, 546-47). Mr. Fox added that information that Mr. Lightbourne did not make any statements to Mr. Gallman/Carson could also be used to undermine Mr. Chavers' testimony "because the State presented Chavers and Gallman as two people in identical situations, providing similar information" (PC-R2. 547-48).[12]

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[12]Mr. Simmons conceded that the effect that this information about Mr. Gallman/Carson could have had on Mr. Lightbourne's trial extends beyond the impeachment of Gallman himself. He admitted that information that law enforcement agents were feeding information to one or some of Mr. Lightbourne's cellmates would cause him to question the veracity of other cellmate witnesses (PC-R2. 429). In fact, at trial Mr. Simmons bolstered these witnesses' credibility by urging the jury to consider whether they corroborate each other (R. 1384).

Counsel for Mr. Lightbourne also presented testimony detailing their efforts to locate the inmates who were in the same cell as Mr. Lightbourne. In January 1989, when Mr. Lightbourne's death warrant was signed, a CCR investigator and a private investigator who was hired to assist on Mr. Lightbourne's case searched for the inmates who had been in the cell with Mr. Lightbourne, specifically Mr. Chavers, Mr. Gallman/Carson, Mr. Carnegia, Mr. Emanuel, and Mr. Hall (PC-R2. 559-97). Counsel were unable to find Mr. Gallman/Carson before the 1990 hearings and the State did not dispute that counsel for Mr. Lightbourne had exercised due diligence in this search (PC-R2. 671). Although the search for Mr. Emanuel began in 1989, he was not found until October 1994, when an investigator working on Mr. Lightbourne's case located him in Texas and obtained an affidavit (PC-R2. 570). Counsel for Mr. Lightbourne also told Judge Angel that they were searching for Mr. Emanuel at the 1990 hearings (PC-R. 420-27). The judge indicated that testimony regarding these efforts to find Mr. Emanuel was "not necessary." (PC-R. 428). At that time Assistant State Attorney Black stated that his office had also been unsuccessful in locating the inmate witnesses (PC-R. 424).

Mr. Emanuel was scheduled to fly to Florida on October 23, 1995, to testify the next day (PC-R. 467-68). On October 24th, counsel for Mr. Lightbourne learned that Mr. Emanuel had been arrested and was being held in Harris County Jail in Houston, Texas (PC-R. 603). Mr. Lightbourne's counsel asked to have the hearing left open so that Mr. Emanuel's testimony could be presented.

Without Mr. Lightbourne having presented Mr. Emanuel's testimony, Assistant State Attorney Black asked for permission to present evidence as to CCR's due diligence in finding

Mr. Emanuel. The State's position was that the judge could hear the State's evidence and decide the diligence issue without allowing Mr. Lightbourne to present his evidence. Judge Angel then permitted the State to present its evidence. The State's evidence consisted of hearsay that CCR had made a criminal records request on FDLE regarding Mr. Emanuel in September of 1994. The State did not present the documentation -- i.e. the request or criminal records disclosure. Mr. Black argued that the fact that Mr. Emanuel was found in October 1994, one month after CCR made the request for his criminal records, proves that counsel for Mr. Lightbourne could have found Mr. Emanuel in 1990 or 1991 had they requested an FDLE criminal history report (PC-R2. 631).[13]

Mr. Black suggested that counsel for Mr. Lightbourne could have found Mr. Emanuel:

> MR. BLACK: They can -- well, they make public records demands all the time for all kinds 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.

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[13]However, no evidence was introduced of what criminal history was provided to CCR (PC-R2. 635, 638-39). In fact, as counsel for Mr. Lightbourne explained, Mr. Emanuel was ultimately found "through dealing with the family members, who had been somewhat evasive because -- and maybe it made sense that they've been evasive because we didn't know he was on parole in Texas and had been absconding here and there." (PC-R2. 635 [Testimony of Karen Combs]). Counsel for Mr. Lightbourne explained that NCIC reports are only available to law enforcement agencies and that CCR, as a defense agency, does not qualify and could not get them (PC-R2. 633). CCR is only able to get FDLE criminal records, which were requested in September 1994; these records are limited to Florida convictions (PC-R2. 635, 638-39).

MR. STRAND: Judge, if I --

MR. BLACK: We had them.

(PC-R2. 638)(emphasis added).[14]

After Mr. Black's argument and without allowing Mr. Lightbourne the opportunity to present witnesses on the matter, Judge Angel found that counsel for Mr. Lightbourne was barred from presenting Mr. Emanuel because he was available to Mr. Lightbourne's trial attorney in 1981 (PC-R2. 641-42).[15] Judge Angel also denied defense requests for a continuance so that Mr. Emanuel's testimony could be presented to the court and a request that the defense be permitted to depose Mr. Emanuel and offer the deposition into evidence (PC-R2. 644, 646).

Judge Angel had permitted counsel for Mr. Lightbourne to proffer testimony regarding Mr. Emanuel's affidavit.[16] Mr. Burke testified that Mr. Emanuel's affidavit confirms that law enforcement agents were recruiting Mr. Lightbourne's cellmates to elicit

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[14]Despite Mr. Black's claim in 1995 that his office had an NCIC report for Mr. Emanuel in 1990 or 1991 and that it would have been provided to CCR on request, at the 1991 hearing, Mr. Black had in fact told the court that his office was also having trouble locating the inmate witnesses (PC-R. 423-24). Clearly, in 1990 Mr. Black misrepresented his office's position in regard to assisting CCR locate witnesses as proved by his argument in 1995 that his office had the NCIC report in 1990 and would have provided it to CCR on request.

[15]Mr. Emanuel's criminal records indicate that on March 18, 1981, Mr. Fox, one of Mr. Lightbourne's trial attorneys, withdrew from representing Mr. Emanuel because he was a possible witness against Mr. Lightbourne (PC-R2. 639-40).

[16]All testimony regarding Mr. Emanuel's affidavit was later stricken at the request of Mr. Black after Judge Angel ruled that counsel for Mr. Lightbourne was barred from calling him as a witness (PC-R2. 642).

incriminating statements from him (PC-R2. 471-72). Mr. Fox agreed about the importance of the information contained in Mr. Emanuel's affidavit:

> [T]he Emanuel affidavit, Carnegia's testimony, Carson's letter all say the things which I could only suspect and not establish: That the police intentionally -- at least, at the very least, intentionally placed witnesses with Lightbourne to solicit testimony. If that were true, then that brings up the suppression issue under Massiah-Henry.
>
> It goes beyond that, that they attempted to get people to testify who told them things which he did not tell them. Not only were they placing them there; if they would not obtain information, they wanted them to fabricate the information.
>
> Those efforts would be most helpful in undermining the credibility of Chavers and Carson.

(PC-R2. 534-35). Mr. Burke testified that the State did not reveal that Mr. Lightbourne made no incriminating statements to Mr. Emanuel (PC-R2. 472).

On February 20, 1996, counsel for Mr. Lightbourne deposed Mr. Emanuel at Esmor Correctional Facility in Houston, Texas, for proffer purposes. Assistant State Attorney Reggie Black attended the deposition on behalf of the State. Mr. Emanuel testified that in 1981 he was arrested for the burglary of a dentist's office and was placed in the same cell as Mr. Lightbourne at the Marion County Jail (PC-R2. 11). He remembers that two law enforcement agents spoke to him about Mr. Lightbourne:

> They asked me if I could get Ian Lightbourne to say that he murdered that white girl. I don't know her name. But they said if I could get him to confess to that, they would get me free of that charge that I was charged with at the time. And at the time, I was young. I was really in love with a girl. And I was -- at the time, I would do quite anything to get out of that trouble I was in. I didn't want to go to prison.

(PC-R2. 12). He also testified that Mr. Lightbourne did not confess to the O'Farrell murder and, in fact, Mr. Lightbourne explicitly said that he was not involved:

> And I never did hear Lightbourne say that he killed no one. But Chavers always was sitting there talking to him -- you know -- 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.
>
> Q And did Mr. Lightbourne in any way indicate that he was guilty of murder?
>
> A No, sir, he didn't show no signs of that.
>
> Q When you say he didn't show any signs of that, did he tell you anything about the homicide?
>
> A No. Really, he was just saying that they was trying to put a murder case on him. He didn't say nothing about he killed no one. I did ask him and he said, "No." But it was other people in that cell that was in trouble and they was -- they was -- they was really trying to help theirselves at the same time as -- you know -- Lightbourne -- well, they was really trying to help theirselves. And all they had to do was say that Lightbourne committed that murder and the police would automatically let us go.
>
> So it was like -- you know -- a duck trail - you know -- Chavers did it first. And he sort of let people know that he had did it after they moved Lightbourne out of the cell. So -- you know -- me, I was young. I said, "Well, shoot. I might as well" -- you know -- "save myself" -- you know.

(PC-R2. 13-15). After Mr. Emanuel told the police that Mr. Lightbourne had confessed to the murder, he was released and the charges against him were dropped (PC-R2. 16-17).

Mr. Emanuel also testified that in 1983, he moved from Florida to Texas and that he lived with various women in government housing, did not pay bills, sign a lease, or have an official address (PC-R2. 18). He was incarcerated in 1984 in Texas, paroled in the same year to Florida where he spent two months, and then returned to Texas until the present (PC-R2. 19). Mr. Emanuel's family still lives in Ocala, but they agreed to not tell anyone where he was living; he explained: "my mother wouldn't tell no one where I was. She just -- she did that just to sort of like protect me" (PC-R2. 20).

During Mr. Emanuel's deposition, counsel for Mr. Lightbourne fortuitously discovered that in 1981 he had been represented by Reginald Black, the State Attorney currently working on Mr. Lightbourne's case (PC-R2. 22-3). Mr. Emanuel was arrested for trespassing and was represented by Mr. Black; when they were in court, Mr. Emanuel felt that the State was not treating him fairly and he complained to Mr. Black: "I told you, I said I had did some work for Eddie Scott and them and they was trying to cross me out" (PC-R2. 36; see also 41). Mr. Emanuel told Mr. Black that he had helped the police on Mr. Lightbourne's case (PC-R2. 53). As a result of the deposition, counsel filed a motion to disqualify the Fifth Judicial Circuit State Attorney's Office or in the alternative to disqualify Mr. Black on the grounds that he had become a material witness to Mr. Lightbourne's Brady claim. Counsel for Mr. Lightbourne simultaneously filed a motion to reopen the evidentiary hearing to consider the testimony of Mr. Emanuel.

On March 15, 1996, the circuit court held another hearing to consider these motions. Counsel for Mr. Lightbourne argued that Mr. Black should be disqualified because his role in litigating Mr. Lightbourne's post-conviction motions violates Mr. Lightbourne's due

process rights by giving the State an unfair advantage based on his prior confidential attorney/client relationship with Mr. Emanuel and his present role trying to impeach his credibility (PC-R2. 176-77).[17] In addition, counsel argued that Mr. Black was a material witness in the case as a result of the disclosures made by Mr. Emanuel at his deposition (PC-R2. 184-85).[18] The State argued that it is irrelevant to Mr. Lightbourne's Brady claim whether Mr. Emanuel was an agent of the State because Mr. Emanuel did not testify at Mr. Lightbourne's trial (PC-R2. 221).[19] While Mr. Black acknowledged that he did represent Mr. Emanuel as a public defender in 1980 and 1981, he disputed whether he had represented Mr. Emanuel after his incarceration with Mr. Lightbourne so that he could not have been told about Mr. Emanuel's role in that case (PC-R2. 194-97). Even if Mr. Emanuel's deposition testimony were true, Black argued that "any confidential communication that Larry Emanuel ever conveyed to me about anything has long since -- if such an event occurred, has long since passed from my memory" (PC-R2. 197).

Despite his denial of the motion to disqualify Mr. Black (PC-R2. 231), Judge Angel acknowledged that the court records did not clearly support Mr. Black's argument:

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[17]As an example of this unfair advantage, counsel for Mr. Lightbourne told the court that Mr. Black was aware of Mr. Emanuel's role in the prosecution of Sonny Boy Oats as revealed by his cross-examination at Mr. Emanuel's deposition (PC-R2. 181-82). Counsel for Mr. Lightbourne was unaware of this connection and unable to explore whether it had any relevance to Mr. Lightbourne's claims.

[18]Counsel also argued that Mr. Emanuel would be prejudiced by Mr. Black's continued participation and that the State would suffer no prejudice if Mr. Black were removed from the case (PC-R2. 183, 188).

[19]Of course, Mr. Emanuel's testimony bears directly on this Court's split over the Henry issue on direct appeal.

> The State seems to feel that the records here indicate that Mr. Emanuel was not believable and was inaccurate. Well, the record is a little bit ambiguous on that point. As a matter of fact, having read over his deposition, Mr. Emanuel's testimony and recollection may be considerably accurate.
>
> ...
>
> He says that he told Mr. Black about his working for Eddie Scott or the State and doing something for Mr. Lightbourne in some point in time when he was in the courtroom. And there's where the record I have here just is not clear, as to what time he was talking about, because on the second VOP the Court file is a little confusing on that.

(PC-R2. 256-59). Judge Angel noted the possibility that Mr. Emanuel was unsure who was representing him at the time he was sentenced for his second violation of parole and that Mr. Black may have been in court that day and received this information from Mr. Emanuel even if he were no longer assigned to Mr. Emanuel's case (PC-R2. 262-63).

Judge Angel also denied Mr. Lightbourne's motion to reopen the evidentiary hearing to present the testimony of Mr. Emanuel (PC-R2. 231). Counsel for Mr. Lightbourne argued that he was being denied his right to a full and fair hearing because the court refused to consider information on the due diligence issue contained in Mr. Emanuel's deposition (PC-R2. 210-12). Counsel also argued that the State was taking inconsistent positions, arguing that the testimony was barred and then also seeking the opportunity to rebut it on the merits, and that Mr. Lightbourne's due process rights were being violated because he was unable to present witnesses supporting the substance of Mr. Emanuel's testimony, the very issue that the State's witnesses testified to (PC-R2. 204-05, 209-18).[20] When Judge Angel

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[20]The State's contradictory positions in regard to Mr. Emanuel and the purpose of the hearing confused Judge Angel; when he agreed to let the State present its witnesses in an

understood the purpose of the State's witnesses and their request, he acknowledged that Mr. Lightbourne's due process rights were threatened:

> Well, that's going to get into the problem of -- that's going to get into the problem of -- possibly the problem of reopening this hearing, and I thought you were objecting to reopening the hearing.
>
> And if we're going to reopen the hearing, then I may need to continue this thing to allow Mr. Strand to talk to these other witnesses that he wanted to talk about and to look at this Oats matter and see what, if anything, that has to do with the posture of his claim that these witnesses were State agents; and what, if any, relationship the Sonny Boy Oats case has to this, which he probably hasn't had a chance to look at. He says he just found out about that.
>
> But be that as it may, if you want to proceed at this point, we can take the testimony of these witnesses.

(PC-R2. 233-34).

The State was allowed to present Ken Raym and Eddie Scott, former deputy sheriffs with the Marion County Sheriff's Department to contest Mr. Emanuel's testimony which Mr. Lightbourne was not permitted to introduce. Both denied recruiting Mr. Emanuel to elicit statements from Mr. Lightbourne (PC-R2. 236, 244). Mr. Raym and Mr. Scott both testified that they had nothing to do with the O'Farrell murder investigation (Id.). The court denied counsel's request for a continuance to provide an opportunity for the effective cross-examination of Mr. Raym and Mr. Scott after the receipt of relevant public records, as well as the opportunity to present witnesses corroborating Mr. Emanuel's deposition testimony (PC-R2. 214).

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effort to rebut Mr. Emanuel's testimony, he thought they were being called in rebuttal of Mr. Emanuel's deposition testimony solely on the due diligence issue (PC-R2. 232).

Judge Angel entered an order denying post-conviction relief addressing only Mr. Gallman/Carson. Judge Angel treated Mr. Lightbourne's claim as one governed by Jones v. State, 591 So. 2d 911 (Fla. 1991), and not by Brady, Bagley, and Kyles. No consideration was given to the effect of the new evidence upon the rulings in 1990-91. Nor did Judge Angel engage in any analysis at all under Brady, Bagley, and/or Kyles.

SUMMARY OF ARGUMENT

1. Mr. Lightbourne was denied his right to a full and fair hearing when the circuit court reopened the evidentiary hearing for the limited purpose of accepting testimony from the State. The court allowed the State to present testimony contesting the content of Mr. Emanuel's deposition when that deposition had not been accepted into evidence. Counsel for Mr. Lightbourne requested but was given no notice of the scope of this hearing and was therefore unprepared to present evidence or cross-examine the State's witnesses. The circuit court violated Mr. Lightbourne's due process rights when it denied his motion for a continuance, rendering counsel ineffective. The circuit court violated Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994), in which this Court remanded for a new evidentiary hearing after the circuit court improperly accepted evidence from the State but prevented the defendant from offering evidence on the very same issue. Mr. Lightbourne must be granted a new hearing at which to present evidence regarding the admissibility of Mr. Emanuel's testimony.

2. Mr. Lightbourne was denied a fair adversarial testing when the State withheld material exculpatory evidence and knowingly presented false testimony in violation of Brady

v. United States, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972). Evidence discovered since Mr. Lightbourne's trial proves that the State recruited inmates to elicit incriminating statements from Mr. Lightbourne, knowingly presented false testimony at his trial, and withheld material exculpatory evidence from Mr. Lightbourne's trial attorneys. The evidence offered in 1995 corroborates that which was previously excluded and lends sufficient indicia of reliability to admit all of the evidence discovered since Mr. Lightbourne's trial. Judge Angel applied the wrong legal standard in denying this claim. Judge Angel mistakenly applied the newly discovered evidence of innocence standard established by this Court in Jones v. State, 591 So. 2d 911 (Fla. 1991). The newly discovered evidence of innocence standard imposes a greater burden on a defendant seeking a new trial than the appropriate Brady/Giglio standard because the latter claim is based on State misconduct. Because he applied the wrong legal standard, Judge Angel's evaluation of the evidence and denial of Mr. Lightbourne's claim cannot withstand this Court's review.

3. Newly discovered evidence establishes that Mr. Lightbourne's death sentence is unreliable and that he is entitled to a new sentencing. The evidence discovered since his trial proves that the State knowingly relied on false testimony in arguing in favor of the death penalty and that this false testimony was the source of all of the aggravating factors found by the sentencing judge and affirmed by this Court on direct appeal. Mr. Lightbourne is innocent of the death penalty because without this false testimony the State could not have established any of the aggravating factors. In Sawyer v. Whitley, 505 U.S. 333 (1992), the Supreme Court explained that a defendant is ineligible for the death penalty if he can show that the statutory criteria do not apply. Pursuant to Sawyer, this Court must separately

consider the effect of the newly discovered evidence on Mr. Lightbourne's penalty phase. A review of the aggravating factors, the State's arguments in favor of the death penalty, and this Court's opinion on direct appeal reveals that Mr. Lightbourne's death sentence is based solely on the false testimony of Mr. Chavers and Mr. Gallman/Carson. Mr. Lightbourne is entitled to a new sentencing.

4. The circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Lightbourne's trial as required by Kyles v. Whitley, 155 S. Ct. 1555 (1995), and State v. Gunsby, 670 So. 2d 920 (1994). Judge Angel's order denying relief considers only the testimony of Mr. Gallman/Carson. Because Judge Angel failed to apply the correct legal standard, his evaluation of one witness's testimony, to the exclusion of all the other evidence presented in Mr. Lightbourne's post-conviction proceedings, cannot withstand this Court's review. Mr. Lightbourne has presented substantial evidence, both the testimony of numerous witnesses and corroborating documentary proof, establishing that the State used jailhouse informants to elicit incriminating statements from Mr. Lightbourne, that Mr. Lightbourne never made any such statements, that the State knowingly presented the false testimony of two jailhouse snitches, and that the State withheld material exculpatory evidence from Mr. Lightbourne's trial attorneys. Had the circuit court examined all of the evidence discovered since Mr. Lightbourne's trial, it would have found that the previously unknown evidence undermines confidence in the outcome. Mr. Lightbourne must be granted a new trial and sentencing.

5. Mr. Lightbourne's rights to due process and equal protection were violated because Assistant State Attorney Black, a material witness to Mr. Lightbourne's Brady,

Giglio, and Henry claims, participated as counsel for the State. Mr. Lightbourne discovered during the February 1991 deposition of Larry Emanuel that in 1981 Mr. Black received information from Mr. Emanuel concerning the State's recruitment of inmates to elicit incriminating statements from Mr. Lightbourne and the State's knowing use of false testimony. This information was withheld from Mr. Lightbourne's trial attorneys. Although Judge Angel admitted that the record was ambiguous and did not necessarily support the State's position, he denied Mr. Lightbourne's motion to disqualify Mr. Black. This erroneous ruling deprived Mr. Lightbourne the right to question a material witness to his Brady, Giglio, and Henry claims.

ARGUMENT I

MR. LIGHTBOURNE WAS DENIED HIS RIGHT TO A FULL AND FAIR HEARING WHEN THE CIRCUIT COURT EXCLUDED RELEVANT EVIDENCE OFFERED BY MR. LIGHTBOURNE AND ALLOWED THE STATE TO PRESENT WITNESSES BUT DENIED MR. LIGHTBOURNE THE OPPORTUNITY TO CONDUCT EFFECTIVE CROSS-EXAMINATION AND TO PRESENT HIS OWN WITNESSES ON THE SAME SUBJECT.

A. THE CIRCUIT COURT VIOLATED MR. LIGHTBOURNE'S DUE PROCESS RIGHT TO A FULL AND FAIR HEARING WHEN IT REFUSED TO CONSIDER RELEVANT TESTIMONY REGARDING COUNSEL'S EFFORTS TO LOCATE MR. EMANUEL.

At the October 1995 hearing when it was discovered that Mr. Emanuel had been arrested and was unavailable to testify, counsel for Mr. Lightbourne sought the circuit court's assistance in obtaining the testimony of Mr. Emanuel. In response, the State presented Karen Combs, an investigator with the State Attorney's Office, who testified that

Mr. Emanuel had been previously incarcerated in the Harris County Jail in Houston, Texas, in 1990 and thus could have been located through an NCIC printout in 1990 (PC-R2. 621). Ms. Combs testified that counsel for Mr. Lightbourne could have located Mr. Emanuel through records which are available through an FDLE records request but that such a request had not been made until September 1994 (PC-R2. 623). Ms. Combs had no personal knowledge. Her testimony was simply hearsay. No records were produced documenting that FDLE records revealed Mr. Emanuel's whereabouts. Counsel for Mr. Lightbourne proffered to the court that NCIC records are not available to CCR because it is a defense agency and that the records that are available include only Florida convictions so that Mr. Emanuel could not be located by CCR prior to 1994 (PC-R2. 633-35). Judge Angel found that Mr. Emanuel's testimony was procedurally barred because trial counsel for Mr. Lightbourne could have found him earlier (PC-R2. 641). This was premised upon Judge Angel's review of Mr. Emanuel's court files showing that Mr. Fox moved to withdraw as Mr. Emanuel's counsel in March of 1981 because Mr. Emanuel was a potential witness against Mr. Lightbourne. Judge Angel, without allowing Mr. Lightbourne the opportunity to present evidence, ruled that Mr. Emanuel's testimony would not be received.

On November 7, 1995, counsel for Mr. Lightbourne filed a motion for reconsideration, urging the court to consider that NCIC reports are not available to CCR and that counsel for Mr. Lightbourne could not have located Mr. Emanuel through the FDLE records that are available to CCR, which include only Florida convictions (PC-R2. 835-

36).[21] Counsel for Mr. Lightbourne also argued that in 1990 the State knew that CCR was trying to locate Mr. Emanuel and made no offer to assist in that search despite the fact that NCIC information is available only to law enforcement agencies and despite Mr. Black's argument in 1990 that his office was eager to assist CCR in locating witnesses (PC-R2. 836). The motion was denied.

For proffer purposes, counsel for Mr. Lightbourne took the deposition of Mr. Emanuel on February 20, 1996. Subsequently, a motion to reopen the evidentiary hearing based on this deposition was filed. The circuit court scheduled a hearing for March 15, 1996.

At the March 15th hearing, counsel for Mr. Lightbourne urged the circuit court to decide the procedural bar issue, taking into consideration relevant information contained in Mr. Emanuel's deposition (PC-R2. 210-12, 224-25). At his deposition, Mr. Emanuel testified about his location since Mr. Lightbourne's trial. He testified that, with the exception of two months in 1984 when he was paroled to Florida, he has lived in Houston, Texas (PC-R2. 18-19). Mr. Emanuel has never signed a lease or paid bills (PC-R2. 18-19, 56-7). Because of his past involvement with drugs, Mr. Emanuel has actively taken measures to ensure that he could not be found, and his family members in Florida have cooperated by not giving out any information regarding his location (PC-R2. 20-21). Mr. Black urged the court to consider his cross-examination of Mr. Emanuel which established

[21]Counsel provided the circuit court with the FDLE Criminal History Records Dissemination Policy which specifically states that records derived from the FBI criminal history record systems, which includes NCIC, are not available to the public under Florida Public Records Law (PC-R2. 840). See §943.054, Fl. Stat., §119.072, Fl. Stat.

that Mr. Emanuel was in the Harris County Jail in 1990 and 1991 (PC-R2. 219). According to Mr. Black, this testimony proves that CCR could have located Mr. Emanuel through NCIC records as early as 1990 (PC-R2. 220).[22] The circuit court denied Mr. Lightbourne's motion to reopen the evidentiary hearing on the basis of its prior ruling that trial counsel could have located Mr. Emanuel (PC-R2. 231).

The circuit court's conclusion that trial counsel for Mr. Lightbourne could have found Mr. Emanuel earlier ignores State v. Gunsby. Mr. Lightbourne's trial counsel did in fact move to withdraw from representing Mr. Emanuel because of a conflict. Under Gunsby, if trial counsel was not diligent, then he rendered deficient performance which prejudiced Mr. Lightbourne. Under Gunsby, lack of diligence by trial counsel presents an ineffective assistance of counsel claim. Under Gunsby, merits review was nonetheless required. Judge Angel erred in his resolution of the issue precluding introduction of Mr. Emanuel's testimony.

Counsel presented unrebutted evidence, both at the October 1995 hearing and through Mr. Emanuel's deposition, that collateral counsel had exercised due diligence and that Mr. Emanuel was unavailable. The State has repeatedly argued that counsel for Mr. Lightbourne could have found Mr. Emanuel through NCIC records which would have revealed his location in Texas as early as 1990; however, this argument was rebutted both at the October 1995 hearing and through documentary evidence submitted with Mr. Lightbourne's motion for reconsideration. Counsel has proved that, contrary to the State's assertions, NCIC

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[22]Mr. Black did not address Florida law prohibiting the disclosure of NCIC information to CCR.

records are not available to CCR. The circuit court did not specifically resolve this issue, relying instead upon its conclusion that trial counsel was not diligent. This conclusion is irrelevant to whether collateral counsel exercised due diligence and does not rebut counsel's argument that Mr. Emanuel should be permitted to testify.

B. THE CIRCUIT COURT DENIED MR. LIGHTBOURNE A FULL AND FAIR HEARING WHEN IT REOPENED THE EVIDENTIARY HEARING FOR THE LIMITED PURPOSE OF ACCEPTING EVIDENCE FROM THE STATE BUT DEPRIVED MR. LIGHTBOURNE AN OPPORTUNITY TO PRESENT RELEVANT EVIDENCE ON THE SAME ISSUES AND TO EFFECTIVELY CROSS-EXAMINE THE STATE'S WITNESSES.

Mr. Lightbourne's due process right to a full and fair hearing was violated when the circuit court reopened the evidentiary hearing to allow the State to present its evidence but denied Mr. Lightbourne the opportunity to call witnesses relevant to the same issue. Johnson v. Singletary, 647 So. 2d 106, 111-12 (Fla. 1994). In addition, counsel for Mr. Lightbourne was not provided adequate notice of the nature of this hearing so that he could effectively prepare to present evidence and to cross-examine the State's witnesses. See Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990)(holding that "essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered").

On March 4, 1996, counsel for Mr. Lightbourne filed a motion to clarify the scope of the March 15th hearing because the State's inconsistent positions concerning Mr. Emanuel -- arguing that the court should not consider his testimony because he could have been located earlier but also disputing the substance of his testimony -- left Mr. Lightbourne without notice of the subject of the hearing and therefore unable to prepare. Neither the State nor the circuit court responded to this motion. At the March 15th hearing, counsel for Mr.

Lightbourne explained the dilemma created by the State's inconsistent positions regarding Mr. Emanuel and the inability of counsel to effectively prepare for the hearing (PC-R2. 204-05). The State indicated its desire to present witnesses regarding Mr. Emanuel, and counsel for Mr. Lightbourne argued that because the scope of the hearing had not been clarified, he was not prepared to effectively cross-examine the State's witnesses or to present his own witnesses (PC-R2. 213-15). Counsel also argued that the circuit court should first decide the procedural bar issue because a finding for the State would preclude the need to present witnesses regarding the substance of Mr. Emanuel's deposition (PC-R2. 215-19).

Judge Angel thought the witnesses being offered by the State had been requested by Mr. Lightbourne. He explained his understanding of the purpose of the hearing:

> I think the testimony should be presented and/or preserved, if nothing else, at least in the nature of a discovery deposition for the Defendant or to present testimony to preserve it for the record. But whether or not the case would be reopened to consider the testimony, we haven't decided that yet.

(PC-R2. 203)(emphasis added).[23] Counsel for Mr. Lightbourne told the court that had he been notified that the court would consider the substance of Mr. Emanuel's deposition, he would have subpoenaed relevant witnesses, including those presented at the October 1995 hearing whose testimony regarding Mr. Emanuel had been stricken from the record (PC-R2. 213). Counsel also requested a continuance to provide an opportunity to present these witnesses and to obtain the public records necessary for an effective cross-examination of the State's witnesses (PC-R2. 214). The request was denied.

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[23]Judge Angel later asked: "I thought the State was arguing earlier that the reason that these witnesses were here was at the behest of the Defendant. But now the State wants to present these witnesses?" (PC-R2. 232).

Despite Judge Angel's statement that he had not yet decided whether to reopen the evidentiary hearing, he allowed the State to proceed with its witnesses (PC-R2. 234). Although he had not yet ruled on the procedural bar issue, Judge Angel allowed the State to present testimony that was, in the words of Mr. Black, intended to "destroy[] the credibility of Larry Emanuel in his deposition and refute[] the proposition that he is in anywise a meaningful, relevant, material witness in these proceedings" (PC-R2. 208). Thus, the court accepted testimony from the State rebutting the substance of Mr. Emanuel's deposition, which had not even been accepted as evidence, while denying counsel for Mr. Lightbourne the opportunity to present evidence on the same subject. Judge Angel acknowledged that Mr. Lightbourne's due process rights were threatened by his actions; he admitted that accepting evidence from the State would possibly constitute reopening the hearing, which the State had objected to when Mr. Lightbourne made the request in order to allow the admission of Mr. Emanuel's testimony (PC-R2. 233-34). Judge Angel also acknowledged that reopening the hearing would require that he grant a continuance so that counsel for Mr. Lightbourne could also present witnesses (Id.). Despite this acknowledgement of the validity of Mr. Lightbourne's due process argument, Judge Angel accepted the State's evidence, denied Mr. Lightbourne's request for a continuance, and denied Mr. Lightbourne's request to reopen the evidentiary hearing.

The State's witnesses, Ken Raym and Eddie Scott, testified that they had no involvement in the O'Farrell murder investigation (PC-R2. 236, 244). This testimony conflicts with Mr. Emanuel's deposition testimony that Mr. Scott and Mr. Raym promised him assistance on his pending charges if he could elicit incriminating statements from Mr.

Lightbourne (PC-R2. 11-12). Because the circuit court reopened the evidentiary hearing to accept evidence from the State but denied Mr. Lightbourne the opportunity to rebut the State's evidence and corroborate Mr. Emanuel's deposition, Mr. Lightbourne's due process right to a full and fair hearing was violated. Mr. Lightbourne must be provided the opportunity to present relevant testimony on this issue.

Mr. Lightbourne's counsel also objected to being forced to cross-examine the State's witnesses without the opportunity to fully prepare and to obtain public records relevant to their testimony (PC-R2. 214, 240, 250). Counsel for Mr. Lightbourne learned for the first time at Mr. Emanuel's deposition that Mr. Emanuel assisted the State in the prosecution of Sonny Boy Oats (PC-R2. 58-62). Counsel was unprepared at that time to question Mr. Emanuel about his arrangement with the State and to discover whether that situation was relevant to Mr. Lightbourne's claim that the State used inmates to elicit incriminating statements from him. Because counsel for Mr. Lightbourne was not notified of the nature of the March 15th hearing and was denied his request for a continuance, he could not explore this potentially relevant area of inquiry because he lacked the necessary public records to effectively cross-examine Mr. Scott and Mr. Raym. The circuit court's ruling deprived Mr. Lightbourne of his due process right to a full and fair hearing and rendered his counsel ineffective.

In Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994), the defendant appealed the denial of his motion to vacate his conviction, and this Court remanded for an evidentiary hearing on his newly discovered evidence claim. Mr. Johnson's claim was based on four affidavits stating that another prisoner had confessed to the crime for which Mr. Johnson was

convicted and sentenced to death. This Court remanded for an evidentiary hearing because the trial court had accepted evidence from the State purporting to show that the man named in the affidavits did not match the eyewitness description of the perpetrator given at the trial; however, the court refused to consider evidence Mr. Johnson offered as corroboration of the affidavits. This Court ruled that allowing the State to present evidence regarding the unreliability of Mr. Johnson's evidence, without providing him a reciprocal opportunity to present evidence corroborating his affidavits, violated his due process rights. This Court noted that "[u]nder these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence." Id. at 111 n. 3.

Justice Overton in his concurring opinion noted that Mr. Johnson must be given an opportunity to present evidence corroborating the affidavits; he explained: "This is especially true given that the trial court allowed the State to present evidence that the affidavits were unreliable but did not afford Johnson the same evidentiary hearing opportunity." Id. at 111. Justice Kogan, also concurring, agreed that "[s]ince the trial court effectively had commenced an evidentiary hearing, it was obligated to grant Johnson's request to present evidence of his own in rebuttal." Id. at 112. See also Jones v. Butterworth, 695 So. 2d 679, 681 (Fla. 1997)(ordering the circuit court to reopen the evidentiary hearing after denying the petitioner the opportunity to present his expert witnesses); Ramirez v. State, 651 So. 2d 1164 (Fla. 1995)(reversing conviction because defendant's due process rights were violated when he was deprived opportunity to rebut State's scientific evidence).

This Court's decisions in Johnson and Ramirez confirm that accepting evidence from one party while denying a reciprocal opportunity to the other denies that party's due process right to a fair hearing. Judge Angel accepted evidence from the State and denied Mr. Lightbourne's requests to present evidence supporting his argument that Mr. Emanuel's testimony should be admitted. Judge Angel also denied Mr. Lightbourne's request for a continuance to adequately prepare for cross-examination of the State's witnesses and to call his own witnesses. As a result, Mr. Lightbourne was denied his right to a full and fair adversary hearing, and the determination to exclude Mr. Emanuel's testimony was based on only one side of the evidence. Mr. Lightbourne must be granted a new hearing.

Having denied Mr. Lightbourne the opportunity to present evidence in a hearing that comported with due process, the circuit court did not have before it competent substantial evidence to support a finding that Mr. Lightbourne should have located Mr. Emanuel in 1990. This Court should remand for an evidentiary hearing at which Mr. Lightbourne will have a full and fair opportunity to present evidence regarding due diligence.

ARGUMENT II

MR. LIGHTBOURNE WAS DENIED A FAIR ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND PRESENTED FALSE TESTIMONY IN VIOLATION OF MR. LIGHTBOURNE'S CONSTITUTIONAL RIGHTS.

In 1989, this Court remanded for a hearing on Mr. Lightbourne's claims under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), that the State had withheld material exculpatory evidence and knowingly presented false and misleading testimony at Mr. Lightbourne's trial. Lightbourne v. Dugger, 549 So. 2d 1364

(Fla. 1989). In 1994, this Court affirmed the denial of Rule 3.850 relief following the evidentiary hearing at which Mr. Chavers feigned incompetency and the circuit court excluded his affidavit and letters. Lightbourne v. State, 644 So. 2d 54 (Fla. 1994). In doing so, this Court accepted the lower court's determination that there were insufficient indicia of reliability to allow the admission of Mr. Chavers' affidavit and letters to the prosecutor, Mr. Hall's affidavit, Mr. Taylor's letter, and Mr. Emanuel's deposition. Since that hearing, Mr. Lightbourne has discovered previously unavailable evidence proving that the State recruited inmates to elicit incriminating statements from Mr. Lightbourne, knowingly presented false testimony at his trial, and withheld material exculpatory evidence from Mr. Lightbourne's trial attorneys. This new evidence also provides indicia of reliability of the evidence not previously admitted.

In the 1996 post-hearing order denying relief, the circuit court applied the wrong standard to Mr. Lightbourne's claims. Although the court recognized that Mr. Lightbourne's claims arise under Brady, Giglio, and Henry, the court considered the evidence as newly discovered evidence of innocence to be analyzed under the standard established by this Court in Jones v. State, 591 So. 2d 911 (Fla. 1991). (PC-R2. 283). The circuit court explained what it believed to be the appropriate legal standard:

> Recanted testimony is considered newly discovered evidence.[FN 8] The trial court must evaluate the weight of the newly discovered evidence and the evidence introduced at trial.[FN9] 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.[FN 10] It should be remembered that a new trial with recanted testimony includes the witness's prior testimony as substantive evidence.[FN 11] It is not as if the new trial excludes prior false testimony.

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

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

FN 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).

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

(PC-R2. 283).[24] 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 Kyles v. Whitley, the Supreme Court explained the appropriate standard of review of a Brady claim:

> In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officer, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie

[24]Judge Angel confused a newly discovered evidence of innocence claim with Brady claim established through newly discovered evidence; although this mistake is understandable, it resulted in the application of the wrong legal standard to Mr. Lightbourne's evidence and the denial of the claims that entitle him to relief.

> change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibres, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.
>
> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

115 S. Ct. 1555, 1573 n. 19 (1995) (citations omitted). Judge Angel failed to apply the appropriate legal standard to Mr. Lightbourne's Brady claim.

Because the circuit court apparently misunderstood the nature of Mr. Lightbourne's claims, its order denying relief improperly evaluated the evidence. While the newly discovered evidence standard requires the reviewing court to weigh both the new evidence and that introduced at trial, Jones, 591 So. 2d at 916, the materiality standard that establishes a Brady violation focuses on the effect that the suppressed evidence would have had on the jury at the trial.[25] When a defendant establishes that the State withheld material exculpatory

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[25]In his order weighing the evidence offered at Mr. Lightbourne's trial, Judge Angel erred in admitting Mr. Gallman/Carson's trial testimony as substantive evidence sua sponte. Judge Angel used the trial testimony to reject the 1995 testimony; thereby creating an

evidence, the court must order a new trial if there is "a reasonable probability that . . . the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). And if the State knowingly used false evidence, the court must order a new trial if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 478 U.S. 97, 103 (1976). In Agurs, the Supreme Court explained why newly discovered evidence claims place a greater burden on the defendant than claims arising from State misconduct:

> [T]he fact that such [exculpatory] evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. If the standard applied to the usual motion for new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

427 U.S. at 111. Because the circuit court applied the wrong standard to Mr. Lightbourne's claims, its order denying relief cannot withstand this Court's review.

The Eleventh Circuit Court of Appeals has explained the elements of a Brady violation: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial." Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(en banc)(citations omitted). Because the truth of a witness's testimony and a witness's motive for testifying are material questions of fact for the jury, the improper withholding of information regarding a witness's credibility is just as violative of

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impossible burden upon Mr. Lightbourne.

the dictates of Brady v. Maryland as the withholding of information regarding a defendant's innocence. Bagley, 473 U.S. 667; Quimette v. Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important State witness is material evidence that must be disclosed by the prosecution. United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997); Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). As a result of the State's misconduct in this case, Mr. Lightbourne was precluded from effectively cross-examining key State witnesses and from effectively presenting a defense, and the jury was deprived of relevant evidence with which to evaluate the State's witnesses' credibility.

Generally, the standard to determine materiality is whether "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been available to the defense. Bagley, 473 U.S. at 682. However, a lower standard applies where the State knowingly used false testimony as occurred here. In such a case, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103 (emphasis added). Accord Giglio, 405 U.S. at 154. The lower standard applies because such cases involve prosecutorial misconduct and the corruption of the truth-seeking function of the trial. Agurs, 427 U.S. at 104; Bagley, 473 U.S. at 680. The Supreme Court has indicated that this lower standard of materiality is equivalent to the Chapman v. California, 386 U.S. 18 (1967), "harmless beyond a reasonable doubt" standard, Bagley, 473 U.S. at 679 n. 9, which requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963)). In this case, where the suppressed Brady

material exposes as false the only evidence supporting the aggravating factors, it cannot be said beyond a reasonable doubt that the State's use of false testimony did not contribute to the verdict and death sentence.

In analyzing a Brady claim under the Supreme Court's opinion in Kyles v. Whitley, the focus is whether the false testimony had an effect on the jury. The Court explained:

> Justice Scalia suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's post-conviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Of course, neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

115 S. Ct. at 1573 n. 19 (citation omitted)(emphasis added). The Court's review of the evidence in Kyles similarly demonstrates its focus on the jury to determine whether the defendant satisfied the materiality standard established in Bagley. In Kyles, the Supreme Court found that the evidence withheld by the State would not only have resulted in a stronger case for the defense, but would also have substantially reduced, or even destroyed, the value of the State's two best witnesses. As in this case, the State in Kyles had physical evidence connecting Mr. Kyles to the crime; however, the Court noted that "none of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone." 115 S. Ct. at 1566 n. 8. The Court explained:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

115 S. Ct. at 1575. Under the Brady standard, Mr. Lightbourne is entitled to a new trial if he can demonstrate that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 115 S. Ct. at 1566. Because the State in this case not only withheld exculpatory evidence but also knowingly presented false testimony, the correct standard is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Agurs, 427 U.S. at 103. Mr. Lightbourne has met that standard.

Material evidence was withheld from Mr. Lightbourne's attorneys or was not available at the time of trial. As is detailed in the Statement of Facts, Mr. Chavers has repeatedly stated that his trial testimony that Mr. Lightbourne confessed to him was false. Mr. Gallman/Carson's 1995 testimony corroborates Mr. Chavers' recantation and confirms that the State withheld material evidence. Both witnesses have admitted that they received benefits from the State in exchange for their testimony, while at the trial they denied that any such arrangements existed. Other documentary evidence that was unavailable at Mr. Lightbourne's trial confirms the nondisclosure of exculpatory evidence. The letters written by Mr. Chavers and Mr. Gallman/Carson attempting to obtain their undisclosed expected benefit establish Brady violations. In fact, Mr. Chavers and Mr. Gallman/Carson never spoke to Mr. Lightbourne about the O'Farrell murder.

This withheld evidence is material to Mr. Lightbourne's defense because it impeaches the State's key witnesses whose testimony resulted in Mr. Lightbourne's conviction and death sentence. The undisclosed evidence reveals that Mr. Chavers and Mr. Gallman/Carson received benefits from the State in exchange for their cooperation, and that they were State

agents deliberately placed in Mr. Lightbourne's cell in order to elicit incriminating statements (statements which Mr. Lightbourne did not make). In Smith v. Wainwright, the Eleventh Circuit Court of Appeals addressed a similar situation in which the State's key witnesses had not been impeached because of trial counsel's ineffectiveness. The court explained the significance of this failure:

> The conviction rested on the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

799 F.2d 1442, 1444 (11th Cir. 1986). In United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997), the Eleventh Circuit Court of Appeals found a Brady violation when the State had withheld evidence that one of their key witnesses received favorable treatment in exchange for his cooperation. At trial, he testified, as did Mr. Chavers and Mr. Gallman/Carson, that he did not expect a reduced sentence in exchange for his testimony. The court applied the "reasonable likelihood" standard, rather than the stricter "reasonable probability" standard, because the State knew at the time the witness testified that he was lying about his arrangement with the State. 117 F.3d at 1317.[26]

Mr. Lightbourne has established that the nondisclosure of the information regarding Mr. Chavers' and Mr. Gallman/Carson's deals with the State and their lenient treatment in exchange for testimony undermines confidence in the outcome of the guilt phase. However,

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[26]However, even under the proper Brady standard which is set forth in Bagley, confidence in the outcome must be undermined. Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

this Court must also consider the effect of this withheld evidence on the penalty phase of Mr. Lightbourne's trial. See Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Clearly, without the false testimony of Mr. Chavers and Mr. Gallman/Carson, the State would have been precluded from arguing for the death penalty. See Jones v. State, No. 84,840 (Fla. January 15, 1998). In the alternative, if the State had disclosed evidence that these witnesses received benefits in exchange for their testimony, Mr. Lightbourne's attorney would have had the tools necessary to impeach their credibility at the penalty phase. Without the Chavers and Gallman/Carson testimony, none of the aggravating factors would have been proved and he would have been ineligible for a death sentence. The jailhouse snitches were critical to the State's case, and the withholding of this information denied Mr. Lightbourne his constitutional right to confront the witnesses against him, his right to the effective assistance of counsel, and his right to a fair trial. The State's misconduct in this case resulted in a failure of the adversarial process. A new trial and sentencing are required.

This Court must also consider that this evidence proving that Mr. Chavers and Mr. Gallman/Carson were agents of the State deliberately placed in Mr. Lightbourne's cell to elicit incriminating statements also proves a violation of United States v. Henry, and Massiah v. United States, 377 U.S. 201 (1964). Thus, in addition to being valuable impeachment evidence that was withheld from Mr. Lightbourne's trial attorneys, this evidence goes to the suppression of Mr. Chavers' and Mr. Gallman/Carson's statements.[27] Mr. Lightbourne has

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[27]Once again, the lack of this kind of evidence divided this Court on direct appeal. While the majority rejected Mr. Lightbourne's Henry claim, Justice Overton in a dissenting opinion found that the evidence was sufficient to establish a violation. With the addition of the newly discovered evidence discussed elsewhere in this brief, this Court must reconsider whether the State violated Henry.

demonstrated a reasonable probability that the false evidence presented at his trial had an effect on the jury. A new trial is required.

ARGUMENT III

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. LIGHTBOURNE'S DEATH SENTENCE IS UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW SENTENCING.

Since this Court ordered an evidentiary hearing on Mr. Lightbourne's Brady claims in 1989, Mr. Lightbourne has discovered previously unavailable evidence further supporting his argument that the State knowingly presented false testimony: Mr. Gallman/Carson testified at the evidentiary hearing that he lied at Mr. Lightbourne's trial when he testified that Mr. Lightbourne confessed to raping and killing Ms. O'Farrell. In addition, counsel has located Mr. Emanuel, another pretrial cellmate of Mr. Lightbourne, who testified that Mr. Lightbourne never confessed to the O'Farrell murder. This new evidence establishes that Mr. Chavers and Mr. Gallman/Carson lied at Mr. Lightbourne's trial and that the State knowingly presented false testimony that provided the only evidence in support of the death sentence and contained highly prejudicial details that made a guilty verdict more likely.[28] In addition, the State violated Giglio v. United States, 405 U.S. 150 (1972), and Napue v.

[28]The State presented Mr. Gallman/Carson and Mr. Chavers as complementary witnesses who corroborated each other because both encountered Mr. Lightbourne under the same circumstances and testified to similar, if not identical, details. Therefore, Mr. Gallman/Carson's recantation also affects the credibility of Mr. Chavers' testimony as indicated by the 1995 testimony of Mr. Burke (PC-R2. 456), Mr. Fox (PC-R2. 530-31, 542, 546-47), and Mr. Simmons (PC-R2. 429). In addition, because Mr. Gallman/Carson's testimony corroborates Mr. Chavers' affidavit recanting his own trial testimony, that evidence should now be admitted. Chambers v. Mississippi.

Illinois, 360 U.S. 264 (1959), when it failed to disclose that these witnesses received benefits in exchange for their testimony. The recantation of Mr. Gallman/Carson is consistent with the other evidence discovered since Mr. Lightbourne's trial: Mr. Chavers' affidavit and letters, Mr. Carnegia's testimony, Mr. Hall's affidavit, and Mr. Emanuel's deposition testimony. This newly discovered evidence must be considered in conjunction with that previously presented for its cumulative effect. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). See Argument IV.

A. THE EVIDENCE PRESENTED IN THE CIRCUIT COURT WAS NOT PREVIOUSLY AVAILABLE IN POST-CONVICTION.

This Court acknowledged in 1994 that Mr. Gallman/Carson "could not be located despite a diligent search." 644 So. 2d at 56. Counsel for Mr. Lightbourne continued the search for Mr. Gallman/Carson but was unable to locate him until June 1994 when he was arrested in Tampa. Because he initially gave law enforcement a fictitious name, his identity was not confirmed for several weeks. Counsel for Mr. Lightbourne first learned of Mr. Gallman/Carson's location on August 1, 1994.[29]

In the circuit court, Mr. Lightbourne presented unrefuted evidence that Mr. Emanuel was not previously available to Mr. Lightbourne's post-conviction counsel. Counsel for Mr. Lightbourne told the circuit court in 1990 that they were searching for Mr. Emanuel, and Mr. Black stated that his office had also been unsuccessful in locating the inmate witnesses (PC-R. 420-27). At the October 1995 hearing, Mr. Lightbourne's counsel presented

[29]In its response to Mr. Lightbourne's most recent motion to vacate, the State conceded the necessity of an evidentiary hearing regarding Mr. Gallman/Carson's affidavit and did not contest that he was previously unavailable to Mr. Lightbourne (PC-R2. 777-78).

additional testimony about their efforts to locate Mr. Emanuel beginning in 1989 (PC-R2. 560-70, 576, 582). Mr. Emanuel's deposition testimony supports counsel's argument that he could not be found (PC-R2. 18-20).

The State has repeatedly argued that Mr. Lightbourne's post-conviction counsel could have located Mr. Emanuel as early as 1990 had they requested an NCIC report from the Florida Department of Law Enforcement (PC-R2. 631). Mr. Black also suggested that had CCR made a records request on the State Attorney's Office requesting the NCIC report on Mr. Emanuel, the information would have been provided (PC-R2. 638). Contrary to the State's assertions, NCIC reports are not and never have been available to Mr. Lightbourne's post-conviction counsel. Counsel for Mr. Lightbourne has submitted documentary proof that they could not have gotten an NCIC report on Mr. Emanuel and further evidence proving that the criminal records available to CCR are limited to Florida convictions and therefore did not assist in the search for Mr. Emanuel who was incarcerated in Texas. See Argument IA.

The circuit court ignored this evidence, as well as the deposition testimony of Mr. Emanuel, in finding that counsel for Mr. Lightbourne had not exercised due diligence in locating him. The court found that Mr. Emanuel was available to trial counsel because Mr. Fox, one of Mr. Lightbourne's trial attorneys, withdrew from representing Mr. Emanuel in March 1981 because of the conflict created by his simultaneous representation of Mr. Lightbourne (PC-R2. 641-42). If this witness was available to trial counsel, then counsel provided ineffective assistance in failing to investigate and present his testimony. Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995)(addressing claim raised alternatively as Brady and

ineffective assistance of counsel); Gunsby, 670 So. 2d at 924 (considering cumulative effect of evidence not presented at trial because of Brady violations, ineffective assistance of counsel and/or newly discovered evidence). Mr. Emanuel's testimony was simply not available earlier. Whether the cause of his unavailability was the State's violation of Brady or trial counsel's ineffectiveness, his testimony should now be considered in this Court's cumulative analysis of all the evidence discovered since Mr. Lightbourne's trial.

B. THE PREVIOUSLY UNAVAILABLE EVIDENCE ESTABLISHES THAT MR. LIGHTBOURNE IS ENTITLED TO A NEW SENTENCING.

Mr. Gallman/Carson and Mr. Emanuel confirm that law enforcement agents recruited inmates to elicit incriminating statements from Mr. Lightbourne and promised benefits in exchange for cooperation and that the State knowingly presented false testimony. This newly discovered evidence undermines confidence in the outcome of the trial and/or would have resulted in a different outcome because Mr. Chavers and Mr. Gallman/Carson provided highly prejudicial testimony that made a conviction more likely and were the only source of evidence supporting the aggravating factors that resulted in a death sentence.[30] Therefore, this newly discovered evidence, had it been available at Mr. Lightbourne's trial, would have

[30]In 1985, this Court affirmed the circuit court's denial of Mr. Lightbourne's claim that his trial counsel was ineffective for failing to present substantial mitigation evidence, relying on its finding on direct appeal that the strength of the aggravating factors warranted the death sentence. 471 So. 2d at 27. The Eleventh Circuit Court of Appeals similarly relied on this Court's direct appeal opinion in affirming the denial of Mr. Lightbourne's petition for writ of habeas corpus which raised the same issue. 829 F.2d at 1025. In light of Mr. Gallman/Carson's and Mr. Chavers' recantations of their testimony supporting the aggravating factors, the lack of mitigation evidence presented to Mr. Lightbourne's jury further supports his argument here that he is entitled to a new sentencing and that the result would be different.

resulted in a life sentence because the State would have lacked any evidence on which to base its argument for the death penalty.[31]

On direct appeal, this Court affirmed the trial court's finding of the following aggravating factors: commission during a burglary and sexual battery; avoiding arrest; pecuniary gain; heinous, atrocious or cruel. 438 So. 2d at 390-91. The facts relied on by this Court in upholding those aggravating factors focused on the evidence that there was a sexual assault which came exclusively from the testimony of Mr. Chavers and Mr. Gallman/Carson. In support of the commission of a felony aggravating factor, this Court noted that "[t]estimony revealed that the defendant had admitted surprising the victim in her home" and that "[d]uring the burglary the victim was forced into acts of oral sex and intercourse as she begged him not to kill her." Id. These details are directly from Mr. Chavers' testimony:

> He said that Ms. O'Farrell was coming out of either the shower and by him being in and her being alone and not knowing anyone was in the house, it was -- he surprised her.
>
> . . .

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[31]Confidence in the outcome of the guilt/innocence phase of Mr. Lightbourne's trial is undermined based on the recantations of Mr. Chavers and Mr. Gallman/Carson. Moreover, even if the State had sufficient evidence to convict Mr. Lightbourne without this false testimony, he would have been ineligible for the death penalty. This Court must separately consider the effect of this false testimony on the penalty phase regardless of the amount of physical evidence the State presented at the trial. In this Court's opinion affirming the circuit court denial of relief in 1994, the effect of this false testimony on the penalty phase was not considered. 644 So. 2d at 57 n. 4. This Court may believe that the State presented sufficient evidence to support a conviction, but that same evidence does not prove the existence of the aggravating factors beyond a reasonable doubt. This is particularly true of the sexual assault which was used to justify several of the aggravating factors upheld by this Court on direct appeal. 438 So. 2d at 390-91.

> Well, he just described it to me that she was -- she was begging him not to kill her, and he told her he wasn't going to kill her, and they had sex. He told her to get on the bed. She -- they had oral sex, you know, over and over.

(R. 1115-16)(emphasis added). Mr. Gallman/Carson also testified that Mr. Lightbourne told him that "he made her have sex with him" and that "she screamed, hollered" when he entered the house (R. 1176-77).

In support of the avoiding arrest aggravating factor, this Court stated that the "[d]efendant admitted knowing the victim. Plainly the defendant killed to avoid identification and arrest. Proof of the requisite intent to avoid detection is strong in this case." 438 So. 2d at 391. The only evidence that Mr. Lightbourne allegedly shot Ms. O'Farrell because she could identify him came from Mr. Gallman/Carson's testimony (R. 1180).

This Court rejected Mr. Lightbourne's argument that the trial court had improperly doubled the pecuniary gain and during the commission of a robbery aggravating factors because "[t]here was adequate proof of rape" and "the trial court does not improperly duplicate robbery and pecuniary gain where defendant committed the crime of rape in conjunction with the murder." Id. Again, Mr. Chavers and Mr. Gallman/Carson were the only source of information that a sexual battery occurred.

In support of the heinous, atrocious, or cruel aggravating factor, this Court again relied on the evidence that a sexual assault had occurred:

> Taking into consideration the totality of the circumstances in this case, the murder and the events leading up to its consummation were carried out in an unnecessarily torturous way toward the victim. The record reflects that the victim was forced to submit to sexual relations with defendant prior to her death, while pleading for her life, and we cannot say that the trial court's finding of heinousness is at material variance with the facts.

Id. (emphasis added). As in the discussion of during the commission of a sexual assault aggravating factor, this language mirrors the testimony of Mr. Chavers and Mr. Gallman/Carson.

Mr. Chavers testified in detail that Mr. Lightbourne confessed to raping Ms. O'Farrell before killing her (R. 1115-16), and Mr. Gallman/Carson provided similar testimony (R. 1176-77). However, the investigation and physical evidence did not provide any evidence of a sexual assault. Lieutenant LaTorre testified at the evidentiary hearing:

> Q When you arrived at the scene of the homicide was there any evidence that indicated to you at that time that the victim had been sexually battered?
>
> A Not that I would have been specifically cognizant of at that time.
>
> Q Okay. In fact, what was this -- was the victim clothed at the time you arrived at the scene?
>
> A Partially, yes.
>
> Q Okay. Could you explain to the Court what she was wearing?
>
> A She was wearing a bra and panties.
>
> Q Was there any indication at the scene that there had been a struggle?
>
> A Not really, no.

(PC-R. 1180). Dr. Gertrude Warner, the medical examiner, testified at the trial and agreed that there was no evidence to indicate that a sexual assault had occurred (R. 742, 763). Dr. Warner also testified that there was no indication that Ms. O'Farrell had engaged in oral sex, contradicting Mr. Chavers' testimony that Mr. Lightbourne forced her to perform oral sex

"over and over" (R. 1116). Thus, Mr. Chavers and Mr. Gallman/Carson were the only sources of evidence for these details that were used to support numerous aggravating factors. Without this testimony, the State could not have argued for the death penalty.[32]

Mr. Simmons admitted in his opening statement that without Mr. Chavers and Mr. Gallman/Carson, the State's case was entirely circumstantial (R. 603-04). Mr. Fox and Mr. Burke, who represented Mr. Lightbourne, testified that without the testimony of Mr. Chavers and Mr. Gallman/Carson, the State would not have been able to argue for a death sentence (PC-R. 50, 274). Mr. Burke explained the impact of the testimony of these two witnesses:

> [T]he role that those two witnesses played was a crucial one because it changed the nature of the case from being bookended with a murder weapon that was used to inflict the deadly shot, to being one where there was [sic] now two people saying that, from the Defendant's own mouth, that he had, in fact, committed not only this homicide, but had done other actions which constituted the bases of the indictment or, in this case, which was the sexual battery and/or burglary theft.
>
> And it also introduced the aggravating factor or pecuniary gain in connection with another felony; and by saying that it was to eliminate a witness, throwing in another aggravating factor, potentially cold, calculated and premeditated, to avoid a lawful arrest.
>
> So many of the aggravating factors in this case, as well as the judgment of acquittal phase, all of those things were greatly enhanced by the testimony of these two witnesses, and, in fact, were probably the only evidence as to those factors.

(PC-R2. 473-74). Clearly, the outcome of Mr. Lightbourne's trial and sentencing phase would have been different without Mr. Chavers and Mr. Gallman/Carson. Mr. Emanuel's

[32]The 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).

hearing testimony confirms that Mr. Lightbourne denied involvement in the O'Farrell murder, that he did not talk to Mr. Chavers, and that law enforcement agents offered cellmates benefits in exchange for cooperation regardless of whether they had reliable information incriminating Mr. Lightbourne. His testimony lends further support to Mr. Gallman/Carson's recantation testimony and corroborates Mr. Chavers' affidavit. Confidence in the outcome of Mr. Lightbourne's trial is undermined. Mr. Lightbourne must be granted a new trial and sentencing.

C. CONCLUSION

Because this newly discovered evidence corroborates the evidence that was excluded from the prior hearing, in particular Mr. Chavers' affidavit recanting his trial testimony, that evidence should now be admitted. Chambers v. Mississippi, 410 U.S. 284 (1973)(holding that hearsay rules cannot be mechanically applied when doing so would violate a defendant's due process rights). In 1994, this Court affirmed the circuit court's exclusion of Mr. Chavers' affidavit, noting that the evidence offered by Mr. Lightbourne did not meet the Chambers hearsay criteria: "[i]n 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." 644 So. 2d at 57. The evidence offered by Mr. Lightbourne is critical to his defense because it proves that he is innocent of the death penalty and that the State could not have sought a death sentence without the false testimony of Mr. Chavers and Mr. Gallman/Carson. See Sawyer v. Whitley, 505 U.S. 333, 345 (1992)(holding that a defendant is innocent of the death penalty if he can show that he is ineligible for the death sentence because the statutory criteria do not

apply); Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991)(same). Although Mr. Chavers' affidavit was not spontaneously generated, his letters to the State Attorney's Office, in which he also admits that he lied at Mr. Lightbourne's trial, were spontaneous and voluntary. Mr. Chavers' affidavit bears indicia of reliability because he has no motive to lie, while in 1981 he clearly lied to help himself on pending charges.[33] In addition, Mr. Chavers' affidavit is corroborated by the testimony of Mr. Gallman/Carson and Mr. Carnegia, Mr. Hall's affidavit, and Mr. Emanuel's deposition testimony. Finally, although Mr. Chavers' affidavit was not against his interest in the traditional sense because the statute of limitations for perjury had expired, this Court should consider that in 1991, when local newspapers revealed that Mr. Chavers had recanted his trial testimony and that he was in fact a jailhouse snitch, he wrote letters to the State Attorney's Office and Judge Angel expressing both his fear that he would be killed in prison and his concern that the State would no longer treat him leniently in exchange for his cooperation because his credibility with the State was destroyed by the newspaper stories about his recantation (PC-R. 1326-35, 1338-39). This Court should also consider Dr. Poetter's evaluation of Mr. Chavers in 1990 in which he stated that Mr. Chavers believed he could be prosecuted for perjury (PC-R. 2043). Clearly, Mr. Chavers believed at the time that he signed the affidavit that he could still be prosecuted for perjury. Mr. Chavers' recantation of his false testimony is against his interest even if he

[33]The reliability of Mr. Chavers' affidavit is further proved by the testimony and affidavit of Ms. Walsh, the investigator who found Mr. Chavers in 1990 and secured his affidavit (PC-R. 1011-12, 1014-17). Ms. Walsh confirms that Mr. Chavers' memory of the events that transpired in 1981 was very clear and that he was "very assertive" about the truth of his affidavit. The reliability of Mr. Chavers' affidavit is also proved by his letters to the State Attorney's Office and his taped conversations with Mr. Phillips revealing that he lied at Mr. Lightbourne's trial.

can no longer be prosecuted for perjury; this lends additional credibility to his affidavit and explains his refusal to cooperate at the 1990 hearings.[34] Mr. Chavers' affidavit and letters should be considered by this Court in its analysis of the cumulative effect of all the evidence discovered since Mr. Lightbourne's trial, that which was previously unavailable, that which was withheld by the State in violation of Brady and Giglio, and that which went undiscovered due to the ineffective assistance of trial counsel. Gunsby. See Argument IV.

ARGUMENT IV

THE CIRCUIT COURT APPLIED THE WRONG STANDARD IN REVIEWING MR. LIGHTBOURNE'S CLAIMS AND FAILED TO CONSIDER THE CUMULATIVE EFFECT OF ALL THE EVIDENCE DISCOVERED SINCE MR. LIGHTBOURNE'S TRIAL.

The circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Lightbourne's trial as required by Kyles v. Whitley and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996)(directing the circuit court to consider newly discovered evidence in conjunction with evidence introduced in the defendant's first 3.850 motion and the evidence presented at trial).[35] In State v. Gunsby,

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[34]In United States v. Bigham, 812 F.2d 943 (5th Cir. 1987), the court upheld the district court's admission of a witness's prior inconsistent statement based on its conclusion that the witness was feigning loss of memory in order to avoid testifying. The court explained: "The policy of the rule to protect against turncoat witnesses is fully implicated in this case. Byrd was obviously an evasive and reluctant witness, and the trial judge reasonably could have concluded that his loss of memory was feigned. . . . As Professor Wigmore observed, 'the unwilling witness often takes refuge in a failure to remember.'" Id. at 946-47. Judge Angel clearly believed that Mr. Chavers was feigning incompetency, and his letter to the State Attorney's Office supports this conclusion (PC-R. 767, 772).

[35]That Kyles v. Whitley is not limited to Brady claims is evidenced by its application to sufficiency of the evidence claims, United States v. Burgos, 94 F.3d 849 (4th Cir. 1996); United States v. Rivenbark, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel

this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel and/or newly discovered evidence. Gunsby is exactly on point here and should have been followed by the circuit court. In Gunsby, this Court found that a new trial was required because the evidence presented at the evidentiary hearing undermined the credibility of key State witnesses. Id. at 923. This Court also addressed the State's argument that some of the defendant's evidence did not meet the test for newly discovered evidence:

> In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington. The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the Rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.

Id. at 924. (citations omitted). The circuit court not only failed to consider the cumulative effect of Mr. Lightbourne's new evidence but also ignored this Court's instructions in Gunsby to consider evidence that does not satisfy the newly discovered test for its support of an ineffective assistance of counsel and/or Brady claims. Had the circuit court examined all the evidence Mr. Lightbourne presented throughout his capital proceedings, it would have

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claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo, 64 F.3d 347 (8th Cir. 1995).

found that the previously unknown evidence, in conjunction with the evidence introduced at Mr. Lightbourne's trial, undermines confidence in the outcome. Gunsby; Swafford. Had the jury heard all the evidence presented in Mr. Lightbourne's post-conviction proceedings, the outcome of his trial and penalty phase would probably have been different.

The evidence presented at the 1995 evidentiary hearing, as well as Mr. Emanuel's deposition testimony that was improperly excluded, requires this Court to reconsider the exclusion of the previously presented evidence regarding Mr. Chavers. The inquiry regarding the admissibility of Mr. Chavers' affidavit cannot be conducted in a vacuum but must consider the consistency of Mr. Chavers' actions since the trial as well as the evidence from other sources confirming the truth of his affidavit. First, Mr. Chavers' letters to the State Attorney's Office and Judge Angel corroborate his affidavit. As early as 1985, Mr. Chavers began writing letters to the State Attorney indicating that he lied at Mr. Lightbourne's trial and expected assistance on pending charges in exchange for his cooperation:

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

(PC-R. 2436).

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

(PC-R. 2437).

> [W]hile I was in jail Ronald Fox talk with me about the man I lied on and help your office put on death row. Sir, Fox gave me his card in case I wanted to change my mind and tell the truth on his defendant . . . it look like I'll never got out of prison anyway so I hope your office never need me in that case and I'll tell the truth and take what ever [happens] after that.

(PC-R. 2434-35). Following the signing of the affidavit, Mr. Chavers wrote letters regarding his lies that put Mr. Lightbourne on death row:

> Phillips, it's all over prison that I have someone on death row, there ain't know where I can go with out someone knowing.

(Letter to Mr. Phillips dated March 10, 1991).

> Judge Angel, if I go to prison I don't think I will make it out alive, everybody know I have a man on death row thanks to the Ocala Star Banner, I was uncompetency when ---- state wanted me to be last summer.

(Letter to Judge Angel dated March 17, 1991).

> Phillips, I might not make it out of prison this time alive! Every body in prison know that I got a Black or brother as they say on death row.

(Letter to Mr. Phillips dated March 3, 1991). In addition, his two taped conversations with State Attorney Phillips confirm yet again that Mr. Chavers lied at Mr. Lightbourne's trial and that the contents of his affidavit are true (PC-R2. Sup. 101-02).

In addition, evidence from other sources corroborates Mr. Chavers' affidavit and Mr. Gallman/Carson's testimony that they lied at Mr. Lightbourne's trial. Mr. Carnegia testified that Mr. Chavers told him how to get out of jail and attempted to recruit him to incriminate Mr. Lightbourne and that Mr. Lightbourne did not tell Mr. Chavers anything about the crime. Mr. Hall's affidavit further proves that Mr. Lightbourne did not talk to Mr. Chavers and the other snitches in the cell and that he overheard Mr. Chavers discussing what he would tell the police about Mr. Lightbourne and that he had gotten out of jail by fabricating evidence before. Mr. Emanuel testified that Mr. Lightbourne never confessed to killing Ms. O'Farrell and that he did not even talk to Mr. Chavers. Mr. Emanuel explained that the

other cellmates decided to cooperate despite Mr. Lightbourne's silence and their lack of evidence against him:

> [I]t was other people in that cell that was in trouble and they was -- they was -- they was really trying to help theirselves at the same time as -- you know -- Lightbourne -- well, they was really trying to help theirselves. And all they had to do was say that Lightbourne committed that murder and the police would automatically let us go.

(PC-R2. 14). Finally, Mr. Gallman/Carson testified that he attempted to elicit incriminating statements from Mr. Lightbourne but that he did not know anything about the crime. Mr. Lightbourne's trial attorneys testified, and State Attorney Simmons agreed, that Mr. Gallman/Carson corroborated Mr. Chavers' testimony because they both encountered Mr. Lightbourne in the jail and provided almost identical testimony against him. While these witnesses were once mutually reinforcing in their testimony against Mr. Lightbourne, they now each corroborate the recantation of the other. In light of all of the evidence proving the truth of Mr. Chavers' affidavit, as well as the evidence indicating that he was intentionally feigning incompetency to avoid the consequences of telling the truth in court, Mr. Chavers' affidavit and letters should now be admitted and considered in the cumulative analysis of Mr. Lightbourne's claims as required by this Court's decision in Gunsby. Had the jury that convicted Mr. Lightbourne heard all this evidence regarding Mr. Chavers, Mr. Gallman/Carson, Mr. Emanuel, Mr. Hall, and Mr. Carnegia, the jury probably would have acquitted. As such, a new trial is required. Gunsby; Kyles.

ARGUMENT V

MR. LIGHTBOURNE'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED BY THE PARTICIPATION OF ASSISTANT STATE ATTORNEY REGINALD BLACK AS COUNSEL FOR THE STATE BECAUSE MR. BLACK IS A NECESSARY AND MATERIAL WITNESS TO MR. LIGHTBOURNE'S CLAIMS REGARDING MR. EMANUEL.

At the February 20, 1996, deposition of Larry Emanuel, counsel for Mr. Lightbourne learned for the first time that Mr. Black is a material witness to Mr. Lightbourne's Brady claim based on his representation of a key witness and his receipt of exculpatory information that was withheld from Mr. Lightbourne's trial attorneys.[36] On February 23, 1996, counsel filed a motion to disqualify Mr. Black. The circuit court held an evidentiary hearing to consider this and other motions on March 15, 1996. The motion to disqualify was denied (PC-R2. 231).

Rule 4-3.7 of the Rules of Professional Conduct addresses the issue of lawyers who become witnesses:

> (a) **When a Lawyer May Testify.** A lawyer shall not act as an 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 the legal services rendered in the case; or,

[36]Despite his obligation under Brady v. Maryland and as an officer of the court, Mr. Black never disclosed this information to the lower court or to Mr. Lightbourne.

> (4) disqualification would work a substantial hardship on the client.

Rule 4-3.7. None of the exceptions to the rule applies here. Mr. Black's testimony would relate to whether the State withheld exculpatory evidence regarding Mr. Emanuel's role as a State agent instructed to elicit incriminating statements from Mr. Lightbourne. Mr. Lightbourne must be given the opportunity to call Mr. Black as a witness.

The Eleventh Circuit Court of Appeals has explained that "a prosecutor must not act as both prosecutor and witness." United States v. Hosford, 782 F.2d 936, 938 (11th Cir. 1986). Florida state courts have also recognized the conflict inherent in a situation where, as in Mr. Lightbourne's case, a lawyer plays the dual role of prosecutor and witness. In State v. Christopher, 623 So. 2d 1228 (Fla. 3rd DCA 1993), the court explained:

> We recognize that the functions of a witness and a prosecuting attorney must be kept separate and distinct and that "the practice of acting as both a prosecutor and a witness is not to be approved and should be indulged in only under exceptional circumstances."

Id. at 1229 (citations omitted).

At his deposition, Mr. Emanuel revealed that he was represented by Mr. Black in 1980 and 1981 and that Mr. Black knew that Mr. Emanuel had assisted the State on Mr. Lightbourne's case (PC-R2. 22-23, 40). Mr. Emanuel remembers that he was being arraigned on a violation of probation charge when he told Mr. Black that the State was not treating him fairly because he had assisted the State in Mr. Lightbourne's case and felt that he should get a lighter sentence (PC-R2. 36, 40). This agreement between the State and Mr. Emanuel is the key element of Mr. Lightbourne's Brady claim relating to Mr. Emanuel and

is also relevant to Mr. Lightbourne's claims regarding Mr. Gallman/Carson and Mr. Chavers.

At the March 15, 1996, hearing, Mr. Black disputed Mr. Emanuel's memory of when he represented him and claimed that the Marion County Clerk's files support his argument (PC-R2. 195).[37] Mr. Black stated that he represented Mr. Emanuel on two cases beginning in 1980 but that his representation of Mr. Emanuel ended in December 1980 (PC-R2. 195-96). Mr. Black concluded that Mr. Emanuel could not have told him about his role in Mr. Lightbourne's case because he ended his representation of Mr. Emanuel before Ms. O'Farrell's murder (PC-R2. 197). Mr. Black also stated that even if Mr. Emanuel had communicated this information to him, he had forgotten it (PC-R2. 197-98).[38]

After denying the motion to disqualify Mr. Black, Judge Angel admitted that Mr. Emanuel might have told the truth at his deposition and that the court records do not

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[37]Mr. Black also argued, and Judge Angel seemed inclined to agree, that the issue whether Mr. Emanuel was a State agent and Mr. Black knew of and withheld this information is irrelevant because Mr. Emanuel did not testify at Mr. Lightbourne's trial (PC-R2. 221). The State ignores that Mr. Emanuel's testimony, like that of Mr. Carnegia and the affidavit of Mr. Hall neither of whom testified at the trial, is relevant to show a pattern of conduct by the Marion County Sheriff's Department and the Fifth Judicial Circuit State Attorney's Office. In addition, this evidence is relevant to a cumulative analysis of Mr. Lightbourne's claims as required by this Court's decision in State v. Gunsby.

[38]Mr. Black's belief that forgetting about Mr. Emanuel's role as a State agent alleviates the problem presented here demonstrates a misunderstanding of Mr. Lightbourne's claims and the basis for the motion to disqualify. Mr. Black must be disqualified because he is a material witness to Mr. Lightbourne's Brady and Henry claims. Mr. Lightbourne must be given the opportunity to question Mr. Black about his communications with Mr. Emanuel and whether he withheld exculpatory information from Mr. Lightbourne's attorneys. The fact that he may have forgotten will perhaps frustrate Mr. Lightbourne's attempt to elicit this information but does not prove that the communication did not occur and is irrelevant to the issue whether Mr. Black must be disqualified.

conclusively prove that Mr. Emanuel never told Mr. Black about his role in the prosecution of Mr. Lightbourne (PC-R2. 256-64). The court acknowledged that the court records offered by the State are "a little bit ambiguous" and that "Mr. Emanuel's testimony and recollection may be considerably accurate" (PC-R2. 256). Judge Angel also admitted that "the record is . . . not quite clear;" "the record here is incomplete;" and that he "just can't tell from the record" whether Mr. Emanuel's memory is accurate (PC-R2. 256-58). Judge Angel also noted that even if Mr. Black is correct about the time during which he represented Mr. Emanuel, Mr. Emanuel's memory of telling Mr. Black about his role in Mr. Lightbourne's case could also be accurate: "[Mr. Emanuel] could have probably been in doubt as to who, in fact, was representing him; and, to cover the waterfront, notified everybody, or the two attorneys that he had had contact with" (PC-R2. 263). Despite this acknowledgement that the court records do not definitively prove that Mr. Black's memory is accurate, Judge Angel denied Mr. Lightbourne's motion to disqualify after having considered what was in essence unsworn testimony from witness/advocate Black and without providing Mr. Lightbourne the opportunity to present evidence that could clarify these issues.

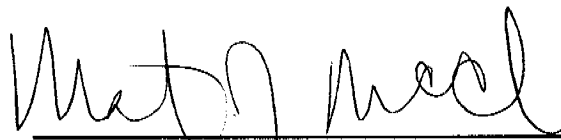
The circuit court erroneously denied Mr. Lightbourne's motion to disqualify Mr. Black. He is clearly a material witness to Mr. Lightbourne's Brady and Henry claims based on his representation of Mr. Emanuel and his receipt of exculpatory information that was withheld from Mr. Lightbourne's trial attorneys. The circuit court acknowledged that the court records do not clearly support the State's argument and that Mr. Emanuel's memory could be accurate. When the evidence before the court presents a debatable issue, there is no justification for denying Mr. Lightbourne's motion without allowing him to call witnesses to

prove his allegations and rebut the State's assertions. Mr. Lightbourne must be given the opportunity to present evidence in support of this motion.

CONCLUSION

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

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by first-class mail, postage prepaid, to all counsel of record on January 15, 1998.



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