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

REPLY BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Litigation Director
Florida Bar No. 0754773

Office of the Capital Collateral
Regional Counsel - Southern Region
1444 Biscayne Boulevard, Suite 202
Miami, Florida 33132
(305) 377-7580

COUNSEL FOR MR. LIGHTBOURNE

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.

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INTRODUCTION

The State's argument consists of the usual, nonsensical boilerplate. The State's formula first asserts that counsel's evidence is procedurally barred. In support of this argument, the State distorts and misrepresents testimony and ignores the express requirements of state and federal law regarding the dissemination of public records. After the customary procedural bar argument, the State illogically suggests that evidence consistent with that presented earlier is merely "cumulative" and unworthy of this Court's attention. The State fails to recognize the distinction between cumulative evidence that is repetitious of previously established fact and corroborative evidence that supports previously presented evidence which had been found insufficient to warrant relief. The newly discovered evidence, which is entirely consistent with that presented earlier, strengthens Mr. Lightbourne's claims that the State violated Brady, Giglio, and Henry when it overzealously sought his conviction and death sentence despite the absence of reliable evidence against him.

The State misrepresents counsel's hearing testimony and completely ignores both state and federal law governing the dissemination of National Criminal Information Center ("NCIC") reports when it argues that Larry Emanuel could have been discovered earlier. The State's only support for this argument is the assertion that Mr. Emanuel could have been located in a Texas jail in 1990 if counsel had simply requested an NCIC report

from the Florida Department of Law Enforcement. Significantly, the State did not address counsel's argument that state and federal expressly prohibit State agencies from disclosing NCIC reports to defense agencies such as CCR. The State argues that had counsel made such a request in 1990, the report would have been provided, but ignores that under state and federal law an agency's receipt of NCIC reports is conditioned on its agreement to withhold them from defense agencies. Accepting the State's argument on this issue would result in the illogical requirement that defense counsel request records to which they are not entitled and which State agencies are prohibited from disclosing simply to prove diligence in locating witnesses.[1]

The State's accusation that the evidence presented by Mr. Lightbourne is "cumulative" to that already presented ignores that this Court previously denied relief on the Brady, Giglio, and Henry claims precisely because Mr. Lightbourne's evidence was insufficient. Newly discovered evidence consistent with that which was previously presented is not "cumulative," as the State alleges; it is corroborative and strengthens Mr. Lightbourne's claims because of its consistency with the evidence previously offered. Significantly, at Mr. Lightbourne's trial the State

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[1]Undersigned counsel in his testimony recognized that on occasion 119 materials received from State Attorney Offices included NCIC printouts which are supposed to be exempted from disclosure. When these materials have been disclosed, counsel has used them. However, undersigned counsel has not (nor did he testify that he has) made 119 requests specifically for NCIC records to which he knows he is not entitled. In its Answer Brief the State blatantly misrepresents undersigned counsel and makes a blatantly false factual assertion based upon the misrepresentation.

used the same strategy that it now disparages when Assistant State Attorney Al Simmons argued to the jury that Mr. Chavers and Mr. Gallman/Carson were credible witnesses precisely because their testimony was consistent. However, the State now argues that Mr. Lightbourne's presentation of consistent evidence is senseless repetition that is unworthy of this Court's consideration.

The State also argues that Mr. Chavers and Mr. Gallman/Carson are simply not worthy of belief. However, as the State's brief reveals, the conviction and death sentence obtained against Mr. Lightbourne depends upon the credibility of these two witnesses who testified at trial to incriminating and highly prejudicial statements allegedly made by Mr. Lightbourne. The State's argument that other evidence supported the death sentence ignores that the State's brief on direct appeal repeatedly cited the combined testimony of the two witnesses it now dismisses as incredible. The State's Answer Brief does not even address counsel's argument that this Court's opinion on direct appeal affirming the conviction and death sentence relied almost exclusively on the Chavers and Gallman/Carson testimony in finding that the State had proved the aggravating factors. Either Mr. Chavers and Mr. Gallman/Carson are worthy of belief or they are not, but the determination whether they are credible applies equally to their trial testimony and their

recantations.[2] Either way, the State cannot prove the aggravating factors supporting Mr. Lightbourne's death sentence.

REPLY TO ARGUMENT I

In its response to Mr. Lightbourne's argument that he was denied his due process right to a full and fair hearing, the State ignores that the issue is whether the circuit court accepted evidence from the State but denied Mr. Lightbourne the reciprocal opportunity to present evidence on the same issue. The State argues that the circuit court only heard testimony on the limited issue of Mr. Emanuel's availability prior to 1994 and that Mr. Lightbourne was provided an opportunity to present evidence regarding his counsel's efforts to locate Mr. Emanuel. At the October 1995 hearing, both the State and Mr. Lightbourne presented evidence on the due diligence issue; however, at the March 1996 hearing, the State presented evidence rebutting the substance of Mr. Emanuel's deposition which had not been admitted into evidence. It is the circuit court's denial of Mr. Lightbourne's right to present witnesses on this same subject at the March hearing that is the focus of his claim that the circuit court denied his due process right to a full and fair hearing.

The State's Answer Brief belies its claim regarding the limited scope of the hearing. The State summarizes the testimony of Ken Raym and Edward Scott, the two witnesses called by the State at the March 1996 hearing, according to Assistant State

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[2]The State argues both that these witnesses are incredible and that the death sentence based on their testimony should be carried out. Clearly, the State wants to have its cake and eat it too.

Attorney Reginald Black, to rebut "the substance of [Emanuel's] deposition." (PC-R2. 231).[3] Although the State now argues that the hearing was reopened for the limited purpose of determining whether Mr. Emanuel's deposition was procedurally barred, the two State witnesses offered testimony that was irrelevant to counsel's diligence in locating Mr. Emanuel. The State summarizes the testimony of its witnesses as follows:

> Raym had nothing to do with the investigation of the O'Farrell murder, or with the arrest of Lightbourne. He never had Emanuel placed in Lightbourne's cell as a "listening post," or to interrogate him.
>
> . . .
>
> [Scott] had no connection to the investigation and arrest of Lightbourne for the O'Farrell murder. He never placed Emanuel in Lightbourne's cell as a listening post, nor was it ever done in his presence.

Answer Brief at 54-55 (citations omitted). This testimony does not concern Mr. Emanuel's availability prior to 1994 but goes directly to the truth of Mr. Emanuel's deposition, a subject about which Mr. Lightbourne was prohibited from offering evidence.

The State also ignores that Judge Angel acknowledged that Mr. Lightbourne's due process rights would be infringed if he allowed the State to present its witnesses; Judge Angel noted

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[3]Mr. Black also told the court that the State's witnesses would "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). The State cannot now argue that the circuit court only accepted evidence on the issue of counsel's diligence in locating Mr. Emanuel when its own witnesses were offered to rebut the substance of his deposition.

that "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. . . ." (PC-R2. 233-34). Despite his recognition that granting the State's request would result in a denial of Mr. Lightbourne's right to a fair hearing, Judge Angel allowed the State to present its witnesses. Clearly, the circuit court violated Mr. Lightbourne's due process right to a full and fair hearing when it accepted evidence from the State while prohibiting Mr. Lightbourne from offering evidence on this same subject.[4]

In response to Mr. Lightbourne's argument that the circuit court ignored his unrebutted evidence that Mr. Emanuel was not available prior to 1994, the State repeats its argument asserted to the circuit court that counsel for Mr. Lightbourne could have located Mr. Emanuel as early as 1990 through NCIC records. The State's only evidence contesting counsel's diligence in locating Mr. Emanuel was the hearsay testimony of Karen Combs, an investigator with the State Attorney's Office, that "the first

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[4]The State took contradictory positions in regard to Mr. Emanuel, arguing on the one hand that his testimony was barred and on the other that it should have the opportunity to rebut it on the merits. Despite his efforts to clarify the scope of the March 15th hearing, counsel for Mr. Lightbourne was unsure whether Judge Angel was accepting evidence on the issue of due diligence in locating Mr. Emanuel or the substance of his deposition. Judge Angel was also confused by the State's arguments and thought its witnesses were being called on the issue of defense counsel's diligence rather than to rebut the substance of Mr. Emanuel's testimony (PC-R2. 232). As a result of Judge Angel's confusion, the State's evidence rebutting Mr. Emanuel's testimony was admitted and Mr. Lightbourne's due process rights were denied.

and only time that CCR applied for a criminal history on Larry Emanuel" was September 22, 1994 (PC-R2. 623). The State presented no evidence of the State's response to CCR's request, nor did it prove that CCR located Mr. Emanuel as a result of its September 1994 request. Most importantly, the State did not offer any evidence proving that counsel for Mr. Lightbourne did in fact receive an NCIC report for Mr. Emanuel or that it could have received it upon request in 1990.

The State claims that Mr. Lightbourne's argument that NCIC records were unavailable to him "is refuted by Mr. McClain's admission that he could obtain such information from the State, and that he had in fact made such requests in the past." Answer Brief at 57. The State takes counsel's testimony out of context in order to twist it to suit its own needs. Counsel's testimony clearly does not support the State's argument about the availability of NCIC records. Mr. McClain testified about his office's efforts to locate witnesses:

> Q Would they [CCR investigators] check with the Florida Department of Law Enforcement or anybody else to obtain an NCIC printout on the subject that they were interested in?
>
> A They try to obtain everything that they can, but I'm not sure that NCIC is made available to CCR because we're not considered a law enforcement agency. For that, we would have to rely on the State Attorney's Office to provide it.
>
> Q Which, of course, you do -- you've done on more than one occasion, haven't you?
>
> A That's correct.

(PC-R2. 567-68).[5] Counsel's so-called "admission" does not support the State's argument about the availability of NCIC records. In fact, counsel testified that such records are not available to CCR but that the State Attorney's Office can provide them at its discretion or that they are sometimes released by mistake if an agency fails to remove an NCIC report from its files before providing them to CCR.[6] In 1990, when counsel for Mr. Lightbourne detailed his efforts to locate Mr. Emanuel and other witnesses, Mr. Black told the circuit court that his office had also been unable to locate "the inmate witnesses" (PC-R. 423-24). While it is impossible to determine from Mr. Black's inconsistent representations whether the State Attorney's Office had an NCIC report for Mr. Emanuel in 1990, it is clear from the record that an NCIC report was not provided to CCR even though Mr. Lightbourne's counsel sought help in finding the witnesses.

After the presentation of the due diligence testimony, counsel argued the issue of Mr. Emanuel's availability. Mr. Black told the circuit court that "on September the 22nd of 1994 was the only time that the Capital Collateral Representative had asked for and obtained an NCIC printout on Larry Emanuel from the Florida Department of Corrections, the only time that such a

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[5]In fact, in 1990, Mr. Nolas was representing Mr. Lightbourne and requested in open court Mr. Black's assistance in finding Mr. Emanuel (PC-R. 423-24).

[6]Mr. Strand, who represented Mr. Lightbourne at the circuit court hearing, similarly told Judge Angel that although State agencies are expressly prohibited from disclosing NCIC reports to defense agencies, they are sometimes released by mistake (PC-R2. 633).

request had been made by CCR to FDLE and they got a reply." (PC-R2. 630-31). The State's argument that "[CCR] got a reply" is not based on any evidence in the record: Ms. Combs testified only that CCR made a request in September 1994 and that her own research revealed that Mr. Emanuel was in a Texas jail in 1990. Ms. Combs never testified that CCR received an NCIC report on Mr. Emanuel in 1994, and the State never offered any evidence proving this point. Mr . Black continued to misrepresent public records law and the facts of this case:

> And at any time during the calendar years 1990 and 1991, if the Capital Collateral Representative had exercised due diligence on behalf of Mr. Lightbourne, they would have been able to do the very same thing they did on September the 22nd of 1994, as apply to the Florida Department of Corrections for an NCIC hit on Larry Emanuel, and they would have discovered his presence and availability in either of those Texas institutions.
>
> . . .
>
> So it's manifestly obvious from the record, Your Honor, that when we were laboring in this vineyard in 1990 and 1991, and there was discussion, as counsel has already put on the record, about wanting Larry Emanuel, if they had only done that one thing, they would have had him. He was available, but they didn't do it.

(PC-R2. 631-32).

Counsel for Mr. Lightbourne explained that "under the law, NCIC -- under Federal law, NCIC is only available to law enforcement agencies. There's a criminal penalty and a civil penalty for releasing NCIC rapsheets to someone besides law enforcement agencies. . . . There's no way that we can get an NCIC printout sheet. Now, we just can't do it." (PC-R2. 633). After counsel's explanation that Mr. Black's argument is flatly

rebutted by the law, the following exchange occurred:

THE COURT: You can't send a request over to the State and have them give it to you?

MR. STRAND: No, you can't do that. And I think that one of the things he's making a mistake about here is that you can make --

THE COURT: You mean if you sent a request over to the State for a check on any witness or person, they won't give it to you?

MR. STRAND: They're not supposed to. Under the law, they're not supposed to release the NCIC rapsheet. And, Judge, I've tried to get them numerous times and never had any luck doing it.

THE COURT: Well, the State just said you contacted FDLE and it sounded to me like you contacted them directly and got this in September of '94.

MR. STRAND: Judge, I think that we've got two separate things here. Okay. There's what's called the NCIC information sheet, and that's the National Criminal Information Center.

That's a Federally-funded center that provides information to law enforcement agencies throughout the United States on suspects, people arrested and so forth. Now, that's a Federal thing and that covers the whole United States.

Now, we have the Florida Department of Law Enforcement, the FDLE. They also carry what they call -- what we refer to here as a "rapsheet." Now, this rapsheet that the FDLE carries only covers the state of Florida. When you look at an FDLE rapsheet, it's for Florida.

. . .

In fact, we did request the FDLE rapsheet on Mr. Emanuel and it says Florida convictions, but it doesn't say anything about Texas.

They are two different agencies, two different things. There is no Florida law that keeps citizens from getting a rapsheet from the FDLE. Under Chapter 119, the court reporter could go and call them up and give them a letter and get a rapsheet. They are two different things.

(PC-R2. 633-35).

Judge Angel ignored this explanation about NCIC reports and state and federal public records law and instead examined the Marion County Jail records for Mr. Emanuel from 1981 (PC-R2. 636-37). Judge Angel concluded that "Larry Emanuel was available to Mr. Lightbourne in March of 1980 and 1981, before this trial." (PC-R2. 640). Judge Angel ignored Mr. Strand's argument that the 1981 records were irrelevant to the issue of post-conviction counsel's due diligence and sustained the State's objection to Mr. Lightbourne calling Mr. Emanuel (PC-R2. 641).

The State continues to ignore that State agencies are prohibited from disclosing NCIC records to CCR and simply quotes Mr. Black's unsupported argument that CCR "make[s] public records demands all the time for all kind[s] of records. And they can certainly do it of the Florida Department of Law Enforcement, which is a government agency. They can do it of the State Attorney's Office, which is a government agency . . . in addition to the process I just described, at any time any defense can move the court to order an exposition of any potential witness' criminal record." Answer Brief at 57 (quoting PC-R2. 638-39). The State's Brief and Mr. Black's argument both ignore that, as counsel informed the circuit court, State agencies are prohibited from providing NCIC records to defense agencies such as CCR.[7]

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[7]In contradiction to Mr. Black's expressed willingness to help CCR locate Mr. Emanuel, the State argues that it is not the duty of the State to actively assist the defense in locating witnesses. Answer Brief at 58, footnote 43. If Mr. Black were able and willing to help CCR locate Mr. Emanuel, as he told the circuit

The State has offered no evidence in support of its argument, and the assertions of Mr. Black are simply insufficient to prove that counsel received an NCIC report on Mr. Emanuel or that the report would have been provided on request in 1990.

The State's Brief also ignores that the circuit court erred in denying Mr. Lightbourne's motion to reopen the evidentiary hearing on the grounds that Mr. Emanuel was previously available to Mr. Lightbourne's trial counsel. If the circuit court is correct about Mr. Emanuel's availability in 1980 or 1981, then Mr. Lightbourne's trial counsel was ineffective. However, Mr. Emanuel's availability to trial counsel is irrelevant to the diligence of post-conviction counsel. Although the State argues that the circuit court also considered the issue of post-conviction counsel's due diligence, the court ignored unrebutted evidence and made no specific findings in regard to postconviction counsel. The fact that Mr. Lightbourne presented unrebutted evidence regarding his postconviction counsel's diligence, particularly the unavailability of NCIC records and Mr. Emanuel's own efforts to avoid detection, undermines the State's argument that the circuit court considered the issue of postconviction counsel's diligence. The State claims that it

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court in 1995, the State would not have to defend its failure to help CCR by arguing it was under no obligation to do so. Counsel has never said that the State has a duty to help locate defense witnesses; it was the State who offered this argument in support of its claim that Mr. Emanuel could have been located earlier (with the assistance of the State) had CCR made it known that it was searching for him. But of course in 1990, Mr. Lightbourne's counsel did explain that Mr. Emanuel and others were being sought. Assistance was requested, and none was forthcoming.

rebutted Mr. Lightbourne's evidence by showing that his argument about NCIC reports is "fallacious," Answer Brief at 79, the State's argument is contrary to both state and federal law specifically prohibiting the release of NCIC reports to defense agencies.[8] Had the court considered Mr. Lightbourne's unrebutted evidence, it would have found that postconviction counsel exercised due diligence and that Mr. Emanuel was not previously available.

Finally, the State's argument that Mr. Emanuel's testimony is irrelevant because he did not testify at Mr. Lightbourne's trial is completely unsupported by the facts of this case. Mr. Emanuel was in the same cell as Mr. Lightbourne, Mr. Carnegia, Mr. Chavers, and Mr. Carson/Gallman. Mr. Chavers and Mr. Carson/Gallman both testified at Mr. Lightbourne's trial that he made incriminating statements about the O'Farrell murder; this highly inflammatory testimony was the only evidence supporting the death sentence and provided prejudicial details that made a guilty verdict more likely. Mr. Chavers and Mr. Carson/Gallman

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[8]Title 28, Section 20.33, Code of Federal Regulations, which governs the dissemination of criminal history information compiled by the Department of Justice, states that such records are available only to "criminal justice agencies for criminal justice purposes," 28 C.F.R. §20.33(a)(1), and that "[t]he exchange of criminal history record information authorized by paragraph (a) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies." 28 C.F.R. §20.33(b). The Florida Legislature adopted this provision in Section 943.054, Fla. Stat., which provides that "[t]he exchange of federal criminal history information is subject to cancellation if dissemination is made outside the receiving departments or related agencies." Chapter 119 provides that criminal history information obtained from federal agencies is exempt from disclosure. See §119.072, Fla. Stat.

have since recanted their testimony, admitted that the State solicited inmates to elicit incriminating statements from Mr. Lightbourne, and testified that they received lenient treatment in exchange for their false testimony against Mr. Lightbourne.[9] Mr. Carnegia testified in 1990 that Mr. Chavers had told him that he could get out of jail by providing incriminating evidence against Mr. Lightbourne and that he overheard Mr. Chavers trying to recruit Mr. Emanuel to assist the State in convicting Mr. Lightbourne (PC-R. 558).

Mr. Emanuel's deposition supports the other witnesses presented by Mr. Lightbourne and further proves that the State used inmates to elicit incriminating statements from Mr. Lightbourne and knowingly presented false testimony at his trial. It is "cumulative," as the State argues, in the sense that it contributes to the accumulation of evidence proving the State's misconduct. And the fact that Mr. Emanuel did not testify at Mr. Lightbourne's trial does not automatically render his testimony irrelevant; in fact, it was the lack of such evidence that compelled this Court to deny relief on Mr. Lightbourne's direct appeal and on his appeal following the 1990 evidentiary hearing.

In 1983, this Court rejected Mr. Lightbourne's argument that the State had violated United States v. Henry when it instructed

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[9]Mr. Chavers provided an affidavit recanting his trial testimony in 1989. He also wrote letters to the State Attorney's Office indicating that his trial testimony was false and that he expected lenient treatment in exchange for his role in Mr. Lightbourne's conviction. Mr. Chavers feigned incompetence and did not testify at the evidentiary hearing. Mr. Gallman/Carson testified in 1995.

other inmates to elicit incriminating statements from Mr. Lightbourne. This Court found Mr. Lightbourne's evidence insufficient:

> Without some promise or guarantee of compensation, some overt scheme in which the State took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the State's actions in this case to an agency relationship with the informant Chavers.

Lightbourne v. State, 438 So. 2d 380, 386 (Fla. 1983)(emphasis added). See Id. at 392 (Overton, J., dissenting)(finding that Chavers was an agent of the State and that Mr. Lightbourne's statements to him should have been suppressed).

Mr. Emanuel's deposition testimony, in conjunction with the other evidence offered by Mr. Lightbourne in postconviction proceedings, is the evidence that was unavailable at the time of direct appeal. This testimony supports Mr. Lightbourne's argument that the State violated Henry, that it sought to convict him without regard for his innocence, and that it knowingly presented false testimony in order to secure a conviction and death sentence. Mr. Emanuel's testimony is also relevant to the issue whether Mr. Chavers' hearsay statements should now be admitted. Following the 1990 evidentiary hearing, Mr. Lightbourne argued that Mr. Chavers' affidavit and letters should be admitted because corroborating evidence proved their reliability; this Court found that Mr. Lightbourne had presented insufficient evidence of reliability:

> The only evidence introduced at the evidentiary hearing corroborating Lightbourne's proffered hearsay evidence was testimony by Richard Carnegia who also shared a

> cell with Lightbourne and Chavers at the county jail. Carnegia testified that Chavers approached him and told him that if he wanted to get out of jail, he should say he heard Lightbourne say he killed somebody.

Lightbourne v. State, 644 So. 2d 54, 57 n.4 (Fla. 1994). The State's argument that Mr. Emanuel's testimony is both irrelevant and cumulative is contradicted by the fact that this Court has specifically noted its reluctance to grant Mr. Lightbourne relief in the absence of additional evidence of the State's misconduct. Because this Court denied Mr. Lightbourne relief based on the insufficiency of evidence proving his claims, more evidence consistent with that already presented cannot possibly be cumulative.

REPLY TO ARGUMENT II

In its response to Argument II, the State claims both that "the trial court . . . correctly applied the newly discovered evidence standard of Jones v. State to Gallman's recanted testimony," Answer Brief at 69, and that "the trial court applied the Brady standard, and found there was no violation." Answer Brief at 76. Although the State seems confused about which standard the circuit court applied to Mr. Lightbourne's claims and which standard should have been applied, it is clear from the circuit court order denying relief that the court erroneously applied the Jones newly discovered evidence of innocence standard to Mr. Lightbourne's Brady/Giglio claim. The court explained its analysis:

> Recanted testimony is considered newly discovered evidence. The trial court must evaluate the weight of the newly discovered evidence and the evidence

> introduced at trial. . . . It should be remembered that a new trial with recanted testimony includes the witness's prior testimony as substantive evidence. It is not as if the new trial excludes false testimony.

(PC-R2. 283). Although the circuit court correctly stated that Mr. Lightbourne's claims arose under Brady, Giglio, and Henry, it cited Jones and other newly discovered evidence cases. Nowhere in its opinion denying relief does the circuit court cite either United States v. Bagley, 473 U.S. 667 (1985), or Kyles v. Whitley, 514 U.S. 419 (1995), the two cases establishing the materiality standard for a Brady claim. Comparison of the court's opinion excerpted above with Jones demonstrates that the circuit court applied the wrong standard to Mr. Lightbourne's claim. In Jones, this Court remanded for an evidentiary hearing and told the circuit court how to evaluate the defendant's newly discovered evidence of innocence:

> At the hearing, the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.

591 So. 2d 911, 916 (Fla. 1991).

Following this Court's opinion in Jones, Judge Angel considered both the newly discovered evidence and the evidence introduced at trial -- a method that imposes a higher burden on a defendant seeking a new trial. However, under the standard that should have been applied to Mr. Lightbourne's Brady claim, the focus is the effect that the suppressed evidence would have had

on a jury. Relief should be granted if Mr. Lightbourne demonstrated 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." Kyles, 514 U.S. at 433.[10] The circuit court erroneously applied the Jones newly discovered evidence standard to Mr. Lightbourne's claims.

The State also argues that the issue of Mr. Chavers' recantation "was disposed of in Lightbourne IV." Answer Brief at 72. While this Court addressed the admissibility of Mr. Chavers' affidavit in 1994, the issue is not "disposed of" because the reliability of his affidavit and letters must be reconsidered in light of the newly discovered evidence. After the 1990 evidentiary hearing at which Mr. Chavers feigned incompetence, this Court affirmed the circuit court decision excluding his affidavit and letters to the State Attorney's Office because they "lack[ed] the necessary indicia of reliability." 644 So. 2d at 57. At that time, this Court found that Mr. Carnegia's testimony was the only evidence offered by Mr. Lightbourne to corroborate the hearsay evidence and that Carnegia's testimony on its own was insufficient to prove its reliability. Mr. Gallman/Carson's testimony provides the additional corroboration that was

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[10]This standard was adopted in Bagley from the prejudice standard enunciated in Strickland. In Strickland, the Supreme Court specifically stated that the standard was not a preponderance of the evidence standard which is what Jones requires.

unavailable in 1990.[11]

Mr. Chavers has repeatedly stated that his trial testimony that Mr. Lightbourne confessed to him was false. Mr. Gallman/Carson's testimony corroborates Mr. Chavers' statements and confirms that the State presented false testimony and withheld material evidence. Both witnesses have admitted, and documentary evidence confirms, that they received benefits in exchange for their testimony against Mr. Lightbourne while at trial they denied the existence of any benefits or deals with the State. At trial, Assistant State Attorney Al Simmons presented Mr. Chavers and Mr. Gallman/Carson as complementary witnesses:

> All right. We've got some direct testimony, Ladies and Gentlemen, by two jailmates of the Defendant and the Court is going to tell you to view their -- to view what they tell you about this man's statements very carefully and you should, and you should consider the circumstances that the statements that the Defendant made were under and you should view the motive of the individuals who are telling you these things and you should consider their demeanor on the stand and their interest in the outcome of the case, but there's another thing you need to consider, Ladies and Gentlemen, and that is how -- what they tell you jibes with other evidence. Is it supported by other evidence. Do they corroborate eachother.

(R. 1384)(emphasis added). Mr. Simmons admitted at the evidentiary hearing that Mr. Gallman/Carson's recantation had a negative effect on Mr. Chavers' credibility (PC-R2. 429). Just as the similarity of their trial testimony strengthened the credibility of each witness, the recantation testimony of Mr.

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[11]This Court should also consider that Mr. Emanuel's deposition testimony provides additional corroboration for Mr. Chavers' affidavit and letters.

Gallman/Carson demonstrates the reliability of Mr. Chavers' recantation in his affidavit and letters. Accordingly, this Court must reconsider its previous decision upholding the exclusion of that evidence.

The State also fails to respond to Mr. Lightbourne's argument that the newly discovered evidence proves that the State violated United States v. Henry when made Mr. Chavers and Mr. Gallman/Carson agents of the State. The newly discovered evidence proves that these witnesses were offered favorable treatment as an incentive to elicit incriminating statements from Mr. Lightbourne and that, when they failed to do so, they were told what to say at his trial.[12] Mr. Lightbourne's trial was

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[12]The Tenth Circuit Court of Appeals recently addressed the issue of the State offering deals to witnesses when it held that Title 18 U.S.C. §201(c)(2), which criminalizes giving anything of value in exchange for testimony, applies to United States Attorneys. After noting that "[i]f justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so," the court explained why such conduct is particularly problematic when committed by the State:

> The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money. Because prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the stricture of §201(c)(2) to their activities.
>
> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer."

United States v. Singleton, No. 97-3178 (10th Cir. 1998)

tainted by the testimony of Mr. Chavers and Mr. Gallman/Carson who have both recanted the substance of their testimony against Mr. Lightbourne and have admitted that they were State agents who were instructed to elicit incriminating statements.

In its direct appeal brief, the State argued that Mr. Lightbourne failed to prove his allegations that an agency relationship existed between the State and these two witnesses:

> The State submits that the situations existent in Henry and Malone are clearly distinguishable from the case sub judice. Mr. Lightbourne's cellmate clearly initiated the contact with Investigator LaTorre (R-1586-87); the investigator had no knowledge whatsoever that Chavers was in the same cell with Mr. Lightbourne (R-1587). Although Mr. Lightbourne was in jail, he was not there on the murder charge in this case but for a previous arrest on concealed weapons charges (R-1586). No indictment for the murder had been returned against the defendant (R-1), and his connection with the case at that point was limited to the fact that he was on

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(quoting Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 803 (1987)). In Singleton, the court found that suppression is the only appropriate remedy:

> Congress evidenced an intent in §201(c)(2) to remove the temptation inherent in a witness's accepting value from a party for his testimony. That temptation, even if unconscious, is to color or falsify one's testimony in favor of the donor. The law already imposes on every witness the solemn and fundamental duty to testify truthfully, and accepting unlawful gratuities or inducements from a party compromises that solemn duty. When testimony tainted in this way is presented to the courts of the United States, judicial integrity is directly impugned in a way it is not by tangible evidence whose reliability is unaffected by an underlying illegality. And when the statutory policy of Congress is to protect courts and parties from that taint, suppression is particularly appropriate because it effectuates that purpose.

Id.

> the list of people to be interviewed (R-1586). There is no evidence that Chavers was a paid informant working on a contingent fee basis or otherwise. Although he did receive a two hundred dollar ($200.00) reward from the sheriff's department, that money was given to him pursuant to a general reward offered by the sheriff's department for information and was not waved as an inducement or carrot-on-a-stick to motivate or induce the informant to elicit information.
>
> Appellant claims that "Theodore Chavers, the informer, was being paid by the State and was, therefore, under the same constraints as any State agent." (AB-31). The statement is clearly unsupported by the record. There was no agency relationship, i.e., no agreement between the State and Chavers that money was to be paid or leniency to be granted, prior to the informant having obtained the information which was passed on after the fact. Similarly, the State would contend that Investigator LaTorre's advice to the informant to keep his ears open does not constitute an attempt by the State to "deliberately elicit incriminating statements" under either Malone or Henry. Without some promise or guarantee of compensation (Henry) or some overt scheme in which the State took part (Malone), the actions of the State in this case should not be elevated to an agency relationship with the informant Chavers. Finally, the State would take issue with other factual contentions asserted in Appellant's brief. It is obvious from the record that Investigator LaTorre never "told Chavers to gain further information from the defendant" (R-1594)(AB-31). LaTorre simply told him to "keep his ears open" (R-1594).

(State Brief on Direct Appeal at 16-17).

The State's argument has been completely undermined by the recantations of Mr. Chavers and Mr. Gallman/Carson, which are corroborated by Mr. Emanuel and Mr. Carnegia. Mr. Gallman/Carson testified that he was "told . . . certain things pertaining to the case" and put "in the cell with the individual to inquire about it, to try to get some information from him." (PC-R2. 371). Mr. Gallman/Carson explained what happened when he told the police that Mr. Lightbourne knew nothing about the O'Farrell

murder: "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." (Id.). Mr. Emanuel and Mr. Carnegia confirm that Chavers and Gallman/Carson were recruited by the State to elicit information from Mr. Lightbourne. Mr. Carnegia testified that Chavers gave him advice about how to get out of jail: "he said that just tell them that you heard Lightbourn[e] say that he killed somebody." (PC-R. 558). Mr. Carnegia explained why he did not follow Chavers' advice: "I didn't want to say something that I didn't hear. You know, it wasn't true." (PC-R. 558-59). Mr. Carnegia also overheard Chavers attempt to convince Mr. Emanuel to become a snitch against Mr. Lightbourne (PC-R. 561). Mr. Emanuel's deposition confirms that the police were recruiting Mr. Lightbourne's cellmates to elicit incriminating statements: "They [two law enforcement agents] asked me if I could get Ian Lightbourne to say that he murdered that white girl . . . they said if I could get him to confess to that, they would get me free of that charge I was charged with at the time." (PC-R2. 12). Finally, Mr. Chavers has repeatedly stated in an affidavit, letters to the State Attorney's Office, and in an interview with Assistant State Attorney James Phillips, that he had a deal with the State and that he lied at Mr. Lightbourne's trial. In his own words: "I have lied to help get what you wanted, that black nigger on death row." (PC-R. 2436).

REPLY TO ARGUMENT III

The State begins its response to Argument III by noting what

it perceives to be the contradictory arguments presented by Mr. Lightbourne in Arguments II and III:

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

Answer Brief at 77, footnote 52. The State has misunderstood the substance of Mr. Lightbourne's claims and seems confused because two distinct claims share a common source: the testimony of James Gallman.[13] Argument II alleges that the State violated Brady and Giglio when it withheld evidence of deals made with State witnesses in exchange for their testimony and knowingly presented false testimony. Argument III alleges that newly discovered evidence, specifically Mr. Gallman/Carson's testimony, proves that Mr. Lightbourne is innocent of the death penalty and that without the testimony of Mr. Chavers and Mr. Gallman/Carson he would not have received a death sentence. The fact that Mr. Gallman/Carson's testimony is also the basis for a newly discovered evidence of innocence claim does not undermine Mr. Lightbourne's claim in Argument II that the circuit court applied the wrong legal standard to his Brady/Giglio claim.

In response to Mr. Lightbourne's claim that he is entitled to a new sentencing, the State attempts to minimize the impact of

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[13]Mr. Emanuel's deposition, which was not accepted into evidence, corroborates Mr. Gallman/Carson's testimony and also supports Mr. Lightbourne's arguments.

Mr. Chavers' and Mr. Gallman/Carson's false testimony. The State claims that "[t]here was substantial evidence from both the guilt and penalty phases of Lightbourne's 1981 trial which was independent of Chavers' and Gallman's testimony, and, in fact 'fully corroborated' the same." Answer Brief at 82.[14] In support of this argument, the State quotes this Court's 1994 opinion summarizing the evidence against Mr. Lightbourne. Answer Brief at 82 (quoting Lightbourne IV, 644 So. 2d at 54 n. 4). However, in that opinion, this Court considered the evidence of Mr. Lightbourne's guilt; that same evidence is not necessarily sufficient to support the death sentence, an issue which was not discussed by this Court in that opinion. In the absence of Mr. Chavers' and Mr. Gallman/Carson's testimony, the State would have been unable to make its case for a death sentence.[15]

The State argues that Mr. Lightbourne's claim that the aggravating factors would not have been proved without Chavers and Gallman/Carson is "without merit." Answer Brief at 72. The

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[14]It is hardly surprising that the State takes inconsistent positions in regard to the effect of corroborative evidence. When offered by the State, such evidence strengthens the case against Mr. Lightbourne, but corroborative evidence offered by Mr. Lightbourne is dismissed as merely cumulative and unworthy of this Court's consideration.

[15]In 1985, this Court rejected an ineffective assistance of counsel claim premised upon the failure to present evidence of mitigating circumstances. This Court's reasoning was based on the substantial evidence supporting the aggravating factors. State v. Gunsby requires the cumulative consideration of all constitutional claims of error. This Court in evaluating this claim must reconsider its 1985 conclusion which is now undermined by evidence unknown at that time negating the "substantial evidence" supporting the aggravating factors.

State misrepresents the evidence presented at trial and the history of this case -- both of which demonstrate the necessity of this false testimony to proving a sexual assault and securing a death sentence. At trial, Assistant State Attorney Al Simmons admitted that without the testimony of Mr. Chavers and Mr. Gallman/Carson, the State's case against Mr. Lightbourne was entirely circumstantial (R. 603). Mr. Simmons also promised the jury that they would hear Mr. Lightbourne's own incriminating statements, emphasizing the persuasive and prejudicial effect that such testimony has on a jury (R. 603-04).[16]

Moreover, the State's brief on direct appeal repeatedly refers to the combined testimony of Chavers and Gallman/Carson to argue that the aggravating factors were proved.[17] In support of the during the course of a felony aggravating circumstance, the State argued:

> Testimony revealed that the Appellant had admitted to surprising the victim in her home (R-1177), that he took some money, a necklace and "something silver" from her, forced her to have sex with him (R-1176-1180) and

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[16]Mr. Simmons told the jury: "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 at one point described what was going on and 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. 603-04).

[17]Mr. Chavers' trial testimony on direct examination appears at R.1104-19. Mr. Carson/Gallman's direct examination testimony appears at R. 1173-82.

> shot the victim because she could identify him (R-1180).

(State's Brief on Direct Appeal at 37-38).

The State again relied on Mr. Lightbourne's alleged "admissions," which were based solely on the testimony of Chavers and Carson/Gallman, to argue that the avoid arrest aggravator had been proved:

> Admissions made by the Appellant revealed that he had taken the victim's necklace and money and had forced her into sexual relations with him and that he shot her because she could identify him (R-1176-1180). Further testimony revealed that Mr. Lightbourne considered the murder a "clean job" noting that the telephone lines had been cut and that no fingerprints had been found (R-1112, 1116-1117), although he later admitted that he had "messed up with the necklace." (R-1176-1178).[18]

(State's Brief on Direct Appeal at 39).

In support of the pecuniary gain aggravating factor, the State again cited Mr. Lightbourne's "admissions" that he had taken money and something silver from the victim. In addition, the State relied again on the evidence of sexual assault to rebut Mr. Lightbourne's argument that finding during the course of a felony and pecuniary gain constituted impermissible doubling (State's Brief on Direct Appeal at 41).

The State's argument that the heinous, atrocious, or cruel aggravating factor was proved also relied on these two witnesses:

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[18]The testimony that Mr. Lightbourne "admitted" that he "forced [the victim] into sexual relations" is irrelevant to the avoid arrest aggravator. The State's repeated references to this false testimony, even where it does not support a particular aggravating circumstance, proves counsel's argument that without the highly prejudicial testimony about sexual assault, the State would have been precluded from proving its case for the death penalty.

> The facts indicate that during a burglary of her home, the Appellant surprised the victim, forced her into acts of oral sex and intercourse as his victim begged him not to kill her (R-1116, 1175-1180). The Appellant took the victim's money and necklace (R-1176-1178) and shot Ms. O'Farrell because she could identify him (R-1180), referring to the murder as "shooting a bitch" (R-1176).
>
> . . .
>
> From these facts we may deduce that the victim in this case surprised by the Appellant indicated her fear for her life by pleading with her assailant not to kill her. Her pleas went unanswered. Instead, the Appellant forced her into acts of oral sex and intercourse followed by a bullet to the head and the accompanying pain and anguish, no matter how fleeting, resulting therefrom.

(State's Brief on Direct Appeal at 42-3). The State also referred (without citing the trial record) to "the victim's pleas that he not kill her."

The State's argument that Chavers and Gallman/Carson were not the only source of aggravating factors also ignores that this Court, in its opinion on direct appeal, relied almost exclusively on the false testimony of these two witnesses in upholding Mr. Lightbourne's death sentence. In support of the commission of a felony aggravator, this Court noted that "[t]estimony revealed that the defendant admitted surprising the victim in her home" and that "during the burglary the victim was forced into acts of oral sex and intercourse as she begged him not to kill her." 438 So. 2d at 390-91.

This Court upheld the avoid arrest aggravator because "[d]efendant admitted knowing the victim. Plainly the defendant killed to avoid identification and arrest." Id. at 391.

Accepting the State's argument on the doubling issue, this Court found that pecuniary gain and during the course of a burglary were not improperly doubled 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 murder." Id.

In support of the heinous, atrocious or cruel aggravating factor, this Court again relied on the Chavers and Gallman/Carson testimony that there had been a sexual assault:

> 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.

Chavers and Gallman/Carson are the only source of these "facts:" that the victim was surprised; that the victim was forced to perform oral sex and intercourse; that the victim was begging for her life; that Mr. Lightbourne took the victim's money; that Mr. Lightbourne took "something silver" from the victim; that the victim was killed to prevent an identification; that Mr. Lightbourne referred to the victim as a "bitch." In addition, the language used in both the State's brief and this Court's opinion mirrors that of Chavers and Gallman/Carson.

The State has attempted to retreat from its earlier admission that there was no other evidence, aside from these two

witnesses, of a sexual assault. Arguing for the State, Assistant Attorney General Gypsy Bailey conceded the importance of Chavers and Gallman/Carson to prove the aggravating factors which were based on the alleged sexual assault; she told the court that "[w]e did have evidence of a sexual battery from Mr. Carson and Chavers," (PC-R2. 672), and cited no other evidence proving that a sexual assault occurred. Ms. Bailey again admitted in her post-hearing memorandum that this testimony was the only evidence of sexual battery (PC-R2. 319). The State now claims that those statements were later "corrected" at the October 31, 1995, hearing on Mr. Lightbourne's Motion for Reconsideration. At that time, the State told the circuit court: "Viable sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death." Answer Brief at 84 (quoting PC-R2. 391)(emphasis added). Evidence of "sexual relations" is insufficient, in the absence of other evidence, to support the aggravating factors that were used to justify Mr. Lightbourne's death sentence. Mr. Lightbourne's argument is further supported by the testimony of Detective La Torre and Dr. Warner that there was no evidence of a sexual assault (R. 742, 763; PC-R. 1180). Dr. Warner also testified that there was no evidence that the victim had engaged in oral sex, directly refuting Chaver's testimony that Mr. Lightbourne forced her to perform oral sex "over and over" (Id.). As explained in Mr. Lightbourne's Initial Brief, without evidence of a sexual assault, Mr. Lightbourne would not have been sentenced to death

because the alleged sexual assault was used to support numerous aggravating factors. In addition, the prejudicial effect of testimony about sexual assault, particularly degrading comments that were falsely attributed to Mr. Lightbourne, cannot be overestimated. Contrary to the State's assertions, the State would not have proved its case for the death penalty in the absence of this false testimony.[19]

The State also disingenuously argues that similar evidence offered at trial would have supported a death sentence in the absence of Mr. Chavers' and Mr. Gallman/Carson's false testimony. The State wants this Court to ignore that these witnesses provided highly inflammatory and prejudicial testimony that consisted of statements allegedly made by Mr. Lightbourne. No other evidence could have been as damaging to Mr. Lightbourne as his own statements, which he never made, regarding the rape, which never occurred, of Ms. O'Farrell. In addition to evaluating the persuasive effect of presenting the defendant's own statements, this Court should also consider the nature of the statements falsely attributed to Mr. Lightbourne. Examination of the trial record confirms that Mr. Chavers and Mr. Gallman/Carson provided extremely inflammatory and degrading comments about the victim that the jury believed were made by Mr. Lightbourne.

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[19]The prejudicial effect of Chavers' and Gallman/Carson's testimony regarding the alleged sexual assault can be fully comprehended only in the context of the history of capital punishment for black defendants convicted of interracial rape. See Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 75 (1973) (noting that between 1930 and 1967, 405 of 455 death sentences for rape were imposed on black men).

This Court must also consider that this highly prejudicial testimony was presented to a jury that knew absolutely nothing about Mr. Lightbourne and his background. Because Mr. Lightbourne's trial counsel presented almost no mitigation evidence, although substantial evidence was available had he conducted an adequate investigation, the jury that sentenced Mr. Lightbourne to death knew almost nothing about him except what it heard from Chavers and Gallman/Carson. In 1985, this Court found that the failure to present mitigation was harmless in light of the substantial evidence supporting the aggravating factors. Lightbourne v. State, 471 So. 2d 27, 28 (Fla. 1985). That testimony proving the aggravating circumstances has now been recanted, and this Court should consider the dual impact of the lack of mitigation evidence presented and the recantation of the testimony supporting the aggravating factors when determining whether Mr. Lightbourne is entitled to a new sentencing.

II.

REPLY TO ARGUMENT IV

The State's response to Argument IV completely misunderstands the import of Mr. Lightbourne's claim and misconstrues the effect of the circuit court's error. Mr. Lightbourne explained in his Initial Brief that the circuit court applied the wrong legal standard to his evidence when it failed to consider the cumulative effect of all the evidence presented in postconviction proceedings as required by State v. Gunsby, 670 So. 2d 920 (Fla. 1994). The State's response that "[u]nlike

Gunsby, this case contains **no** Brady violations, **no** reliable newly discovered evidence, or valid ineffective assistance of counsel claims. The only thing Gunsby has in common with this cause is that it comes from the same jurisdiction." Answer Brief at 88 (emphasis in original). The State is correct that the circuit court found that Mr. Lightbourne had failed to prove that the State violated Brady, Giglio, and Henry and that the newly discovered evidence was sufficient to warrant a new trial.[20] However, the State fails to realize that the circuit court's conclusions are invalid because it applied the wrong legal standard to Mr. Lightbourne's evidence; because the court's analysis was flawed, its denial of Mr. Lightbourne's claims cannot be used to rebut his argument concerning the appropriate legal standard. If the circuit court had correctly analyzed all the evidence introduced since Mr. Lightbourne's trial, it would have found that he is entitled to a new trial and sentencing.

The State incorrectly argues that Gunsby does not apply to Mr. Lightbourne's case because Gunsby is limited to its unique facts; however, this Court has not indicated that a cumulative analysis should only be conducted under the exact facts of Gunsby. In support of its argument, the State takes this Court's

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[20]Mr. Lightbourne disagrees with the State's argument that he did not present an ineffective assistance of counsel claim. The circuit court found that Mr. Emanuel's testimony was procedurally barred because it could have been discovered by trial counsel. The failure to investigate and present a defense constitutes the ineffective assistance of counsel. Pursuant to Gunsby, the circuit court should have considered whether trial counsel's lack of diligence was ineffectiveness.

reference to the "unique circumstances" of Gunsby out of context. In Gunsby, this Court stated:

> [W]hen 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.

670 So. 2d at 924. Contrary to the State's argument, this Court never said that the necessity of conducting a cumulative analysis is limited to the unique facts of Gunsby, only that the unique facts of that case mandate a new trial. The State's argument is further undermined by the fact that this Court has conducted a cumulative analysis of evidence in cases other than Gunsby. See Swafford v. State, 679 So. 2d 736 (Fla. 1996); Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995).

In fact, this Court recently conducted a cumulative analysis of evidence offered over the course of nine years and three postconviction evidentiary hearings. In Jones v. State, 23 Fla. L. Weekly S137 (Fla. March 17, 1998), the defendant presented newly discovered evidence of innocence and evidence that the State had violated Brady, and this Court considered all of the evidence presented throughout the postconviction proceedings before deciding whether Mr. Jones had met his burden of proof. In Swafford, this Court similarly ordered the circuit court to consider newly discovered evidence in conjunction with evidence presented at a prior evidentiary hearing. 679 So. 2d at 739.

This further supports Mr. Lightbourne's argument that the circuit court erred in failing to reconsider the evidence presented at the 1990 hearing in light of the new evidence. Contrary to the State's argument, the cumulative analysis conducted by this Court in Gunsby is not limited to the unique facts of that case but has been applied by this Court to situations identical to Mr. Lightbourne's.[21]

The State also misunderstands the effect that the correct legal analysis would have had on Mr. Lightbourne's case. The State seems to believe that because the circuit court found the hearsay unreliable and the testimony incredible, there was no evidence to which a Gunsby cumulative analysis could be applied. The State explains that the circuit court found that Gallman's testimony was incredible, that Chavers' affidavit and letters are unreliable hearsay, that Emanuel's deposition (even if it were admitted) would be cumulative to Carnegia's testimony, and that Carnegia's testimony alone is insufficient to prove Mr. Lightbourne's claims. However, the circuit court's decisions about the admissibility of hearsay evidence and the credibility of witnesses would have been different had it considered the evidence cumulatively. Because the circuit court considered each piece of evidence individually, it failed to see that all of the

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[21]The State also ignores that the Supreme Court's opinion in Kyles v. Whitley, which explains that a cumulative analysis of the effect of Brady material is required, has been applied to a variety of claims, including newly discovered evidence claims, ineffective assistance of counsel claims, and sufficiency of the evidence claims. See Initial Brief at 80 footnote 35.

evidence presented by Mr. Lightbourne is consistent; the appropriate analysis under Gunsby would have demonstrated the reliability and credibility of all the evidence discovered since Mr. Lightbourne's trial.

The State again claims that Mr. Chavers' affidavit and letters are unreliable hearsay because this Court made that determination in 1994. The State fails to address Mr. Lightbourne's argument that Mr. Chavers' statements must be reevaluated for reliability in light of the newly discovered evidence. The appropriate legal analysis would demonstrate that Mr. Chavers' numerous out-of-court statements -- his affidavit, letters to the State, and taped conversations with the State Attorney -- are consistent not only with each other but also with all the other evidence presented in postconviction proceedings. The State makes the same argument in reference to Mr. Hall's affidavit without explaining why the decision to exclude the affidavit should not be reconsidered in light of the new evidence. As it did in Gunsby, this Court should conduct its own analysis of the cumulative effect of all the evidence presented in Mr. Lightbourne's postconviction proceedings.

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 Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 15, 1998.

for Bar # 0993476
MARTIN J. MCCLAIN
Florida Bar No. 0754773
Litigation Director
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Mr. Lightbourne

Copies furnished to:

Mark Dunn
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399

Supreme Court of Florida

TUESDAY, JULY 21, 1998

IAN DECO LIGHTBOURNE,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 89,526
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
	*	
**********	*	

Appellant's Motion for Extension of Pages is granted and Appellant's Reply Brief of 36 pages was filed with this Court on July 15, 1998.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC

cc: Mr. Martin J. McClain
Mr. Mark S. Dunn

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,526

IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR EXTENSION OF PAGES

COMES NOW THE APPELLANT, **IAN DECO LIGHTBOURNE**, by and through undersigned counsel, and respectfully requests that this Court grant his unopposed motion for an extension of the page limitation for his Reply Brief. In support thereof, Mr. Lightbourne would show:

Mr. Lightbourne is a death-sentenced defendant whose appeal from the denial of Rule 3.850 relief following a limited evidentiary hearing is pending before this Court. Mr. Lightbourne's Reply Brief is thirty-six (36) pages, one page longer than the maximum allowed by this Court's rules.

Assistant Attorney General Mark Dunn has been contacted and does not oppose this motion.

WHEREFORE, Mr. Lightbourne, through counsel, requests that this Court accept his Reply Brief which is thirty-six (36) pages.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Extension has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 15, 1998.

for Bar #0993476
~~MARTIN~~ J. MCCLAIN
Florida Bar No. 0754773
Litigation Director
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Mr. Lightbourne

Copies furnished to:

Mark Dunn
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399