IN THE SUPREME COURT OF FLORIDA

IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC01-553

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Ian Deco Lightbourne, was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The State will use the following symbols to reference the various aspects of the record in this case:

R	=	Record on direct appeal to this Court
PCR1990	=	1990-91 record on 3.850 to this Court
PCR1996	=	1995-96 record on 3.850 to this Court
PCR1996Sup	=	1995-96 supplementary record on 3.850 to this Court
PCR1999	=	1999 record on 3.850 to this Court, i.e., the record of the trial court proceedings that resulted from the remand from this Court and that resulted in the Order being appealed here
PCR1999Sup	=	1999 supplementary record on 3.850 to this Court, i.e., the supplementary record of the trial court proceedings that resulted from the remand from this Court and that resulted in the Order being appealed here

The State will add a "T" in front of any volume number typed by the court reporter on the front of the transcript. Similarly, a "T" placed in front of page numbers indicates the court

reporter's typed pagination. Otherwise, volume numbers and pagination are those of the circuit clerk. "IB" will designate Appellant's Initial Brief. The foregoing respective symbols will be followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations, unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On appeal here is Judge Angel's order denying Lightbourne's postconviction motion (PCR1999 X 1397), and found:

> that the testimony of Larry Emanuel, by itself and together with all other post-trial evidence, adds nothing of value to Mr. Lightbourne's claim that Theodore Chavers and Theophilus Carson were acting as agents for law enforcement in soliciting statements from Mr. Lightbourne. To the contrary, Emanuel's testimony shows that these informants were acting on their own and that he, and probably the others, would say almost anything to help themselves. Emanuel's testimony is so lacking in credibility that it is clear why the State did not call him as a witness at trial.

(PCR1999 1396, footnote omitted) Judge Angel, having considered

> the testimony of Larry Emanuel and the cumulative effect of all evidence in the record, the total picture is abundantly clear that all jailhouse informants were acting out of self interest and hope of personal gain and that none of them were acting as agents solicited by the State.

(PCR1999 X 1296)

Judge Angel "[c]onsider[ed] the [post-trial] testimony of Larry Emanuel, by itself and together with all other post-trial evidence" and found:

1. That Theodore Chavers and Theophilus Carson were not acting as agents for law enforcement in soliciting statements from Ian Lightbourne.

2. That the State's use of jail informant testimony did not violate Ian Lightbourne's right to counsel.

3. That there is no reasonable possibility that a new penalty phase hearing would result in a different result as to the imposition of the death penalty.

4. That the presentation of this new evidence at a new penalty phase hearing would probably not produce a different result.

(PCR1999 X 1396)

On appeal, Judge Angel's order is entitled to a view of the evidence favorable to holding that competent, substantial evidence supports it. See standard of review discussed infra. Therefore, the State objects to argumentation within Lightbourne's Statement of Facts, especially argumentation that favors a factual finding contrary to Judge Angel's. Examples include the use of emphasis through bold typeface or underlining within block quotes (IB 8, 11, 18); characterizations of Emanuel's testimony as "resolute" (IB 11), "clarifying" or "clarified" (IB 13, 14, 14), "consistent with" (IB 14), "yet admitted" (IB 19); and, editorial comments such as "Despite the attempts to confuse him" (IB 11) and "attempted this tactic again" (IB 12) gratuitously attributing ill motive.

The State also questions how a witness feeling sorry for Emanuel (IB 17) has any relevance in this appeal.

In arguing in support of the circuit judge's order here, the State will rely upon the cumulative record of this case, including the original trial facts, especially as summarized in Lightbourne v. State, 438 So.2d 380, 390-91 (Fla. 1983), and

Lightbourne v. Dugger, 829 F.2d 1012, 1014-15 (11th Cir. 1987).

The State will, at length, focus on the 1999 evidentiary hearing conducted pursuant to this Court's remand. Inter alia, it will focus upon Emanuel's 1999 testimony that he had spoken with Keith Raym and Eddie Scott about Lightbourne's case. (PCR1999 VII 923-24). In 1996, these officers had testified that they had nothing to do with Lightbourne's case. (PCR1996 3/15/96 Transcript T68-69, T73, T76)

Emanuel acknowledged that his 1994 affidavit concerning this case was "a little bit misleading." (PCR1999 VII 977)

Emanuel responded to a question regarding the Oats' case: "I don't even have to answer no more questions on that Sonny Boy Oats case" (PCR1999 VII 989) and indicated that the prosecution engaged in "foul play" because it did not use his testimony in Lightbourne's trial (PCR1999 VII 950-51).

At the 1999 hearing, prosecutor Black testified:

> I have no recollection whatsoever of representing Mr. Emanuel during the period 1980 or '81, or before that or after that for that matter. I have a present recollection created from my study of court records.
> ***
> ... I am not in a position to say that I did or did not have conversations with Mr. Emanuel about any subject, including whether or not he was part of the Lightbourne case.

(PCR VII 1033-34) Subsequent to Emanuel's return to Ocala at his instigation, Black had done "nothing of substance" in this case. (PCR1999 VII 1047) At the 1999 hearing, Lightbourne called Black as his witness. (Id. at 1026)

Concerning Black's representation of him, Emanuel on direct examination testified, in part, at the 1999 hearing:

> Q Now, did there come a time when you had any discussion with Mr. Black about your involvement with Mr. Lightbourne's case?
> A Yeah. I had told him that I had been working with the police department on some cases. And the burglary cases that I had, the second one that I had, they threw it out because it was a trespassing. ***

(PCR1999 VII 926) Thus, the State disputes any suggestion that Emanuel told Black any details of "what he had done for law enforcement" (IB 14).

In addition, the State will reach back into other details of the hearings conducted in 1990 and 1995-96.

Finally, the State notes its objection to the argument appearing under Lightbourne's "Procedural History" (IB 3 n. 2) and indicates that it will submit authorities in note 13 infra in support of the prosecutor's administrative/ministerial actions.

SUMMARY OF ARGUMENT

ISSUE I.

Inmate Lightbourne would unlawfully substitute his factual findings for those of Circuit Judge Angel's.

The accumulation of raw numbers of unreliable and unbelievable statements from recanting inmates does not justify providing Lightbourne a new penalty phase. Raw numbers of inmates do not decide the issue. In postconviction proceedings, the circuit judge, looking the witnesses in the eye and observing their demeanor on the stand, does.

Emanuel's 1999 postconviction testimony illustrates why inmates' postconviction hearsay affidavits and letters are inherently untrustworthy and generally wither in the crucible of cross-examination. While Emanuel's proposed testimony looked promising for Lightbourne as abstract words on paper, Emanuel's credibility was destroyed at the evidentiary hearing. Indeed, Emanuel is a case study supporting the wisdom of the well-settled principle that "recanted testimony is 'exceedingly unreliable.'"

Accordingly, Judge Angel found not only Emanuel unworthy of belief, but also Lightbourne's other postconviction recantation evidence, and, based upon the cumulative record before him, lawfully denied Lightbourne's postconviction claims.

ISSUE I is meritless.

ISSUE II.

Lightbourne's complaint about Prosecutor Black's role as Emanuel's attorney in about 1981 is devoid of merit, and Lightbourne has failed to specify a constitutionally cognizable class, rendering any equal protection claim fatally flawed. As to both equal protection and due process, Black's representation of Emanuel has not prejudiced Lightbourne in any way. Emanuel told him no details whatsoever about his (Emanuel's) supposed role in Lightbourne's case, and Black recalled none. Black has been a professional advocate for the State, period.

ISSUE III.

To date, Lightbourne has failed to show a prima facie case that there was (1) an actual conflict that (2) incurred prejudice upon Lightbourne based upon CCRC's representation of Oats. The content of Emanuel's 1981 statement to the police concerning Oats was not at issue. At most, Lightbourne has shown a nonprejudicial potential conflict, which fails to meet both prerequisites for relief.

ARGUMENT

ISSUE I

DID THE TRIAL COURT REVERSIBLY ERR BY FINDING EMANUEL'S EVIDENTIARY HEARING TESTIMONY UNWORTHY OF BELIEF AND HIS AND THE OTHER POSTCONVICTION EVIDENCE INCONSEQUENTIAL? (Restated)

In Lightbourne v. State, 742 So.2d 238 (Fla. 1999), this Court remanded to the circuit court to afford Lightbourne the opportunity to submit the postconviction testimony of Larry Emanuel and for the circuit court to make findings pertaining to Lightbourne's postconviction claims arising out of jail inmate recantations. Lightbourne, 742 So.2d at 248-49, clearly indicated that guilt was established independent of the trial testimony of the jail inmates and that, therefore, the remand only concerned the penalty phase: "Even without Chavers' and Carson's testimony, the evidence overwhelmingly supports a conviction of guilt."

Issue I targets the circuit court's findings in the order (PCR1999 X 1395-97) it entered pursuant to the 1999 remand. The Order was entered February 26, 2001, after conducting an

extensive evidentiary hearing in which several witnesses testified, including Larry Emanuel. (See PCR1999 VII). Circuit Judge Carven D. Angel's 2001 Order found that Emanuel's postconviction testimony is unworthy of belief and thereby adds nothing to Lightbourne's postconviction claims; that Theodore Chavers and Theophilus Carson were not agents of the State; that the State's use of their testimony at trial did not violate Lightbourne's right to counsel; and, that, cumulatively viewing all of the postconviction evidence, Lightbourne would still receive the death penalty in any new penalty phase. (PCR1999 X 1395-97)

As finder of postconviction fact, Judge Angel[1] has now personally observed the postconviction testimony, on the one hand, of former jail inmates Theodore **Chavers** (PCR1990 T-IV T98-196, T-VII T18-179, T-VIII T4-59, T-XII T16-59), Theophilus **Carson**, aka James Thomas Gallman (PCR1996 T-I T12-57), and Richard **Carnegie** (PCR1990 T-V T11-66), and, pursuant to this Court's 1999 remand, Larry **Emanuel** (PCR1999 VII 917-1025), and, on the other hand, Albert **Simmons**, the lead prosecutor in Lightbourne's case (PCR1996 T-I T59-85), Timothy **Bradley**, Carson's attorney (PCR1996 T-I T141-55), James T. **Reich**, who prosecuted Carson in 1981 (PCR1996 T-I T254-63), Bob **Joyner**, a police officer in 1981 (PCR1996 T-II T292-96), Fred **Latorre**, the

[1] Judge Swigert personally had observed the trial testimony and sentenced Lightbourne to death. (See R T-II et seq.)

lead investigator in this case (PCR1996 T-II T297-306, PCR1999 VII 1066-77), Deputy Guy **McWilliams**, who assisted the lead investigator, LaTorre, in the investigation of this case (PCR1996 T-II T306-13), Ken **Raym**, in 1981 an investigator with the sheriff's office who worked with Deputy Eddie Scott (PCR1996 volume dated 3/15/96 T66-73), and Edward L. **Scott**, an attorney at the time of the postconviction evidentiary hearing but a sheriff's office investigator from 1978 to 1984 (PCR1996 volume dated 3/15/96 T74-84).[2] The State respectfully submits that the cumulative postconviction evidence supports Judge Angel's findings pertaining to them and thereby supports affirming his denial of postconviction relief. Lightbourne has failed to meet the burdens applicable to his postconviction claims.

A. The Circuit Court's Findings.

Judge Angel denied Lightbourne's postconviction motion (PCR1999 X 1397), found that Larry Emanuel's 1999 postconviction testimony is not worthy of belief, and found that, cumulatively viewing the evidence, Lightbourne has failed to establish a claim upon which to grant relief:

> The Court finds that the testimony of Larry Emanuel, by itself and together with all other post-trial evidence, adds nothing of value to Mr. Lightbourne's claim that Theodore Chavers and Theophilus Carson were acting as

[2] At the end of the 1995 postconviction evidentiary hearing, collateral counsel summarized the evidence he submitted as showing, or would show, that Carson was lying at trial. He focused upon Carson, Simmons, Chavers, Carnegie, and Emanuel. (See PCR1996 T-II T 322-23)

> agents for law enforcement in soliciting statements from Mr. Lightbourne. To the contrary, Emanuel's testimony shows that these informants were acting on their own and that he, and probably the others, would say almost anything to help themselves. Emanuel's testimony is so lacking in credibility that it is clear why the State did not call him as a witness at trial.

(PCR1999 1396, footnote omitted) Judge Angel, having considered

> the testimony of Larry Emanuel and the cumulative effect of all evidence in the record, the total picture is abundantly clear that all jailhouse informants were acting out of self interest and hope of personal gain and that none of them were acting as agents solicited by the State.

(PCR1999 X 1296)

Judge Angel "[c]onsider[ed] the [post-trial] testimony of Larry Emanuel, by itself and together with all other post-trial evidence" and found:

> 1. That Theodore Chavers and Theophilus Carson were not acting as agents for law enforcement in soliciting statements from Ian Lightbourne.
> 2. That the State's use of jail informant testimony did not violate Ian Lightbourne's right to counsel.
> 3. That there is no reasonable possibility that a new penalty phase hearing would result in a different result as to the imposition of the death penalty.
> 4. That the presentation of this new evidence at a new penalty phase hearing would probably not produce a different result.

(PCR1999 X 1396)

It appears that Lightbourne wishes this Court to reweigh evidence, some of which has been held to be inadmissible, and substitute his factual findings for those of Judge Angel's. However, under this Court's well-settled standard of appellate review, given the cumulative record of evidence that was admitted, Judge's Angel's findings merit affirmance.

B. The Standard of Appellate Review.

As factual findings, the trial court's conclusions regarding and the cumulative postconviction evidence, including Emanuel's testimony, are entitled to affirmance if supported by competent, substantial evidence. See Way v. State, 760 So.2d 903 911-12 (Fla. 2000) ("trial court's finding after evaluating conflicting evidence that *Brady* material had been disclosed is a factual finding"; "reviewing court should uphold the finding as long as it is supported by competent, substantial evidence in the record"), citing Stephens v. State, 748 So.2d 1028 (Fla. 1999); Shere v. State, 742 So.2d 215, 218 n.8 (Fla. 1999) (post-conviction evidentiary hearing resulting in trial court "rejecting the claim of ineffectiveness for not investigating or developing further mental mitigation"; "the role of the trial judge in an evidentiary hearing is to make credibility determinations and findings of fact"); State v. Spaziano, 692 So.2d 174, 178 (Fla. 1997) ("superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective"); Phillips v. State, 608 So.2d 778, 780 (Fla. 1992) (factual findings concerning recanted inmate testimony; "The circuit court found this evidence to be completely unbelievable, and we find competent, substantial evidence to support this finding").

As Johnson v. State, 660 So.2d 637, 641-42 (Fla. 1995), put it:

> When evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory. *Wuornos v. State*, 644 So.2d 1012, 1019 (Fla.1994), *cert. denied*, --- U.S. ----, 115 S.Ct. 1708, 131 L.Ed.2d 568 (1995).

Here, the "prevailing theory" is that the postconviction recantations and related evidence are not worthy of any weight and therefore do not support any postconviction claims.

Contrary to Lightbourne's assertion (IB 50-51), the length of the trial court's findings is not the criterion for their affirmance. The trial court has reviewed extensive memoranda from the parties, including ones submitted after the 1999 evidentiary hearing (PCR1999 VIII 1095 et seq., X 1327 et seq., 1379 et seq.) and evaluated the evidence extending over three sets of evidentiary hearings, and explicitly found that cumulatively it does not merit postconviction relief: "[c]onsidering the testimony of Larry Emanuel and the **cumulative impact of all evidence**, the **total picture** is ..."; "[c]onsidering the testimony of Larry Emanuel, by itself and **together with all other post-trial evidence** ..."). (PCR1999 X 1396) Especially when the record is viewed "in the light most favorable to the prevailing theory," competent, substantial evidence support the trial court's assessment of the postconviction evidence.

Melendez v. State, 718 So.2d 746, 747-48 (Fla. 1998) (footnote omitted), capsulized these principles and applied them to a post-conviction allegation of "newly discovered evidence":

> The court found that the testimony of these witnesses, 'either individually or cumulatively, falls short of the standard required to grant a retrial,' and denied

Melendez's rule 3.850 motion. Melendez appeals that denial, raising four issues.

Melendez first claims that newly discovered evidence establishes his innocence and the trial court erred in denying him relief. We disagree. This Court set forth the relevant standards in *Blanco v. State*, 702 So.2d 1250 (Fla.1997):

> First, to qualify as newly discovered evidence, 'the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.' Second, to prompt a new trial, 'the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.'
>
> In reviewing a trial court's application of the above law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'

Id. at 1251 (footnotes omitted) (*quoting Jones v. State*, 591 So.2d 911, 915, 916 (Fla. 1991), and *Demps v. State*, 462 So.2d 1074, 1075 (Fla. 1984)). In the present case, the trial court addressed this claim at length and concluded:

> In support of the newly discovered evidence claim the defendant called five witnesses: Deborah Ciotti, Janice Dawson, Sandra Kay James, John Berrien and Dwight Wells. They all claimed that Vernon James had made incriminating statements to them about the murder. Four of the five were not credible witnesses and their testimony, either individually or cumulatively, falls short of the standard required to grant a retrial.
>
> ....
>
> In summary, the newly discovered evidence claim rests on the testimony of three convicted felons who say Vernon James made incriminating statements about the murder, the partial recanting of a co-defendant's testimony, and a lawyer's vague memories of Vernon James' several confessions. The original defense was that Vernon James did it. The jury rejected that defense and none of the above would likely have been credible enough to change that verdict in my opinion.

The record shows that the trial court properly applied the law, and its findings are supported by competent substantial evidence. Consequently, this Court is precluded from substituting its judgment for that of the trial court on this matter. *See Blanco*, 702 So.2d at 1252 (*citing Demps v. State*, 462 So.2d 1074 (Fla.1984)). We find no error.

Melendez, 718 So.2d at 748-49, also affirmed the trial court's factual finding that rendered a Brady claim ineffectual:

> The major problem with this so-called Brady violation is that in order to sustain it one has to believe [defense witness] John Berrien. I do not believe John Berrien. *** None of the four elements of a Brady violation were proved.

As in Melendez, there is "no error" here.

Moreover, in assessing the cumulative impact of recanted testimony, the raw number of recantations is not controlling. See Jones v. State, 709 So.2d 512, 525 (Fla. 1998) ("unlike the confessions in *Chambers*, the alleged confessions in this case lack indicia of trustworthiness. The fact that more inmates have come forward does not necessarily render the confessions trustworthy").

After the facts are determined with due deference to the trial court, the abuse-of-discretion standard applies to whether Lightbourne is entitled to a new penalty phase:

> In reviewing the trial court's decision, we are mindful that 'this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion.' *** A trial court's order on a motion for new trial will not be reversed absent an abuse of discretion. *Spaziano*, 692 So.2d at 178.

Jones v. State, 709 So.2d 512, 514-15 (Fla. 1998). Accordingly, Lightbourne bears the burden of establishing that, after conflicts in the postconviction evidence are resolved in favor of the rejection of his claims, "no reasonable [person] would take the view adopted by the trial court," Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), quoting Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).

C. Evidence Supporting the Circuit Judge's Findings.

Three of Judge Angel's factual findings undermine all of the extant postconviction claims: (1) Emanuel's postconviction testimony is not believable, (2) the other jailhouse informants are not believable, and therefore (3) the cumulative impact of all of the postconviction evidence does not support postconviction relief.

Each of the three factual findings comport with the warning this Court issued when it remanded this case, discussing Armstrong v. State, 642 So.2d 730, 735 (Fla.1994):

> We cautioned, however, that recanted testimony is 'exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true.' *Id.* Only where the recanted testimony is of such nature that a different verdict would probably be rendered should a new trial be granted.

1. The record supports the finding that Emanuel's testimony is not believable.

In 1981, law enforcement made an affirmative decision not to call Larry Emanuel as a witness in Lightbourne's trial. Latorre, the lead investigator in this case (PCR1999 VII 1067), chose not to "involve him [Emanuel] in the case." He felt that Emanuel "would be of no benefit in this case." (PCR1999 VII 1070) He indicated that Emanuel's information was "similar to what [he] had already received from another individual" and that Emanuel was a convicted felon. (Id. at 1070, 1075, 1076-77) Emanuel's December 2, 1999, testimony patently shows why the State's decision, resulting in it NOT vouching for Emanuel's credibility

in the 1981 trial of this cause, was a wise decision. The cumulative facts support the trial court's finding that he was unworthy of belief.

First, arguendo, accepting Emanuel's 1999 postconviction testimony at face value, it indicates that Chavers said that Lightbourne killed the victim, not that Chavers was willing to lie about it:

> [A]bout two days later or a day, my cousin Otis McBride, he was in the cell with me, and he came back and he come telling me, saying: 'You know that Theodore [Chavers] done said that that boy killed that lady.' And he said to me – I said: 'So what you going to do?' He said: 'I'm going to do like Chavers did.'
>
> So all we did was just said that we heard him say he killed somebody. But we didn't, you know. We just did that to get out of jail, because the police was giving up any kind of deal to get the conviction on him.

(PCR1999 921) Thus, Emanuel essentially testified that in 1981 he desperately wanted to get out of jail. His cousin-McBride told him that Chavers said that Lightbourne killed the victim, and Emanuel and McBride were willing to say the same thing as Chavers, even though for them, it was a lie. Law enforcement was wise not to use Emanuel's testimony at Lightbourne's trial.

Second, Emanuel testified that Theodore (Chavers) said (through McBride) that Lightbourne "killed that lady." (PCR1999 VII 921) However, the gravamen of Chavers' trial testimony was not that Lightbourne said that he killed the victim, but rather he admitted to having sex with her, to having the gun, and to her begging for her life. (See R T-IV T787-90, T-V T802) In fact, Chavers expressly testified at trial that Lightbourne did not admit to killing the victim:

Q. But did he say to you, I killed the lady, or I shot the lady, or anything like that?
A No, sir, he didn't say that, no.
***
Q What about the fact that he told you he didn't shoot her?
A He didn't never tell me he didn't shoot her.
Q Did he ever tell he did?
A No, sir; I told you he didn't.
Q Okay. So because you felt the gun he had a week after the murder was the gun that killed her, you assumed that he killed her; is that right?
A No, I am not assuming anything. I called the police, Fred Latorre, and from that they ran some bullet statistics on the gun and found out that was the gun that killed her.
Q Okay. Let's assume for the sake of argument that's true. Did you then presume because a week after the murder he had that gun he must have killed her?
A No. The only way I came in contact of knowing anything about it is from what he told me.
Q He tell you he killed her?
A No, I told you he never did tell me he killed her.

(R T-IV 790, T-V T802-803) If Chavers, in fact, at the time of trial had information that Lightbourne killed the victim, as such, then certainly the prosecution would have used it at trial, or at a minimum, taking Lightbourne's postconviction theory at face value, Chavers would have been as willing to lie at trial about Lightbourne admitting to killing the victim as admitting to sex, the gun, and begging. Instead, Chavers credibly testified at trial to the mind games that Lightbourne played with him, only admitting to aspects of the incident but not admitting to executing a defenseless victim. In any event, Emanuel's 1999 testimony that Chavers' information concerned the killing itself is contradicted by Chavers' actual trial testimony, in which he denied knowing or even inferring that Lightbourne killed the victim.

Third, Emanuel lied about, or, at a minimum, was very confused about, which officers spoke with him about this case. At the 1999 hearing, Emanuel swore that he had spoken with Keith Raym and Eddie Scott (PCR1999 VII 923-24), whereas these officers testified in 1996 to the contrary. In 1996, Ken Raym testified:

> Q. Did you ever have anything to do with the investigation of the murder of Nancy O'Farrell?
> A. No, I did not.
> Q. Did you ever have anything to do with Larry Emanuel in connection with the investigation of the murder of Nancy O'Farrell?
> A. No.
> Q. Did you ever have anything to do with the investigation of and arrest of Ian Lightbourne?
> A. No, I did not.
> Q. Did you ever place Larry Emanuel in a jail cell for any purpose?
> A. Except if I had arrested him. I might have had a part in of putting him in jail, but –
> Q. To incarcerate him?
> A. Yes.
> Q. Did you ever place him or have him placed in a jail cell for the purpose of being a listening post or interrogating Ian Lightbourne?
> A. Absolutely not.
> Q. Did Mr. Scott ever do that in your presence?
> A. No, sir.
> ***
> Q. Mr. Raym, do you have an independent, specific recollection of whether or not you placed Larry Emanuel or had him placed in a cell to interrogate or be a listening post to the Defendant Lightbourne?
> A. I, personally, nor was I a part of putting anyone in the cell to be a party to an interrogation of an inmate.
> Q. Never?
> A. Never. Absolutely not.

(PCR1996 3/15/96 Transcript T68-69, T73)

In 1996, Edward Scott testified:

> Q. ... During ... the latter portions of the calendar year 1980 and the first months of 1981, did you have anything, any connection whatsoever with the investigation of the murder of Nancy O'Farrell?
> A. None.

Q. Do you remember whether or not during that short period of time, you ever – you or anyone else in your presence ever placed Larry Emanuel or had him placed in a jail cell with Ian Lightbourne for any purpose?
A. I did not, and it never happened in front of me.
Q. Specifically for the purpose of being a listening post to Ian Lightbourne or to interrogate Ian Lightbourne about the murder of Nancy O'Farrell?
A. I did not. I had absolutely nothing to do with that case.

(PCR1996 3/15/96 Transcript T76) Instead, Scott testified that he had discussed the Oats case with Emanuel, (PCR1996 3/15/96 Transcript T77-82) which is corroborated through independent documentation: 1/23/81 immunity agreement (PCR1999 VI 893); 1/23/81 "Statement of Larry Bernard Emmanuel" (PCR1999 VI 896 et seq.). Scott continued by clearly indicating that his investigation of Oats' case had nothing to do with Lightbourne's:

Q. The exercises that you just described with relation to Sonny Boy Oats, any of the cases involving Sonny Boy Oats and Larry Emanuel, did they in any way whatsoever have anything to do with the Defendant Ian Lightbourne?
A. No.

(PCR1996 3/15/96 Transcript T83)

Accordingly, fourth, Emanuel swore that his memory had commingled other cases with Lightbourne's: "[I]t was so much stuff mingling in my head, and mingling, messing with them. So I can't say exactly what was what." (PCR1999 VII 983. See also Emanuel's 1/23/81 statement to police regarding the "shooting death of Jeannette Dyers of the Little Country Store" and "the shooting that occurred at Dick's food store," PCR1999 VI 896 et seq.).

Fifth, at one point, Emanuel admitted that, in spite of his 1994 sworn assertion to the contrary (PCR1999 VII 980-82, State's

Exhibit #8), he "can't remember" providing Officer Eddie Scott a "statement" about this homicide (PCR1999 VII 966, 968).

Sixth, even though Emanuel admitted to confusing his memory of the Oats' case with his purported memory of Lightbourne's, he unreasonably and hostilely responded to a question regarding the Oats' case: "I don't even have to answer no more questions on that Sonny Boy Oats case." (PCR1999 VII 989) Similarly, he accused that the prosecution engaged in "foul play" because it did not use his testimony in Lightbourne's trial (PCR1999 VII 950-51), whereas, in contrast, he also testified, in essence, that law enforcement kept its bargain (PCR1999 VII 923-25, 938-39).

Seventh, Emanuel admitted that he had forgotten the nature of his own 1980-81 cases (PCR1999 VII 1001-1002); after allowing the prosecutor to confuse them, he had to be "reminded" of their details on redirect exam. It is incredulous that he supposedly remembers the details of conversations occurring and not occurring in a jail in the same era.

Eighth, cumulatively viewing the foregoing problems in Emanuel's testimony with his robotic responses to collateral defense counsel's redirect examination questions (See PCR1999 VII T996-101) renders his testimony all-the-more incredulous. Thus, the first 12 questions and answers (See PCR1999 VII T996-99) were in this robotic format: "Yes," "Yes," "That's right," "Yes, I was," "No," "Uh-huh," "Yes, sir, I remember," "That's correct," "Yes," "Yes," "Yes," "Yes." Emanuel then gave a few answers

extending more than a word or two but intermixed with several robotic ones (PCR1999 VII 999-1002), then gave about 21 more robotic answers (PCR1999 VII 92-95): "No, sir," "That's right," "That's right," "That's right," "Yeah," "Yeah," "Yes," "Yes," "Yes, That's right," "Yes," "Yes, I was," "Yes, please," "Yes," "That's right," "That's right," "That's just my signature," "Yes," "Yes," "That's right," "Yes," "Yes."

Ninth, Emanuel, waited about 15 years to come forward with his purported information that would assist Lightbourne, then, when confronted about his delay, evasively tried to shift the focus of veracity from himself to another:

> Q. [Y]ou admitted yourself to knowing that he was on death row. Why would you wait 15 years to try to help him, like you say you're doing now?
> And I'm saying 15 years because that's - your affidavit is dated '94, so maybe that's about 15 years.
> A. Well, I know that Theodore Chavers is a big liar, and he would, he would tell a lie to save himself or get out of jail, and wouldn't care who it hurt in the process.
> And I was sitting there and never did hear him say that. But that's all I got to say on that case.
> Q. Yeah, but you didn't answer the question. The question was: Why did you wait 15 years to tell somebody this?
> ***

(PCR1999 991)

Moreover, tenth, Emanuel ultimately attempted to explain his delay by indicating Lightbourne might have already been executed. (See PCR1999 992: "I didn't even know if they had killed him or not") This is all-the-more damaging to his credibility. He sat on this supposed information while he thought that Lightbourne was being executed, yet for some mysterious reason he developed a conscience some 15 years after Lightbourne's trial.

Eleventh, Emanuel's testimony at the 1999 hearing is internally inconsistent concerning his motivation to help himself. Supposedly law enforcement solicited Emanuel to seek a statement from Lightbourne and promised Emanuel assistance with his case if he delivered (PCR1999 VII 11, 13-14, 24), and Emanuel indicated that he was sufficiently motivated to help himself that he lied to the police by telling them that he overheard Lightbourne confess (See PCR1999 VII 924). However, even though Emanuel was in the same cell with Lightbourne for days (See PCR1999 VII 921, 928), he supposedly just did not get around to asking him about the murder:

> Q Now, did you ever have any conversations with Mr. Lightbourne where you asked him whether he had committed the murder?
> A No, I never did get a chance to ask him that. But I just talked to him, you know, just kicking it with him.

(PCR1999 VII 923) Given the time they were in the cell together, Emanuel's supposed explanation is unworthy of belief:

> ... I never did get a chance to really ask him because there was another inmate in the cell named Theodore Chavers. He took up the whole conversation with Ian Lightbourne at the time.

(PCR1999 VII 921) Instead of pursuing the supposed police deal, Emanuel decided to lie to the police about hearing Lightbourne incriminate himself. Thus, Emanuel was not motivated to pursue a police deal because really there was no such deal or, as he testified, he decided to tell the police a lie about Lightbourne incriminating himself. Under either scenario, Emanuel is not credible.

Twelfth, Emanuel has provided mutually contradictory statements under oath concerning his conversations with Chavers. Emanuel's 1994 affidavit swore:

> The other guys in the cell *** told me that the police had offered to get them out from under their charges if they could get Lightbourne to admit to the killing to. One of those guys was Uncle Nut Chavers.

(PCR1996 State's Exhibit 9) In contrast, in 1999, Emanuel testified:

> Q Okay. Did you ever have any conversations with Mr. Chavers about Mr. Lightbourne?
> A No, not really.

(PCR1999 VII 922)[3]

Thirteenth, additional aspects of the "cold record" support the circuit judge's finding of Emanuel's unreliability as a witness:[4] Emanuel initially denied making a statement regarding the Oats case, then, when confronted with it, finally admitted to giving the statement (See PCR1999 963-64); Emanuel explicitly re-assured himself, which a truthful witness need not do: "And it really – and, yeah, that's what I said" (PCR1999 VII 972); Emanuel failed to respond to questions (See PCR1999 VII 967: "Enough time has passed. I guess you're not going to answer it or ..."; VII 1013: "No Response"); Emanuel explicitly acknowledged

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[3] At the 1999 hearing, Emanuel testified that his cousin (McBride) told him that Chavers said: "that boy killed that lady." (PCR1999 VII 921)

[4] Although there is no direct evidence indicating its effect on Emanuel's ability to perceive, remember, and recount events, Emanuel has had a history of drug abuse. (See PCR1999 VII 930: 1997 drug rehab; VII 1018-19: 1996 drug rehab in Texas)

that his 1994 affidavit was "a little bit misleading" (PCR1999 VII 977); Emanuel erroneously accused the prosecutor of "saying that he was going to indict me for this Sonny Boy Oats case" (PCR1999 1015-16); and, Emanuel is a multiple-felony offender; at the time of the 1999 hearing, he was convicted of felonies, in his words, "probably about six times" (T 12/2/99 22-23).

2. The cumulative record belies Lightbourne's postconviction claims.

As Judge Angel found, the composite of postconviction accusations is unbelievable, and therefore do not support postconviction relief.

Judge Angel has had the distinctive ability to view the demeanor of each postconviction witness in the courtroom and cumulatively assess their credibility based upon this distinct vantage point. This fact-finder role alone supports his conclusions. Moreover, his conclusions based on these postconviction observations are supported by the cold record.

The discussion of Emanuel's 1999 testimony has already implicated aspects of the record that have accumulated ("cumulative") over the years. Emanuel's 1999 testimony concerning Chavers indication that Lightbourne killed the victim is inconsistent with Chavers' trial testimony that involved no admission of killing the victim. Emanuel's 1994 sworn assertion that he provided Scott a statement regarding Lightbourne's case contrasts with his 1999 lack of memory concerning such a statement. Emanuel's 1999 assertion that he had spoken with Raym

and Scott about Lightbourne's case conflicts with the 1996 testimony of these officers.

When viewing the postconviction evidence favorably in support of the judgement and sentence, even aspects of Emanuel's 1999 testimony support Chavers' and Carsons' ability to hear Lightbourne's admissions without Emanuel hearing them:

> Q. On direct, you said ..., I think that there's approximately 12 people or so in a cell where you were at with Ian Lightbourne back in '80, slash, '81, whenever it was? Did you say that earlier this morning, about 12 people in the cell?
> A. (Nodding head.) About 12.
> ***
> Q. ... So there are bunk beds all the way around the perimeter of the room, right?
> A. Yes.
> ***
> Q. ... who else [besides McBride, Chavers, Lightbourne, and Emanuel] was in that cell that you can remember?
> A. I can't remember all the rest of them now.
> Q. Isn't is true that there were times when various people were taken out of the cell for various reasons? Individuals would be taken out of the cell for medical or, for whatever reason, taken out of there?
> A. Yes.
> Q. All right. And so when you're not in that cell, you couldn't possibly know what was being said between people left back in the cell, could you?
> A. No.

(PCR1999 VII 992-94) Furthermore, Emanuel admitted that if a cellmate wanted to "have a private conversation," they [p]robably could" (Id. at 995).[5] Thus, even if one were to believe that Emanuel saw Lightbourne and Chavers talking and their conversation did not include Lightbourne incriminating himself,

[5] On redirect exam, Emanuel testified, perhaps inconsistent with the above discussion, that he would have overheard Lightbourne and Chavers "talking softly" (PCR1999 VII 1007).

this does not exclude the possibility that Lightbourne and Chavers had other conversations that Emanuel did not hear.[6]

An overview of additional cumulative evidence shows as follows:

- Albert **Simmons**, the lead prosecutor in Lightbourne's case, testified that he never made, authorized, or directed any deals for Carson in exchange for his testimony (PCR1996 T-I T59-85);
- Timothy **Bradley**, Carson's attorney, indicated that he recalled no State deal with Carsons (PCR1996 T-I T141-55, especially T149-50) and that he worked out a deal with the State based upon the weak case against Carson (PCR1996 T-I T148)[7];
- James T. **Reich**, prosecuted Carsons in 1981, reviewed documents pertaining to it and indicated that they were indicative of a routine prosecution (PCR1996 T-I T254-63);

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[6] Also, if one were to erroneously consider the content of Hall's hearsay affidavit, described at Lightbourne v. State, 644 So.2d 54, 56 (Fla. 1994) ("Lightbourne sought to admit into evidence an affidavit made by Jack R. Hall in 1989 who claimed that he was in the cell with Lightbourne the whole time that Chavers was there and that Hall was the only inmate that Lightbourne would talk to"), Emanuel swore at the hearing (PCR1999 VII 11) that **Chavers** [not Hall] monopolized conversations with Lightbourne. The reality undoubtedly is that Lightbourne had many conversations with several cell mates, some of which other people heard and some of which they did not.

[7] Bradley testified that he had no independent recollection (PCR1996 T-I T150) but that he thought he would recall "unusual" events like the police or prosecutor proposing special treatment of Carson in exchange for Carson's testimony in Lightbourne's case (PCR1996 T-I T149-50).

- Bob **Joyner**, in 1981 a police officer, testified that Carson initiated contact with him by informing Joyner that "he had information in reference to the murder," that he (Joyner) referred the matter to Deputy LaTorre, and that he (Joyner) did not arrange for Carson to obtain any benefit (PCR1996 T-II T292-96); accordingly, in 1981, Carson's statement indicated that he initiated contact with "Investigator Joiner" (PCR1996 VI 900);
- Fred **Latorre** (PCR1996 T-II T297-306), the lead investigator in this case, testified that Bob Joyner contacted him regarding Carson, (Id. at T298) that, as a result, he interviewed Carson (Id. at T299-300), that he previously had no contact with Carson (Id. at T301), that he offered Carson no reward or benefit for the information Carson provided regarding Lightbourne (Id. at T301-303), that he did not tell Carson to fabricate any testimony against Lightbourne (Id. at T302), that he had no knowledge of anyone in the sheriff's department, the police department, or the State Attorney's Office instructing Carson to fabricate any evidence (Id.), that Carson's trial testimony against Lightbourne was essentially the same as what Carson volunteered to him (Id. at T304); that he knew of no one in the sheriff's department who had interviewed Carson other than himself and Sergeant McWilliams (Id. at T303); regarding Emanuel, LaTorre testified that, until he received an indication that Emanuel wanted to share some

information with him about this case, he only had contact with him in a previous case (PCR1999 VII 1068), he did not request Emanuel to do anything and has no knowledge of anyone else attempting to induce Emanuel to do anything (PCR1999 VII 1068-69), and he did not take a statement from Emanuel and chose not to involve him in this case because it "would be of no benefit" (Id. at 1069-70) because it duplicated information he already had (Id. at 1070) and because of his felony record (Id. at 1075);

- Deputy Guy **McWilliams** (PCR1996 T-II T306-13), testified that he assisted the lead investigator, LaTorre, in the investigation of this case (Id. at T307); Joyner contacted him regarding Carson having information about this case (Id. at T307); pre-trial he only had one contact with Carson, which was when he and Latorre interviewed him as a result of Joyner's contact (Id. at T307-309); he never interviewed Carson without LaTorre being present (Id. at 313); he never offered Carson any benefit, promise, or inducement to testify against Lightbourne, nor did anyone in his presence (Id. at T309); he never counseled, advised, directed, or requested Carson to perjure himself or lie in his trial testimony against Lightbourne (Id. at T309); in 1981, he never heard Carson make any statement that conflicted with his trial testimony (Id. at T310).

Specifically concerning **Raym** and **Scott**:

- Ken **Raym**, testified that in 1981 he was an investigator with the sheriff's office, worked with Deputy Eddie Scott, and may have participated in Emanuel's arrest for burglaries unrelated to this case, but that he (Raym) had nothing to do with the investigation of the death of the victim in this case, had nothing to do with the investigation or arrest of Lightbourne, and did not place him in a cell with Lightbourne for the purpose of being a listening post, nor did he observe Scott do that (PCR1996 volume dated 3/15/96 T66-73);
- Edward L. **Scott**, an attorney at the time of the postconviction evidentiary hearing but a sheriff's office investigator from 1978 to 1984, thought he had arrested Emanuel for some burglaries, but he (Scott) had nothing to do with the investigation of the murder of the victim here, nothing to do with the investigation and arrest of Lightbourne, and never placed, nor witnessed the placing, of Emanuel in a jail cell for any purpose (PCR1996 volume dated 3/15/96 T74-76, 83).

Accepting for the sake of argument **Richard Carnegie**'s 1990 testimony on its face, it undermines Lightbourne's claims in several ways.

Perhaps most importantly, Carnegie indicated that when he informed law enforcement that he did not overhear any incriminating statements by Lightbourne, law enforcement did not pursue the matter further with him. (See PCR1990 T-V T28-30)

There was no attempt at coercing him to say otherwise and there was no attempt to recruit him as a listening post at that point. Thus, Carnegie's testimony implicates no official wrongdoing, nor does it implicate any cover-up. Instead, Carnegie supports a conclusion that law enforcement behaved properly.

Carnegie contradicted Emanuel's characterization of police behavior (See PCR1999 VII 920-21) on a crucial point. Law enforcement did not solicit him; Chavers did:

> Q. Did there ever come a time when Mr. Chavers approached you about whether you wanted to get out of jail?
> A. Yes, sir.
> ***
> Q. What did he say to you?
> 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 Lightbourne say that he killed somebody.
> Q. And what did you say to that?
> A. I told him I didn't want to go along with nothing like that. And I said I got a parole hold anyway. I said it's not going to help me.

(PCR1990 T-V T20, T21. See also PCR1990 T-V T28, T41-42) Essentially Carnegie testified that Chavers recruited him to support him (Chavers) in testifying against Lightbourne. Indeed, for all Carnegie knew, Lightbourne did make incriminating statements to Chavers. Thus, Carnegie admitted, as did Emanuel, that conversations could be carried on in the jail cell under circumstances in which he did not hear them. (See PCR1990 T-V T49-50)

Furthermore, Carnegie testified that he overheard Chavers try to recruit Emanuel (PCR1990 T-V T24), but, to the contrary, Emanuel testified that McBride and the police tried to recruit

him (PCR1999 VII T11). Indeed, Emanuel responded in the negative to the question whether he "ever [had] any conversations with Mr. Chavers about Lightbourne" (PCR1999 VII T12).

Further, Carnegie said he heard Lightbourne totally deny committing the murders (PCR1990 T-V T41, T48), which further incriminates Lightbourne in them, given the overwhelming evidence of his guilt.

Carnegie's post-conviction evidentiary hearing testimony conflicts with not only Emanuel's but also **Carson**'s because Carson, like Emanuel, alleges police impropriety. However, unlike Carsons, who claimed police coercion, Emanuel indicated that he (Emanuel) decided to lie.

Carsons testified in 1995 that police solicited him and then threatened him when he told them that Lightbourne had made no incriminating statement (PCR1996 T-I T36-39). In addition to the police denying coercion or solicitation, other aspects of the cumulative record undermine his credibility at the post-conviction phase.

Carsons testified at trial that he received time served on his "Accessory to Grand Theft" charge due to weaknesses in the State's case (R T-V T856), whereas at the October 1995 post-conviction hearing, Carsons testified that law enforcement threatened him with five to seven years on the charge (PCR1996 T-I T17-18, T23, T38), and then, after supposedly cooperating, he received "time served" (PCR1996 T-I T44), as law enforcement promised for cooperation (PCR1996 T-I T17, T19). The post-

conviction evidentiary hearing testimony of Carsons' attorney, Timothy Bradley, is consistent with appropriate police behavior, consistent with Carsons' trial testimony, and inconsistent with Carson's post-conviction recantation. Bradley reviewed notes and documents pertaining to Carsons' 1981 theft-related charge.

After Carsons supposedly had agreed to lie for the police (See PCR1996 T-I T26: about 2 weeks after police said they would put him in cell with Lightbourne), Bradley interviewed Carsons on February 23, 1981, (PCR1996 T-I T143) and there was nothing unusual about it; instead, it was "[r]outine" (PCR1996 T-I T145. See also PCR1996 T-I T147: "routine"). Carsons indicated nothing to Bradley about perjuring himself for the police or even being a listening post/interviewer for them (See PCR1996 T-I T148-49), and, accordingly, Carsons admitted to saying nothing to the trial prosecutor about perjuring himself (See PCR1996 T-I T39-40).

In other words, whenever Carsons had an opportunity to escape from the supposed coercive jaws of the police by reporting, in private, their misbehavior to officials, including one who was sworn to protect his welfare by representing him, he did and said nothing. Instead of taking advantage of opportunities to create a corroborative record of police misbehavior, Carsons kept himself as the only witness to the supposed misbehavior.

A response to the foregoing argument would be, "Carsons maintained his silence because the police had threatened him with five to seven years in prison." At the outset, the State notes that Carsons is the only person who has testified to such threats

to him. More importantly, the police would have known that Carsons was no stranger to the criminal justice system; they would have known that threatening Carsons with five to seven years incarceration would have been totally and patently unrealistic on a five-year felony (PCR1996 T-I T147), especially one with weak evidence (PCR1996 T-I T148). Carsons was, and is, unworthy of belief.

Furthermore, given the circumstances of Carsons' tenure in jail, Bradley indicated that when he interviewed Carsons, he intended "to get this man out of jail as quickly as [he] could" (PCR1996 T-I T146). Regarding the time that Carsons had already served in jail, Bradley indicated that it

> allows for the relative weakness of the case and the amount of time it would have required the State to put it together in a meaningful fashion. It wouldn't have been worth it, I don't think, for the State to have invested that much time to get a third degree felony on this gentleman.

(PCR1996 T-I T148) In other words, Carsons got a "deal" because he had already served appreciable time and because of weaknesses in the State's case, not because he was an agent of police misbehavior.

In this regard, Bradley corroborates Carsons' trial testimony:

> Q. ... Now, when you got out of jail on March 3rd, how is it that you came to get out of jail?
> A. Well, the State really didn't have strong enough charges because the witness that they had had [sic] told them I wasn't the one. They gave me time served.
> Q. All right. Did you have an attorney?
> A. Mr. Bradley.

(R T-V T856) In 1995, Bradley essentially agreed with Carsons' trial testimony, not with Carsons' post-conviction testimony. The former is credible, the latter is not.

It is also noteworthy, as discussed above, that the police decided not to use Emanuel's incriminating information, but, Carsons testified that he told the police that he had no such information. In the face of Carsons' uncooperativeness, supposedly the police were intent on coercing him to testify against Lightbourne. In other words, cumulatively taking their testimonies at face value for the sake of argument, **Emanuel presented himself as cooperative with the police, and Carsons was not cooperative, yet, for some unexplained reason, the police told the cooperative witness that they would not need him while coercing the uncooperative witness to lie.** Viewing Emanuel's and Carsons' testimonies cumulatively, they are ludicrous; their post-conviction stories are unworthy of belief.

Yet another point is that Carsons in deposition had acknowledged that some of the same officers had interviewed him at two sessions (PCR1996 T-I T46), yet at the post-conviction hearing, he said that the two groups of officers were different (PCR1996 T-I T26-27, T36. See also PCR1996 T-I T43: group "One" and group "Two"). Yet on direct exam, Carsons swore that he could not remember if officers in the first interview were at the second one (PCR1996 T-I T20). Carsons seemed to be making things up as he went along.

In sum, Emanuel's post-conviction testimony is worth "zero." Carnegie's post-conviction testimony is worth "zero." Carson's post-conviction testimony is worth "zero." Cumulatively, zero plus zero plus zero is zero. Each, individually and cumulatively is "exceedingly unreliable." To these zeros, Lightbourne erroneously would like to add inadmissible evidence, such as **Chavers**' affidavit.

In viewing this case cumulatively, Lightbourne v. State, 644 So.2d 54, 57 (Fla. 1994) (footnote omitted), provides guidance in upholding the exclusion of **Chavers**' affidavit as hearsay:

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

Returning momentarily to Emanuel, all of these indicia of unreliability apply to him:

- Emanuel waited "several years after the trial" to come forward, even though he thought that in the interim Lightbourne might be executed;
- Emanuel did more than feign memory loss; he demonstrated it, commingling facts, and then, more than Chavers' feigning, turned hostile and refused to answer questions when confronted with apparent problems with his story;

- Emanuel's testimony was "contradictory" within itself as well as with other significant evidence in the case.

Indeed, "some of the statements made by Chavers in ... letters are contradictory and indicate that he told the truth at trial," 644 So.2d at 57.

All of the foregoing buttress the wisdom of applying the general maxim to Emanuel and this record as a whole that recanted testimony is "exceedingly unreliable."

D. Additional Rejoinder.

The State has addressed the gravamen of Lightbourne's appellate position in the forgoing pages by asserting, with record support, that Judge Angel did satisfy the purpose of the remand and evaluate Emanuel's live testimony and the cumulative record. At this juncture, the State addresses several additional points in Lightbourne's Initial Brief.

Lightbourne labors long and hard to present supposed facts to this Court that the trial court or this Court has rejected. For example, he lengthily discusses and relies upon Emanuel's (IB 28-32, 51-52), Carsons's (IB 44-48), and Carnegie's (IB 36-38), testimonies, but, even when viewing them cumulatively, the trial court has rejected these as unworthy of belief. He relies upon Chavers' hearsay (IB 32-36) and Hall's hearsay (IB 39-40), but this hearsay was and is inadmissible and unreliable, as this Court expressly held, "Hall's affidavit clearly was not contrary to his pecuniary or proprietary interest, nor did the evidence

expose him to criminal liability" and "the hearsay evidence relating to Chavers lacks the necessary indicia of reliability, 644 So.2d at 57. This Court also noted Chavers' letters "were written by Chavers in an attempt to manipulate the State so that he could get out of jail," Id., and that "some of the statements made by Chavers in the letters are contradictory and indicate that he told the truth at trial," Id. at n. 3.

Lightbourne (IB 34 n. 12) also attempts to resurrect reliance upon Taylor, but this Court has previously dispatched such reliance:

> As for Taylor, we doubt that he was unavailable as a witness. Taylor was transferred from the county jail to a prison facility in another locality before he was called to testify at the evidentiary hearing because defense counsel failed to inform jail personnel of their intent to call him as a witness. In any event, Taylor's letter does not fall within any of the exceptions for hearsay, regardless of his availability.

644 So.2d at 57.

At several points, Lightbourne argues that Judge Angel "found that the informants presented false testimony at Mr. Lightbourne's trial." (IB 26 n. 8. See also, e.g., IB 50, 55) the State has three responses, the first of which is several pages long.

First, Lightbourne excerpts only part of Judge Angel's conclusion. The full statement he made concerning Chavers and Carson was as follows:

> Their lack of credibility was adequately attacked by defense counsel at trial and the penalty phase.[8] No reasonable juror would place much credence in the testimony of these informants, except such as is **corroborated by independent evidence.**

(PCR1999 X 1396) In other words, he did not conclude that no credence could be reasonably placed in their trial testimony. Consistent with Judge Angel's conclusion, the jury could have reasonably weighed Chavers' and Carson's trial testimony with all of the other evidence in its totality. Moreover, Judge Angel recognized that their testimony was, in fact, corroborated by other evidence, entitling its incriminating nature special weight. Judge Angel's order properly recognized the pre-existing impeachment and the role of corroboration, entitling it to an affirmance. See Ventura v. State, 26 Fla. L. Weekly S361, *6 (Fla. 2001) ("In addition to being significantly impeached, McDonald's detailed testimony regarding the planning of the murder was extensively corroborated by the introduction of several hotel registration cards confirming McDonald's accounts

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[8] On direct examination, the State presented to the jury Chavers' testimony that he (Chavers) was incarcerated. (See R T-IV T780-81, T792. See also R T-V T-840-41) The State also asked on direct examination whether Chavers had been paid anything "in return for the information that [he] gave to" the police, to which Chavers responded, "Yes, sir, but that was after I got out of jail." (R T-IV T-792) Accordingly, on cross-examination, Chavers admitted to three convictions and volunteered their nature (R T-V T-839-40).

Theophilus Carson at trial admitted on direct examination that when he was in the cell with Lightbourne, he was charged with "Accessory to grand theft" (R T-V T856). On cross-examination, he also admitted that his real name was "James T. Gallman" (R T-V T860).

of meetings with Ventura";"based on this record of ample impeachment and corroboration, we hold the evidence of the deal immaterial under *Giglio*"), citing, inter alia, Routly v. State, 590 So.2d 397, 400 (Fla. 1991) (holding that additional evidence of a deal between the State and its key witness was not material where cross-examination exposed that the witness was granted immunity by the State but not every "provision of her immunity agreement"); United States v. Petrillo, 821 F.2d 85, 90 (2nd Cir.1987) (finding no violation of Giglio where the key aspects of the witness's testimony were corroborated by other testimony).

Lightbourne v. State, 438 So.2d 380, 390-91 (Fla. 1983), while including a reference to Lightbourne's admission, summarized many of the facts based upon non-informant evidence:

> The evidence presented to the jury in this case, and considered by the learned trial judge at sentencing was clearly sufficient to establish the burglary and sexual battery. A screen had been cut and a window of victim's house had been pried open and broken. Testimony revealed that the defendant had admitted surprising the victim in her home, that he took some money, a necklace, and a small silver coin bank. The phone cords had been severed. Viable sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death. The defendant's blood type was consistent with semen and blood tests and factors present therein as testified to by experts. Pubic hair found at the crime scene was microscopically matched with those of the defendant. These facts and others contained in the record in this case are clearly sufficient to support the findings of burglary and sexual battery. As such they also stand sufficiently strong to support the aggravating circumstance ... .

Lightbourne v. Dugger, 829 F.2d 1012, 1014-15 (11th Cir. 1987) (footnote omitted), narrated additional details of the non-informant evidence:

On Saturday, January 17, 1981, Nancy's sister, Mrs. Mary Lewis, and her husband arrived at Nancy's cottage to pick up some furniture. Mr. and Mrs. Lewis discovered a **broken window** and entered the residence through an unlocked sliding glass door. Nancy's body, dressed only in a bra and panties, was found lying on her bed. Mr. and Mrs. Lewis attempted to contact the police and noticed that the **telephone wires had been cut**. ***

A pillow was found by Nancy's head and a pool of blood was discovered under her body. The source of the blood was traced to a gunshot wound just inside the hairline near the left temple. When Nancy's body was removed from her bed, a .25 caliber shell casing was detected. The bedspread on which Nancy was lying was taken to headquarters and examined for the presence of hairs and fibers.

On January 18, 1981, an autopsy was performed on Nancy's body. An X-ray showed the existence of a bullet in the right posterior portion of Nancy's head. The bullet was retrieved, evidence of rape was preserved, and blood and hair samples were taken.

On January 24, 1981, petitioner was arrested in Ocala for carrying a concealed weapon. Petitioner, a twenty-one year old native of New Providence, Nassau, was found sleeping in his car in the possession of an RG .25 caliber semi-automatic pistol with black tape wrapped around the handle. Petitioner was seen by the Ocala police with this gun on January 15, 1981, the day before Nancy died. At the time of the arrest, **petitioner listed the Ocala stud farm as his address. Petitioner was formerly employed by the stud farm as a groom**, and he informed the arresting officer that although he no longer lived or worked at the O'Farrell ranch, **he still received his mail there**.

*** On February 3, 1981, when petitioner was questioned by officials from the Marion County Sheriff's Department, he admitted that he owned the .25 caliber pistol found on his person and that he owned a **rose shaped pendant bearing three Greek letters attached to a fine gold chain**. ***

*** At trial, Dr. Gertrude Warner, an Associate Medical Examiner for Marion County, testified that she was the pathologist who performed the autopsy. According to Dr. Warner, the cause of Nancy's death was a brain hemorrhage precipitated by the gunshot wound. Dr. Warner further testified that an analysis of bodily fluids revealed that Nancy had engaged in **sexual relations within forty-eight hours of the examination**.

Keith R. Paul, a forensic serologist from the Florida State Crime Laboratory, testified about tests performed on Nancy's clothing. A **blood and semen analysis** revealed the presence of type B blood factors and phosphoglucomutase (PGM) enzyme type 2-1. Both of these blood factors **matched** the results of tests performed on samples of **petitioner's blood**. Nancy had type O blood and PGM type 1.

> Charles R. Meyers, a laboratory analyst and specialist in forensic ballistics testified that he examined the **pillow found next to Nancy's head and detected a bullet hole passing through it**. According to Meyers, residue found on the pillow indicated that a **gun had been fired within close proximity**. Also, Meyers compared the bullet retrieved during the autopsy with bullets test fired from petitioner's gun. In Meyers's opinion, the bullet which caused the death of Miss O'Farrell was fired from the same gun. In addition, Meyers compared the .25 caliber shell casing found in Nancy's bed to those used to test fire petitioner's gun. In Meyers's opinion, the similarity of markings on the primers indicated that the spent shell recovered from Nancy's bed was fired from the same weapon.
>
> Mary Ann Mayer, a microanalyst employed by the Florida Department of Law Enforcement, testified that she performed examinations of hairs collected from Nancy's bedspread. After comparing one hair to samples taken from petitioner, Mayer found that the hair recovered from Nancy's residence was microscopically identical to **petitioner's pubic hair**. Mayer stated that it was extremely rare for individuals to have hair with precisely the same characteristics.
>
> The **necklace found in petitioner's possession was identified as Nancy's** Alpha Omega Pi sorority lavaliere. Nancy's relatives testified that the necklace was unique and easily identifiable because Nancy had attached a Madonna cameo to the back of the pendant. Nancy's financial records reflect that **she cashed a check for $150 on January 14, 1981. Nancy's relatives testified that only $2.00 was recovered from Nancy's residence after her death**.

Here, even without any testimony from Chavers or Carson, the remaining evidence established **CCP**, with Lightbourne cutting the phone lines showing his reflective design, ultimately shooting the victim execution-style through a pillow. See, Overton v. State, 26 Fla. L. Weekly S592 (Fla. 2001) (defendant's preparation included cutting of phone lines; trial court found CCP and Supreme Court upheld proportionality); Ramirez v. State, 739 So.2d 568, 581 n. 10, 588 (Fla. 1999) (facts included, inter alia, "cut the exterior phone lines. Next, they cut through a screen door and gained access to a porch. Ramirez then broke the glass out of a window with the use of a crowbar. Grimshaw and

Ramirez, both wearing gloves, climbed into the house through this window"; "reject Ramirez's contention in his third point on appeal that there was insufficient evidence to support the finding that the murder was cold, calculated and premeditated (CCP), and that the aggravating circumstances of commission to avoid arrest and CCP had to be merged"); Hoskins v. State, 702 So.2d 202, 210 (Fla. 1997) (CCP "[g]enerally ... reserved for execution or contract murders or witness elimination type murders").

Indeed, Lightbourne v. State, 438 So.2d 380, 391 (Fla. 1983), upheld CCP based upon non-informant-based facts:

> We find that the defendant cut phone lines, entered the house at a time when others would most likely not be present, and effected the execution-style killing using a pillow placed between the murder weapon and the victim's head. As such, the trial court could properly find this aggravating circumstance.

Accordingly, Chavers told the trial jury that Lightbourne essentially admitted to **raping the victim**, which was corroborated by evidence indicating that, in the nonconsensual context of cutting the victim's phone line (T-II T328, T-IV T711), cutting the screen and breaking in through a window (See R T-II T287, T342, T-IV T711), shooting the victim execution-style using a pillow (See R T-III T404), and Lightbourne's semen was found in the victim and his pubic hair at the crime scene (R T-IV T715-16, T766-68). These facts also established the **burglary**. Simply put, a speculative hypothesis of consensual sex amidst breaking into the home through a window, cutting the phone lines, shooting, and stealing from the woman, is unreasonable. See Zack v. State, 753

So.2d 9, 13-14, 17-18 (Fla. 2000) (Zack claimed he and Smith had consensual sex and that she thereafter made a comment regarding his mother's murder); Gudinas v. State, 693 So.2d 953, 962-63 (Fla. 1997); Holton v. State, 573 So.2d 284 (Fla. 1990).

Pecuniary gain was supported by independent evidence of the victim's missing money and her necklace in Lightbourne's possession after the murder. (R T-II 293-96, T-III T521-22, T534-35, T554-55) See Rogers v. State, 783 So.2d 980, 993 (Fla. 2001) ("State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain"); Beasley v. State, 774 So.2d 649, 667 (Fla. 2000) ("Mrs. Monfort received $900 cash shortly before she was murdered and that, later that night, Beasley was seen with a $100 bill and Mrs. Monfort's car, which he disposed of prior to traveling to Miami (where he appeared, with neither cash nor car, the next day)"), citing Randolph v. State, 463 So.2d 186, 190 (Fla.1984) (upholding combined aggravating circumstances of pecuniary gain/commission during a robbery where evidence showed that the victim had $100 cash on him just a few hours before his murder, and, after the murder, only $20 was found hidden in a passenger door compartment of his truck, which evidence was relevant to demonstrate the "distinct probability that Randolph [who was charged with first degree murder and attempted robbery] approached the victim on the evening in question to rob him, and, in fact, did rob him"); Hildwin v. State, 727 So.2d 193, 195 (Fla. 1998) (Hildwin "had no money and

was reduced to searching for pop bottles on the road side to scrape up enough cash to buy sufficient gas to get home"; "After her death he had her property and had forged and cashed a check on her account"); Finney v. State, 660 So.2d 674, 680 (Fla. 1995) ("fact that Finney pawned the victim's VCR shortly after the murder, along with the evidence that Ms. Sutherland's jewelry box was missing and the contents of her purse had been dumped on the floor, supports the finding that the murder was committed for pecuniary gain").

Carson testified at trial that Lightbourne admitted to killing the victim to **eliminate her as a witness**, which was corroborated by evidence that Lightbourne had worked for the victim's family on the murder scene (R T-III T542-45, indicating that the victim would be able to identify him as the perpetrator.[9] See Howell v. State, 707 So.2d 674, 681-82 (Fla. 1998) ("ample evidence was presented in support of the conclusion that witness elimination was Howell's dominant motive for the murder of Bailey"; "fact that Howell may have had other motives for murdering Bailey does not preclude the application of this aggravator"); Thompson v. State, 648 So.2d 692, 695 (Fla. 1994) ("proper for a trial court to utilize both the pecuniary gain and avoid arrest aggravators"; "Once Thompson had obtained the $1,500 check from Swack and Walker, there was little reason to kill them other than to

[9] Thus, the State disputes Lightbourne's assertion (IB 56, emphasis in original) that the "only evidence that Mr. Lightbourne allegedly shot O'Farrell because she could identify him came from Carson's testimony."

eliminate the sole witnesses to his actions"); Card v. State, 453 So.2d 17, 18, 24 (Fla. 1984) (victim assaulted in a more publicly visible location, then driven to a more remote spot about eight miles away, where she was killed; "appellant knew the victim and she could have identified him").

HAC was corroborated with evidence independent of an informant, where Lightbourne shot her execution-style through a pillow after breaking in and raping her. See Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1996) ("Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim"). Compare Knight v. State, 746 So.2d 423, 435-36 (Fla. 1998) ("simply is no evidence of what took place between the victims and Knight during the trip in the automobile before the execution-style killings took place"; evidence insufficient for HAC but harmless).

Accordingly, the postconviction recantation evidence from the informants is totally unworthy of belief and key aspects of the trial evidence from these informants remains credible and supportive of the death penalty. This analysis comports with the presumption of correctness Judge Angel's order, as well as the presumption of correctness of Judge Swigert's death sentence order.

Second, ultimately, it is the death sentence rendered by Judge Swigert that is contested here; it is not just Judge Angel's 2001 findings that are at issue here. As Judge Angel found, Judge Swigert's death sentence, at issue, comports with his disbelief

of the jailhouse informants, also at issue. Judge Angel observed the informants when they were untruthful in their recantation. Since their recantation was untruthful and since the fact-finder believed them at trial in key aspects of their testimony, their trial testimony, in those key respects, was truthful.

Third, arguendo, contrary to Lightbourne's willingness to leap from the face of Judge Angel's Order to a conclusion that he is entitled to a new penalty proceeding, any supposed ambiguity in the Order, if it is not resolved in a manner comporting with the presumptions of correctness of both circuit judges' orders and if it is otherwise consequential to the outcome here, should be resolved by remanding the case to Judge Angel to clarify the order.

The State must acknowledge this Court's prior conclusion that "it [is] more difficult to discount the probable effect the evidence would have on the penalty phase because of the potential significance of Chavers' and Carson's testimony as to several of the aggravators," 742 So.2d at 249. The opinion continued, Id.:

> Without their graphic testimony of what Lightbourne allegedly told them, there is serious doubt about at least two of these aggravators--HAC and committed to avoid arrest. We simply cannot ignore this cumulative picture and the effect it may have had on the imposition of the death penalty.

However, given the panoply of non-informant evidence establishing weighty aggravation in this case (e.g., the cut telephone wires, the cut screen and broken window, the execution-style killing with the pillow, Lightbourne's semen found in the

victim,[10] and the known identity of the killer to the victim's family), such a remand would be unnecessary under any circumstances.

Moreover, this Court recognizes CCP and HAC as strong aggravation. See Larkins v. State, 739 So.2d 90, 95 (Fla. 1999)

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[10] Thus, the State disputes Lightbourne's assertion (IB 56, emphasis in original) that "Chavers and Carson were the only source of information that a sexual battery occurred."

As in previous proceedings, Lightbourne contends (IB 58 n. 23) that the "State conceded at the 1995 hearing that there was no other evidence, aside from Chavers and Carson, proving sexual assault." As Assistant Attorney General Mark Dunn pointed out at length in his Answer Brief, pp. 83-84, SC #89,526, this is incorrect:

> Lightbourne asserts ... that '[t]he State conceded at the 1995 hearing that there was no other evidence, aside from Mr. Chavers and Mr. Gallman/Carson, proving a sexual assault (PC-R2. 672).' On October 24, 1995, Ms. Bailey argued: 'We did have evidence of a sexual battery from Mr. Carson and Chavers, but we're still left with the burglary being established by totally different evidence.' In her post-hearing memorandum she commented at p. 15, fn.6, the testimony of Gallman (and Chavers) was the only evidence of sexual battery. However, on the next page she stated 'there was some independent evidence (sperm found in vagina and on bedspread matched Lightbourne OR/715-16, 1092-93). At the hearing on Lightbourne's Motion for Reconsideration, conducted October 31, 1996, undersigned counsel voiced a correction for the record regarding Ms. Bailey's comments on the sexual battery proof, citing this Court's language in Lightbourne I:
>
> > Viable sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death. The Defendant's blood type was consistent with semen and blood tests and factors present therein as testified by experts. Pubic hair found at the crime scene microscopically matched with those of the Defendant's.
>
> Id., at 391. This evidence was recognized again in Lightbourne IV, at 59 n.4.

(HAC and CCP "are two of the most serious aggravators set out in the statutory sentencing scheme").

The strong aggravation vastly outweighed the non-statutory mitigation that "defendant was twenty-one years old at the time of the crime and had no significant history of prior criminal activity," 438 So.2d at 390.[11]

E. Conclusion: No relief is justified under any theory.

The issue on remand was whether Lightbourne's claims merit a new penalty phase. Lightbourne now contends (IB 54-65, 67-68) that the postconviction record establishes violations of United States v. Henry, 447 U.S. 264 (1980),[12] Giglio v. United States, 405 U.S. 150(1972), and Brady v. Maryland, 373 U.S. 83 (1963). He is incorrect.

Lightbourne, 742 So.2d at 247 (footnote omitted), summarized these principles in the context of this case:

> A *Henry* violation is established when police improperly use a jailhouse informant to elicit statements from a defendant in violation of his Sixth Amendment right to counsel, *see* 447 U.S. at 274, 100 S.Ct. 2183, and *Giglio* is violated when the state knowingly presents false testimony. *See* 405 U.S. at 154-55, 92 S.Ct. 763. Because Lightbourne's *Brady*

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[11] Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985), held that "[c]ounsel was not ineffective for failing to present mitigating evidence at sentencing. The trial record clearly indicates that the sentencing judge was in fact aware of many of the mitigating factors that counsel on appeal is now presenting to the Court."

[12] Lightbourne acknowledges (IB 68) that his Henry claim has been resolved against him. Even though the prior resolution bars it here, in an abundance of caution, the State continues to address it.

> claim is based on the alleged violations of *Henry* and *Giglio*, unless Carson's recanted testimony that the police solicited and used his false testimony is credible, Lightbourne's Brady claim cannot be established.

Here, the trial court's findings that reject the postconviction evidence from the former inmates are fatal to these claims: There is no credible evidence that the police used Chavers or Carson to elicit statements from Lightbourne or that Chavers or Carson was lying at trial as to key (uncorroborated) facts and that the State had any knowledge of any such lies. Therefore, "Lightbourne's *Brady* claim cannot be established."

Moreover, as discussed above, the State maintains that key aspects of Chavers and Carson's trial testimony remain credible, especially given the non-informant evidence, thereby alternatively disposing of Lightbourne's Giglio and Brady claims.

Concerning newly discovered evidence, Lightbourne, 742 So.2d at 247, explained that Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998), requires "the trial court ... to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial' in determining whether the evidence would **probably** produce a different result on retrial." However, as block-quoted supra, Jones, quoting Spaziano, also holds that the trial court's findings are entitled to deference where the record supports them. Here, the trial court's observations of Chavers and Carson are now buttressed by its observations of Emanuel. The State submits that, if Lightbourne were to present their postconviction testimony to the

jury, the result would be the same. Indeed, given their current discredited status (as discussed above), they would affirmatively harm Lightbourne's cause. Further, the trial court correctly observed that they had already been significantly impeached at trial, but corroborative and other evidence was so sufficiently weighty that the death penalty would have remained the outcome, especially given the weighty aggravator of CCP.

Lightbourne contends (IB 61, 62) that because the evidence is now "overwhelming," he is entitled to relief. The State disagrees. The evidence is "underwhelming" because the new evidence is essentially non-existent, rendering the posture of this case as it was prior to the evidentiary hearings. Emanuel's lack of credibility renders it entirely insignificant. Larry Emanuel's evidentiary hearing testimony does not accumulate with anything else.

Lightbourne has failed to meet his burden to establish that the result of the penalty phase would probably produce a different result.

As in Stano v. State, 708 So.2d 271, 276 (Fla. 1998, the State submits that this Court should

> agree with the trial court that even if this evidence were considered newly discovered evidence for the reasons previously stated, the evidence would not make an acquittal [here, of the death penalty] at a retrial probable.

ISSUE II

WHETHER A SPECIFIC PROSECUTOR'S LIMITED ROLE IN THESE POSTCONVICTION PROCEEDINGS DENIED LIGHTBOURNE EQUAL PROTECTION AND DUE PROCESS.(Restated)

Lightbourne claims that assistant state attorney Reginald Black's involvement on the postconviction proceedings denied him equal protection and due process because Emanuel told Black about "what was going on with Mr. Lightbourne's case" and because Black attempted to ensure that "Larry Emanuel never got into a witness chair" (IB 73). This claim is groundless and entirely inconsequential. At the outset, the State notes that Lightbourne has failed to specify a constitutionally cognizable class, rendering any equal protection claim fatally flawed.

As to both equal protection and due process, Prosecutor Black's role as Emanuel's attorney in 1981 has not prejudiced Lightbourne even one iota.

ISSUE II is devoid of any showing that Black's momentary representation of Emanuel provided any benefit to the State whatsoever here; instead, Black lacked any memory of anything significant pertaining to his representation of Emanuel (PCR VII 1026-49), and, as such, Black's limited and earlier involvement in this case (See IB 72 n. 72) was simply that of an experienced prosecutor, unaffected by his representation of Emanuel. Indeed, as such, he properly instigated the rapid action that ensured Emanuel's presence at the 1999 hearing.[13] (See PCR1999 VII 1036-

[13] See generally Arbelaez v. State, 775 So.2d 909, 916 (Fla. 2000) ("the ex parte communication involved the judge

47) Thus, subsequent to Emanuel's return to Ocala at his instigation, Black had done "nothing of substance" in this case. (PCR1999 VII 1047) At the 1999 hearing, Lightbourne called Black as his witness. (Id. at 1026)

Contrary to Lightbourne's suggestion (IB 73-74), Black did not act as an advocate at the 1999 hearing. Prosecutor Rock Hooker handled the hearing.

Further, as discussed at length, and as supported at length with citations to the record, under ISSUE I, Emanuel is unworthy of belief in any event.

Even erroneously accepting most of Emanuel's testimony at face value on this point, Lightbourne has not established that Emanuel ever discussed with Black any details whatsoever concerning this case. For example, Emanuel testified at the 1999 hearing:

> Q [direct exam] Now, did there come a time when you had any discussion with Mr. Black **about your involvement with Mr. Lightbourne's case**?
> A Yeah. **I had told him that I had been working with the police department on some cases.** And the burglary cases that I had, the second one that I had, they threw it out because it was a trespassing. ***
> ***
> Q [cross exam] So, really, sitting here now, your own memory is that **you're really not sure when Reggie Black represented you**?
> A (Shaking head.)
> ***

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setting a time period for the State to file its response to Arbelaez's 3.850 motion"; "fall into the category of strictly administrative matters that are not prohibited"); Barwick v. State, 660 So.2d 685, 692 (Fla. 1995) (not all communications outside the presence of opposing counsel are legally cognizable as "ex parte"); Rose v. State, 601 So.2d 1181 (Fla. 1992) (communications pertaining to "strictly administrative matters").

Q [redirect exam] You had testified on direct examination that you had -- that you remember talking to Mr. Black about **what you had done in Mr. Lightbourne's case;** is that correct?
A Yes.
Q And is that still your testimony?
A Yes, that's still my testimony.
Q And so **if** you had spoken to Mr. Black about what the police had done with you regarding Mr. Lightbourne, would that have been after you would have been put in the cell with Mr. Lightbourne?
A Yes, that was after then they put me in there. And after they didn't use my statement, they used Chavers' statement, it was like they just -- they really --
Like I said, in the deposition, they crossed me out, because they used -- they didn't use my statement, but they had me in there, trying to help them get what they wanted.
***
Q [further redirect exam] Because as you're sitting here today, we've thrown a lot of dates at you and everything else. But is it clear in your mind that you had a conversation with Reginald Black **regarding Mr. Lightbourne**?
A That's right.

(PCR1999 VII 926, 984-85, 1005-1006, 1024) In contrast to showing that Mr. Black had any knowledge at any time about police solicitation of inmates, Emanuel, when not asked a leading question, simply stated, "I had told him that I had been working with the police department on some cases."

Counsel for the State and Lightbourne agreed to put Emanuel's deposition "in." (PCR VII 1020) In his deposition, Emanuel clearly stated that he did not tell Black any details concerning Lightbourne's case. In Emanuel's words to Black, "I didn't tell you what I had done." (PCR1996Sup I 159) At another point, Emanuel swore that he had not told anyone else about the Lightbourne case except officers Scott and "Rain." (Id. at 139. See also Id. at 142)

The foregoing **evidence** belies Lightbourne's bald and groundless assertions (E.g., IB 70 n. 29, 74, 75) that Black was attempting to hide anything of value from any court.

As a matter of general policy, if a lawyer becoming a witness in order to establish that he is not a true witness disqualifies him from the role of counsel, chaos will ensue, and the judicial process will be held hostage to the whim of an opposing party to simply make the accusation.

Here, Black recalled nothing of value from Emanuel, and Emanuel had told him nothing of value. Black was not a material witness to anything.

Thus, this Court expressly noted in passing and without concern, that this claim was raised that last time it reviewed the case:

> On appeal, Lightbourne alleges five errors: *** (5) Lightbourne's due process and equal protection rights were violated by the participation of an assistant state attorney who may have been a material witness.

Lightbourne, 742 So.2d at 245. As a successive claim, this issue is procedurally barred.

ISSUE III

WHETHER THE TRIAL COURT REVERSIBLY ERRED BY DENYING COLLATERAL COUNSEL'S REQUEST TO WITHDRAW FROM REPRESENTING LIGHTBOURNE DUE TO HIS REPRESENTATION OF A DEFENDANT WHOM A WITNESS IN THIS PROCEEDING HAD AGREED TO TESTIFY AGAINST APPROXIMATELY TWENTY YEARS AGO (Restated)

This claim is based upon the CCRC attorney's representation of Sonny Boy Oats.

Lightbourne must show that the trial court was unreasonable in denying his motion to withdraw. See Owen v. State, 773 So. 2d 510, 514 (Fla. 2000) ("court's ruling on a matter related to the 'course and conduct' of a proceeding is generally within the sound discretion of the court and will not be disturbed on review absent an abuse of discretion").

This is not a situation where an attorney is simultaneously representing co-defendants with conflicting interests, and Oats was not a witness in this proceeding, and therefore, CCRC counsel was not called upon to cross-examine Oats.

Accordingly, ISSUE III fails to show any requisite prejudice whatsoever to Lightbourne due to counsel's representation of Oats. In Lightbourne v. Dugger, 829 F.2d 1012, 1022-24 (11th Cir. 1987), Lightbourne asserted

> that an actual conflict arose when Carson, a former cellmate of petitioner and a former client of the public defender's office, testified on behalf of the state at petitioner's trial. The gist of petitioner's argument is that the 'simultaneous representation' of Carson and petitioner by the same public defender's office prevented rigorous cross-examination of Carson in an attempt to impeach his credibility.

The Eleventh Circuit reasoned that, to prevail, the defendant must show an actual conflict as well as an adverse effect on this defendant's representation due to that conflict.

> Petitioner has articulated a **potential conflict** of interest. An attorney who cross-examines a former client inherently encounters divided loyalties.
> ***
> [W]e hold that even if an actual conflict existed, petitioner has failed to allege such facts which, if proven, would demonstrate that the alleged conflict adversely affected petitioner's representation.
> ***

> The record reflects that Carson testified during direct examination that he was incarcerated for accessory to grand theft and that he was released because of a deal worked out with the state. During an extensive cross-examination, counsel for petitioner questioned Carson about his relationship with petitioner, contradictions in the sequence of events, potential independent sources of knowledge of the O'Farrell homicide, Carson's use of an alias, and the lack of specifics with regard to petitioner's alleged statements, including what was taken, where the gun came from, and how the events transpired. In addition, counsel for petitioner thoroughly inquired about the details of Carson's plea agreement and elicited the facts that Carson pled nolo contendere to the charges and received a sentence of time served consisting of approximately 100 days. Given this testimony, we discern no adverse effect upon petitioner's representation. Counsel for petitioner fully and fairly cross-examined Carson with respect to his "deal" with the state in order to show the possibility of bias or prejudice. In addition, petitioner's counsel attempted to impeach Carson's credibility through a variety of methods. Any conflict of interest which may have existed by virtue of the fact that Assistant Public Defender Fox happened to cross-examine a client formerly represented by the same public defender's office had, at best, a de minimus effect upon petitioner's representation. Accordingly, we find no merit to petitioner's claim that an actual conflict adversely affected petitioner's assistance of counsel.

Here, effective cross-examination of the other party, Oats, was not at issue. Here, Oats' case was fertile ground for the State's cross-examination of Emanuel because it appeared that Emanuel was confusing the Oats case with this case. (See PCR1999 VII 955-58, 962-69)[14]

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[14] The prosecutor at one point indicated that "the witness" is going to deny the truthfulness of "this statement" (PCR1999 VII 970), but then pursued a line of questioning in which Emanuel affirmed the truthfulness of his statement concerning Oats (Id. at 971-73), then attacked Emanuel's truthfulness in his statement to CCRC regarding **this case**, not Oats' (Id. at 973-83) Later, Emanuel accused the prosecutor of threatening him with an indictment in the Oats case, the prosecutor denied it and reaffirmed Emanuel's immunity in that case, and Emanuel, responded, "That's what I was just checking."

In contrast to the record showing that the accuracy of Emanuel's Oats statement was not a factor undermining Lightbourne's position, Lightbourne speculates that the trial court may have contemplated it. Bald speculation does not justify reversing the trial court and disrupting the postconviction process. See Allen v. Butterworth, 756 So. 2d 52, 57 (Fla. 2000) (value of minimizing delay in capital case litigation).

As sole authority for this issue, Lightbourne cites to Guzman v. State, 644 So.2d 996 (Fla. 1994). However, Guzman does not stand for the proposition that a trial court abrogates all of its authority and duties as orderly case manager and arbiter and applier of the law of conflict. Otherwise, collateral counsel would be vested with absolute discretion, which would gut the well-settled reasonable exercise of discretion vested in the trial judge in matters directly impacting the orderly processing of cases.

Guzman illuminated its operative facts: "We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another." 644 So.2d at 999. After some extensive discussion of the facts of that case, it held: "[W]e find that an actual conflict of interest and prejudice has been shown in this record and, consequently, that the denial of the motion to withdraw was reversible error." Id.

(Id. at 1015-16) In other words, the accuracy of details in the Oats statement did not become an issue; Emanuel confirmed it, and the prosecutor moved on.

Here, there was no actual conflict and no prejudice shown. ISSUE III presents no error and merits no reversal.

CONCLUSION

Lightbourne's request that the guilt determination be reversed is beyond the scope of this Court's remand and overwhelmingly unsupported by the record.

The State respectfully requests this Honorable Court affirm Lightbourne's death sentence and the circuit court's denial of Lightbourne's postconviction motion. If the form of the order denying the postconviction motion is deemed lacking, the appropriate remedy would be to remand for clarification.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy of this ANSWER BRIEF OF APPELLEE has been furnished by MAIL on December 14, 2001, to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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