

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-553

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IAN DECO LIGHTBOURNE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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INITIAL BRIEF OF APPELLANT

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**PRELIMINARY STATEMENT**

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

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

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

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

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

"PC-R3." -- record on 3.850 appeal following the 1999 evidentiary hearing; and

"PC-R3. Sup." -- supplemental record on 3.850 appeal to this Court following the 1999 evidentiary hearing.

All other references will be self-explanatory.

**REQUEST FOR ORAL ARGUMENT**

Mr. Lightbourne requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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### PROCEDURAL HISTORY

Mr. Lightbourne was convicted of first-degree murder in the circuit court of the Fifth Judicial Circuit, Marion County (R. 1436), and was sentenced to death (R. 1500). Mr. Lightbourne's conviction and sentence of death were affirmed by this Court on direct appeal. Lightbourne v. State, 438 So. 2d 380 (Fla. 1983). Justice Overton dissented and would have granted Mr. Lightbourne a new trial based on a Henry violation:

I reluctantly dissent because I find the recent United States Supreme Court decision in United States v. Henry, 447 U.S. 264 (1980), mandates a reversal under the circumstances of this case. A jailhouse informer was placed in a cell adjacent to appellant's and was requested to keep his ears open. The investigating officer understood that the informant expected something in return for his information, and the informant was paid two hundred dollars in cash, in addition to being released nineteen days early in return for his services. These factors make the informant an agent of the state under the dictates of Henry, which requires suppression of the statements made by the appellant to the informant in the absence of Miranda warnings. I find we have no choice but to grant a new trial.

Id. at 392 (Overton, J., dissenting).

Mr. Lightbourne thereafter sought postconviction relief pursuant to Fla. R. Crim. P. 3.850. No evidentiary hearing was afforded, and this Court affirmed the summary denial of relief. Lightbourne v. State, 471 So. 2d 27 (Fla. 1985). Justices Overton, McDonald, and Shaw, dissented. Id. at 29.

Mr. Lightbourne thereafter sought relief in the federal courts. The Eleventh Circuit Court of Appeals affirmed the denial of federal habeas corpus relief, over the ardent dissent of Judge Anderson, who found that the Henry violation warranted a resentencing:

[T]he error is not harmless with regard to sentencing. Chavers' testimony contained the only direct evidence of oral sexual assault on the victim as well as the only graphic descriptions of the sexual attack and comments by the defendant about the victim's anatomy. Since this evidence would support the existence of an aggravating circumstance, and since it was likely to have been influential with the jury on the sentencing issue, I cannot conclude that the testimony was harmless with regard to sentencing.

Lightbourne v. Dugger, 829 F. 2d 1012, 1035 (11th Cir. 1987)

(Anderson, J., concurring in part and dissenting in part).

On January 30, 1989, Mr. Lightbourne filed his second Rule 3.850 motion, alleging new information establishing a Brady<sup>1</sup> violation with respect to jailhouse informants Chavers and Carson. This Court remanded for an evidentiary hearing. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Evidentiary hearings were held in circuit court in 1990. On April 17, 1991, Mr. Lightbourne filed a motion to reopen the evidentiary hearing, which was granted. An additional evidentiary hearing was conducted. The circuit court denied relief on June 12, 1992, and Mr. Lightbourne appealed. This Court affirmed. Lightbourne v. State, 644 So. 2d 54 (Fla. 1994).

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

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<sup>1</sup>Brady v. Maryland, 373 U.S. 83 (1963).

March 15, 1996, and denied both motions. The circuit court denied relief on June 19, 1996. On appeal, this Court held that Mr. Lightbourne was not barred from presenting the testimony of Larry Bernard Emanuel, an inmate who was incarcerated with Mr. Lightbourne prior to trial, and remanded "for an evidentiary hearing as to Emanuel's testimony and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the reliability and veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase is required." Lightbourne v. State, 742 So. 2d 238 (Fla. 1999).

On August 2, 1999, shortly after the issuance of the Court's opinion but before mandate issued, the lower court issued a Notice and Order to Appear for the evidentiary hearing which the court scheduled for August 10, 1999 (PC-R3. Supp. 1404).<sup>2</sup> Mr. Lightbourne immediately filed a motion to vacate the hearing date and reset the evidentiary hearing due to the fact that mandate had not issued and that additional time and notice was needed to prepare for the hearing (Id. at 1410-13). The State objected to rescheduling the hearing because the State had had Mr. Emanuel

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<sup>2</sup>Unbeknownst to Mr. Lightbourne's counsel at the time, this order was the result of an *ex parte* communication between Judge Angel's office and a member of the State Attorney's Office. On August 4, 1999, Assistant State Attorney Rock Hooker informed Mr. Lightbourne's counsel that the reason that Judge Angel set the hearing so quickly was that Judge Angel had been concerned that Mr. Emanuel would not be in custody very long in Florida and might be difficult to locate later on (PC-R3. Supp. 1419). Mr. Hooker himself denied imparting this information to Judge Angel (id.); it was later discovered that it was Assistant State Attorney Reginald Black who discussed the Emanuel situation with Judge Angel's judicial assistant, which resulted in the setting of the evidentiary hearing before this Court's mandate had even issued (PC-R3. 96).

arrested in Texas and although he was being transported back to Florida for the hearing, the State feared that Emanuel would not remain in Florida custody for very long (Id. at 1405-08). Mr. Lightbourne later supplemented his motion with the fact that Mr. Emanuel had been brought back to Marion County, where he pled guilty to several misdemeanor charges and sentenced to a year in jail; thus, Mr. Emanuel would be in custody (Id. at 1416-17). By order dated August 6, 1999, the court later reset the evidentiary hearing for October 21, 1999 (PC-R3. 65).

On August 13, 1999, Mr. Lightbourne filed a motion to disqualify Judge Angel due to the *ex parte* communication between his office and the State Attorney's Office (PC-R3. Supp. 1418-24). See supra n.2. On August 18, 1999, the lower court requested that Mr. Lightbourne notice a hearing on the motion to disqualify for October 18, 1999 (PC-R3. Supp. 1425). On September 28, 1999, Mr. Lightbourne supplemented his motion to disqualify, arguing that under the authority of Anderson v. Glass, 727 So. 2d 1147 (Fla. 5th DCA 1999), the motion had to be granted due to the delay in excess of thirty (30) days in ruling on the motion, and that no hearing on the motion was requested (PC-R3. 27-30). On October 12, 1999, with no ruling still from the trial court and the evidentiary hearing date looming,<sup>3</sup> Mr. Lightbourne sought a writ of prohibition and mandamus from this Court, requesting that Judge

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<sup>3</sup>Because of the pending motion to disqualify and the concomitant failure of Judge Angel to rule on it, Mr. Lightbourne was deprived of court assistance to secure necessary pre-hearing discovery orders as well as witness transportation orders (PC-R3. 51).

Angel be disqualified (PC-R3. 45-55).<sup>4</sup> On October 14, 1999, this Court ordered the State to respond to the writ, which response was filed on October 18, 1999, the same day of the hearing before Judge Angel on the motion to disqualify (Id. at 123-42). Following the October 18 hearing (PC-R3. 79-119), Judge Angel denied the motion, but did reset the evidentiary hearing for December 1 and 2, 1999 (Id. at 118). Two days later, on October 20, 1999, this Court denied Mr. Lightbourne's writ (PC-R3. Supp. 1432).

The evidentiary hearing occurred on December 2, 1999 (PC-R2. 911-1088). Following the submission of post-hearing memoranda from both Mr. Lightbourne (id. at 1095-1326), and the State (id. at 1327-75), and a reply from Mr. Lightbourne (id. at 1379-94), the lower court, by order dated February 26, 2001, denied relief (Id. at 1395-97). A timely notice of appeal was filed (Id. at 1398-99).

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<sup>4</sup>See Lightbourne v. State, No. 96,727.

### STATEMENT OF FACTS

On December 2, 1999, the lower court heard evidence pursuant to the remand from this Court ordering an evidentiary hearing to include the previously excluded testimony of Larry Bernard Emanuel. The testimony of Mr. Emanuel corroborates the evidence provided in 1990, 1991, 1995 and 1996, that (1) the State recruited inmates, who were housed in the jail with Mr. Lightbourne, to elicit incriminating statements from him, (2) the State withheld material evidence from Mr. Lightbourne, and (3) that the State knowingly presented false evidence at Mr. Lightbourne's trial. The 1999 hearing further established that the State Attorney's Office had a conflict of interest in this matter through the participation of Assistant State Attorney Reginald Black.

Mr. Lightbourne called three witnesses at the evidentiary hearing: Larry Emanuel (PC-R3. 917-1024); Assistant State Attorney Reginald Black (id. at 1026-49); and State Attorney Investigator Richard Deen (Id. at 1052-65). The State called one witness: Major Frederick LaTorre of the Marion County Sheriff's Department (Id. at 1066-77).

**Larry Bernard Emanuel.** Larry Emanuel was in the Marion County Jail in 1980 and 1981. In 1980, Emanuel was arrested for burglary of a dentist's office and released in December 1980 because the case was dropped (PC-R3. 997). On January 20, 1981, Emanuel was arrested again for burglary of a second dentist's office (PC-R3. 998). It was during this second incarceration that Emanuel met Mr. Lightbourne in the Marion County Jail.

While in the Marion County Jail, Emanuel and Mr. Lightbourne shared a cell (PC-R3. 920). Emanuel recalled that Theodore Chavers was also in the same cell (PC-R3. 927). Emanuel had known Chavers for some time prior to 1981 and knew that he had a reputation for "snitching" and doing "a lot of undercover work for the police department" (PC-R3. 928). Emanuel could not remember the names of the other inmates in the cell, but believed he could recognize them if he saw them (Id.). Shortly after Mr. Lightbourne was placed in the cell, Emanuel was approached by law enforcement agents, who asked him to get information as to whether Mr. Lightbourne had murdered someone (PC-R3. 921).<sup>5</sup> The law enforcement officers also informed Emanuel that his burglary charge would be dropped if he could get information from Mr. Lightbourne (PC-R3. 924). Although Emanuel agreed, he was never able to talk to Mr. Lightbourne because Chavers "took up the whole conversation with Lightbourne at the time" (Id.). Emanuel explained that although he did not speak to Mr. Lightbourne specifically about the murder, because of his bed being positioned next to Mr. Lightbourne's he was able to listen to the conversations between Chavers and Mr. Lightbourne (Id.). Emanuel never heard Mr. Lightbourne tell Chavers that he killed anyone (Id.). Counsel for Mr. Lightbourne questioned Mr. Emanuel repeatedly on this:

Q [by Mr. Scher] Okay. At any time during the time you were in that cell with Mr. Lightbourne and Mr. Chavers, did you ever hear Mr. Lightbourne confess to murder?

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<sup>5</sup>Emanuel testified that Eddie Scott and "Keith Raym" were the two law enforcement agents he had spoken with (PC-R3. 923). Emanuel explained that he knew Scott previously through an introduction by Emanuel's cousin, but that he did not know Raym previously (Id.).

A [by Mr. Emanuel] No.

Q Did you ever hear Mr. Lightbourne confess to Mr. Chavers anything about a rape?

A No.

Q How about anything about a burglary?

A No, no more than they was talking about - they got a store called the Big Apple right out there on 40. I think he knowed Lightbourne from that club because everyone hung out there. That's all I heard them talk about.

(PC-R3. 922) (emphasis added). Emanuel repeatedly confirmed that Mr. Lightbourne had never confessed to murder or any other crime (Id. at 924; 925). Emanuel acknowledged that he told the police that Mr. Lightbourne had confessed even though it was not true because he was "young" and "really in love with a girl" and "wanted to be out there with her" (Id. at 925).

Emanuel further explained that about two days after Mr. Lightbourne was placed in the cell, he (Emanuel) had a conversation with his cousin who was also incarcerated:

But about 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 done said 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.**

(Id.) (emphasis added). Shortly after Chavers told law enforcement officers that he heard Mr. Lightbourne say he had murdered someone, Mr. Lightbourne was moved out of the cell (PC-R3. 924). At that time, officers started pulling inmates out of the cell one-by-one to determine if anyone else heard a confession (Id.). When Emanuel was pulled out to talk to the officers, he told them he heard Mr. Lightbourne confess (Id.). Emanuel reiterated that he told the officers this information even though he never heard Mr. Lightbourne confessing to a murder (PC-R3. 925). Emanuel stated that he was told by the officers his testimony was not needed, and his charges were then dropped (Id.).

Emanuel further explained that he had previously been represented by Assistant State Attorney Reginald Black in 1980-81 in connection with his pending charges. During that representation, specifically during a court appearance in January 1981, Emanuel told Mr. Black that he was working on some cases with the police including Mr. Lightbourne's case and he expected to have his case dropped in return for his help (PC-R3. 926).

On cross-examination, Emanuel confirmed that Eddie Scott and Keith Raym came to speak with him about Mr. Lightbourne's case in January, 1981, and told him they would drop charges against him if he could get Mr. Lightbourne to confess while in the Marion County Jail (PC-R3. 933-34). The State introduced the court files from Emanuel's cases: State Exhibit 2 was Case No. 77-1169 (violation of probation); and State Exhibit 3 was Case No. 80-568 (burglary, in which Emanuel and his cousin, Otis McBride, were co-defendants) (PC-R3. 934-35). As to the 1977 case, involving dealing with stolen property, Emanuel confirmed he was on probation for that charge when he was arrested again in 1981 (Id. at 936-37). Emanuel did not know when Mr. Lightbourne had been arrested (Id.). Emanuel reiterated that it was Scott and Raym with whom he spoke about Mr. Lightbourne, believed that they were working on Mr. Lightbourne's case, and also knew that "they was also investigating me" (Id. at 941-42). Emanuel knew Scott and Raym previously, because his cousin, Otis McBride, "was working with them" (Id. at 943). The State then showed Emanuel that the 1980 burglary of a dentist office case was nolle prossed on December 9, 1980 (Id. at 945), and questioned how Emanuel could have been in the jail and had his charges dropped in exchange for information against Mr. Lightbourne when the charge was

dropped before the O'Farrell murder (Id. at 945-46).<sup>6</sup> Emanuel received no written agreement with respect to his cooperation with the police in Mr. Lightbourne's case (Id. at 948).

The State showed Emanuel an immunity agreement signed by Emanuel, Eddie Scott, and Frederick LaTorre, on January 23, 1981 (Id. at 952-55) (State Exhibit 6). The immunity agreement was in the Sonny Boy Oats case (Id. at 956).<sup>7</sup> Emanuel also identified a statement he gave on January 23, 1981, in the Oats case (Id. at 962) (State Exhibit 7). Eddie Scott and Assistant State Attorney Ray Gill were present at the statement (Id. at 962-63). Emanuel could not recall if the statement he gave in the Oats case was the only statement that he gave about a homicide to Eddie Scott (Id. at 966). However, Emanuel was resolute in his testimony that he did speak to law enforcement also about Mr. Lightbourne's case:

Q I mean, did you ever tell a law enforcement person that Ian Lightbourne had admitted to such-and-such? Did you ever tell them that? Could you say that positively now, after I showed you the Sonny Boy Oats stuff?

A At the time I did say that.

Q You think you did?

A No. I know I did.

Q So you did talk to some law enforcement agency - agent about Ian Lightbourne?

A During the time he was in the Marion County Jail?

Q Yes, sir.

A Yes, I did.

(PC-R3. 968) (emphasis added). Despite the attempts to confuse him, Emanuel reiterated once again that he "knew" that he told law enforcement that Mr. Lightbourne had confessed (Id. at 968).

The State then questioned Emanuel about the statement he gave in the Oats case, and Mr. Lightbourne's counsel objected and re-raised his objection to the conflict of interest (Id. at 969). After the court overruled the objection, the prosecutor told the court that he was only going to ask Emanuel "whether or not he told the truth" in his statement to the police about the Oats case (Id.). Mr. Lightbourne's counsel again objected to questions going to the merits of the Oats case because "we're having a problem again with the conflict" (Id. at 970). The prosecutor proffered that he believed that Emanuel will say that "everything he said in this statement here was not true"; Mr. Lightbourne's counsel reiterated that if this was the case, then a conflict of interest was apparent, and he renewed his motion to withdraw, which was denied (Id.). The State then questioned Emanuel about his participation in the Oats case, with Mr. Lightbourne's counsel repeatedly objecting (Id. at 971-73).

Emanuel also was questioned about the affidavit he signed after representatives from CCR came to see him in 1994 (Id. at 973-76). After accusing Emanuel of being "misleading" because he was supposedly not in the jail when Mr. Lightbourne had been arrested (id. at 977-78), Emanuel responded that the prosecutor was "blowing the dates out of proportion" and he could not recall "step-for-step" the exact chronology of his cases (Id. at 978-79). When the prosecutor attempted this tactic again, Emanuel repeatedly responded that "he's misleading me on the dates" (Id. at 983).

The State next asked Emanuel regarding his legal representation in 1980-81; however, the State only

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<sup>6</sup>The State was misleading Emanuel, as the truth is that Emanuel was re-arrested in January, 1981, for another burglary case. This was clarified on redirect examination.

<sup>7</sup>Mr. Oats' case also arose out of Marion County. See Oats v. State, 446 So. 2d 90 (Fla. 1984); Oats v. State, 472 So. 2d 1142 (Fla.), cert. denied, 474 U.S. 865 (1985).

questioned Mr. Emanuel on charges which he was arrested for in June 1980 and based on that court file (Case No. 80-568 B) concluded that that was the only case for which Reginald Black represented Mr. Emanuel (Id. at 985). Emanuel could not recall on which cases Black represented him (Id. at 934).

The State went back to questioning Emanuel about the Oats case; Emanuel confirmed that he did not testify at either the Oats or Lightbourne trials (Id. at 990). Emanuel reiterated that he knew Chavers as "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" (Id. at 991). Emanuel also re-emphasized that "I was sitting there and I never did hear [Mr. Lightbourne] say that" (Id.).

On re-direct examination, Emanuel clarified that one burglary case involving a dentist's office had been dropped in December 1980 (Id. at 997). However, he was again arrested in January, 1981, for burglary of another dentist's office (Id. at 997-98) Thus, there were two cases involving burglary of dentist's offices (Id.). When he was re-arrested in January, 1981, he was put in jail (Id.). In fact, the statement he gave on January 23, 1981, in the Oats case occurred while he was in the Marion County Jail (Id. at 998-99). When he was re-arrested in January, 1981, the State also violated his probation from his earlier 1977 case (Id. at 999). It was the second burglary case that was dropped following the information he gave regarding Mr. Lightbourne's case (Id.). It was the 1977 case that Black represented him on, and it was the probation from the 1977 case that was violated upon his second arrest in January, 1981 (Id. at 1000). Mr. Lightbourne then introduced the Clerk's Office docket sheet regarding the January, 1981, arrest (Id. at 1000-01) (Defense Exhibit 1). As a result of the January, 1981, arrest, Emanuel was placed in the same cell as Chavers and Ian Lightbourne (Id. at 1001). Emanuel explained that he had confused that there were two burglaries, and that the prosecutor had confused him on cross-examination (Id.). He also clarified that Eddie Scott was involved in the Oats case, and he also gave Scott a statement about Mr. Lightbourne (Id. at 1003).

Emanuel further clarified on re-direct that he talked with Reginald Black about Mr. Lightbourne's case at some point after he was in Mr. Lightbourne's cell (Id. at 1005). He also explained that although the State "didn't use my statement, they used Chavers' statement . . . they had me in there, trying to help them get what they wanted" (Id. at 1006). He told Black about what he had done for law enforcement in Mr. Lightbourne's case because he was upset that the State was giving him the 18 months on the violation of probation from his 1977 case (Id.). If Mr. Black also recalled that he represented Emanuel in January, 1981, he would have no reason to dispute that because "[h]e was that attorney" (Id. at 1009).

Emanuel also testified that Detective LaTorre's testimony at Mr. Lightbourne's trial that Emanuel was in fact in the cell with Mr. Lightbourne was consistent with his testimony and contrary to the State's suggestion that Emanuel was not in jail at the time (Id. at 1007-08). Once again, Emanuel confirmed that at no time did Mr. Lightbourne confess to the murder of Nancy O'Farrell (Id. at 1008).

**Reginald Black.** Mr. Black is currently employed at the State Attorney's Office handling "administrative matters" (Id. at 1027). He had two stints at the State Attorney's Office, the second commencing in July, 1986; prior to that time, he was in private practice and handled a great deal of criminal cases (Id.). Since his return to the State Attorney's Office, Black handled a number of capital postconviction cases, including that of Sonny Boy Oats, Paul Hildwin, and Ian Lightbourne (Id. at 1029).

In terms of his prior involvement in Mr. Lightbourne's case, Black recalled that around 1996, Larry Emanuel's name surfaced as a witness and "we . . . were in search of Mr. Emanuel" (Id. at 1031-32). Black also participated in Emanuel's deposition in 1996 (Id.). At that time, the issue of whether Black had previously represented Mr. Emanuel had arisen (Id. at 1032-33). At the time he conducted Emanuel's deposition, Black did remember having previously represented Emanuel and "had seen court records that bore that out" (Id. at 1033). Black had no independent recollection have representing Emanuel in 1980 or 1981,

and was "not in any 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" (Id. at 1034). He later reiterated that he represented Emanuel "in a 1980 case involving a charge of burglary of a dentist office, and an accompanying violation of probation charge from a 1977 case, that charge being predicated on the 1980 alleged law violation" (Id. at 1048).

Following the 1999 remand from this Court, Black "immediately" took action to locate Emanuel, and spoke with investigator Raym; Emanuel was located in custody in Houston (Id. at 1037). Black did not know whether Raym had contact with Texas authorities before Emanuel was arrested in Houston (Id.). Black's recollection was refreshed with a document showing that Raym had reported to both him and the other prosecutors on the case that Emanuel was on probation in Houston, but not in custody (Id. at 1038-39). Black then confirmed that Emanuel was taken into custody "not too long" after Florida authorities "initiated this search" (Id. at 1039). After Emanuel was taken into custody in Texas, Marion County filed felony charges for a cocaine possession case against Emanuel (Id.). Black discussed the filing of the charges with Assistant State Attorney Jim McCune (Id. at 1040). Black had no idea why the charges were not filed previously, that is, before Emanuel's presence was going to be required for the evidentiary hearing in Mr. Lightbourne's case (Id. at 1041). However, he did recall that the Texas authorities were going to increase their attempts to locate and apprehend Emanuel once it was known that Emanuel was needed in Florida (Id. at 1043). Once Emanuel had been arrested in Texas pursuant to the Florida charges, Black conferred with investigator Deen, who was familiar with Emanuel (Id. at 1045).

The State did not conduct cross-examination of Black.

**Richard Deen.** Deen is an investigator with the Marion County State Attorney's Office (Id. at 1053). He was with that office when Mr. Lightbourne's case went to trial (Id. at 1054). However, until 1999, when he was asked to go to Houston to accompany Emanuel to Florida, he had no involvement in Mr. Lightbourne's case (Id. at 1054-55).

Deen went to Texas along with Detective Carmen DeFalco in order to bring Emanuel to Florida (Id. at 1057). During the trip, they really did not discuss the case other than the fact that Emanuel was needed to testify in Mr. Lightbourne's hearing (Id. at 1058). Also on the trip, Deen reviewed the deposition given by Emanuel in Mr. Lightbourne's case (Id. at 1058-59). When they arrived in Houston, there were a few administrative problems with gaining custody of Emanuel, but eventually Emanuel was released to their custody (Id. at 1059-60). Emanuel knew of the pending charges in Marion County, as well as the fact that he was needed to testify in Mr. Lightbourne's case (Id. at 1060).

Deen explained that he "felt kind of sorry for Mr. Emanuel" because "he's a guy that has wasted his life away either through drugs or in jail" (Id. at 1061). Deen testified that he gave some words of advice to Emanuel:

[ ] I cautioned him when we had got back to Marion County, and I told him, I said: "Well, I don't know what your future holds about your pending charges." I said: "And the only thing that I know about this hearing that you have coming up with - concerning the Lightbourne case is that the best thing you can do for yourself is to simply tell the truth as best as you can remember it."

And that was - that's the sum total of my conversation with him about the Lightbourne case.

Q Did he respond to you when you made that statement?

A He said that he would. I mean, he gave an affirmative answer.

(Id. at 1061).

Deen also acknowledged that he had some general knowledge of Mr. Lightbourne's case, and the fact that "part of the testimony concerned jail house informants" (Id. at 1065). Deen explained what he knew of informant Chavers:

Q Now who is - from your knowledge, who is Theodore Chavers?

A Well, I have no actual - I don't remember ever having any personal contact with Mr. Chavers, **although he was well-known in the - not only to members of the Marion County Sheriff's Department, but to the city police department.**

**He was an individual who had a fairly extensive criminal background, and who had been involved in being in jail numerous times, and who had - was always one to come up with some type of something that he thought would be beneficial to him.**

(Id. at 1065).

**Frederick LaTorre.** The State's only witness at the evidentiary hearing was Major Frederick LaTorre from the Marion County Sheriff's Office (PC-R3. 1066). LaTorre testified that he was the lead investigator in both the Oats and Lightbourne cases (PC-R3. 1067). LaTorre recalled that he spoke with Larry Emanuel during the Lightbourne investigation, although he did not recall exactly how his name surfaced (PC-R3. 1067-68). Prior to the contact in the Lightbourne case, LaTorre explained that he knew Mr. Emanuel from another case as well (PC-R3. 1068). La Torre denied requesting that Mr. Emanuel get a statement from Ian Lightbourne, and had "no knowledge that anyone attempted to do that and no one would have done that at my direction" (PC-R3. 1068-69). When he spoke with Larry Emanuel, LaTorre explained that he "just listened to some information that he gave me" and "did not take a statement or document it in any way" (PC-R3. 1069). LaTorre decided not to take a formal statement from Emanuel because "[t]he information he supplied to me was similar to information that I had already received from another individual. And because of [Emanuel's] association with another case, which was the Oats case, I chose not to take a taped statement from him or involve him in the case" (PC-R3. 1070).

On cross-examination, LaTorre testified that he spoke with Larry Emanuel "sometime after I had spoken to Theodore Chavers and Theophilus Carson" (PC-R3. 1072). LaTorre was working with investigator Eddie Scott on Mr. Oats' case (PC-R3. 1072-73), and recalled taking a statement from Mr. Emanuel with respect to the Oats case (PC-R3. 1073). This interview would have been before he talked to Mr. Emanuel about Mr. Lightbourne's case (Id.). LaTorre reiterated that he decided not to take a statement from Larry Emanuel because he had information from Theodore Chavers, and LaTorre acknowledged awareness that Chavers has since recanted (PC-R3. 1074). LaTorre also acknowledged not wanting to use Emanuel in the Lightbourne case because Emanuel was good for another felony case, yet admitted that both Chavers and Carson were also convicted felons (PC-R3. 1075). LaTorre testified that he was also aware that Carson had recanted his confession, and had "seen documents that indicate" that they had testified that promises had been made to them in exchange for their testimony against Mr. Lightbourne (PC-R3. 1076). Finally, LaTorre acknowledged that "there was another individual that I spoke to from the cell that had similar information" but that LaTorre did "not recall his name and I did not take a statement or document it" (PC-R3. 1077).

SUMMARY OF THE ARGUMENTS

1. At the evidentiary hearing held pursuant to the Court's 1999 opinion, Mr. Lightbourne established his entitlement to relief in that (1) the State withheld material exculpatory evidence in violation of Brady, (2) the State presented false testimony at trial, (3) newly discovered evidence required that relief be granted, and (4) a violation of Henry occurred. Larry Bernard Emanuel's testimony that Mr. Lightbourne never confessed to informants Chavers and/or Carson completes the picture of what really occurred in the cell while Mr. Lightbourne was awaiting trial. The truth is that Mr. Lightbourne never confessed, and the trial testimony of Chavers and Carson was false. Emanuel's testimony corroborates the veracity of the prior recantations of Chavers and Carson, which themselves are corroborated by independent evidence, both testimonial and documentary. Although the lower court found that Chavers and Carson were motivated out of self-interest to testify against Mr. Lightbourne, that they would say almost anything to help themselves, and that no reasonable juror could have believed Chavers and Carson, the lower court nonetheless denied relief. However, the lower court employed erroneous legal standards and failed to conduct the requisite cumulative analysis. In light of the totality of the record as it now stands, the inescapable conclusion is that Mr. Lightbourne is entitled to, at a minimum, a resentencing proceeding. The principal support for the aggravating factors in this case was the testimony of Chavers and Carson, as this Court found in its 1999 opinion. Despite this, the lower court ignored both the trial and post-trial evidence and arrived at conclusions devoid of legal or factual support.

2. At the 1999 evidentiary hearing, Mr. Lightbourne establishes that his due process rights were violated by the participation of Assistant State Attorney Reginald Black in the prior postconviction proceedings. Black represented Larry Emanuel in 1980 and 1981, and could not dispute Emanuel's testimony that he (Emanuel) told Black at the time that he was being asked to provide false information to law enforcement in Mr. Lightbourne's case. Despite knowing of his prior representation of Emanuel, Black successfully argued that Emanuel should not be a witness in Mr. Lightbourne's case. This Court, however, disagreed in its 1999 opinion. Despite the fact that the reason for the delay in hearing Emanuel's testimony was Black's arguments, the State challenged Emanuel's testimony due to lack of memory and failure to come forward until 1999. In light of Black's conduct, Mr. Lightbourne submits that due process was violated.

3. The lower court erred in denying collateral counsel's motion to withdraw from Mr. Lightbourne's case due to a conflict of interest. Collateral counsel represented both Mr. Lightbourne and Sonny Boy Oats. Emanuel was a co-defendant in Mr. Oats' case, and over counsel's objection, the State was permitted to question Emanuel about his role in the Oats case and the veracity of statements he made to law enforcement in the Oats case. The State's actions made counsel's representation of both Mr. Lightbourne and Mr. Oats a conflict of interest, and the court should have permitted counsel to withdraw from Mr. Lightbourne's case.

## ARGUMENT I

MR. LIGHTBOURNE WAS DENIED A RELIABLE ADVERSARIAL TESTING BECAUSE THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND PRESENTED FALSE TESTIMONY IN VIOLATION OF MR. LIGHTBOURNE'S CONSTITUTIONAL RIGHTS. IN THE ALTERNATIVE, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. LIGHTBOURNE'S DEATH SENTENCE IS UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW SENTENCING.

### A. INTRODUCTION.

In 1989, this Court remanded for a hearing on Mr. Lightbourne's claims under Brady and Giglio, i.e. that the State had withheld material exculpatory evidence and knowingly presented false and misleading testimony at Mr. Lightbourne's trial. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). In 1994, this Court affirmed the denial of Rule 3.850 relief following the evidentiary hearing at which Chavers feigned incompetency and the circuit court excluded his affidavit and letters. Lightbourne v. State, 644 So. 2d 54 (Fla. 1994). In doing so, this Court accepted the lower court's determination that there were insufficient indicia of reliability to allow the admission of Chavers' affidavit and letters to the prosecutor, the affidavit of Jack Hall, another of Mr. Lightbourne's cellmates, Mr. Hall's affidavit, Mr. Taylor's letter, and Mr. Emanuel's deposition. Pursuant to the filing of Mr. Lightbourne's fourth Rule 3.850 motion, the circuit court held further evidentiary hearings to hear Carson's testimony. However, the lower court continued to exclude the testimony of Emanuel. On appeal, this Court found that Emanuel's testimony was not procedurally barred and remanded to the circuit court for "an evidentiary hearing as to Emanuel's testimony and for the trial court to consider the cumulative effect of the post-trial evidence in evaluating the veracity of Chavers' and Carson's trial testimony in determining whether a new penalty phase hearing is required, either under Lightbourne's Brady or newly discovered evidence claims." Lightbourne, 742 So. 2d at 248.

In its 1999 opinion, the Court wrote:

[a]ll of Lightbourne's cellmates from 1981 who have now been located, either by hearing testimony, deposition, or affidavit, corroborate Lightbourne's claims that agents of the state may have actively solicited testimony against Lightbourne. Even if there was no active solicitation, all of the evidence may corroborate the claim that Carson and Chavers' testimony at the original trial may have been false and that their testimony was motivated by a belief that testimony favorable to the state would help them on their pending charges.

Lightbourne v. State, 742 So. 2d 238, 248 (Fla. 1999). The Court, however, rejected Mr. Lightbourne's Henry claim because it found that "the evidence overwhelmingly supports a conviction of guilt." Id.

As to the penalty phase, however, the Court wrote that "the same firm conclusions" could not be reached:

We find it 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. Chavers' and Carson's testimony provided many of the inflammatory details of the crime. Specifically, Chavers testified that Lightbourne told him that he had surprised the victim as she was coming out of the shower, forced her to perform sex acts, including forcing her to perform oral sex "over and over," and that she "was begging him not to kill her." Carson testified that Lightbourne told him police "had him" for "shooting a bitch," meaning O'Farrell, and that he shot her because "she could identify him." This testimony provided graphic details of what allegedly occurred before the actual murder and may have formed the basis of at least three of the aggravators found by the trial court—HAC, CCP, and committed to avoid arrest. 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.

Id. at 249 (emphasis added).

In denying Mr. Lightbourne's motion, the lower court, after indicating that it conducted the cumulative analysis mandated by this Court, found that the jailhouse informants who testified at trial—Chavers and Carson—"were acting out of self-interest and hope of personal gain" and that "[n]o reasonable juror would place much credence in the testimony of these informants, except such as is

corroborated by independent evidence" (PC-R3. 1396).<sup>8</sup> The lower court further held as a matter of fact that "the informants were acting on their own" and "would say most anything to help themselves" (Id.). Despite these findings, the lower court concluded that, as to the Brady aspects of this claim, "there is no reasonable probability that a new penalty phase hearing would result in a different result as to the imposition of the death penalty" (Id.). As to the newly-discovered evidence aspects, the lower court concluded that "[t]he presentation of this new evidence at a new penalty phase hearing would probably not produce a different result" (Id.). As to the Henry aspects of the claim, the lower court concluded that Chavers and Carson "were not acting as agents for law enforcement in soliciting statements from Ian Lightbourne" (Id.).

As explained below, Mr. Lightbourne submits that the lower court employed erroneous legal standards on both the Brady and newly-discovered evidence aspects to this issue, and it failed altogether to address the Giglio aspects of this claim. He also submits that, in light of Emanuel's testimony, the previous resolution of the Henry claim should be reconsidered. Further, Mr. Lightbourne submits that the lower court failed to comply with the Court's mandate that it conduct a meaningful cumulative analysis of the post-trial evidence in order to evaluate Mr. Lightbourne's claims. Finally, some of the lower court's findings are not supported by competent and substantial evidence. In light of the proper legal standards, the proper cumulative analysis mandated by this Court, and the evidence that does find support in the record, the inescapable conclusion is that Mr. Lightbourne was deprived of a fair sentencing proceeding, and a resentencing must be ordered.

**B. STANDARD OF REVIEW ON APPEAL.**

In reviewing Mr. Lightbourne's claims under Brady, Giglio, and his newly-discovered evidence claim, see Jones v. State, 709 So. 2d 512 (Fla. 1998); State v. Mills, 788 So. 2d 249 (Fla. 2001), this Court defers to factual findings made by the lower court to the extent that they are supported by competent and substantial evidence, but reviews *de novo* the application of those facts to the law. Stephens v. State, 748 So. 2d 1028 (Fla. 1999); Way v. State, 760 So. 2d 903 (Fla. 2000).

**C. OVERWHELMING EVIDENCE ESTABLISHES THAT MR. LIGHTBOURNE NEVER CONFESSED TO CHAVERS AND/OR CARSON.**

The recantations of informants Chavers and Carson are overwhelmingly supported by the evidence, both testimonial and documentary, most recently by the testimony of Larry Emanuel. As this Court's 1999 opinion makes clear, all of the previously-excluded information must now be evaluated cumulatively. Carson's 1995 testimony corroborates Chavers' recantation and confirms that the State withheld material evidence. Emanuel's testimony corroborates both Carson's and Chavers' recantations. Both witnesses have admitted that they received benefits from the State in exchange for their testimony, while at the trial they denied that any such arrangements existed. Other documentary evidence that was unavailable at Mr. Lightbourne's trial confirms the nondisclosure of exculpatory evidence. The letters written by Chavers and Carson attempting to obtain their undisclosed expected benefit establish Brady violations. Emanuel's testimony is further corroboration of the fact that Chavers and Carson never spoke to Mr. Lightbourne about the O'Farrell murder. At each of the numerous evidentiary hearings in this case, the pieces have fallen into place, bit by bit, and the truth has now come to light. Mr. Lightbourne is entitled to relief.

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<sup>8</sup> Essentially, the lower court found that the informants presented false testimony at Mr. Lightbourne's trial, in violation of Giglio v. United States, 405 U.S. 150 (1972). Yet the lower court did neither discuss nor conduct a legal analysis of the Giglio aspects.

1. **Larry Emanuel.** While in the Marion County Jail, Emanuel and Mr. Lightbourne shared a cell (PC-R3. 920). Emanuel recalled that Theodore Chavers was also in the same cell (PC-R3. 927). Emanuel had known Chavers for some time prior to 1981 and knew that he had a reputation for "snitching" and doing "a lot of undercover work for the police department" (PC-R3. 928).<sup>9</sup> Shortly after Mr. Lightbourne was placed in the cell, Emanuel was approached by law enforcement agents, who asked him to get information as to whether Mr. Lightbourne had murdered someone (PC-R3. 921).<sup>10</sup> The law enforcement officers also informed Emanuel that his burglary charge would be dropped if he could get information from Mr. Lightbourne (PC-R3. 924). Although Emanuel agreed, he was never able to talk to Mr. Lightbourne because Chavers "took up the whole conversation with Lightbourne at the time" (Id.). Emanuel explained that although he did not speak to Mr. Lightbourne specifically about the murder, because of his bed being positioned next to Mr. Lightbourne's he was able to listen to the conversations between Chavers and Mr. Lightbourne (Id.). Emanuel never heard Mr. Lightbourne tell Chavers that he killed anyone (Id.). Counsel for Mr. Lightbourne questioned Mr. Emanuel repeatedly on this:

Q [by Mr. Scher] Okay. At any time during the time you were in that cell with Mr. Lightbourne and Mr. Chavers, did you ever hear Mr. Lightbourne confess to murder?

A [by Mr. Emanuel] No.

Q Did you ever hear Mr. Lightbourne confess to Mr. Chavers anything about a rape?

A No.

Q How about anything about a burglary?

A No, no more than they was talking about - they got a store called the Big Apple right out there on 40. I think he knowed Lightbourne from that club because everyone hung out there. That's all I heard them talk about.

(PC-R3. 922) (emphasis added). Emanuel repeatedly confirmed that Mr. Lightbourne had never confessed to murder or any other crime (Id. at 924; 925).<sup>11</sup> Emanuel acknowledged that he told the police that Mr.

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<sup>9</sup>In fact, at the evidentiary hearing, State Attorney Investigator Deen, who was employed with that office at the time of Mr. Lightbourne's trial, candidly acknowledged that Chavers "was always one to come up with some type of something that he thought would be beneficial to him" (PC-R3. 1065). Of course, such was not the position of the State at Mr. Lightbourne's trial or in the postconviction litigation.

<sup>10</sup>Emanuel testified that Eddie Scott and "Keith Raym" were the two law enforcement agents he had spoken with (PC-R3. 923). Emanuel explained that he knew Scott previously through an introduction by Emanuel's cousin, but that he did not know Raym previously (Id.).

<sup>11</sup>During the 1995 evidentiary hearings, Mr. Lightbourne presented the testimony of his trial attorneys on the issue of the importance of Larry Emanuel's disclosures. Mr. Burke confirmed that he did not know at the time that Mr. Emanuel had information that Mr. Lightbourne had not made incriminating statements in the cell and that he would have used the information had it been disclosed (PC-R2-472). Mr. Fox confirmed that the information from Larry Emanuel would have been significant for Mr. Lightbourne's defense:

Q Was - as Mr. Lightbourne's trial attorney, is

Lightbourne had confessed even though it was not true because he was "young" and "really in love with a girl" and "wanted to be out there with her" (Id. at 925).

Emanuel further explained that about two days after Mr. Lightbourne was placed in the cell, he (Emanuel) had a conversation with his cousin who was also incarcerated:

But about 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 done said 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.**

(Id.) (emphasis added). Shortly after Chavers told law enforcement officers that he heard Mr. Lightbourne say he had murdered someone, Mr. Lightbourne was moved out of the cell (PC-R3. 924). At that time, officers started pulling inmates out of the cell one-by-one to determine if anyone else heard a confession (Id.). When Emanuel was pulled out to talk to the officers, he told them he heard Mr. Lightbourne confess (Id.). Emanuel reiterated that he told the officers this information even though he never heard Mr. Lightbourne confessing to a murder (PC-R3. 925). Emanuel stated that he was told by the officers his testimony was not needed, and his charges were then dropped (Id.).

2. **Theodore Chavers/Richard Carnegia.** That Mr. Lightbourne never confessed to either Chavers or Carson is further corroborate by Chavers himself, as well as Richard Carnegia, another cellmate. In connection with prior postconviction proceedings, Chavers' provided a sworn affidavit alleging the following:

1. My name is Theodore Cleveland Chavers, and my nickname is "Uncle Nut." I was made to testify against Ian Lightbourne at his trial in 1981.
2. In 1981, I was very familiar to the local law enforcement officers because of numerous arrests and charges made against me in Ocala. When I was in the Marion County Jail in January of 1981, I was placed in a cell with Ian Lightbourne and several other inmates.
3. Shortly after being put in the cell with Lightbourne, Detective LaTorre took me out and talked to me at length. He made it clear to me that it was in my best interest to find out all I could from Lightbourne about the O'Farrell murder. In fact did this and then several charges pending against me were dropped.

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this information significant to you?

A Yes. I mean, the Emanuel affidavit, Carnegia's testimony, Carson's letter all say the things which I could only suspect and not establish:

That the police had intentionally - at least, at the very least, intentionally placed witnesses with Lightbourne to solicit testimony. If that were true, then that brings up the suppression issue under Massiah-Henry.

It goes beyond that, that they attempted to get people to testify who told them things which he did not tell them. Not only were they placing them there; if they would not obtain information, they wanted them to fabricate the information. Those efforts would be most helpful in undermining the credibility of Chavers and Carson.

(PC-R2. 534-35).

4. Theophilus Carson, who was also in the cell with Lightbourne and me, worked for the State too. Although Lightbourne never told any of us that he killed the O'Farrell woman, the cops got Carson to say that at the trial by dropping his charges. I know that he lied on Lightbourne to get out of trouble.
5. The officers pressed me for details about what Lightbourne was saying even though there was not anything really to say. I told them I didn't want to get involved since they had other evidence but with all they had on me they could make me do what they wanted.
6. The state attorneys went over and over what they wanted me to say at the trial. They told me the things they wanted me to say to the jury at Lightbourne's trial. They came at me and rehearsed everything I should say.
7. When the investigators involved me in this case, they made it clear that if I scratched their backs, they'd scratch mine - but if I didn't cooperate, they could bring me even more trouble than I already have. In fact, what really happened in my conversations with Lightbourne and the way they made me say it was very different. I knew I had to make things look good for the way they wanted the investigation to go.
8. Before the trial, I heard that the O'Farrell family had offered a \$10,000.00 reward for anyone who helped with their case. I called the O'Farrell's to collect and they agreed to meet with me, but they didn't show up but the cops did instead. They gave me \$200.00 and told me to leave the O'Farrell family alone and not to talk to anyone about this or the case.
9. In the past, I refused to discuss this matter with anyone because the police wanted it to stay quiet. They told me to keep my mouth shut and I knew they'd give me heat if I didn't. Because I had been in so much trouble in the past, the police would make me cooperate with them whenever they wanted me to, just like in Lightbourne's case.
10. I am now willing to discuss these things because I no longer have any pending charges which could be held over my head.

(PC-R3. 1148-51).

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

JP [Phillips]: We understand there's some affidavit you might have signed on the Lightborn [sic] case. You know anything about that? Did some people from some lawyers office come and talk to you about Lightborn [sic]? We just need to know what that is. We haven't got a copy of it yet. Do you remember signing anything?

TC [Chavers]: Uh huh.

JP: Was it true or was it not true? You know you got to go to --

TC: I reckon yeah, man. I don't know nothin; been happenin', man, I'm serious man, yeah.

JP: Well some man from the rep- lawyer from Mr. Lightborn [sic] has told us

TC: Uh huh.

JP: That you did an affidavit saying

TC: Right.

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

TC: Everything was a lie?

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

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

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

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

JP: **It was.**

TC: **Yes sir.**

(PC-R3. 1153-69) (emphasis added). During this conversation, Chavers explained that he had lied in his letters to the State Attorney's Office: "I was just, you know like sorta like using that for sorta like

lenience."<sup>12</sup>

When he initially took the stand in June 1990, Chavers appeared to have great difficulty understanding questions. See, e.g., PC-R. 438-83. He explained that "[t]here's a lot of things I remember and a lot of things I don't" (PC-R. 469). During extensive and often repetitive questioning, counsel for Mr. Lightbourne was able to establish only that Chavers had been in the jail cell with Mr. Lightbourne, that he had spoken to Lieutenant La Torre, and that he had been returned to the cell with Mr. Lightbourne (PC-R. 456-57, 483). The court inquired whether Chavers was under the influence of drugs and/or alcohol and whether Chavers' recent car accident had affected his mental processes (PC-R. 492, *et seq.*). The court then ordered Chavers to remain in jail overnight to improve his condition (PC-R. 526). The next day, the court ordered a mental health evaluation to determine Chavers' competency to testify (PC-R. 608). The expert concluded that Chavers was not competent to testify (PC-R. 639), and the court ordered that he remain in custody until the next session of the hearing to be held on July 2, 1990 (PC-R. 652-53). At the July 1990 hearing, experts reported that Chavers was suffering from post-concussion syndrome and was not competent to testify (PC-R. 679-80). His testimony was again deferred, this time until October 8, 1990. At the October 8th hearing, Chavers claimed an inability to remember anything, including testifying at Mr. Lightbourne's trial, giving a deposition, and signing an affidavit. See, e.g. PC-R. 742-66, 799-871. The court believed Chavers was being intentionally uncooperative, stating that his memory and ability to testify were "perfectly fine" and that he was "playing games;" the court also told Chavers directly: "I believe you know something, and we want to hear it. We want to know what you know" (PC-R. 767, 772). The next day, when Chavers continued to profess a lack of memory, the court held him in contempt (PC-R. 950), and ultimately determined that he was unavailable as a witness (PC-R. 1255, 1259).

Although uncooperative at these hearings, Chavers admitted that an inmate named Richard Carnegia was also in the cell with him and Mr. Lightbourne in 1981 (PC-R. 443). Carnegia confirmed this and testified that he knew Chavers was a snitch when he entered the cell (PC-R. 553). He knew that Chavers frequently supplied information to Mr. Bray, an Ocala police officer, and he had heard that Chavers had a relationship with the State Attorney's Office (PC-R. 554).<sup>13</sup> Carnegia testified that he "respected" Chavers because of

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<sup>12</sup>At the 1990 hearings, Mr. Lightbourne also presented the proffered testimony of Ray Taylor, Chavers' cellmate during the evidentiary hearing. Taylor had written his attorney a letter stating that Chavers had said that his trial testimony was not true. Chavers also told Taylor that he was feigning incompetency in order to avoid testifying. Mr. Lightbourne requested that Taylor be produced as a witness, but the court denied the request (PC-R. 1258-59). Taylor was transferred out of the jail to a state prison just fifteen minutes before Mr. Lightbourne requested his presence as a witness (PC-R. 1256).

<sup>13</sup>This testimony was confirmed by the 1999 evidentiary hearing testimony of Richard Deen, an investigator from the Marion County State Attorney's Office. Deen acknowledged that Chavers was "well-known . . . not only to members of the Marion County Sheriff's Department, but to the city police department" (PC-R3. 1065). According to Deen, Chavers was an "individual who had a fairly extensive criminal background and who had been involved in being in jail numerous times and who had -- was always one to come up with some type of something that he thought would be beneficial

his position as a State informant:

ABecause  
he, you  
know, he  
had --  
he was

in a position where sometime he could say things, you know, and they would  
be believable, you know. And by me being on parole and stuff, you know, I would  
give him respect because I didn't want to get crossed.

Q You didn't want to get crossed?

A No.

Q What do you mean by that?

A Be put in a jam for something I didn't do or didn't know about it.

Q And that was based upon your knowledge of Mr. Chavers as an informant?

A Yes, sir.

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

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

Q And what did you say?

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

(PC-R. 558).

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

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

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

A Yes, sir.

Q And was Mr. Lightbourne answering?

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

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

A No, sir.

(PC-R. 573).<sup>14</sup> Carnegia never heard Mr. Lightbourne tell Chavers anything about the O'Farrell murder (PC-R. 559-560). Carnegia explained that Chavers was asking Mr. Lightbourne questions "in a friendly manner, like

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to him" (PC-R3. 1065).

<sup>14</sup>Carnegia's account is corroborated by Emanuel's testimony. Emanuel explained that he was never able to get Mr. Lightbourne to talk because Chavers "took up the whole conversation with Lightbourne" (PC-R3. 924). Because of the closeness of the beds in the cell, Emanuel was able to hear the conversations between Mr. Lightbourne and Chavers, and testified that Mr. Lightbourne never confessed anything to Chavers (Id. at 922; 924; 925; 1008).

`You can trust me,'" (PC-R. 573), and that he was "trying to make him feel relaxed, you know; [saying] `You know this ain't going to go no further than here'" (PC-R. 578).<sup>15</sup>

The affidavit of Jack Hall, another inmate who was in the holding cell with Chavers and Mr. Lightbourne in 1981 (PC-R. 1401-02), also corroborates the testimony of Emanuel, Chavers, Carnegia, and the fact that Mr. Lightbourne never confessed to anyone anything about the O'Farrell murder. Hall's affidavit states as follows:

1. My name is Jack Hall and I currently reside at the Marion Correctional Institute in Lowell, Florida. I am 48 years old.
2. In January and February of 1981, I was incarcerated at the Marion County Jail. I was in a cell with Ian Lightbourne the entire time I was at the jail.
3. Because Lightbourne spoke with a thick accent, he had a real hard time communicating with other inmates. I was the only inmate at the jail during this time that Lightbourne would talk to.
4. When Lightbourne was first brought to the Marion County Jail, he was placed in the same cell as me. Shortly after Lightbourne's arrival, three trustees were moved into our cell. One of these trustees was "Nut" Chavers, but I did not and do not know the name of the others. Neither Lightbourne nor I ever talked with them. They huddled in the corner talking together for awhile and then called for the guards to come and let them back out. Lightbourne never spoke to any of these guys the whole time they were in our cell.
5. These same trustees were placed in our cell several more times, and acted the same way each time. They would huddle up and whisper together like they were making a plan, and they would laugh a lot, too. A few times I overheard the things they were saying - the were talking about Lightbourne and a murder case. I specifically remember the guy called "Nut" talking about what they were going to tell the cops about Lightbourne. They said that they were going to say that Lightbourne told them all about the murder of the O'Farrell woman. I also heard them talking about getting out of jail and heard "Nut" telling the others that he had gotten out this way before.
6. Long after I was transferred back to the state prison system, I learned that at least one of the trustees who had been in the cell with me and Lightbourne - "Nut" Chavers - testified at Lightbourne's trial and said that Lightbourne had told him that he did the murder. I knew when I heard this that it was a lie - Lightbourne and I were together the whole time, in the same cell, and neither of us spoke to those guys who were put in with us. Like I said, I had heard "Nut" and the others talking about what they were going to tell the cops, but I never thought they would or could actually get up in a court and say this like it was true.
7. I didn't know Ian Lightbourne before I met him in the Marion County Jail, and never saw him again after he left. I wouldn't say we were friends - I am about twenty years older than Lightbourne, white, and born and raised in Ocala, so we didn't really have a lot in common. We were cellmates and were in together for about 24 hours a day for quite a while and so we naturally got to talking. I just couldn't sit here and let any man die because of a bunch of lies.

(PC-R3. 1171-72).<sup>16</sup>

In addition to the above evidence indicating that Chavers' trial testimony that Mr. Lightbourne had

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<sup>15</sup>Mr. Fox and Mr. Burke, who represented Mr. Lightbourne at trial, both testified at the 1995 evidentiary hearing that Carnegia's testimony provides corroboration for the allegation that law enforcement agents were recruiting inmates to elicit information from Mr. Lightbourne and that those inmates who cooperated expected a benefit from the State in return (PC-R2. 460, 463-64, 532-33). According to Fox: "I would have had a field day with it. It's the kind of thing that we would have hoped to have found to undermine the credibility of the jailhouse snitches." (PC-R2. 533).

<sup>16</sup>Despite this Court's mandate, it is not clear that the lower court considered this affidavit in its conclusory and perfunctory order (PC-R3. 1395-97). It is clear, however, that Hall's affidavit must be considered pursuant to this Court's 1999 opinion, as well as under Chambers v. Mississippi, 419 U.S. 284 (1973).

confessed was false, Mr. Lightbourne presented evidence regarding the benefits Chavers received in exchange for his assistance in convicting Mr. Lightbourne. At the time Chavers was in jail with Mr. Lightbourne, he was serving a sentence for driving with a suspended license. He also had charges pending for escape, resisting arrest with violence, and grand theft (R. 1165). Chavers testified that on February 10, 1981, he was released on his own recognizance on the escape charge and posted a \$5000 bond on the other two charges (Id.). However, jail records show that on February 10, 1981, after he provided Lieutenant La Torre with information incriminating Mr. Lightbourne, Chavers was released from jail on his own recognizance on all three charges at the direction of the State Attorney's Office (PC-R3. 1173). In addition, David Baillie, Chavers' bail bondsman, testified at the evidentiary hearing that he did not post a \$5000 bond for Mr. Chavers on February 10, 1981 (PC-R3. 1179, 1181-82). Baillie did post a bond for Chavers on March 5, 1981, on the suspended license charge, but Chavers did not put up any money for this bond (Id. at 1182).<sup>17</sup>

Further, although Chavers testified that these charges were still pending at the time of Mr. Lightbourne's trial, in fact the State had filed an "Announcement of No Information" on the escape charge **before** Mr. Lightbourne's trial (PC-R3. 1199), despite the fact that three jail corrections officers were eyewitnesses to the escape (Id. at 1200-01). Finally, five days after Mr. Lightbourne was sentenced to death, Chavers entered a plea agreement on the resisting arrest and grand theft charges and received three years probation although these charges carried a maximum possible sentence of ten years imprisonment (PC-R2. 2440).

At trial, Chavers testified that after his release from jail on February 10, 1981, Marion County Sheriff Moreland gave him \$200 (R. 1119). However, documents establish that Mr. Chavers received the \$200 from Lieutenant La Torre on February 12, 1981, at 1:10 p.m. (PC-R3. 1203), *i.e.*, less than two hours before he gave the detailed second statement incriminating Mr. Lightbourne.<sup>18</sup> La Torre confirmed that he gave Chavers the money on February 12, 1981 (PC-R. 1133).

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

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<sup>17</sup>Baillie posted the bond for free because of Chavers' involvement with the O'Farrell murder case (PC-R3. 1182-84). He explained his motivation: "I'm a law and order person, and the fact that I bonded him out at the suggestion or request or what not of the authorities was on my own . . . I felt like that that [sic] was part of my contribution to society at that time" (Id. at 1185).

<sup>18</sup>Chavers initially provided La Torre a statement implicating Mr. Lightbourne on February 2, 1981 (PC-R. 2412-15). This statement was vague and general, containing no details of the offense (PC-R. 1128; PC-R. 116). In fact, La Torre testified at the evidentiary hearing that in this first interview, Chavers "did not go into a lot of specifics" and "never made any indications that Lightbourn[e] had told him he did the incident" (PC-R. 1128-29). Chavers provided La Torre a second, more detailed statement on February 12, 1981, at 2:59 p.m. (PC-R. 2416-23). La Torre described the second statement as being "in more detail and encompassed more particular points that the first statement did" (PC-R. 1163). Specifically, the first statement contained nothing about a sexual assault (PC-R. 1176).

exchange for his role in convicting Mr. Lightbourne. The letters reveal the following information that directly contradicts Mr. Chavers' trial testimony. For example, in a letter to Assistant State Attorney Gill dated January 6, 1985, seeking assistance on a new matter, Chavers reminded Gill that he "lied to help get what you wanted, that black nigger on death row, so please help me!" (PC-R3. 1204). In another letter to Assistant State Attorney Gill dated January 6, 1986, Chavers again was requesting assistance, and again reminded Gill about "the man I lied on and help your office put on death row" (PC-R3. 1209). Letters written by Chavers to Al Simmons, the prosecutor on Mr. Lightbourne's case, confirm that he was promised assistance on his pending charges in exchange for his testimony. **Before** the trial, Chavers wrote, "I hope and trust you get me out after the trial is over . . . I will do my best at the trial to help convict this killer" (PC-R3. 1212). Between the guilt and penalty phases, Chavers wrote, "I'm glad the trial is over, I hope I did a good job. Sir, I hope and trust in you that you will get me out of here . . . Sir, I would like to be out before May first . . . Sir, I will continue helping you" (Id. at 1214). Chavers was again called to testify on October 15, 1991, after the lower court granted Mr. Lightbourne's motion to reopen the evidentiary hearing. Chavers had written several letters to the State Attorney's Office and Judge Angel revealing that Chavers felt that the State was angry at him for recanting his trial testimony against Mr. Lightbourne and that the State was not treating him fairly as a result (See e.g. PC-R. 1326-47). These letters also reveal that Chavers was trying to assist the State in solving the Ray Williams murder case in exchange for a reduced sentence. For example, on April 9, 1991, Chavers wrote to State Attorney Jim Phillips:

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

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

**3. Theophilus Carson.** At the October 1995 evidentiary hearing, Mr. Lightbourne presented Theophilus Carson, a.k.a James Gallman. In contrast to his trial testimony that Mr. Lightbourne had made incriminating statements to him and that he received no benefit in exchange for his testimony, Carson testified in 1995 that law enforcement officers supplied the information that formed the basis of his trial testimony and that he felt coerced into becoming an agent for the State.<sup>19</sup>

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

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

Q And you --

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

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<sup>19</sup>Indeed, this Court found that Carson's testimony "was consistent with Chavers' previous affidavit." Lightbourne v. State, 742 So. 2d at 244.

Q Do you recall what those certain things were?

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

Q And prior to the time that these law enforcement officers told you about a necklace and a weapon, and the necklace with a pendant, had you ever heard about the necklace or the weapon or this case at all, Mr. Lightbourne's case?

A No, sir.

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

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

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

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

A That was what I was told to do.

Q And were you doing that?

A Yes, I was trying to do that.

Q And did Mr. Lightbourne, in fact, tell you anything that - did he admit that he had committed this homicide or had been involved in it?

A No, he didn't.

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

A I told them just what I told you: He didn't tell me anything.

Q And what was their response to that?

A Well, they told me certain things to say that he did; and if I didn't go along with what they was saying, that they would make it real hard for me.

(PC-R2. 371).

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

A Yes. They told me they would get me time served.

Q And what did they tell you if you didn't cooperate with them in this?

A Well, by me being from out of town, I didn't have any family here; and with accessory to a grand theft charge, they told me they would make it hard on me, they would give me five to seven years, max out.

(PC-R2. 371-72). He explained that he was only twenty-five at the time and could not make bail or post a bond (PC-R2. 378). In direct contradiction of his trial testimony, where he testified that the disposition of his Marion County charges was worked out before he talked to Lieutenant La Torre (R. 1180, 1183), he testified in 1995 that his charges were dropped in exchange for his cooperation (PC-R2. 375). In addition, he was promised assistance on pending charges in Hillsborough County, specifically that they would "resolve the charges" (PC-R2. 373). On October 24, 1982, he wrote to the State Attorney's Office:

STATE ATTORNEY OFFICE OF OCALA

To Head State Attorney

I James T. Gallman, AKA (Theophilus R. Carson) was a key witness in the

homicide trial of Egin Lightbolt, the murder of the Ocala Stud Farm owner. I took the stand for the state, I put my life on the line concerning the matter, my testimony was a key in convicting Lightbolt, in return I got nothing but frustration. I was suppose to get a witness pay which I haven't received yet. I was suppose to have had a deal worked out with the state attorney office here in Tampa, but they tell me they have no records of it, and wasn't contacted.

Sir, I am writing this letter in regards and hoping to get some response and a positive reply. I need some legal documents showing that I was a state witness for Marion County, involvement with this trial. I need these appears to present to Judge Harry Lee Coe, III and state attorney office of Tampa. And the witness pay -- sir, I am in very need of it. I would like to thank you for your time, and much needed consideration in the matter.

Thank you kindly

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

James L. Gallman  
AKA (Theophilus R. Carson)

(PC-R3. 1222). At the hearing, Carson explained his motivation for writing the letter: "the State Attorney's Office in Hillsborough didn't have the knowledge of me cooperating with the State down here in Marion County" and he was attempting to get the State to fulfill its promise of assistance on the Hillsborough charges (PC-R2. 376-77).<sup>20</sup>

**D. THE LOWER COURT'S DUBIOUS CUMULATIVE ANALYSIS AND ERRONEOUS LEGAL ANALYSIS.**

**1. Adequacy of Lower Court's Cumulative Analysis.**

The lower court appears to have conducted no meaningful cumulative analysis of the overwhelming evidence in this record. Yet even without conducting the required analysis, the lower court concluded that "[n]o reasonable juror would place much credence in the testimony of these informants" (PC-R3. 1396). That being said, and in light of this Court's clear statement that the "graphic details" of the crime testified to by Chavers and Carson raised a "serious doubt" as to the existence of several of the aggravators, Lightbourne, 742 So. 2d at 249, it is difficult to fathom how confidence is not undermined in the outcome of the penalty phase at this time.

Mr. Lightbourne agrees fully with the lower court's determination that Chavers and Carson "were acting out of self-interest and hope of personal gain" when they testified at Mr. Lightbourne's trial, and that they would "say most anything to help themselves" (PC-R3. 1396). This is, of course, the heart of the Brady and Giglio violations which occurred in this case. At trial, Chavers testified that everything he knew about the O'Farrell murder came from Mr. Lightbourne (R. 1124; 1144), that he was not promised anything

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<sup>20</sup>Timothy Bradley, the public defender who represented Carson on the Marion County charges, confirmed that his notes from his first meeting with his client on February 23, 1981, do not reflect a discussion of a plea bargain (PC-R2. 506). He testified that he did not negotiate a plea agreement and that he did not know why his client was offered time served (Id.). Bradley testified that he did not know that Carson was assisting the State in Mr. Lightbourne's case and that he would have been forced to discontinue his representation because of the conflict of interest created by his office's representation of Mr. Lightbourne (PC-R2. 503). Assistant State Attorney Simmons, who received Carson's request for help in Hillsborough County, acknowledged calling Hillsborough County on Carson's behalf (PC-R2. 435). Although he was unaware of the Marion County charges, Simmons admitted that he "was going to help him with his cases in Tampa" (PC-R2. 438).

in exchange for his testimony (R. 1124), that he was released from jail on February 10, 1981, only 19 days before completing his sentence (R. 1119), and that although he had 3 other charges pending against him when he was released, he was released on his own recognizance on one of the charges, that he posted a \$5,000 bond on the others, and that trial was still pending on all three charges (R. 1165). It is now known that Chavers' trial testimony was false and that the State withheld evidence which impeached Chavers' representations to the jury.

As for Carson, he too testified at trial that everything he knew about the O'Farrell murder came from Mr. Lightbourne (R. 1179). Carson also testified that he was arrested in November, 1980 (on accessory to grand theft), and was released on March 3, 1981 because the State had insufficient evidence against him (R. 1181). After more than 3 months in jail, Carson was released approximately one week after providing evidence against Mr. Lightbourne (R. 1195). However, he testified that he worked out a plea agreement by which he would receive time served **before** he provided information against Mr. Lightbourne: "We had a plea bargain before all this occurred. All right. This was about - before I talked to Lightbourn[e]. this was about a week - they had come to me with time served" (R. 1180-81). It is now known that Carson too provided false testimony to at Mr. Lightbourne's trial:

Carson testified that, in fact, Lightbourne had not admitted any involvement in the crime whatsoever and that he was motivated to testify falsely against Lightbourne because he was under charges for accessory to grand theft at the time and that the State had him in a "do or die" situation. Carson claimed that the officers told him that they would ensure that his sentence on the charge was "max[ed] out" if he did not cooperate, and if he did, he would receive a "time served" sentence. Carson claimed that his charges were "dropped" after he testified in the Lightbourne case and that the officers also agreed to help him on charges he was facing in Hillsborough County.

Lightbourne, 742 So. 2d at 244.

Thus, Mr. Lightbourne agrees with the lower court that Chavers and Carson were such unreliable witnesses that "[n]o reasonable juror would place much credence in the testimony of these informants" (PC-R3. 1396). Yet, overlooking the legal significance of its findings, the lower court concluded that Emanuel's testimony "adds nothing of value" to Mr. Lightbourne's Brady and Giglio claims (Id.). This is flatly contrary to this Court's mandate to the lower court to conduct a cumulative analysis after consideration of Emanuel's testimony. Lightbourne, 742 So. 2d at 249. To find that Emanuel "adds nothing" to Mr. Lightbourne's claim is to ignore the record and simply deny relief without any meaningful legal or factual analysis. Uttering the "magic words" in conclusory fashion, as the lower court clearly did, cannot substitute for a principled cumulative analysis mandated by this Court. See Sochor v. Florida, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) ("An appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion"); Clemons v. Mississippi, 494 U.S. 738, 753 (1990) (remanding to lower court for "a detailed explanation based on the record" when lower court failed to undertake an explicit analysis supporting its "cryptic" one-sentence conclusion of harmless error).

The abundance of evidence that has been presented since 1990 supports Mr. Lightbourne's Brady/Giglio, newly discovered evidence and Henry claims. As did Chavers and Carson, Emanuel testified repeatedly that he was approached by law enforcement agents, who asked him to get information as to whether Mr. Lightbourne had murdered someone (PC-R3. 921). As did Chavers and Carson, Emanuel testified that he never heard Mr. Lightbourne say that he killed anyone (PC-R3. 922). While this Court recognized the consistency between Chavers' affidavit and Carson's testimony, the consistency between Richard Carnegia's testimony and both statements, and the consistency between Carnegia's testimony and Emanuel's proffered deposition, Lightbourne, 742 So. 2d 238 at 244-48, the circuit court found that "much of their testimony is inconsistent, contradictory, and just not worthy of much belief" (PC-R3. 1396). It is unclear what

"testimony" the lower court is referring to; certainly, Mr. Lightbourne agrees that Chavers' and Carson's trial testimony was "not worthy of much belief." To the extent that the lower court is referring to the post-trial evidence, this finding is unsupported by any evidence (particularly the unrefuted documentary evidence), and is due no deference on appeal. Significantly, as to the Brady aspects, that the lower court apparently disbelieved the testimony of Chavers and Carson is of no moment. As the Supreme Court explained, the observation by a post-trial judge on a witness' credibility "could [not] possibly have affected the jury's appraisal of [the witness'] credibility at the time of [ ] trial." Kyles, 514 U.S. 449 n.19.

The lower court also indicated that "all the jailhouse informants were acting out of self-interest and hope of personal gain" and "would say almost anything to help themselves." Mr. Lightbourne agrees that Chavers and Carson were acting out of "self-interest" when they testified at trial; however, the lower court overlooked that these precise findings undermine confidence in the outcome of the penalty phase.

The circuit court further wrote in conclusory fashion that "Emanuel's testimony is so lacking in credibility that it is clear why the State did not call him as a witness at trial," referring to the testimony of Major LaTorre in support of this finding (PC-R3. 1396). This finding is completely lacking in any record support. First of all, what exactly was it that Emanuel testified to that was supposedly not credible? His name? His criminal history? That he was in the Marion County Jail? That he signed an affidavit and was deposed in this case? Emanuel testified for over 100 pages of transcript. What exactly was it that was "so lacking in credibility"? The lower court, other than making a bald assertion, provides no facts or other insight. Incanting the "magic words" of "no credibility" does not substitute for a principled explanation of why the court is making such a finding, for such findings are subject to the "competent and substantial evidence" standard. Way, 760 So. 2d at 911-12. In Mr. Lightbourne's case, it is clear (and unrefuted) from LaTorre's testimony that the reason he did not use Emanuel's assistance in the Lightbourne case had nothing to do with his lack of credibility (PC-R3. 1070; 1075).

In its 1999 opinion, this Court cautioned that "the trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision." Lightbourne, 742 So. 2d at 247. However, the trial court does not appear to have conducted such an analysis. Even though the order indicates that Chavers and Carson lied at trial and that "[n]o reasonable juror would place much credence in the testimony of these informants, except such as is corroborated by independent evidence" (PC-R3. 1396), the trial court's order does not reflect any meaningful consideration of the impact that Chavers' and Carson's trial testimony had at the penalty phase.

**2. Relief is Required under Brady, Giglio, Jones, and Henry.**

Mr. Lightbourne submits that, in light of the record as it now stands, he is entitled to relief under any of the legal standards attendant to the facts of this case: Mr. Lightbourne has established (1) that the State withheld material evidence in violation of Brady, (2) that the State presented false evidence in violation of Giglio, (3) that this evidence constitutes newly-discovered evidence under Jones and Mills, and that (4) the State's use of Chavers and Carson as agents violated Henry.<sup>21</sup>

(a) **Brady and Giglio violations.** This Court's 1999 opinion could not have been clearer. In unmistakable language, the Court wrote that it was "difficult to discount the probable effect the evidence

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<sup>21</sup>Mr. Lightbourne recognizes that the Henry aspect of this claim was resolved by the Court's 1999 opinion. However, the lower court did re-consider this issue in light of Emanuel's testimony. Thus it will be addressed in this appeal.

would have on the penalty phase because of the potential significance of Chavers' and Carson's testimony as to several of the aggravators." Lightbourne, 742 So. 2d at 249. The Court further unambiguously wrote that "there is serious doubt about at least two of these aggravators--HAC and committed to avoid arrest." Id. Yet despite finding that "[no] reasonable juror would have placed much credence" on the testimony of Chavers and Carson, the lower court found that Mr. Lightbourne was not prejudiced by the Brady and Giglio violations. These two conclusions are utterly at odds with each other and with this Court's 1999 opinion.

As the Court discussed in its 1999 opinion, the evidence supporting several of the aggravators came solely from the testimony of Chavers and Carson. On direct appeal, this Court affirmed the trial court's finding of the following aggravating factors: commission during a burglary and sexual battery; avoiding arrest; pecuniary gain; heinous, atrocious or cruel. Lightbourne v. State, 438 So. 2d 380, 390-91 (Fla. 1983). The facts relied on by this Court in upholding those aggravating factors focused on the evidence that there was a sexual assault which came exclusively from the testimony of Chavers and Carson.<sup>22</sup> In support of the commission of the felony aggravating factor alleging sexual assault, this Court noted that "[t]estimony revealed that the defendant had admitted surprising the victim in her home" and that "[d]uring the burglary the victim was forced into acts of oral sex and intercourse as she begged him not to kill her." Id. These details are directly from Mr. Chavers' testimony:

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

. . .

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

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

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

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

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

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

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<sup>22</sup>See Lightbourne v. Dugger, 829 F. 2d 1012, 1035 (11th Cir. 1987) (Anderson, J., concurring in part and dissenting in part) ("Chavers' testimony contained the only direct evidence of oral sexual assault on the victim as well as the only graphic descriptions of the sexual attack and comments by the defendant about the victim's anatomy").

that the trial court's finding of heinousness is at material variance with the facts. Id. (emphasis added). As in the discussion of during the commission of a sexual assault aggravating factor, this language mirrors the testimony of Chavers and Carson.

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

Q When you arrived at the scene of the homicide was there any evidence that indicated to you at that time that the victim had been sexually battered?

A Not that I would have been specifically cognizant of at that time.

Q Okay. In fact, what was this -- was the victim clothed at the time you arrived at the scene?

A Partially, yes.

Q Okay. Could you explain to the Court what she was wearing?

A She was wearing a bra and panties.

Q Was there any indication at the scene that there had been a struggle?

A Not really, no.

(PC-R. 1180). Dr. Gertrude Warner, the medical examiner, testified at the trial and agreed that there was no evidence to indicate that a sexual assault had occurred (R. 742, 763). Dr. Warner also testified that there was no indication that O'Farrell had engaged in oral sex, contradicting Chavers' testimony that Mr. Lightbourne forced her to perform oral sex "over and over" (R. 1116). Thus, Chavers and Carson were the only sources of evidence for these details that were used to support numerous aggravating factors. Without this testimony, the State could not have argued for the death penalty.<sup>23</sup>

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

[T]he role that those two witnesses played was a crucial one because it changed the nature of the case from being bookended with a murder weapon that was used to inflict the deadly shot, to being one where there was [sic] now two people saying that, from the Defendant's own mouth, that he had, in fact, committed not only this homicide, but had done other actions which constituted the bases of the indictment or, in this case, which was the sexual battery and/or burglary theft.

And it also introduced the aggravating factor or pecuniary gain in connection with another felony; and by saying that it was to eliminate a witness, throwing in another aggravating factor, potentially cold, calculated and premeditated, to avoid a lawful arrest.

So many of the aggravating factors in this case, as well as the judgment of acquittal phase, all of those things were greatly enhanced by the testimony of these two witnesses, and, in fact, were probably the only evidence as to those factors.

(PC-R2. 473-74).

It simply cannot be legally concluded that confidence is not undermined in this case when the jury hears false testimony to the effect that Mr. Lightbourne had the victim "crawling around on the floor and sucking his penis" and the victim was "screaming and hollering" (R. 603-604). In rejecting Mr.

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<sup>23</sup>The State conceded at the 1995 hearing that there was no other evidence, aside from Chavers and Carson, proving a sexual assault (PC-R2. 672).

Lightbourne's Brady and Giglio claims, however, the lower court barely discussed the controlling legal standards; the little that is discussed in the lower court's order reflects that it employed incorrect legal standards.<sup>24</sup> As to the Brady claim, the lower court wrote that one of the questions it needed to consider was "[w]hether there is a reasonable probability of a different result as to the imposition of the death penalty in the event of a new penalty phase hearing" (PC-R3. 1395) (citing Kyles v. Whitley, 514 U.S. 419 (1995)). Making no findings whatsoever with respect to the various elements of a Brady claim,<sup>25</sup> the lower court, in conclusory fashion, simply parroted back (in part) his earlier statement, writing "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" (Id. at 1396). Both formulations of the law as expressed by the lower court are erroneous. The focus of a Brady claim is the proceeding being challenged, that is, the outcome of Mr. Lightbourne's penalty phase proceedings; it is not whether Mr. Lightbourne would likely be sentenced to death at a new penalty phase. As this Court has explained:

the focus in postconviction Brady-Bagley analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

Young v. State, 739 So. 2d 553, 559 (Fla. 1999). Thus, Mr. Lightbourne need not demonstrate "a different result . . . in the event of a new penalty phase," as the lower court erroneously concluded (PC-R3. 1395). The lower court's requirement that Mr. Lightbourne establish that he would not be resentenced to death at a hypothetical new penalty phase is impossible to meet and legally erroneous.

Moreover, the standard under Brady is not whether there is a "reasonable possibility" of a different result, as the lower court concluded (PC-R3. 1396). The well-established standard is whether there is a "reasonable probability" of a different result. Kyles, 514 U.S. at 434-36; United States v. Bagley, 473 U.S. 667, 678 (1985). As the Supreme Court has explained, "the adjective is important," and a test requiring that a defendant demonstrate a "possibility" of a different result is contrary to Bagley, which only requires that "the favorable evidence could reasonably be taken in such a different light as to undermine confidence in the verdict." Young, 739 So. 2d at 557 (quoting Kyles, 514 U.S. at 434-36). Accord Strickler v. Greene, 527 U.S. 263, 300 (1999) (Souter, J., concurring in part and dissenting in part) (the "reasonable possibility" standard and "the reasonable probability" standard "express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers' reasoning").

In light of the overwhelming nature of the evidence, and once the proper legal standards are applied, Mr. Lightbourne is entitled to relief under Brady. This Court has emphasized "the State is obligated to disclose to a defendant all exculpatory evidence in its possession." Young v. State, 739 So. 2d 553, 558 (Fla. 1999). Accord Rogers v. State, 782 So. 2d 373 (Fla. 2001); State v. Huggins, 788 So. 2d

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<sup>24</sup>In fact, the lower court did not even discuss the Giglio aspects of the evidence at all, despite the fact that it was extensively brief in Mr. Lightbourne's post-hearing memorandum (PC-R3. 1100; 1135-36; 1138).

<sup>25</sup>These elements are (1) the evidence must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State; (3) and prejudice must have ensued. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); State v. Huggins, 788 So. 2d 238, 242 (Fla. 2001).

238 (Fla. 2001); Hoffman v. State, 26 Fla. L. Weekly S438 (Fla. July 5, 2001). In Young, the Court determined that information withheld from the defense was material because it directly went to establishing aggravating circumstances and a resentencing was ordered. Mr. Lightbourne's situation is not distinguishable. The evidence is overwhelming: five witness have now stated that law enforcement agents were aware that Ian Lightbourne never confessed, because they in fact solicited the fabrication. Chavers and Carson have recanted, and their recantations are fully supported by independent evidence including Emanuel's testimony;<sup>26</sup> Chavers' taped conversation with Assistant State Attorney James Phillips (PC-R3. 1153-69); Chavers' ongoing relationship as an informant with the Ocala police department (PC-R. 553-54, PC-R3. 928); testimony of bail bondsman David Bailie (PC-R3. 1179); documents showing that Chavers' received \$200.00 from LaTorre less than two hours before he gave the detailed statement incriminating Lightbourne (PC-R. 204); letters written by Chavers to Assistant State Attorney Al Simmons confirming that a deal was made in exchange for his testimony (PC-R3. 1212); and Carson's letters to the State Attorney's Office (PC-R3. 1222).

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<sup>26</sup>During the 1995 evidentiary hearings, Mr. Lightbourne presented the testimony of his trial attorneys on the issue of the importance of Emanuel's disclosures. Mr. Burke confirmed that he did not know at the time that Emanuel had information that Mr. Lightbourne had not made incriminating statements in the cell and that he would have used the information had it been disclosed (PC-R2-472). Mr. Fox confirmed that the information from Emanuel would have been significant for Mr. Lightbourne's defense:

Q Was - as Mr. Lightbourne's trial attorney, is this information significant to you?

A Yes. I mean, the Emanuel affidavit, Carnegia's testimony, Carson's letter all say the things which I could only suspect and not establish:

That the police had intentionally - at least, at the very least, intentionally placed witnesses with Lightbourne to solicit testimony. If that were true, then that brings up the suppression issue under Massiah-Henry.

It goes beyond that, that they attempted to get people to testify who told them things which he did not tell them. Not only were they placing them there; if they would not obtain information, they wanted them to fabricate the information. Those efforts would be most helpful in undermining the credibility of Chavers and Carson.

(PC-R2. 534-35).

In assessing the reliability, or lack thereof, of Mr. Lightbourne's penalty phase, the Court must also consider the mitigation that was not presented due to ineffective assistance of counsel. In its recent opinion, this Court noted that the trial court found only two mitigators: no significant history of criminal activity and Mr. Lightbourne's relative youth. Lightbourne, 742 So. 2d at 241. The Court also noted that aside from Mr. Lightbourne's own brief testimony that "he was twenty-one years old, a Bahamian citizen, and a father of three who had never been convicted of a crime as an adult[,] . . . [n]o other mitigating evidence was presented to the jury." Id. at 240-41.

Substantial mitigation, however, did not reach Mr. Lightbourne's jury. Numerous affidavits and other documentary evidence establishing a wealth of mitigating evidence was never heard by Mr. Lightbourne's jury. See PC-R3. 1223-1325. Because Mr. Lightbourne was never granted an evidentiary hearing on his penalty phase ineffective assistance of counsel claim, Lightbourne v. State, 471 So. 2d 27 (Fla. 1985), the mitigation evidence that the jury did not hear must be taken as true, and must now be reconsidered as part of the cumulative analysis to determine whether the outcome of Mr. Lightbourne's sentencing phase was constitutionally reliable.

In addition to a Brady violation, Mr. Lightbourne has established a clear Giglio violation. Unlike a Brady claim, which need not result from knowing or intentional action, the presentation of false testimony, and the failure to correct it, is a "corruption of the truth-seeking process." United States v. Agurs, 427 U.S. 97, 104 (1976). When the prosecution "knew, or should have known, of the perjury," id. at 103, due process requires that it be corrected or that relief be granted if the false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." Williams v. Griswald 743 F. 2d 1533, 1543 (11th Cir. 1984) (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)). The standard for establishing a Giglio violation is less onerous than for a Brady violation. Agurs, 427 U.S. at 97.27

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<sup>27</sup>Mr. Lightbourne is aware of this Court's recent opinion in Rose v. State, 774 So.2d 629 (Fla. 2000), where the Court wrote that "[t]he standard for determining whether false testimony is 'material' under Giglio is the same as the standard for determining whether the State withheld 'material' evidence in violation of Brady." Id. at 635. Most respectfully this Court's interpretation of the Giglio standard was erroneous. In Agurs, the Supreme Court explained that the post-trial discovery of suppressed information can give rise to several different legal claims. One type of claim occurs where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." Agurs, 427 U.S. at 103. In this type of situation, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. Unlike a Brady-type situation where no intent to suppress is required to be demonstrated, a "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." Id. at 104. Thus, although both Brady and Giglio require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. Thus, the standard for establishing "materiality" under Giglio has "the lowest threshold" and is "the least onerous." United States

It is clear the testimony of Chavers and Carson was false; indeed, the lower court explicitly found that "much of their testimony is inconsistent, contradictory, and just not worthy of much belief" (PC-R3. 1396). The court also found that "no reasonable juror would place much credence in the testimony of these informants, except such as is corroborated by independent evidence" (Id.). Given these findings, coupled with the reality that there was no independent evidence to support several of the aggravating factors, as this Court explicitly found in its 1999 opinion, that a Giglio violation occurred in this case is not a matter of dispute, and relief should be granted.

**(b) Relief is required under Jones and Mills**

Mr. Lightbourne is also entitled to relief on the basis of the newly-discovered evidence standards set forth in Jones v. State, 709 So. 2d 512 (Fla. 1998), and State v. Mills, 788 So. 2d 249 (Fla. 2001). The lower court concluded that "the presentation of this new evidence at a penalty phase hearing would probably not produce a different result" (PC-R3. 1396), yet this bald conclusion was made with no legal analysis or factual explanation. As such, it is deficient and, on *de novo* review, this Court must conclude otherwise.

The newly-discovered evidence of the falsity of the testimony of Chavers and Carson, the documentary evidence supporting such, and the impeachment which is newly-discovered clearly establish Mr. Lightbourne's entitlement to relief. Emanuel confirms that law enforcement agents recruited inmates to elicit incriminating statements from Mr. Lightbourne and promised benefits in exchange for cooperation and that the State knowingly presented false testimony. This newly discovered evidence undermines confidence in the outcome of the penalty phase and/or would have resulted in a different outcome because Chavers and Carson provided highly prejudicial testimony that made a conviction more likely and were the only source of evidence supporting the aggravating factors that resulted in a death sentence.

Suffice it to say that there is more than a reasonable probability of a different outcome at a new penalty phase if the jury were to hear that Chavers had written letters to the prosecutor boasting that he "lied to help get what you wanted, that black nigger on death row" (PC-R3. 1204), and reminding the prosecutor about "the man I lied on and help your office put on death row" (PC-R3. 1209). Suffice it to say that there is more than a reasonable probability of a different outcome at a new penalty phase if the jury were to hear that the State Attorney's Office own investigator opined that Chavers "was always one to come up with some type of something that he thought would be beneficial to him" (Id. at 1065). The list goes on, as demonstrated throughout this brief.

Furthermore, the lower court arrived at its summary conclusion without regard for the apparent contradiction between the legal conclusion it reached and the findings that "much of [Chavers' and Carson's] testimony is inconsistent, contradictory, and just not worthy of much belief" and that "no reasonable juror would place much credence in the testimony of these informants, except such as is corroborated by independent evidence" (PC-R3. 1396). In light of these findings, Mr. Lightbourne has established his entitlement to relief under Jones and Mills.

**(c) Henry violation.**

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v. Anderson, 574 So. 2d 1347, 1355 (5th Cir. 1978). See also Craig v. State, 685 So. 2d 1224, 1232-34 (Fla. 1996) (Wells, J. concurring in part and dissenting in part) (discussing differing legal standards attendant to Brady and Giglio claims). Mr. Lightbourne submits that the analysis in Rose is erroneous and should be abrogated or clarified.

In light of Emanuel's testimony, Mr. Lightbourne submits that the Court should reconsider the issue that Chavers and Carson were agents of the State deliberately placed in Mr. Lightbourne's cell to elicit incriminating statements, in violation of United States v. Henry, 447 U.S. 264 (1980), and Massiah v. United States, 377 U.S. 201 (1964). In addition to being valuable impeachment evidence that was withheld from Mr. Lightbourne's trial attorneys, this evidence goes to the suppression of Chavers' and Carson's statements.<sup>28</sup>

There is sufficient evidence in the record since 1990 indicating that law enforcement agents placed Chavers, a well-known, often used informant, into Mr. Lightbourne's cell with instructions to obtain a confession from him. Additionally, Carson was also instructed by law enforcement agents to obtain information regarding a weapon and a necklace with a pendant on it (PC-R2. 370). It is known from Emanuel that shortly after he was placed in the cell with Mr. Lightbourne, he too was approached by law enforcement officers who asked him to get information as to whether Mr. Lightbourne had killed anyone (PC-R3. 921). This Court agreed that "all of Lightbourne's cellmates from 1981 who have now been located, either by hearing testimony, deposition or affidavit, corroborate Lightbourne's claims that agents of the State may have actively solicited testimony against Lightbourne." Lightbourne, 742 So. 2d at 248. The testimony of all the cellmates shows that not only were snitches used by law enforcement to elicit information from Mr. Lightbourne, but when Mr. Lightbourne failed to confess, law enforcement agents told the informants to lie (PC-R2. 371). Mr. Lightbourne submits that he is entitled to relief under Henry.

**E. CONCLUSION**

Based on Emanuel's corroborating testimony, as well as all the evidence previously presented, Mr. Lightbourne has established that the trial testimony of Theodore Chavers and Theophilous Carson is unreliable and untrustworthy. Mr. Lightbourne is entitled to a new penalty phase proceeding. Additionally, Mr. Lightbourne continues to assert his right to a new trial. Mr. Lightbourne recognizes this Court addressed this issue in its latest opinion; however, that decision was made without the benefit of hearing Emanuel's testimony as well as the information regarding the conflict of interest. See Argument II, infra. Mr. Lightbourne thus asserts that this Court should reanalyze his entitlement to a new trial based on the facts and arguments in this brief.

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<sup>28</sup>The lack of this kind of evidence divided this Court on direct appeal. While the majority rejected Mr. Lightbourne's Henry claim, Justice Overton in a dissenting opinion found that the evidence was sufficient to establish a violation. With the addition of the newly discovered evidence discussed elsewhere in this brief, this Court must reconsider whether the State violated Henry.

ARGUMENT II

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

Mr. Lightbourne's rights to due process and equal protection were violated because Assistant State Attorney Reginald Black, a material witness to Mr. Lightbourne's Brady, Giglio, and Henry claims, participated as counsel for the State. Mr. Lightbourne discovered during the February 1996 deposition of Larry Emanuel that in 1981, Mr. Black represented Mr. Emanuel and received information from Mr. Emanuel concerning the State's recruitment of inmates to elicit incriminating statements from Mr. Lightbourne and the State's knowing use of false testimony.

At the March 15, 1996, hearing, Black disputed Emanuel's memory of when he represented him and claimed that the Marion County Clerk's files support his argument (PC-R2. 195).<sup>29</sup> Black stated that he represented Emanuel on two cases beginning in 1980 but that his representation of Emanuel ended in December 1980 (PC-R2. 195-96). Black concluded that Emanuel could not have told him about his role in Mr. Lightbourne's case because he ended his representation of Emanuel before Ms. O'Farrell's murder (PC-R2. 197). Black also stated that even if Mr. Emanuel had communicated this information to him, he had forgotten it (PC-R2. 197-98).

After denying the motion to disqualify Black, Judge Angel admitted that Emanuel might have told the truth at his deposition and that the court records did not conclusively prove that Emanuel never told Black about his role in the prosecution of Mr. Lightbourne (PC-R2. 256-64). The court acknowledged that the court records offered by the State are "a little bit ambiguous" and that "Mr. Emanuel's testimony and recollection may be considerably accurate" (PC-R2. 256). Judge Angel also admitted that "the record is . . . not quite clear;" "the record here is incomplete;" and that he "just can't tell from the record" whether Mr. Emanuel's memory is accurate (PC-R2. 256-58). Judge Angel also noted that even if Black was correct about the time during which he represented Emanuel, Emanuel's memory of telling Mr. Black about his role in Mr. Lightbourne's case could also be accurate: "[Mr. Emanuel] could have probably been in doubt as to who, in fact, was representing him; and, to cover the waterfront, notified everybody, or the two attorneys that he had had contact with" (PC-R2. 263).

At the 1999 evidentiary hearing, Emanuel confirmed his deposition testimony that he informed Black on at least one occasion of the State's recruitment of inmates to elicit incriminating statements from Mr. Lightbourne and the State's knowing use of false testimony. Likewise, court records reflect that Mr. Emanuel's testimony is accurate.

Furthermore, at the 1999 hearing, contrary to his previous testimony in 1996, Black acknowledged that he could have been involved in representing Mr. Emanuel through January 1981 (PC-R3. 180), and that he

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<sup>29</sup>Mr. Black also argued at that time, and Judge Angel seemed inclined to agree, that the issue whether Emanuel was a State agent and Mr. Black knew of and withheld this information was irrelevant because Emanuel did not testify at Mr. Lightbourne's trial (PC-R2. 221). The State ignored that Emanuel's testimony, like that of the wealth of other evidence such as Carnegia's testimony and the affidavit of Jack Hall, neither of whom testified at the trial, was relevant to corroborate the recantations of Chavers and Carson. In its 1999 opinion, this Court eventually disagreed with the State's position.

was in the courtroom with Emanuel at least once, if not more, during the period of June 1980 to January 1981 (PC-R3. 181). Because of his lack of memory, Black was "not in any position to say that I did or did not have any conversations with Mr. Emanuel about any subject, including whether or not he was part of the Lightbourne case" (PC-R3. 1034). In the face of his connection to Larry Bernard Emanuel, Black continued to prosecute Mr. Lightbourne's case in post-conviction and participated in numerous evidentiary hearings (PC-R3. 1030).<sup>30</sup> Mr. Lightbourne submits that Black's dual role in this case violated due process. Below, the State urged Judge Angel to find Emanuel lacking in credibility, lambasting Emanuel for his lack of memory about certain events and because he "waited fifteen years" to come forward (PC-R3. 1342-57). Of course, the only reason that Emanuel did not testify until 1999 was that the lower court, at the express urging of Assistant State Attorney Reginald Black, who knew that he had previously represented Emanuel and who knew that Emanuel was alleging that he had told Black of his involvement in Mr. Lightbourne's case during the course of that legal representation, procedurally barred the issue and refused to permit Mr. Lightbourne to present Emanuel's testimony. Given that Black has now acknowledged that he represented Emanuel as late as January, 1981, and his inability to dispute Emanuel's testimony that he had told Black about what was going on with Mr. Lightbourne's case, Black's attempts to ensure that Larry Emanuel never got into a witness chair and tell the truth are shocking and a palpable violation of due process. Had Emanuel testified years ago, perhaps his memory would have been clearer on some details (although his memory of significant events was not impaired). The State's attempts to attack Emanuel, however, for his purported "memory lapses" and his "failure" to come forward until 1999 are disingenuous and ring hollow in light of Black's efforts to keep Emanuel from testifying.

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

(a) **When a Lawyer May Testify.** A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;
- (3) the testimony relates to the nature and value of the legal services rendered in the case; or,

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<sup>30</sup>Black's "active" involvement in Mr. Lightbourne's case ended in 1996, but he maintained a role as a consultant on the case (PC-R3. 1076). In fact, Black did have a direct involvement in locating and securing Emanuel's presence at the most recent hearing (PC-R3. 1036). Following the 1999 remand, Black "initiated activity by Investigator Ken Rahm of [their] office to attempt to locate Mr. Emanuel, which he did...within a week or several weeks, a few weeks found him to be in custody in Houston, Texas" (R. 127). Black could not remember if Rahm had found Emanuel already in custody or if custody had been secured after Rahm spoke to Mr. Emanuel's probation officer in Texas (R. 128). However, an e-mail presented by counsel for Mr. Lightbourne confirms that on July 12, 1999, Rahm spoke to the probation officer in Texas, Emanuel was not in custody at that time, and the probation officer would contact Rahm as soon as he was located (PC-R3. 129, Defense Exhibit 4). After Black had a felony information filed in Marion County against Emanuel, Emanuel was not too long thereafter arrested in Texas.

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

None of the exceptions to the rule applies here. Black's knowledge relates to whether the State withheld exculpatory evidence regarding Emanuel's role as a State agent instructed to elicit incriminating statements from Mr. Lightbourne. Thus, he was a witness. The Eleventh Circuit Court of Appeals has explained that "a prosecutor must not act as both prosecutor and witness." United States v. Hosford, 782 F.2d 936, 938 (11th Cir. 1986). Florida state courts have also recognized the conflict inherent in a situation where, as in Mr. Lightbourne's case, a lawyer plays the dual role of prosecutor and witness. In State v. Christopher, 623 So. 2d 1228 (Fla. 3rd DCA 1993), the court explained:

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

Id. at 1229 (citations omitted). There have been a number of cases which have held that the disqualification required by this rule does not require disqualification of the entire state attorney's office. In State v. Clausell, 474 So. 2d 1189 (Fla. 1985), this Court found that where the Assistant State Attorneys who would be witnesses were not the assigned attorneys representing the State in the matter, disqualification of the entire office was not warranted absent actual prejudice. The opinion implicitly recognizes that the "advocate-witness" rule precluded a prosecutor who was a witness in a case from also acting as prosecutor. Similarly, in Meggs v. McClure, 538 So. 2d 518 (1st DCA 1989), the individual who was the witness was not acting as the prosecutor in the case. The court refused to disqualify the entire office absent actual prejudice.

Because Black was clearly a material witness to Mr. Lightbourne's Brady and Henry claims based on his representation of Emanuel and his receipt of exculpatory information that was withheld from Mr. Lightbourne's trial attorneys, Black's continued involvement in Mr. Lightbourne's case, particularly his successful argument that the Emanuel issue was procedurally barred, has prejudiced Mr. Lightbourne. Despite having represented Emanuel, Black argued to the circuit court that Emanuel's testimony should not be heard. Despite having represented Emanuel and being privy to the exculpatory information, Black has argued that Mr. Lightbourne's evidence should not be believed. Mr. Lightbourne is entitled to relief.

### ARGUMENT III

#### THE LOWER COURT ERRED IN DENYING COLLATERAL COUNSEL'S MOTION TO WITHDRAW DUE TO A CONFLICT OF INTEREST.

In July, 1999, pursuant to the remand of this Court, the undersigned counsel was assigned to represent Mr. Lightbourne. Mr. Lightbourne had been previously represented by other attorneys, and the undersigned had never been previously involved in the case. At that time, the undersigned was representing Sonny Boy Oats, another death sentenced inmate, in his federal habeas corpus proceedings in the United States District Court for the Middle District of Florida, the Eleventh Circuit Court of Appeals, and the Supreme Court of the United States. Mr. Oats' petition for a writ of certiorari from the denial of habeas corpus relief was denied on June 14, 1999 (just prior to the remand in Mr. Lightbourne's case).

In preparing for the 1999 evidentiary hearing in Mr. Lightbourne's case, counsel for Mr. Lightbourne discovered that he has a conflict of interest due to the involvement of witness Larry Emanuel. Emanuel was, of course, a key witness in Mr. Lightbourne's case at the present time. However, Emanuel was also implicated as a co-defendant in the crime for which Mr. Oats was eventually convicted and sentenced to death,<sup>31</sup> and was given immunity for his participation in the crime for which Mr. Oats was eventually convicted and sentenced to death.

In order to avoid having to further delay the proceedings in Mr. Lightbourne's case, the undersigned first filed a motion to withdraw from Mr. Oat's case. After hearing argument on the motion, Judge Angel, the same judge presiding over Mr. Lightbourne's case, denied the motion.<sup>32</sup> Prior to the start of Mr. Lightbourne's evidentiary hearing, counsel moved to withdraw from Mr. Lightbourne's case since the conflict had not been resolved (PC-R3. 913). This motion was likewise denied (*Id.*).

During the testimony of Emanuel, the State inquired regarding his role in the Sonny Boy Oats case. Although the undersigned conceded that the written statement made by Emanuel in the Oats case pertained only to the Oats case, the State continued to pursue questions regarding the Oats statement (PC-R3. 964, 969-73). The State cross-examined Emanuel on the substance of his written statement in the Oats case (PC-R3. 968, 971, 972) and questioned its veracity (PC-R3. 973). The undersigned continued to object throughout the questioning due to the ongoing conflict of interest (PC-R3. 970-73).

The lower court erred in denying collateral counsel's repeated motions to withdraw, particularly when the State made it clear that it was going to question Emanuel about his role in the Oats case as well as the veracity of the statements he made to law enforcement during the Oats investigation. In fact, the prosecutor below represented to the court that "I believe that the witness is going to say that everything that [Emanuel] said in this statement [to law enforcement in the Oats case] was not true" (PC-R3. 970). Although Emanuel did reaffirm the veracity of the information he gave to the police in the Oats case (*id.* at 971-73), the conflict remained, as the undersigned was not in a position to question Emanuel on this matter due to his simultaneous representation of Mr. Oats. For example, the prosecutor represented to the court that he believed that Emanuel had lied to police in the Oats case; because counsel also represented Mr. Oats, he was not in a position to inquire more specifically about this, as it was certainly not in Mr.

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<sup>31</sup>Emanuel never testified, however, at Mr. Oats' trial.

<sup>32</sup>On motion of the State, both appeals taken by collateral counsel seeking review of Judge Angel's disposition of the conflict issue in Mr. Oats' case were dismissed. *Oats v. State*, 753 So. 2d 565 (Fla. 2000); *Oats v. State*, 789 So. 2d 347 (Fla. 2001).

Lightbourne's interest for his attorney to be questioning Emanuel about whether he told the truth to police in another capital case. Because counsel does not and cannot know the extent to which the lower court contemplated the prosecutor's representation that Emanuel lied to police in the Oats case in resolving the issues in Mr. Lightbourne's case, the conflict is apparent, and the motion to withdraw should have been granted. See Guzman v. State, 644 So. 2d 996 (Fla. 1994). Relief is warranted.

CONCLUSION

In light of the foregoing arguments, Mr. Lightbourne submits that he is entitled to relief in the form of a new trial and/or a resentencing proceeding.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to all counsel of record on September 10, 2001.

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CERTIFICATE OF FONT

Counsel certifies that this brief is typed in Courier 12-point font.