IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,303

RAYMOND ROBERT CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
MARTIN J. McCLAIN
JULIE D. NAYLOR

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's denial of Mr. Clark's motion for post-conviction relief. See Fla. R. Crim. P. 3.850. No evidentiary hearing was conducted. In this brief, the record on Mr. Clark's earlier direct appeal to this Court shall be cited as "ROA [page number]," and the transcript of the arguments presented to the lower court in this action shall be cited as "Tr. [page number]." All other references are self-explanatory or will be otherwise explained.

RENEWED MOTION FOR ORAL ARGUMENT

The instant brief is being filed, with leave of the Court, pursuant to this Court's Order granting Mr. Clark's motion for permission to brief the issues presented in the Fla. R. Crim. P. 3.850 motion. In his motion for leave, Mr. Clark also requested that the Court permit oral argument on the claims raised. The Court declined to provide a date for oral argument. Mr. Clark herein renews the latter request. Although counsel for Mr. Clark understands the serious scheduling difficulties facing the Court at this time, we nevertheless respectfully urge that the Court allow oral argument given the special circumstances involved in this action. This is a capital case, and this Court's disposition of the issues involved will literally determine whether Mr. Clark lives or dies. This case involves a number of claims which, in undersigned counsel's opinion, are as significant as any previously presented to this Court. For example, counsel's research has disclosed no precedent in which this Court has squarely addressed the

claim presented as Issue II of Mr. Clark's brief. That issue involves important matters on which post-Hitchcock v. Dugger precedential authority is needed from this Court. Moreover, Mr. Clark's case involves a number of complex and important procedural issues which should be adequately aired by oral argument.

This Court has not hesitated in permitting oral argument in other cases involving complex procedural issues and important questions of fact and law. See, e.g., M. Johnson v. State, No. 72,231 (Fla. 1988). Given the importance, complexity, and stakes involved in Mr. Clark's case, oral argument would be appropriate here as well, and by renewing Mr. Clark's motion we respectfully urge that the Court permit him that opportunity.

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Raymond Clark was convicted on a charge of first degree murder and, after penalty proceedings at which defense counsel presented no evidence, sentenced to death. This Court affirmed the conviction and sentence on November 21, 1979. Clark v. State, 379 So. 2d 97 (Fla. 1979). Post-conviction motions asserting inter alia, ineffective assistance of counsel were thereafter denied. Clark v. State, 460 So. 2d 886 (Fla. 1984); Clark v. State, 467 So. 2d 699 (Fla. 1985).

A petition for writ of habeas corpus was then filed in and later denied by the United States District Court for the Middle District of Florida. The United States Court of Appeals for the Eleventh Circuit thereafter denied relief. Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987).

After the Governor issued a death warrant setting Mr. Clark's execution for April 27, 1988, Mr. Clark filed a motion pursuant to Fla. R. Crim. P. 3.850 in the circuit court. The circuit court denied relief and appeal was taken to the Florida Supreme Court.

This Honorable Court on April 26, 1988, granted a stay of execution pending disposition of the appeal. Mr. Clark then petitioned the Court for leave to brief the issues and the Court granted the request.

B. SUBSTANTIVE FACTS

The State's case was based almost entirely on the testimony of Ty (aka "Ty-Stick") Johnston, Mr. Clark's co-defendant. Ty-Stick, entered an agreement with the State. Pursuant to this agreement, and in exchange for his testimony against Mr. Clark (R. 2020), Ty-Stick was allowed to enter a plea to second-degree murder (R.

2019). Ty-Stick is today no longer in custody; after serving a portion of his sentence, he was released pursuant to the second degree-murder agreement referred to above.

The substance of Ty-Stick's testimony was that he and Mr. Clark were in need of money and therefore went looking for someone rich to rob (R. 2021). They eventually ended up at a Sun Bank parking lot where they waited by a Cadillac until a man, as it turned out David Drake, came out of the bank. The two had Mr. Drake drive to a secluded area, where Mr. Drake wrote them a check for $5,000 (R. 2029). Mr. Drake was then shot twice (R. 2031). The two returned to the Sun Bank where they tried unsuccessfully to cash the check (R. 2032), and, later in the day, left for California (R. 2033). As this Court summarized on direct appeal, a motion for a new trial was made at the conclusion of the proceedings on the basis of

> a letter from a former cell mate of Johnston's stating that Johnston had told him that he had shot the victim.

Clark, supra, 379 So. 2d 97. That motion was denied. The only direct evidence concerning the victim's death elicited at trial was derived from Ty-Stick Johnston.

After trial and sentencing, Mr. Clark addressed the sentencing court. He explained that Ty-Stick had been the person who killed the victim, outside of his presence, and that he became involved after the shooting when, inter alia, he tried to cash the check (R. 3213).

As stated, trial counsel Susan Schaeffer, now a Circuit Court Judge, neither attempted to develop nor attempted to introduce any nonstatutory mitigating evidence at the penalty phase. Judge Schaffer explained in her affidavit (proffered before the lower court) that this omission was not based on a tactical consideration, but rather was a result of the preclusive, official interpretation of the then-existing

capital sentencing statute. Of course, at the time of Mr. Clark's 1977 trial, this Court, the trial court, and reasonable lawyers and judges interpreted the statute as restricting nonstatutory mitigation. Judge Schaeffer was bound by the official interpretation; as her affidavit explains.

The compelling evidence presented to the lower court in support of Mr. Clark's Rule 3.850 motion, however, was not limited to the Hitchcock v. Dugger claim (Issue II). Significant factual allegations were presented in support of the entirety of what was pled in the motion and sound factual and legal arguments were presented respecting the fact that Mr. Clark's claims were subject to no procedural constraint. An evidentiary hearing was urged on each of these issues. The lower court, although finding no "abuse" on the part of counsel, summarily denied relief on the merits and declined to conduct a hearing on any procedural question because of that denial. The court, however, neither attached any portions of the files and records which "conclusively" showed that Mr. Clark was entitled to "no relief," nor referred in its order to what prior records made such a showing. In this brief, Mr. Clark will demonstrate why this Court, like the lower court, should also reach the merits of Mr. Clark's claims, and why merits are much more than sufficient to require an evidentiary hearing and Rule 3.850 relief. The facts attendant to Mr. Clark's claims are discussed in the body of the brief, as they relate to the issues raised in this action.

SUMMARY OF ARGUMENT

I. Mr. Clark's claims were properly brought in this Rule 3.850 action. Although this is not Mr. Clark's first post-conviction motion, the claims were predicated upon fundamental changes in constitutional law, on issues involving

factual and legal bases which were not and could not have been known earlier, and on the fact that the ends of justice required that the merits of Mr. Clark's claims be heard. No two-year limitation bar was asserted by the State below, and Mr. Clark requested a hearing at which evidence could be presented on the factual question of "timeliness". The lower court, although finding no "abuse" on the part of Mr. Clark's counsel, ultimately ruled that such a hearing was not necessary because it ultimately disposed of each claim on the merits. Although the lower court was correct in reaching the merits, its adverse rulings in that regard were in error. The claims involved classic Rule 3.850 issues and Mr. Clark made a compelling prima facie showing. An evidentiary hearing, State v. Sireci, and Rule 3.850 relief were warranted. However, the lower court neither conducted an evidentiary hearing, nor attached those portions of the files and records conclusively showing that Mr. Clark was entitled to no relief, see Squires v. State; Gorham v. State, nor referred in its order to those portions conclusively showing Mr. Clark's non-entitlement to relief; apparently, the lower court also did not have the full prior record before it. Steinhorst v. State. The Rule 3.850 trial court erred. An evidentiary hearing was clearly warranted in this action, Sireci; O'Callaghan v. State; Lemon v. State, and remand is now appropriate.

II. Mr. Clark's capital trial took place in 1977, before Lockett v. Ohio and Songer v. State and precisely during the period of time when Florida's capital sentencing statute had its most preclusive effects. The statute had its effects on judges and attorneys. Harvard v. State. Mr. Clark's former trial counsel and now Circuit Court Judge Susan Schaeffer, was a reasonable, zealous, and professional criminal defense attorney. As her detailed affidavit, proffered before the lower

court, explains, her efforts in investigating, developing, and presenting non-statutory mitigating evidence were absolutely constrained by the then-existing statute and its official interpretation. See, e.g., United States v. Cronic. As a consequence, Mr. Clark was denied an individualized and reliable capital sentencing determination by the operation of state law -- the wealth of significant mitigation detailed in the body of Issue II, infra, never reached the jury because Judge Schaeffer was constrained. This claim is now properly before the Court, Hitchcock v. Dugger; Thompson v. State/Thompson v. Dugger, as it was before the Eleventh Circuit. That Court, however, overlooked this issue and focused solely on the sentencing court's instructions. This evidentiary claim remains to be properly resolved. Since the files and records by no means demonstrated that Judge Schaeffer's thorough affidavit was conclusively wrong and, to the contrary, supported Mr. Clark's claim, an evidentiary hearing was more than warranted. Sireci; Cooper v. Wainwright. The lower court erred in failing to conduct one. One should be conducted, and thereafter Rule 3.850 relief should be granted. McCrae v. State.

III. The only direct evidence connecting Mr. Clark to the instant offense at trial was the bargained for accomplice testimony of co-defendant Ty-Stick Johnston. Mr. Clark proffered before the lower court significant evidence that critical impeachment information regarding co-defendant Johnston was withheld by the State. See Brady v. Maryland. The files and records by no means showed that Mr. Clark was entitled to no relief on his claim, and an evidentiary hearing was therefore warranted. Sireci; Gorham. This claim could not have been brought earler: Johnston refused to provide this information to former trial and collateral counsel, the State to this day refuses to disclose its files pursuant to Mr. Clark's legitimate requests

under Fla. Stat. section 119.01 et seq., and Johnston's former lawyer -- now an Assistant State Attorney -- refuses to turn over his former client's files although his former client has provided Mr. Clark's present counsel with a release. The factual basis of the claim were thus unknown and could not have been known. State v. Sireci. Under these circumstances, it would be a gross miscarriage to preclude consideration of Mr. Clark's claim, since it was the State's own concealment of evidence that precluded Mr. Clark from bringing it earlier. See Walker v. Lockhart; Freeman v. Georgia.

IV. Mr. Clark's motion presents a claim pursuant to Caldwell v. Mississippi which is identical in every pertinent respect to the claim found sufficient to warrant relief by the en banc Eleventh Circuit in Mann v. Dugger. The ends of justice counsel that Mr. Clark's claim be heard and that relief be granted. Moreover, given the pendency of Dugger v. Adams, it would be a miscarriage of justice for this Court to deny Mr. Clark's claim and allow him to go to his execution before the United States Supreme Court determines whether it will be constitutionally appropriate for him to receive the relief to which he is entitled under Mann.

V. Mr. Clark's claim presented a classic violation of Booth v. Maryland. The lower court denied relief on the merits. Booth did not exist at the time of Mr. Clark's trial, direct appeal, or prior collateral proceedings and, in fact, Judge Schaeffer's affidavit explained that the legal basis of this claim were simply unavailable to her at that time. Mills v. Maryland now makes clear that Booth, as in every other eighth amendment case issued by the United States Supreme Court, must be given retroactive effect. The ends of justice require that the merits be reached and that relief be granted.

VI. Mr. Clark's sentence was aggravated by the unconstitutional and overbroad application of the "heinous, atrocious, and cruel aggravating circumstance." Maynard v. Cartwright, issued by the United States Supreme Court this week, directly controls this case and demonstrates that relief is appropriate.

VII. Mr. Clark was denied his essential constitutional right to confront his chief accuser, co-defendant Ty-Stick Johnston. This was fundamental constitutional error and the ends of justice counsel that the claim now be heard and that relief now be granted.

VIII. Mr. Clark's capital conviction and sentence of death were predicated upon the unconstitutional admission of his purported failure to submit to a voice exemplar. This refusal was based solely on the advice of counsel, Judge Schaeffer, and at the time of trial, when Judge Schaeffer and Mr. Clark learned that it might be used at trial, Mr. Clark requested that he be allowed to take one. The State and the trial court refused, and instead Mr. Clark's refusal was introduced. The ends of justice require that these errors now be heard and corrected, for Mr. Clark's capital conviction and sentence of death were unconstitutionally predicated upon false and misleading evidence. Smith v. Murray; Murray v. Carrier.

IX. Mr. Clark's sentence of death rests upon an unconstitutional automatic aggravating circumstance. Under Lowenfield v. Phelps, issued just this year, Mr. Clark is entitled to relief for his capital sentence is fundamentally unreliable and unfair.

X. The trial court unconstitutionally shifted to Mr. Clark the burden of persuasion and proof on the ultimate question of whether he should live or die. This

was fundamental constitutional error which, pursuant to inter alia Caldwell, Mullaney v. Wilbur, and Smith v. Murray must now be heard. Relief is appropriate.

XI. Mr. Clark's jury was fundamentally misinformed with regard to its penalty phase vote. This error may well have resulted in an unwarranted sentence of death. Under Mills v. Maryland, Caldwell v. Mississippi, Smith v. Murray, and the eighth and fourteenth amendments, Mr. Clark's claim should now be heard and relief should now be granted.

ISSUE I

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S RULE 3.850 MOTION WITHOUT AN EVIDENTIARY HEARING.

Mr. Clark's motion alleged facts in support of claims which have traditionally been presented in Rule 3.850 actions and tested at an evidentiary hearing. As will be discussed in the body of each issue presented herein, the claims were not barred from review by procedural or successive/successor petition constraints. Cf. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985); see also, Thompson v. Dugger/Thompson v. State, 515 So. 2d 173 (Fla. 1987)(granting relief to successive post-conviction litigant presenting Hitchcock v. Dugger claim identical to the one rejected earlier by state and federal courts); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(successor petition; relief granted on same basis). The lower court, in fact, reached the merits of Mr. Clark's claims and denied them.[1] However, the trial court neither attached any portion of the record to

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[1]The lower court's on-the-record rulings as well as its order are somewhat unclear with regard to what type of procedural bar it was asserting when it ruled

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its order, nor referred in its order to what portion of the record "conclusively" showed that Mr. Clark was entitled to no relief, nor conducted an evidentiary

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that some of Mr. Clark's claims were not "timely" filed. What is clear, is that no Rule 3.850 two-year limitation bar was asserted by the State before the lower court and that therefore the State has waived any such defenses to Mr. Clark's action. See, e.g., Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984); LaRoche v. Wainwright, 599 F.2d 722, 724 (5th Cir. 1979); Grooms v. Wainwright, 610 F.2d 344, 347 (5th Cir. 1980); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981). That issue is thus not now before this Court.

What is also clear is that the lower court found no "abuse" on the part of Mr. Clark's counsel (Tr. 90-93). Moreover, Mr. Clark specifically explained in his pleadings and orally before the lower court that the motion's claims were predicated on substantial changes in the law, see, e.g., Thompson v. Dugger, supra, and/or involved fundamental constitutional errors which "precluded the development of true facts" and/or resulted in the admission of false and misleading ones. See Murray v. Carrier, 106 S. Ct. 2639 (1986); Smith v. Murray, 106 S. Ct. 2661 (1986); Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987). Cf. State v. Sireci, supra, 502 So. 2d at 1224. Since the errors asserted herein "perverted the jurors deliberations concerning the ultimate question of whether [Raymond Clark should have been convicted of capital murder and sentenced to die," Smith v. Murray, 106 S. Ct. at 2668, the claims were properly before the lower court -- the ends of justice required that the claims be heard. Moore, supra, 824 F.2d 847; Sireci, supra; State v. Crews, supra.

The lower court correctly noted that many of Mr. Clark's claims had been presented earlier to this Court as well as to the federal courts. It was precisely with regard to those claims that Mr. Clark explained why substantial changes in the law called for reconsideration, see, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Witt v. State, 387 So. 2d 922 (Fla. 1980); cf. Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984)(Enmund v. Florida substantial change in law); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. App. 1981)(Cuyler v. Sullivan substantial change in law), and why the ends of justice called for a hearing on the merits and post-conviction relief. Moore, supra; Smith v. Murray, supra; Sireci, supra; cf. Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986)("[I]n the case of error that prejudicially denies fundamental rights . . . this Court will revisit a matter previously settled . . ."). The ends of justice also required that the claims be heard because the prior adverse dispositions were founded upon "plain errors of law." Bass v. Wainwright, 675 F.2d 1204, 1207 (11th Cir. 1982); cf. Kennedy v. Wainwright, supra. This is especially true with regard to the Eleventh Circuit's disposition of Mr. Clark's Hitchcock v. Dugger claim. See Issue II, infra.

Finally, with regard to all of the claims, and especially with regard to Mr. Clark's Brady v. Maryland claim, Issue III, infra, Mr. Clark requested that the Rule

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hearing. See Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Squires v. State, 513 So. 2d 138 (Fla. 1987). Moreover, it is apparent from the record on appeal before this Court that the Rule 3.850 trial court did not have before it the complete record of Mr. Clark's previous proceedings. See Steinhorst v. State, 498 So. 2d 414 (Fla.

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3.850 trial court conduct a hearing on any "abuse" or other procedural bars wherein Mr. Clark would present proof as to why the claims could not have been brought earlier. For example, no procedural bar could be applied with regard to Mr. Clark's Brady v. Maryland claim (Issue II) because it was the State's own misconduct that precluded the claims from being brought earlier, see Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); Freeman v. Georgia, 599 F.2d 65, 71-72 (5th Cir. 1979); Judge Schaeffer's affidavit explained why she was unable to raise Mr. Clark's Booth v. Maryland and Caldwell v. Mississippi claims in earlier proceedings; Mr. Clark's Hitchcock claim, of course, was predicated upon the new law established by the Hitchcock opinion. The necessity for a hearing on such fact-based procedural questions is obvious: as the United States Supreme Court has held, a petitioner is entitled to an evidentiary hearing on such questions wherein he can present the facts demonstrating that he did not abuse his rights to post-conviction remedies, Price v. Johnston, 334 U.S. 266 (1948); Sanders v. United States, 373 U.S. 1 (1963); see also, Walker v. Lockhart, supra, 763 F.2d at 955 n.26, because "detention . . . obtained [in violation of the constitution] is intolerable" and thus "the opportunity to be heard, to argue and present evidence, must never be totally foreclosed." Townsend v. Sain, 372 U.S. 293, 312 (1963). Thus,

> [i]n cases in which a man's life is at stake . . . the state must meet a heavy burden when it argues that the petitioner's misconduct is sufficiently grave to warrant the sanction of [summary] dismissal.

Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). See also, State v. Sireci, supra. In short, a petitioner's rights to access to a post-conviction forum are not lost simply because he may have filed a prior action.

Ultimately, however, the lower court declined to conduct a hearing on any procedural question, or to squarely address any of the matters discussed above, finding that the need for such a hearing was obviated by its rulings that Mr. Clark was not entitled to relief on the merits of the claims asserted (e.g., Tr. 90-93). The lower court's focus and its ultimate analysis were thus founded on its view of the merits. It is therefore, ultimately, the lower court's views on the merits which are now before this Court, and that court's view on the merits (which we respectfully assert to be erroneous) are the primary focus of this brief.

1986). Consequently, although nothing in prior records by any means conclusively rebuts Mr. Clark's claims, it is the facial validity of Mr. Clark's motion and the need for adequate evidentiary resolution on the basis of the claims therein pled, that comprises the primary issue before this Court. Gorham; Squires; Steinhorst.

As stated, and as will be discussed in the body of this brief, Mr. Clark's motion presented claims which have been classically deemed cognizable pursuant to Rule 3.850. Since the files and records by no means demonstrated that Mr. Clark was "conclusively" entitled to "no relief," an evidentiary hearing was required. See State v. Sireci, supra, 502 So. 2d at 1224; O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986); see also, State v. Crews, supra, 477 So. 2d at 984-85. None was held and remand for the proper development of facts is appropriate.

ISSUE II

MR. CLARK WAS DENIED AN INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE THE OPERATION OF STATE LAW RESTRICTED HIS TRIAL COUNSEL'S EFFORTS TO DEVELOP AND PRESENT NON-STATUTORY MITIGATING EVIDENCE IN VIOLATION OF HITCHCOCK V. DUGGER AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eleventh Circuit denied relief on the jury instruction and judicial restriction aspects of Mr. Clark's Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), claim by holding such errors "harmless" since Mr. Clark (i.e., his counsel) failed to "produce evidence of any nonstatutory mitigating factors . . ." Clark v. Dugger, 834 F.2d 1570 (11th Cir. 1987). The Court, however, did not speak to the most important aspect of Mr. Clark's Hitchcock claim -- the fact that counsel was precluded from

developing and presenting such evidence.[2] Of course, what the Eleventh Circuit failed to comprehend is that the preclusion on counsel explains why no evidence was "produce[d]." What the Eleventh Circuit failed to consider is that counsel did not present nonstatutory mitigation not because it was non-existent, but rather because she was statutorily constrained from presenting it.

Mr. Clark's capital trial and sentencing proceeding took place in 1977. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), was this Court's authoritative pronouncement on the capital sentencing statute then in effect. Cooper was the law, and under Cooper's official, preclusive interpretation, reasonable and professional defense attorneys were restricted in their efforts to investigate, develop, and present non-statutory mitigation. Here, what former defense counsel's affidavits (proffered before the lower court) make clear is that she operated under the official but unconstitutionally restrictive interpretation of the statute.

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[2]In failing to speak to this central aspect of Mr. Clark's claim the federal appeals court committed plain error. See Bass v. Wainwright, 675 F.2d 1204, 1207 (11th Cir. 1982). In any event, there can be no question that the merits of Mr. Clark's Hitchcock claim were properly before the lower court and are now properly before this Court. The lower court denied an evidentiary hearing (see, infra) and denied relief; it is therefore this Court that should now take the corrective action which the eighth amendment requires. This type of issue, of course, is a classic example of a claim which must be heard in Rule 3.850 proceedings, as is made clear by every post-Hitchcock ruling rendered by this Court. See, e.g., Morgan v. State, 515 So. 2d 975 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Mikenas v. Dugger, 13 F.L.W. 52 (Fla., Jan. 21, 1988); Waterhouse v. State, 13 F.L.W. 98 (Fla., Feb. 11, 1988). Neither does a prior adverse ruling from the federal appeals court, see Thompson v. Dugger/Thompson v. State, 515 So. 2d 173 (Fla. 1987), nor a pre-Hitchcock adverse ruling from this Court, see Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Cooper v. Dugger, No. 71,139 (Fla., May 12, 1988), defeat the cognizability of the merits of the claim in this action or Mr. Clark's entitlement to relief. Thompson, supra; McCrae, supra. The issue was properly brought in this action. As will be discussed, the files and records by no means demonstrated that Mr. Clark was entitled to "no relief;" an evidentiary hearing was warranted. Lemon, supra, 498 So. 2d 923.

Susan Schaeffer, then an Assistant Public Defender and now a Circuit Court Judge, was a reasonable, professional, and zealous criminal defense attorney. Judge Schaeffer represented Mr. Clark in 1977. She now explains, and would testify at a hearing regarding, her understanding of the preclusive sentencing scheme then in effect and its effects on her and on Mr. Clark's case:[3]

> My name is Susan F. Schaeffer and I am a Circuit Judge in Florida's Sixth Judicial Circuit. In 1977, I was an Assistant Public Defender and served as a trial attorney for Raymond Robert Clark when he faced charges of first-degree murder, kidnapping and extortion.
>
> At the time I represented Mr. Clark, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Clark was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The law at the time limited the relevant mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to allow consideration of any other mitigating circumstance). I was aware of that limitation and prepared Mr. Clark's case accordingly.
>
> Mr. Clark's capital trial and sentencing proceedings took place at a time when Florida criminal defense attorneys, prosecutors and judges generally understood that the mitigating evidence which could be introduced at a capital sentencing proceeding was restricted to the statutory list referred to above. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), was the controlling precedent at the relevant time. In Cooper, the Florida Supreme Court instructed that Florida capital sentencers, whether judge or jury, were limited strictly to the consideration of mitigating factors enumerated especially in Fla. Stat. sec. 921.141.
>
> As a public defender, I understood expending time and energy on an attempt to develop and prove inadmissible

[3]Judge Schaeffer's affidavit is reproduced herein in its entirety for the Court's review.

evidence to be a waste of resources. My focus was on uncovering evidence of those statutory enumerated mitigating circumstances which were at the time the only ones relevant to the capital process. I did not pursue or develop nonstatutory mitigation because to do so would have been fruitless (such nonstatutory mitigating circumstances were inadmissible under the statute) and therefore a waste of time, particularly when there was so much other work to do in preparing for Mr. Clark's trial. My strategy as to the development of mitigating circumstances was quite simply what the law then mandated: I looked for evidence of the statutory circumstances because the law at the time precluded the use and introduction of any nonstatutory mitigating circumstances.

The trial court also limited my access to the assistance of a court-appointed psychiatrist. The court ruled that I was not entitled to a confidential expert, i.e., that I would have to share any information provided by the expert with the State and the sentencing court. Subsequent to Mr. Clark's trial the law changed not only as to the relevancy of nonstatutory mitigating circumstances but also as to the availability of a confidential court-appointed expert. If the trial were today, or if the law then had allowed for consideration of nonstatutory mitigating evidence such as was recently addressed in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), I certainly would have made the required showing of need of such confidential assistance and obtained the expert's help in developing the mitigating circumstances present in Mr. Clark's case, including those nonstatutory mitigating circumstances which I could not pursue in 1977. A mental health professional may have provided assistance in developing nonstatutory mitigating circumstances regarding Mr. Clark.

If the proceedings were today, I certainly would have presented as a nonstatutory mitigating circumstance the disparate treatment afforded Mr. Clark's co-defendant, Ty Johnston, to wit: he would not receive the death penalty, he was to receive no mandatory minimum, nor would he receive consecutive terms, and in all likelihood, his sentence would be less than the maximum (which in fact ultimately proved to be the case). The jury deliberated twelve hours before convicting Mr. Clark; certainly the length of the deliberations reflected on Mr. Johnston's credibility. Ultimately the jury may have convicted Mr. Clark without believing Mr. Johnston's incredible claim that he was

> passively observing. Certainly the jury's doubts about Mr. Johnston and the respective roles the co-defendants played in the crime could have been used to compellingly argue that this death penalty was inappropriate for Mr. Clark when Mr. Johnston under his plea agreement would be receiving so much less.
>
> Another area that I certainly would have explored in an effort to uncover nonstatutory mitigation would have been the relationship between Mr. Clark and Mr. Johnston. At trial, Mr. Johnston conceded that Mr. Clark had cared for him and looked after him. Acts of kindness could have been further developed and argued as nonstatutory mitigation justifying the imposition of a sentence of less than death. However, because I was aware that the law in effect at the time did not permit the introduction and use of such mitigation, I did not pursue such evidence and instead focused my attention on the development of statutory mitigating circumstances.
>
> I note that at the time of Mr. Clark's trial, neither Caldwell v. Mississippi nor Booth v. Maryland had been decided. I therefore had no eighth amendment basis upon which to assert such issues.

(Affidavit of Susan Schaeffer, Appendix to Rule 3.850 motion [hereinafter "Appendix"], Vol. I, Ex. 5).[4]

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[4] In 1985, Judge Schaeffer explained, in an affidavit then proffered before the federal district court:

> While employed in the Public Defender's Office, Piinellas County, Florida, I was appointed to represent Raymond Robert Clark in a Case No. DRC-77-2941 CFASO.
>
> Upon completion of the trial phase, the defendant was found guilty of first degree murder thereby requiring the case to proceed to the penalty phase of the trial.
>
> It was your affiant's understanding, due to consultations with several attorneys who had represented defendant at sentencing phases of capital trials and my own experience in handling capital cases, that a defendant in a capital case would be precluded from presenting any

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Judge Schaeffer's construction of the statute was "reasonable": judges and lawyers in Florida, at the time, could not but have labored under that preclusive view of the statute. See Songer v. Wainwright, 769 F.2d 1488, 1494 (11th Cir. 1985)(Clark, Kravitch, Johnson, and Anderson, concurring in part and dissenting in part)("Of course, neither the state trial judge's nor Songer's counsel's construction of the statute was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time." [emphasis added]). See also, Harvard v. State, 486 So. 2d 540 (Fla. 1986). Mr. Clark was tried in 1977, before Lockett v. Ohio, 438 U.S. 586 (1978) and before Songer v. State, 365 So. 2d 696 (Fla. 1978), at the time when the statute's preclusive interpretation had its most far reaching effects. Cf. Hitchcock v. Dugger, 107 S. Ct. at 1823 (noting that Florida judges conducting sentencing proceedings during the relevant time period "believed that Florida law precluded consideration of nonstatutory mitigating circumstances"). The reasonableness of Judge Schaeffer's understanding of the law was discussed by this Court in Harvard, supra, and by the Eleventh Circuit in Songer v. Wainwright, 769 F.2d at 1489 (emphasis supplied):

> The fact that the Florida Supreme Court has now held that neither the wording of the Florida Statute nor its prior

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> mitigating circumstances outside of those enumerated in Florida Statutes 921.141(6).
>
> As a result of operating under these restrictions, your affiant did not focus her investigation upon the developing of mitigating circumstances. It is your affiant's belief that mitigating circumstances outside of those specifically enumerated in the statute may well have existed and could have been brought before the sentencing jury.

> decisions precluded the introduction of nonstatutory mitigating evidence, Songer v. State, 463 So. 2d 229 (Fla. 1985), relying on Songer v. State, 365 So. 2d 696, (Fla. 1978), is not controlling in the instant matter. That court has recognized that the law could have been so "misconstrued." See Perry v. State, 395 So. 2d 170, 174 (Fla. 1981); Jacobs v. State, 396 So. 2d 713, 718 (Fla. 1981), and Harvard v. State, 486 So. 2d 540 (Fla. 1986), where, in denying a claim of ineffective assistance of counsel at sentencing, the court conclude[d], as did the trial judge, that the conduct of Harvard's counsel, given the state of the law on the date the case was tried, reflects reasonable professional judgment. Id. at 540. This was also because "at the time appellant was sentenced, our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence."

It was, in fact, that "reasonable" construction of the statute which, as Judge Schaeffer now explains, rendered the assistance she provided at the sentencing phase constitutionally ineffective and deprived Mr. Clark of what the eighth amendment mandates -- an individualized and reliable capital sentencing determination. Judge Schaeffer's efforts were restricted by the application of state law; the State's case for death was therefore never subjected to "meaningful adversarial testing." See United States v. Cronic, 466 U.S. 648, 659 (1984).[5]

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[5] In fact, on appeal of the denial of Mr. Clark's pre-Hitchcock motion for Rule 3.850 relief, Clark v. State, 460 So. 2d 886 (Fla. 1984), this Court held that counsel's performance was not deficient "under prevailing professional norms at the time." It was counsel's "reasonable" performance under those then-prevailing norms that caused nonstatutory mitigating evidence not to be developed nor presented, as Judge Schaeffer explains in her affidavits. This type of direct evidence, from the attorney who tried the action and is in the best position to relate what transpired, should not be ignored. See McCrae v. State, 510 So. 2d at 880 and n. 3 (relying on testimony of former trial counsel at Rule 3.850 hearing in support of grant of relief on defendant's Hitchcock claim). This is the first time, post-Hitchcock, that Mr. Clark has had the opportunity to present his claims pursuant to Rule 3.850. The

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As a result of that preclusive construction, a wealth of mitigating evidence never got to the court. Counsel's "reasonable" preclusive understanding resulted in her failure to investigate, develop, and present powerful non-statutory mitigating evidence which was then available (see infra). In fact, nonstatutory mitigation was available in abundance, as reflected in Mr. Clark's Rule 3.850 motion and its appendices, as would have been shown at an evidentiary hearing. Here, as in Songer v. Wainwright,

> [t]hese omissions were not the product of a tactical choice by Songer's counsel, as held by the federal district court on the first petition. Rather, the omissions were a result of the perception of Florida law shared by Songer's counsel and the trial judge.

769 F.2d at 1491 (footnote omitted).

United States v. Cronic, 466 U.S. 648 (1984), held that

> [t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-7 (emphasis added)(footnote omitted). There, the Supreme Court recognized that "There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Id. at 658 (footnote omitted). Mr. Clark's is such a case.

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files and records by no means showed that he was entitled to "no relief"; to the ocntrary, the dearth of evidence presented by Judge Schaeffer at the penalty phase reflects how constrained she believed herself to be because of the preclusive effects of the then-prevailing view of Florida's capital sentencing statute. An evidentiary hearing was warranted.

Mr. Clark's penalty trial lost its character as a confrontation between adversaries because Judge Schaeffer operated in a system which precluded her presentation of nonstatutory mitigation.[6] As Judge Clark explained in Songer, in conformity with this Court's recent pronouncements, the majority opinion (granting only resentencing before a judge) did not go far enough because it

> ignore[d] the reality of the state of mind of the prosecutor, the defense counsel, the trial judge and the jury with respect to the meaning of the Florida death penalty statute at the time of Songer's capital sentencing proceeding in 1974. The effect of their combined perception resulted not only, as the majority acknowledges, in the trial judge's failure to consider nonstatutory mitigating evidence, but also in counsel's failure to develop or present nonstatutory mitigating evidence and instructions that prevented the jury from considering such evidence.

769 F.2d at 1490 (Clark, Kravitch, Johnson and Anderson, concurring in part and dissenting in part).

The right to counsel is violated when the State "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); see also United States v. Cronic, supra; cf. Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights), relied on in, Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 2646 (1986). Thus, a defendant is deprived of the right to the effective assistance of counsel by a court order barring

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[6]The irony of the situation, in fact, is that the more knowledgeable and professional a defense attorney was in 1977, the more such an attorney would believe herself or himself precluded, and the more ineffective he or she became. When counsel knew nonstatutory mitigation could not be presented, and would not be considered, counsel of course would have and did put his or her limited resources to better use (See Affidavit os Judge Schaeffer, supra).

attorney-client consultation during an overnight trial recess, Geders v. United States, 425 U.S. 80 (1976); by court-ordered representation of multiple defendants, Holloway v. Arkansas, 435 U.S. 474 (1979); by a court's refusal to allow summation at a bench trial, Herring v. New York, 422 U.S. 853 (1975); by a state statute requiring a criminal defendant who wishes to testify on his own behalf to do so prior to the presentation of other defense testimony, Brooks v. Tennessee, 406 U.S. 605 (1972); by a state statute restricting a criminal defendant's right to testify on his own behalf. Ferguson v. Georgia, 365 U.S. 570 (1961).

A fortiori, a criminal defendant's rights to the effective assistance of counsel, Cronic, supra, are violated where, as here, a state statute, Brooks, supra; Ferguson, supra, and the official judicial interpretation given that statute by the State's highest court, see Cooper v. State, supra, tie counsel's hands and "interfere" with counsel's "decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. at 687. Judge Schaeffer's hands were tied. She was forced to operate under the same preclusive system condemned in Hitchcock; the statute then in effect was the "objective factor external to the defense [which] impeded counsel's efforts . . ." Amadeo v. Zant, ___ U.S. ___ (No. 87-5277, May 31, 1988), slip op. at 6, citing Murray v. Carrier, 477 U.S. 478, 488 (1986). Mr. Clark's resulting sentence of death was neither individualized nor reliable and was thus obtained in violation of Hitchcock and the eighth and fourteenth amendments.

A. COUNSEL'S INTERPRETATION WAS REASONABLE

Cooper v. State, 336 So. 2d 1133 (Fla. 1976) was the law at the time Mr. Clark was sentenced to death. There, the Florida Supreme Court had spoken:

> We held in State v. Dixon [283 So.2d 1 (Fla. 1973)] that the rules of evidence are to be relaxed in the

sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

. . . .

As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law-abiding. Cooper has shown that by his conduct here. In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.

. . . .

The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist...." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

336 So. 2d at 1139 and n.7 (emphasis supplied).

As discussed, the Florida Supreme Court has now recognized that Cooper was interpreted as limiting consideration of mitigating factors. See Harvard v. State, supra; Perry v. State, 395 So. 2d 170, 174 (Fla. 1981)(trial judge, citing Cooper, "followed the law as he believed it was being interpreted at the time of trial" and precluded evidence of non-statutory factors). See also Jacobs v. State, 396 So. 2d 713, 718 (Fla. 1981)(judge "held the mistaken belief that he could not consider non-statutory mitigating circumstances" where sentence was imposed in August, 1976, just after Cooper); cf. Lucas v. State, 490 So. 2d 943 (1986); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987).

The Florida Supreme Court has likewise recognized that Cooper affected attorneys' presentation of evidence at the sentencing phase of capital trials, and that an attorney's failure, during the post-Cooper/pre-Songer period to develop and present available mitigating evidence, was "reasonable" in light of the then-prevailing preclusive understanding of capital sentencing law. Thus, in Harvard v. State, supra, 486 So. 2d 540, the Court, in denying a claim of ineffective assistance of counsel at sentencing, "concluded[d], as did the trial judge, that the conduct of Harvard's counsel, given the state of the law on the date the case was tried, reflect's reasonable professional judgment." Id. at 540. This was so because "at the time appellant was sentenced, our death penalty statute could have been reasonably understood to preclude the introduction of non-statutory mitigating evidence." Id. at 539; see also Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982)(counsel not ineffective because of restrictive view of statute and counsel would not be "expected to predict the decision in Lockett v. Ohio").

Mr. Clark was tried in 1977 and in 1977 it was Cooper that guided Judge Schaeffer, Mr. Clark's trial attorney, as it did "reasonable" Florida capital attorneys at that time.

Of course, we now know that that restrictive interpretation, albeit "reasonable", was constitutionally wrong. The United States Supreme Court has spoken. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). But the fact remains that the status and operation of Florida law at the time Mr. Clark was sentenced to death rendered his attorney ineffective, cf. United States v. Cronic, 466 U.S. 648 (1948), and by operation of state law deprived Mr. Clark of the individualized sentencing determination which the eighth amendment requires.

B. THE NON-STATUTORY MITIGATION THAT WAS NEVER DEVELOPED DUE TO THE PRECLUSION ON COUNSEL

Judge Schaeffer's affidavit relates some of what would have been pursued. What would have been "produce[d]", Clark, 834 F.2d at 1570, had counsel not been precluded, would have made a real difference. Under no construction can it be said that the preclusion on Judge Schaeffer's efforts to develop and present non-statutory mitigating evidence had "no effect upon the [sentencers'] deliberations." See Skipper v. South Carolina, 106 S. Ct. 1669, 1673 (1986). Here, it by no means is "clear beyond a reasonable doubt" that Mr. Clark's sentencing jury, a jury which deliberated for twelve hours at guilt-innocence and then struggled at the penalty phase (see Affidavit of Judge Schaeffer, supra), would not have been affected by the substantial nonstatutory mitigation proffered to the Rule 3.850 trial court -- mitigation which would have been presented had counsel not been constrained.

Obviously, the investigation, development, and presentation of evidence and argument regarding the disparate treatment afforded to the cooperating co-defendant

(see Affidavit of Judge Schaeffer, supra) would have made a difference. In Brookings v. State, 495 So. 2d 135 (Fla. 1986), this Court reversed a judge's override of a jury's "life recommendation" because that recommendation could well have rested on the independent nonstatutory mitigating effect of the life sentence given to a cooperating accomplice in exchange for testimony. Id. at 142-43; accord McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The Court held that the disparate treatment given to a cooperating accomplice, as opposed to the treatment given the capital defendant, were "reasonable" mitigating factors to be considered by the jury and the court at the penalty phase. Brookings, 495 So. 2d at 142-43.

Raymond Clark was prosecuted to the utmost. "Ty Stick" Johnston, in exchange for his testimony, was given special treatment: no death penalty and the possibility of early parole. (Johnston today is not incarcerated.) His status as a cooperating accomplice and, in turn, the disparate treatment given to him and Mr. Clark, should have been developed and forcefully presented as a [nonstatutory] mitigating factor, Brookings; Hitchcock, but counsel was restricted.

Similarly, the jury should have been allowed to consider, in mitigation, that the only direct evidence implicating Mr. Clark was that provided by cooperating accomplice "Ty Stick" Johnston. Counsel, however, was precluded from developing such evidence and argument because of the then-existing state law. Such matters, however, also mitigated the offense. The jury should have been allowed to consider the mitigating effect of the fact that the only direct evidence implicating Mr. Clark in

the capital offense came from an accomplice who had every reason to lie in order to save himself.[7]

But there is a great deal more. The jury at Mr. Clark's trial heard a great deal about the circumstances of the offense. Yet, they heard almost nothing about the character and background of the offender. It is in this regard that the statute most egregiously tied Judge Schaeffer's hands, and it is in this regard that Judge Schaeffer's investigation, development, and presentation of evidence was most constrained -- these matters did not "fit" within the then-prevailing statute.

Judge Schaeffer relates, and would relate at the requisite hearing, that she would have sought to develop mental health mitigation had the penalty phase been conducted today -- i.e., had the statute and its official interpretation, Cooper, supra, not precluded her. Such evidence would have been compelling, as the account of a qualified mental health expert who was asked to evaluate Mr. Clark in this regard demonstrates:

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[7]The jury here was never allowed to consider as mitigation, at sentencing, the fact that questions remained to be answered, because the prosecution was essentially based on bargained-for accomplice testimony. The law precluded counsel from properly developing and presenting the issue, or asking for any penalty phase instructions in this regard. The jury, at the penalty phase, was not allowed to deliberate and reflect with regard to what numerous courts have considered even in non-capital cases: the fact that accomplice testimony is inherently unreliable. See Phelps v. United States, 252 F.2d 49 (5th Cir. 1958); United States v. Curry, 471 F.2d 419 (5th Cir. 1973); Turner v. State, 452 A.2d 416 (Md. 1982); Thompson v. State, 374 So. 2d 338 (Ala. 1979); Bendle v. State, 583 P.2d 840 (Alaska 1978); State v. Howard, 400 P.2d 332 (Ariz. 1965); Redman v. State, 668 S.W.2d 541 (Ark. 1984); Castell v. State, 301 S.E.2d 234 (Ga. 1983); State v. Evans, 631 P.2d 1220 (Idaho 1981); State v. Hutchison, 341 N.W.2d 33 (Iowa 1983); State v. Harmons, 664 P.2d 922 (Mont. 1983); State v. Morse, 318 N.W.2d 889 (Neb. 1982); Sheriff, Clark County, Nevada v. Hamilton, 646 P.2d 122 (Nev. 1982); People v. Lipsky, 443 N.E.2d 925 (N.Y. 1982); State v. Lind, 322 N.W.2d 826 (N.D. 1982); Oregon v. Hall, 595 P.2d 1240 (Or. 1979); Mathis v. State, 590 S.W. 449 (Tenn. 1979); Paulus v. State, 633 S.W.2d 827 (Tex. App. 1981).

As you requested, I have addressed my report to the mental health evidence that speaks to mitigation in Mr. Clark's case. I previously evaluated Mr. Clark on March 26, 1985 and a report was submitted to Richard Hersch, Esquire, regarding my impressions at that time. Since then, in addition to the additional two hour interview conducted at Florida State Prison on February 5, 1988, I have also had the opportunity to review a voluminous set of materials provided by your office. The materials reviewed included: Mr. Clark's school records; the death certificate of his half-sister; affidavits of Mr. Clark's mother, step-father, and neighbor; Naval records; various medical and legal documents regarding Mr. Clark's prior offense in California including the report and testimony of psychiatrist Owen E. Henniger; California prison records including documentation regarding Mr. Clark's participation in a drug experimentation program; transcripts of phone conversations between Mr. Clark and his codefendant Ty Johnston; pretrial deposition and trial testimony of Ty Johnston; juvenile records of Ty Johnston; prison and probation records of Ty Johnston; Florida post-sentence investigation report on Mr. Clark; Florida prison records of Mr. Clark including medical records.

In my prior report, I concluded that Mr. Clark is an individual who essentially has never grown up. It was indicated that despite his two violent episodes, he is generally an extremely passive person who avoids conflicts whenever possible. His passive and escapist approach to problem solving is characterized by his numerous suicide attempts, several of them being almost lethal. Many of Mr. Clark's behavior patterns can be explained by his need to compensate for his feelings of inadequacy and perceived rejection. He is easily manipulated and influenced by others, particularly by those with whom he is in a dependent relationship. Although it could be assumed that due to the codefendant's age, he was dependent on Mr. Clark, from a review of the relevant data, including the codefendant's records and a transcript of taped telephone calls between the two parties, it is clear that Mr. Clark was certainly the weaker of the two emotionally. Throughout these conversations, Mr. Clark literally begs Ty to respond in kind when he tells him "I love you," but fails to get such a response. As is typical with adult children of alcoholics, Mr. Clark was apparently still searching for the affection lacking in his childhood. Although one could easily accept the codefendant's testimony regarding Mr. Clark at face value, a review of the records clearly reveals numerous

contradictions in Ty's testimony, suggesting the self-serving nature of his statements.

The additional materials reviewed by this examiner strongly support the contention that Mr. Clark derives from an extremely unstable family background, which is characterized by neglect, emotional deprivation and a lack of significant positive role models. This man has demonstrated significant emotional problems from an early age. Mr. Clark was ignored by his natural father who left the family when Mr. Clark was 4 years old. He was subsequently raised by his mother and step-father. The parents report that their marriage was unhappy and that both of them abused alcohol. They were inadequate and ineffective parents who admit that Mr. Clark "never really had a fair chance when he was growing up." Mr. Clark was punished to excess during his childhood and lacked love and attention. He was never adopted by his step-father, but took his name, perhaps in an effort to feel as if he belonged. When his step-father left, Mr. Clark was abandoned by his mother and taken in by a neighbor who attempted to provide him with a home.

Given his home situation, it is not surprising that Mr. Clark did poorly in school. It is reported that at times he would go to the neighbor's home for breakfast as the provision of meals in the Clark household was inconsistent. In 1959, when Mr. Clark enlisted in the Navy, he was noted to be malnourished and underweight, which is no doubt a consequence of his upbringing.

Mr. Clark's first suicide attempt occurred in 1962 while he was in the Navy. As with his later suicide attempts, it was nearly lethal. He remained comatose for two days and was described as having a "long term pattern of emotional instability." A later suicide attempt in 1964 rendered Mr. Clark unconscious as a result of the inhalation of noxious gas and slashing of his wrists. Mr. Clark's most recent suicide attempt was in 1982 and caused respiratory arrest. CPR was administered during Mr. Clark's transport by helicopter to a hospital. These suicide attempts are congruent with his history of depression and emotional disturbance. In prison, he was medicated with both Triavil and Sinequan for his depression.

Mr. Clark has developed a deeply ingrained sexual identity conflict which has contributed to the development of pathological relationships with persons who tend to dominate and easily influence him due to his highly vulnerable

emotional state. He has a history of depression, poor self-image, and failure at his various endeavors despite what is reported to be an average IQ.

In addition to Mr. Clark's emotionally unstable background, a recent affidavit of Ruth Rogers (Mr. Clark's mother) reveals that he was diagnosed as suffering from encephalitis when he was about 12 years old. This information was not known to this examiner at the time of my previous examination, or I would have strongly recommended that Mr. Clark be evaluated for possible neurological deficits. Encephalitis, with its accompanying high fever, is known to produce irreversible brain damage, which certainly could have contributed to Mr. Clark's deviant behavior patterns, as could his abuse of narcotics. Additionally, Mr. Clark was a participant in a drug experimentation program in the California prison system during which time a variety of chemical substances were administered to Mr. Clark. The long term effects of these drugs are not clear. This strongly supports the need for neurological testing and evaluation.

A review of Mr. Clark's Department of Corrections records reveals that Mr. Clark has continued to be free of management problems at Florida State Prison as he has not had a disciplinary report in eight years. In view of his positive adjustment and personality profile, it is likely that he would not pose a management problem should he be permitted to reside within an open prison population.

In conclusion, the current evaluation supports my original impressions that Mr. Clark is a seriously disturbed individual, who under the stress of a pathological relationship, has a tendency to have a tenuous grasp on reality. This is consistent with the 1965 evaluation by Dr. Owen E. Henniger, a psychiatrist who concluded that Mr. Clark was insane at the time of his prior offense in California. Based on the additional materials reviewed, it is this examiner's contention that Mr. Clark was under the substantial psychological domination of the codefendant, despite the disparate age difference of the two parties. He suffers from Mixed Personality Disorder which is chronic in nature and was certainly in existence at the time of both of the offenses. Strong components of Borderline and Dependent Personality Disorder are also present, in that Mr. Clark engages in physically self-damaging acts, has an identity disturbance relating to self-image and gender identity, has a pattern of unstable and intense interpersonal relations,

> is impulsive in areas that are self-damaging and has affective instability as documented by his periods of depression. Given Mr. Clark's history, I would strongly recommend that a neurological examination be conducted on Mr. Clark to more definitively rule out any Organic Brain Syndrome which may have been caused by his history of encephalitis, drug use, and participation in drug experimentation.

(Report of Dr. Krop, Appendix, Vol. I, Ex. 14).[8]

The judge and jury charged with the responsibility of determining Raymond Robert Clark's ultimate fate had no opportunity to consider evidence regarding his background, character or early life. The law restricted his attorney's efforts. The humanity[9] of a person about to be sentenced for a capital offense is the critical question at the penalty phase of a capital trial. See, e.g., Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984). Evidence bearing on who Raymond Robert Clark was and where he came from would have suggested that his personality and motivations could be explained, at least in part, by his personal history and thus would have shown that there was a Ray Clark worth saving. This is just the kind of humanizing evidence that "may make a critical

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[8]Of course, this type of mental health mitigation not only related to Mr. Clark's background, but also would have been relevant to the circumstances of the offense and one of the key questions posed at trial; namely, was Mr. Clark's behavior influenced and/or dominated by Mr. Johnston?

[9]Of course, the eighth amendment assures an individualized sentencing determination, precisely because, as the Court explained in Woodson, if the sentencer is not allowed to consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants will be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The most relevant mitigating evidence, however, was never considered by Mr. Clark's sentencers.

difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It would have made the difference between life and death in this case.

Raymond Robert Clark was born in Meriden, Connecticut on July 12, 1941 to Ruth and Frank Partridge. Ray was "a wartime baby - conceived so that Mr. Partridge could avoid the service." (Aff. of Harry Clark).[10] His mother, now known as Ruth Rogers, recalls that Ray's father was a "womanizer and a gambler... [he] never cared much about Ray, he just ran around on me all the time. In fact, one of Frank's girlfriends had his baby before [we] were even divorced." (Aff. of Ruth Rogers).

Ray's mother remarried when he was four years old. Her second husband, Harry Clark, moved the family to Independence, Missouri, where Ray grew up unwanted, ignored and unloved. "Because we were never the kind of parents we should have been," Harry Clark recalls, "Ray never really had a fair chance when he was growing up." Ray's mother, Ruth, paints a similar picture:

> Harry and I did not have a good relationship - especially after our daughter, Ruth Ann, was born. Harry paid a lot of attention to Ruth Ann when she was a baby and just ignored Ray. It hurt me a lot to see how Harry rejected Ray. Because I was so unhappy, I started to drink a lot and that made things a lot worse.

(Aff. of Ruth Rogers).

Ruth and Harry Clark's marital misery left Ray tragically scarred. Their alcoholism prevented them from interacting in any meaningful way with Ray, leaving him ignored and neglected. Ray's resulting emotional problems went largely unnoticed by his parents who were too unhappy with their own lives to care:

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[10]The information discussed herein, and a great deal more, was contained in affidavits included in the appendix to Mr. Clark's Rule 3.850 motion and proffered before the lower court.

> Ruth and I both drank a lot when Ray was growing up and after awhile we never really paid attention to what was going on with him. I do remember that Ray was having problems in school, but I never paid much attention to what they were... Even though Ray was having a hard time growing up normally, Ruth and I didn't pay much attention to it at the time. We were busy with our own problems and weren't smart enough to realize Ray needed help.

(Aff. of Harry Clark).

Ray's step-father explains that his "life was at a stand-still then." Ruth recalls that

> Harry was always very moody. Sometimes he would just sit there silently for days. The only time he ever really paid attention to Ray was when he misbehaved. I remember one time, when Harry was beating Ray in the basement with his belt, I got so upset that I ran down and grabbed the belt and cracked Harry with it and told him that if he ever laid a hand on Ray again, it would be the last time.

(Aff. of Ruth Rogers). Harry's own confusion and unhappiness is revealed in his comments regarding Ruth's reaction to his physical abuse of her son:

> Ruth never came to Ray's defense when I would get onto him like a normal mother would. When I would punish or yell at Ray, Ruth just didn't care what was happening. Sometimes I would have to spank Ray when he was bad and I am sure that there were times when I hit him too hard. Ray never had the kind of supervision that he deserved, and our drinking problem just made everything worse.

(Aff. of Harry Clark).

The depression and despair of a second failed marriage rendered Ruth Clark incapable of providing her son with the nurturing love necessary to overcome the damage of his step-father's cruel rejection and abuse:

> About all that Ruth ever did for Ray was feed him. There was never the closeness or caring that most mothers have for their children. When I would get up in the morning to go to work, Ruth would stay in bed and when I said "Good Morning"

> to her she would say to me, "What the hell is so good about it?"

(Aff. of Harry Clark).

Joyce Clark, the wife of Ray's step-brother, Bob, reports that Ray's mother "was a selfish individual who rejected him and as long as he was living with his mother and step-father she discriminated against him and favored his younger half-sister." (California Probation officer's report, 4/23/65).

Ray's childhood was consistently marked by his constant attempts to win the approval and affection of those around him. Despite a desperate need for the guidance and support of strong parental role models, Ray was denied caring and love during his critical childhood years. A neighbor, Frances Schmidt, recalls that

> [Ray] never could do anything to please his parents and he tried so hard... No one in his family showed him any respect or love. His mother didn't speak a civil word to that child from the time he got up in the morning til he went to bed at night. Poor thing, he heard yelling and shouting all the time. It breaks my heart when I remember that poor kid... Ray wanted to be loved more than anything...

(Aff. of W. J. Schmidt).

Denied even the simplest display of caring in his own home, Ray sought refuge by spending as much time as he could with the Schmidt family:

> Little Ray used to call me "mom", not his mother. He used to come to my house in the morning, to go to school with my children. Many days he had no breakfast at home and would eat breakfast at my house... He was so neglected at home that the little bit of love we could give him meant a lot to him.

(Id.).

School records show that Ray was unable to achieve on a level commensurate with his peers. His academic performance ratings were consistently poor or failing. Ray's mother explains,

> As Ray got older, he started acting like he might have some problems and so we sent him to a military academy called the De La Salle School. The school was run by Catholic Franciscan Brothers who knew how to straighten out boys that were difficult. The school was not too far from where we lived so Ray still lived at home even though he was going to a special school.

(Aff. of Ruth Rogers). This attempt to intervene on Ray's behalf proved futile, however, because he only attended this "special school" for a short time before the Clark family came apart at the seams:

> Things just got worse and worse at home and then I found out Harry was sleeping with my best friend, Florence, and so I told him to leave. When Harry left me... I was so confused and miserable that I just didn't care what happened, so Harry took Ruth Ann with him but he left Ray behind... Since I didn't have any money I had to move from Independence into a hotel apartment in Kansas City.

(Aff. of Ruth Rogers). The loss of her husband and daughter devastated Ray's mother. Harry Clark explains how the divorce affected Ray:

> I just couldn't take it anymore, and so I left Ruth. When I left, I took our 10 year old daughter Ruth Ann with me because things were too bad with Ruth to leave her there. Ruth didn't try to stop me from taking Ruth Ann because she knew that if she contested it, I would win... After I left, Ruth moved to a bad part of town and just abandoned Ray, even though he was still a young boy.

(Aff. of Harry Clark). Frances Schmidt, a neighbor to the Clark family, recalls what happened when Ray was abandoned by his mother and step-father:

> ...there came a time when the poor child had to live with us for one and a half years. His mom and step-dad had divorced and she just kicked him out on the streets. My son asked me if Ray could live with us as he had no place to go -- he was

> all of thirteen. Ray simply had no place to go and no one to turn to but us... After his parents were divorced, Ruth moved to a bad part of town. All she wanted to do was entertain all the men, and she didn't care what happened to her son. I remember he came to stay with us in November, when it was just getting cold.

(Aff. of W. J. Schmidt).

Barely a teenager, Ray Clark had already been emotionally, psychologically and intellectually crippled by the family into which he was born. The Schmidt family tried to give Ray the caring he had never had before, but the damage was done. After a few more years of high school, Ray dropped out, fled to California, and joined the Navy. Navy medical records indicate that at the time Ray enlisted, he was suffering from malnutrition.

The emotional deprivation, neglect and abuse suffered during childhood and adolescence took its toll on Ray Clark during young adulthood and led to a gradual downward spiral into the escape of dangerous and self-destructive drugs. During his Navy service, Ray was accused of possessing and/or distributing barbituates. He responded by attempting suicide - Ray ingested 70 Dexamyl tablets, which left him comatose for two days. Dr. Blair, a Navy psychiatrist, notes:

> [H]e was 'depressed' and ingested to avoid going to the brig... Past history shows a long time pattern of emotionality instability marked by an itinerant way of life and his own view of himself as moody, beligerent [sic] and a person who finds it difficult to take orders. Has much disciplinary action since in the Navy, mostly for unauthorized absence.

(Navy Records of Ray Clark).

Because of Ray's immaturity and instability, he eventually received a dishonorable discharge from the Navy. Ray then moved into a garage apartment in Long

Beach, California, rented to him by the Taylor family, who were friends and neighbors of Ray's step-brother, Bob Clark. Mrs. Taylor remarked that

> [s]he had heard that [Ray] had been kicked around by his parents... she found that he hated his mother and had not much use for his father either. However, he seemed to like kids and there was always a gang of boys and girls around him. It appeared as if he wanted to be a big shot in their eyes... Sometimes [Ray] told her he felt people didn't like him... She felt sorry for [Ray] and since they were a big family she took him in and always treated him well and did everything they could to help him.

(California Probation Officer's report, 4/23/65).

In 1964, Ray attempted suicide for the second time. Dr. Owen E. Heninger, a psychiatrist, relates the events surrounding this incident:

> Mr. Clark recently came to medical attention when he was discovered with both arms and wrists slashed and apparently trying to kill himself by breathing household gas fumes.
>
> According to Mr. Clark, this took place because of a mutual suicide pact he had with a "boy" whom he was in love with. He and the "boy" had had a long and close relationship together and when he told the "boy" that he was leaving town, the "boy" threatened to kill himself. "He put his arms around me and cried." They decided that rather than separate, they would mutually commit suicide, wrote a suicide note, turned on the gas without lighting it and went to bed together. (...Mr. Clark said he had had six beers). He awoke in the middle of the night, left the room, and when he returned the "boy" was dead and at this point he tried to kill himself by slashing his arms with a razor and breathing gas fumes.

(Psychiatric Examination Report of Dr. Heninger). Ray was convicted of first degree murder and was incarcerated for approximately nine years in a California prison despite Dr. Heninger's conclusion that Ray was insane at the time of the offense:

> Under the influence of alcohol, noxious gas fumes and the psychological conflict of separating from his love object, he lost control over his primitive impulses of destructive rage and acted them out directly on his love object... In

> my opinion, [Mr. Clark] was insane at the time of the act; he was, by reason of a disease of the mind, unable to choose the right and refrain from the wrong.

(Id.).

While incarcerated in California, Ray was used as a guinea pig in a drug experimentation program. A variety of chemicals were administered to Ray, including Dichlorvos, an organophosphorus insecticide generally used in the form of impregnated strips or blocks which slowly release vapor. The U.S. Department of Health recommends that insecticide strips with Dichorvos not be used in rooms where ill patients or the aged are confining or in areas where food is prepared or served. Ray was also given Indocin as part of these drug experiments. Potential side effects of Indocin include depression, anxiety, depersonalization, mental confusion and psychic disturbances including psychotic episodes. Other chemicals were administered to Ray as well. (See drug experimentation records, appended to Mr. Clark's Rule 3.850 motion). However, "[t]he long term effects of these drugs is not clear [but] strongly supports the need for neurological testing and evaluation." (Report of Harry Krop, supra).

In 1974, Ray was paroled and put on work release washing windows at a juvenile facility in California where he met his codefendant in this case, Ty Johnston.

Johnston's relationship with Mr. Clark, and Johnston's dominant role (see Report of Dr. Krop; Affidavit of Susan Schaeffer, supra) should have been explored. Counsel, however, was restricted.[11]

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[11]For the Court's convenience, copies of the affidavits referred to herein are attached at the conclusion of this brief.

C. MR. CLARK'S ENTITLEMENT TO A FULL AND FAIR EVIDENTIARY HEARING AND POST-CONVICTION RELIEF

The penalty phase proceedings in this case, like those in Hitchcock, violated the eighth amendment. The same preclusive consideration was provided because the statute restricted counsel.

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). No one took note of anything concerning the character of the offender and circumstances of the offense, Gregg v. Georgia, which mitigated against death but which was not in the statute, because the statute tied Judge Schaeffer's hands. Ample [nonstatutory] mitigation, however, was available and should have been developed, presented, and considered. See Hitchcock, supra.

Mr. Clark's claim was properly before the Rule 3.850 Court: Hitchcock v. Dugger represents a substantial change in law mandating post-conviction merits consideration. An evidentiary hearing was and is warranted because the "files and records" by no means conclusively showed that Mr. Clark was entitled to "no relief" on this evidentiary claim; to the contrary, the files and records supported Mr. Clark's claim. See O'Callaghan v. State, 461 So. 2d at 1355; State v. Sireci, supra, 502 So. 2d at 1224 (successive Rule 3.850 motion; same); Lemon v. State, 498 So. 2d 923 (Fla. 1986). Evidentiary hearings, after all, are generally the proper means by which to resolve Hitchcock/Lockett issues such as Mr. Clark's, see Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1986)(evidentiary hearings required in cases raising Lockett issues), citing, Hitchcock v. Wainwright, 770 F.2d 1514, 1517 (11th

Cir. 1985)(en banc), rev'd sub nom. on other grounds, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and this Court has specifically relied on the record adduced at Rule 3.850 hearings in order to properly resolve Hitchcock/Lockett claims. See, e.g., McCrae v. State, supra, 510 So. 2d at 880 and n.3 ("Upon our review of the original trial record in this case and the testimony presented at the rule 3.850 motion hearing below, we find [a Hitchcock violation]" [emphasis added]). Mr. Clark's claim was before the Rule 3.850 trial court on the merits, and the merits demonstrated Mr. Clark's entitlement to adequate evidentiary resolution and thereafter Rule 3.850 relief. Mr. Clark's capital sentencing proceeding was "fundamentally unfair," Riley v. Wainwright, 517 So. 2d 656, 660 n.2 (Fla. 1987)("exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair."); this Court should reverse and remand for proper resolution.

ISSUE III

THE STATE'S SUPPRESSION OF CRITICAL EXCULPATORY EVIDENCE VIOLATED BRADY V. MARYLAND AND MR. CLARK'S RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND CAPITAL SENTENCING DETERMINATION.

Prosecutors may neither suppress material evidence, nor allow witnesses to lie or shade the truth, nor present misleading evidence, and certainly may never argue to the jury facts or inferences from facts known to be false. The prosecutor's function is to seek justice, not to obtain convictions. See ABA Standards for Criminal Justice, "The Prosecutor Function", Standards 3-1.1 to 3-1.4. Thus, the prosecutor must disclose information that is helpful to the defense, whether that information relates to guilt or innocence, and regardless of whether defense counsel requests the specific information. United States v. Bagley, 105 S. Ct. 3375 (1985).

Here the State failed to disclose key information regarding the co-defendant, "Ty-Stick" Johnston, and how he came to implicate Mr. Clark. "Ty-Stick" was by no means the innocent young man who "came forward," as the State asserted at trial. Today, finally, after his release, Ty-Stick provided an affidavit relating what the State should have disclosed to the defense long ago.[12] As Judge Schaeffer explains:

> My name is Susan F. Schaeffer and I am a Circuit Judge in Florida's Sixth Judicial Circuit. In 1977, I was an Assistant Public Defender and served as trial attorney for Raymond Robert Clark when he faced charges of first degree murder, kidnapping and extortion.
>
> At the time I represented Mr. Clark, I was never made aware that his co-defendant, Ty Jeffrey Johnston, was told by the police that Mr. Clark had fingered Mr. Johnston as the person who had killed the victim in this case.
>
> At the time I represented Mr. Clark, I was also not made aware that Ty Jeffrey Johnston was told by the police that if he didn't cooperate and "do what they wanted", Ray would testify against Ty and then Ty would "fry" in the electric chair.
>
> At the time I represented Mr. Clark, I was also not made aware that Ty Jeffrey Johnston made no statement to the police regarding this offense until he was told by the police that Ray had already made a statement that Ty killed the victim in this case.
>
> At the time I represented Mr. Clark, none of the information described above was provided to me by the prosecution.
>
> All of the above is true and accurate to the best of my recollection.

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[12] Former collateral counsel attempted to interview Ty-Stick, but he then refused to provide any information. The State to this date refuses to disclose its files (see infra). Judge Schaeffer's affidavit, infra, also explains the obvious -- that the evidence was withheld from her as well at the time of trial.

(Affidavit of Susan Schaeffer, Appendix, Vol. I, Ex. 6). This information would have been critical. As explained in Ty's affidavit, proffered before the lower court, the State convinced him to talk by lying to him and stating that Mr. Clark had already "fingered" him. They told him, inter alia, that unless he talked based on what Mr. Clark had said he, Mr. Johnston, would "fry" in the electric chair:

> My name is Ty Johnson. I was a witness at Raymond Robert Clark's trial in September, 1977, in which Ray Clark was found guilty of first degree murder and sentenced to death.
>
> I was first contacted by the police to be a witness in this case while I was residing in South San Francisco, California, with my parents, Carol and Alvin Johnston. The police came to my house at night and talked to my parents and then took me to a police station in California to be investigated.
>
> The police told me that they had talked to Ray Clark in Florida and that he had said that I had killed David Drake. The police also said that if I didn't cooperate with them and testify against Ray, then Ray would testify against me instead. I was told repeatedly that I would fry in the electric chair if I didn't do what they wanted. This made me really mad at Ray Clark.
>
> The police then did their "good cop/bad cop" routine in order to convince me that I needed to talk. The good cop was telling me things would be better for me if I would tell them what they wanted to know. He said he was sure that I had not really done anything, but he needed to know so that he could help.
>
> It was then, and after they told me Ray Clark had fingered me and gave a statement that I did it, that I gave the police my first statement about Raymond Clark. As I recall, the police had a tape recorder and taped this conversation.
>
> The police and the prosecutor met with me over and over before I finally testified against Ray. The prosecutor told me the questions he would ask, and told me that Susan, Ray's

> lawyer, would cross-examine me. I was told how to handle myself in court and how to answer the questions.
>
> Ray and I smoked a lot of pot and drank a lot of beer together. Ray drank much more than I did. He never ran out of beer, and always had one in his hand.

(Affidavit of "Ty" Johnston).

A. THE EVIDENCE SHOULD HAVE BEEN DISCLOSED

The facts surrounding the shooting were described only by Ty-Stick; his credibility was the central issue at trial. The jury deliberated for twelve hours at guilt-innocence. It was certainly a close case. But defense counsel didn't know that Ty-Stick had been told that Mr. Clark had implicated him and that he was going to fry because of it; she didn't know that he was angry at Mr. Clark because of this; she could not use this information, information which would have been critical to the deliberations of a jury that, even without it, deliberated for twelve hours. Judge Schaeffer questioned Ty extensively about his motivation to lie at trial -- Ty provided none of this, and the State sat silently as he withheld it. The key questions surrounding why Ty went out of his way to implicate Mr. Clark (the man who had cared for him and supported him) were never answered, because the information was withheld. Of course, the constitutional analysis attendant to this claim is clear, and is set forth in footnote 13, infra.[13]

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[13]The withholding of this exculpatory evidence violated the fifth, sixth, eighth and fourteenth amendments and deprived Mr. Clark of a fundamentally fair and reliable capital trial and sentencing determination. Brady v. Maryland, 373 U.S. 83 (1963). Where, as here, withheld evidence goes to the credibility and veracity, i.e., when it impeaches the testimony of a prosecution witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. See generally

(footnote continued on following page)

Promises and threats to witnesses are classically exculpatory. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Any motivation

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(footnote continued from preceding page)

Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1974). Of course, counsel cannot be effective when deceived; the concealment of impeachment evidence thus violates the sixth amendment right to effective assistance of counsel as well. Cf. United States v. Cronic, 104 S. Ct. 2039 (1984). The fundamental unreliability of a capital conviction and sentence of death gained as a result of such prosecutorial misconduct also violates the eighth amendment. Brady, supra; Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984).

Those constitutional protections prevent miscarriages of justice and ensure the integrity of fact-finding. Those protections were abrogated in this case. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974).

As is obvious, there is "particular need for full cross-examination of the State's star witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and when that star happens to be a co-defendant, denial of proper impeachment is especially troubling. It is with a very careful eye that the State's handling of star-witness co-defendant's statements should be scrutinized.

Counsel for Mr. Clark made repeated attempts to obtain exculpatory, material information pretrial. Such exculpatory and/or material evidence may relate to either the guilt and/or capital sentencing trial. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence).

The method of assessing materiality is well-established. Analysis begins with the Supreme Court's reminder in Agurs that the failure of the prosecution to provide the defense with specifically requested evidence "is seldom if ever excusable." United States v. Agurs, 427 U.S. at 106. Any doubts on the materiality issue accordingly must be resolved "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980); accord United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978); Anderson v. South Carolina, 542 F. Supp. 725, 732 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983); United States v. Feeney, 501 F. Supp. 1324, 1334 (D. Colo. 1980); United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1154 (D. Utah 1977). "[T]his rule is especially appropriate in a death penalty case." Chaney v. Brown, supra, 730 F.2d at 1344.

Second, materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at

(footnote continued on following page)

for testifying must also be disclosed. Giglio. Impeachment of prosecution witnesses is often, and especially in this case, critical to the defense case. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in criminal cases when a person must be allowed to effectively confront a co-defendant and/or dealing witness:

(footnote continued from preceding page)

trial. E.g., United States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-35, 736, 737 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983)(withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

Third, materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). See also, Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973).

Finally, and most importantly, it does not negate materiality that a jury which heard the withheld evidence could still convict the defendant. Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir. 1984); Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981). This is so, because, in assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's innocence or a reasonable doubt as to his guilt, or even whether the reviewing court weighing all the evidence would decide for the State. Rather, because "it is for a jury, and not th[e] Court to determine guilt or innocence," Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981), materiality is established and reversal required once the reviewing court concludes that the suppressed evidence would have affected the outcome. Bagley, supra. That is, where, as here, there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [either phase of the capital] proceeding would have been different," Bagley, supra, 105 S. Ct. at 3383, reversal is proper.

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 U.S., at 87, so, that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Bagley, supra.

Here, the State deliberately withheld critical exculpatory and mitigating material. Mr. Clark's trial attorney repeatedly sought through every discovery device available to her, all the exculpatory information she could regarding Mr. Johnston. The focus of the trial was on the credibility of Mr. Johnston, i.e., on the reliability of his story. He was in fact the State's case. Yet despite his testimony that Mr. Clark did in fact commit the homicide, the jury deliberated twelve hours before convicting. Certainly, with the information she did have counsel raised serious concerns about Mr. Johnston's credibility. However, the one thing counsel did not have was knowledge of how the State initially convinced Mr. Johnston to implicate Mr. Clark. They told Mr. Johnston that Mr. Clark had told them about the crime and was relating it in such a fashion so as to try to set Mr. Johnston up to be executed. In essence Mr. Johnston was told that Mr. Clark was trying to kill him and that he (Mr. Johnston) should get Mr. Clark before Mr. Clark got him. The undisclosed information gave Mr. Johnston a very powerful motive to lie. He needed to get even and protect himself. The police in essence told him he could do this by

fingering Mr. Clark. The disclosure of such information would have destroyed Johnston's credibility, and Johnston was the only direct evidence implicating Mr. Clark. The Bagley materiality standard is met in this case. The true motive for Mr. Johnston's story at the time he first related it prior to the deal he cut with the State was critical. This evidence was material: a reasonable probability exists that the results of the trial and sentencing proceedings would have been different if the jury had known the whole, true story. This is particularly true where, as here, the jury deliberates at length (12 hours) and has considerable difficulty reaching a verdict. Accordingly, an evidentiary hearing was warranted.

B. MR. CLARK'S CLAIM IS SUBJECT TO NO PROCEDURAL PRECLUSION

As discussed in Issue I, supra, the Rule 3.850 trial court declined to conduct a hearing on the reasons why this claim could not have been brought earlier since it ultimately reached the merits and ruled adversely to Mr. Clark. The discussion presented above demonstrates that the lower court erred: an evidentiary hearing was required on this classic Rule 3.850 issue. See Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988).

There can be no question here that the merits of Mr. Clark's claim were properly before the trial court: the claim could not have been brought ealier, since it was the State's own misconduct that precluded counsel from learning of its existence. A post-conviction petitioner's "conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim when the first petition was filed." Moore v. Kemp, 824 F.2d 847, 851 (11th Cir. 1987)(en banc). As the Motion to Vacate demonstrates, neither Mr. Clark nor his counsel were aware of the factual basis of the Brady v. Maryland violations arising

out of cooperating accomplice "Ty-Stick" Johnston's relationship with the State prior to Mr. Clark's trial. Trial counsel attempted to learn about that relationship, as did former collateral counsel. The State hid the relationship throughout the prior proceedings. Much of the truth remains concealed to this very day, as the State continues to oppose Mr. Clark's proper requests for disclosure of the State Attorney's files (made pursuant to the Florida Freedom of Information Statute, Fla. Stat. sec. 119.01 et seq.)(See infra, section C).

A petitioner cannot be faulted for not raising a claim earlier when it is the State itself that suppresses the "tools" upon which the claim can be based:

> In the present case, [the petitioner] has not deliberately withheld this ground for relief, nor was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for [the petitioner's] delay in presenting this claim rested on the State's failure to disclose. Under the circumstances, [the petitioner] has not waived his right to a federal hearing on the claim.

Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); see also, Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979).

This claim, in fact, must be determined on its merits, for it involves a paradigm of interference by state officials which precluded Mr. Clark from bringing it earlier. See Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights); cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986).

In this regard, in a different but related factual context, the United States Supreme Court recently held that a State's asserted procedural obstacles are insufficent to overcome a post-conviction petitioner's entitlement to relief when it is the State's own misconduct that resulted in the petitioner's failure to urge the

claim. See Amadeo v. Zant, ___ U.S. ___ (No. 87-5277, May 31, 1988).

Likewise, in Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987), the Seventh Circuit found cause for procedural default when the evidence which gave rise to a claim of ineffective assistance of counsel was concealed by the Assistant State Attorney.[14] Of course, in Mr. Clark's case it was "interference" (i.e., the concealment of evidence) which made the factual basis for the claim unavailable earlier. Murray v. Carrier, 106 S. Ct. at 2646. No bar applies.

C. OTHER FAILURE'S TO DISCLOSE

As stated, the State refuses to this day to disclose what it knows about Ty-Stick. Mr. Clark's proper requests for disclosure pursuant to Fla. Stat. section 119.01, et. seq. [Freedom of Information], were refused notwithstanding the fact that

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[14]The evidence concealed concerned fifteen-year-old convictions of the defendant in another jurisdiction. The State argued that defense counsel, who stipulated to two such prior convictions which in fact did not exist, could have independently secured the records of the convictions from the other jurisdiction. The court pointed to the difficulty the State itself had had in attempting to secure the records, and said:

> As an indigent death row inmate relying on the efforts of appointed counsel, petitioner did not have available to him all of the resources of the State in attempting to secure copies of the alleged New York convictions. He sought the help of the NAACP Legal Defense Fund in New York in locating the records, but that office was unable to produce certified copies of the New York records until the summer of 1985. Without the factual information contained in those records, any ineffective assistance of counsel claim based on Mr. Kinser's stipulation to the existence of the New York convictions would have been useless for petitioner who would have been unable to demonstrate prejudice as a result of Mr. Kinser's error.

Lewis, 832 F.2d at 1457.

Mr. Clark was, under the statute, clearly entitled to the information requested. The lower court then, erroneously, declined to direct disclosure on the basis of the fact that it was denying Mr. Clark's claim.

Ty Johnston's former defense counsel, Allan Allweiss, now an Assistant State Attorney, similarly refused to provide the files in his possession regarding Mr. Johnston, although Mr. Johnston had provided Mr. Clark's present counsel with a release authorizing disclosure of what were, after all, his (Ty's) files. Again, the State holds back. Again, the lower court declined to order Allweiss to turn over his former client's files on the basis of its adverse ruling on Mr. Clark's claim.

Each of these rulings were erroneous. Mr. Clark's case should be remanded, the files disclosed, and a proper evidentiary hearing conducted for each of the reasons set forth herein. See Sireci, supra, 502 So. 2d at 1224.

ISSUE IV

ARGUMENT, INSTRUCTION AND COMMENT BY THE PROSECUTOR AND COURT THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN RAYMOND CLARK'S SENTENCE OF DEATH DIMINISHED HIS CAPITAL SENTENCING JURY'S SENSE OF RESPONSIBILITY FOR THE AWESOME CAPITAL SENTENCING TASK THAT THE LAW WOULD CALL ON THEM TO PERFORM, AND MISLED AND MISINFORMED THEM AS TO THEIR PROPER ROLE, IN VIOLATION OF MR. CLARK'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, CALDWELL v. MISSISSIPPI, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

On March 7, 1988, the United States Supreme Court granted certiorari in Dugger v. Adams, 56 U.S.L.W. 3601, previous history in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), modifying on rehearing, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). Adams will have a direct effect on the viability of Mr. Clark's sentence of death: if the Supreme Court affirms the Eleventh Circuit's grant of relief in Adams

Mr. Clark's death sentence must be vacated; the prosecutorial arguments and judicial comments discussed below violated Mr. Clark's rights to a reliable and individualized capital sentencing determination in the same way as those condemned by the Adams panel.

On April 21, 1988, the Eleventh Circuit, en banc, issued its opinion in Mann v. Dugger. Relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Clark's eighth amendment rights. Raymond Clark is entitled to relief under Mann, for there is no discernible difference between the two cases.

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), did not exist at the time of Mr. Clark's trial, direct appeal, or prior state court post-conviction proceedings. Nor were any precedents then available applying Caldwell's standards to Florida's trifurcated capital sentencing scheme. The first such case was Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987).[15]

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[15]Mr. Clark's case proceeded into the federal system and was filed in the United States District Court before Caldwell v. Mississippi had been issued. Later, while his case was pending before the United States Court of Appeals for the Eleventh Circuit, Mr. Clark filed a supplemental brief requesting leave to present his Caldwell issue to the United States District Court and/or the Florida state courts. The request was not granted and the Eleventh Circuit specifically declined to address the claim. See Clark v. Dugger, 834 F.2d 1561, 1536 n.1 (11th Cir. 1987).

This is the first opportunity Mr. Clark has had to present his Caldwell v. Mississippi claim to any court. The claim should now be heard and relief should now be granted. At a minimum, Mr. Clark urges that the Court withhold decision pending the United States Supreme Court's resolution in Adams.

B. MR. CLARK'S CLAIM SHOULD BE HEARD

Mr. Clark acknowledges this Court's prior, adverse rulings on this claim. See Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987). Given the pendency of Adams and the issuance of Mann, however, Mr. Clark urges reconsideration.

Caldwell represents a "substantial change" in eighth amendment law, far more substantial in fact than Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). This is so because where Hitchcock changed the standard of review which the Florida Supreme Court had been applying to a class of constitutional claims, see Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(Hitchcock rejected "mere presentation" standard of review applied to Lockett v. Ohio issues); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(same), the Caldwell decision established a class of constitutional claims which did not previously exist:

> None of the [pre-Caldwell eighth amendment] cases indicated that prosecutorial comments or statements by a trial judge to the jury, other than those that limited the mitigating factors that could be considered, implicated the eighth amendment prohibition against cruel and unusual punishment.

Adams v. Dugger, 816 F.2d at 1499. Thus, Caldwell's holding that the eighth amendment is violated by the "fear [of] substantial unreliability as well as bias in favor of death sentences" resulting from "state-induced suggestions that the sentencing jury may shift its sense of responsibility . . .," 105 S. Ct. at 2640, clearly represented a substantial change in the law. As such, Caldwell falls

squarely within the standards enunciated in Witt v. State, 387 So. 2d 922 (Fla. 1980), and Downs v. Dugger.

Caldwell involves the essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46. The opinion established, for the first time, that comments which diminish a capital jury's sense of responsibility render the resulting death sentence unreliable and therefore constitutionally invalid. Caldwell is a substantial change in law because it established the eighth amendment principle.

Caldwell also substantially changed the standard of review, cf. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), pursuant to which such issues must be analyzed: under Caldwell, the State must show that comments such as those provided to Mr. Clark's sentencing jury had "no effect" on their verdict. Id. at 2646. No opinion had so held before Caldwell was announced. Cf. Thompson, supra (Hitchcock changed standard of review); Downs v. Dugger, supra (same).

In sum, the legal basis of Mr. Clark's claim was simply not available until Caldwell was decided. See Adams v. Dugger, supra. There is no procedural bar. See Rule 3.850; cf. Reed v. Ross, 468 U.S. 1 (1984); Downs v. Dugger, supra.

C. MR. CLARK'S ENTITLEMENT TO RELIEF

In Mann v. Dugger, a case involving the very same prosecutorial and judicial comments heard by Mr. Clark's jury, the en banc Eleventh Circuit granted relief. There is no discernible difference between Mann and Mr. Clark's case. Compare Mann v. Dugger, No. 86-3182 (11th Cir. April 21, 1988), slip op. at 18 ("You understand

you do not impose the death penalty; that is not on your shoulders . . .Again, that decision rests up here with the law, with Judge Federico.")(prosecutor's comments), with Clark, ROA 2574-75 ("Each of you understand that the Judge is not bound by your recommendation as to the sentence, that he carries the entire weight of the sentence on his shoulders. None of it carries on your shoulders. All you're doing is making a suggestion to him. He may accept your suggestion or he may reject your suggestion. In other words, he is the one that will walk out of this room at the end of sentencing . . . with the weight of that sentence on his shoulders.") (prosecutor's comments); compare Mann, slip op. at 20 ("As you have been told, the final decisions to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you . . . and render . . . an advisory opinion . . .") (jury instructions), with Clark, ROA 3198-99 ("As you have been told, the final decision as to what punishment shall be imposed and that responsibility is the responsibility of me. However, it is your duty to follow the law, which will now be given to you by me, and render to me an advisory sentence.)(jury instructions). There is no difference.

In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," id., slip op. at 17, and thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that had been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement

> of reliability in capital sentencing. See Adams v. Wainwright, 804 F.2d 1526, 1532 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. March 7, 1988).

Id. As discussed in Claim I of Mr. Clark's motion there is absolutely no principled factual or legal distinction between Mr. Clark's case and Mann. Under Mann, Mr. Clark is entitled to relief.

Throughout the proceedings resulting in Mr. Clark's capital conviction and sentence of death, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their nonresponsibility at the sentencing phase. As to guilt or innocence, they were told they were the only ones who would determine the facts. As to sentencing, however, the responsibility was not on their "shoulders" but rested solely with the judge.

Mann v. Dugger makes clear that proceedings such as those resulting in Mr. Clark's sentence of death violate Caldwell and the eighth amendment. In Mann, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. The comments were then "sanctioned," cf. Caldwell, supra, by the trial court's instructions that "the final decision as to what punishment shall be imposed is the responsibility of the judge." Mann, slip op. at 20. The comments, argument and judicial instructions provided to Mr. Clark's jury were as egregious as those in Mann and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

1. Voir Dire

Here the prosecutor explained and admonished, as the prosecutor in Mann v. Dugger explained and admonished, that the jurors' role at the penalty phase would be essentially insignificant:

> Now, you've heard me talk with Mrs. Lawson about the two-stage part of the trial. Again, so everybody understands what we're talking about, we're talking about two stages of a trial, a determination of guilt or innocence, and then, if guilty as charged, we go to a second phase of the trial where the jury recommends a sentence -- an advisory sentence -- to the Judge. Each of you understand that the Judge is not bound by your recommendation as to the sentence, that he carries the entire weight of the sentence on his shoulders. None of its carries on your shoulders. All you're doing is making a suggestion to him. He may accept your suggestion or he may reject your suggestion.
>
> In other words, he is the one that will walk out of this room at the end of sentencing, if we get that far, with the weight of that sentence on his shoulders. Do each of you understand that?

(ROA 2574-75)(emphasis supplied). Cf. Mann, slip op. at 18 ("You understand you do not impose the death penalty; that is not on your shoulders. . . . Again, that decision rests up here with the law, with Judge Federico . . ."). In Mr. Clark's case, as in Mann the effort to minimize the jury's sense of responsibility was persistent:

> [PROSECUTOR]: Do you understand that in the event the death penalty were the ultimate consequence in this case, that that is a burden that must be shouldered alone by Judge Beach and not by you as a juror.
>
> [JUROR]: Right.
>
> [PROSECUTOR]: That if you get to that point in the trial, the recommendation is merely that, a recommendation that he can either take or reject. Do you understand that?

[JUROR]: Yes.

(ROA 2593)(emphasis supplied).

> [PROSECUTOR]: . . . If he is found guilty of a capital crime, then the jury comes back and has another hearing, comes back in a courtroom. We have another hearing, and then the jury goes back and determines what sentence it wants to recommend to the Judge. It can recommend either the death penalty or life in prison. Do you understand that?
>
> [JUROR]: Yes.
>
> [PROSECUTOR]: Now, do you further understand that Judge Beach, in this case, if it ever goes to that point, that the death penalty is imposed, that is a burden that rests solely on the shoulders of Judge Beach. In other words, you can recommend to him death or life and he can either accept your recommendation or reject your recommendation. Do you understand that?
>
> [JUROR]: Yes.
>
> [PROSECUTOR]: It's his job to sentence, not yours.
>
> MRS. WATSON: Right.

(ROA 2689)(emphasis supplied). These and other similar comments set the minimizing tone when the jurors were first introduced to the proceedings, on voir dire. Then, the Court's preliminary instructions, as in Mann and as in Caldwell, only sanctioned the prosecutor's efforts:

> Ladies and gentlemen, the procedure in a case of this kind, where there is a capital crime charged, that the death penalty is involved, is that first, this jury will determine guilt or innocence . . . Then, the jury will go out and consider the evidence to make a recommendation of what the penalty should be, a recommendation of what the penalty should be, a recommendation of death or a recommendation of mercy. You will bring that back. That, however, is not binding. I am the one who finally decides what the penalty would be. I could either go along with what you recommend, or I can impose my own sentence contrary to your recommendation.

(ROA 2725-26)(emphasis supplied). Cf. Mann, slip op. at 20. The prosecutor then again continued his efforts and made sure that the jurors understood themselves to have little responsibility for deciding whether Mr. Clark would live or die. For example:

> [PROSECUTOR]: Do you understand, ma'am, that if we get to that point in the trial, that the jury is recommending a sentence, that the final sentence is the responsibility of Judge Beach in this case?
>
> [JUROR]: Yes.
>
> [PROSECUTOR]: And that is a burden he must carry with him, and it is not something you have to worry about?
>
> [JUROR]: Yes.
>
> [PROSECUTOR]: Do you understand that?
>
> [JUROR]: Yes.

(ROA 2871-72).

2. Closing Arguments

The prosecutor presented a carefully thought-out attack. On the one hand, the picture painted of Mr. Clark was that of a worthless homosexual (e.g., ROA 2374), who did not deserve sympathy, mercy or a second chance (e.g., ROA 3174). On the other hand, he urged the jurors to remember that it was not they but "Judge Beach that carrie[d] the sentencing burden" (ROA 3184). He urged them to unleash unbridled outrage, while diminishing their sense of responsibility for the awesome capital sentencing task that the law would call on them to perform:

> [PROSECUTOR]: Now, ladies and gentlement, I recognize that to reach a judgment regarding another man's life is probably the most difficult thing that any of us, as citizens, as members of the court system, or as judge's, could ever

> possibly do. But remember Judge Beach carries the burden with him.

(ROA 3184)(emphasis supplied).

3. Jury Instructions

At the guilt-innocence phase, the jury was instructed to disregard the consequences of their verdict. Cf. Mann, supra. Then, at sentencing, they were time and again instructed that their role was merely advisory and only a recommendation which could be accepted or rejected as the sentencing judge saw fit. (E.g., ROA 3198-99; 3204-05). As the judge instructed:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed on the defendant for his crime of murder in the first degree. As you've been told, the final decision as to what punishment shall be imposed and that responsibility is the responsibility of me. However, it is your duty to follow the law, which will now be given to you by me, and render to me an advisory sentence.

(ROA 3198-99)(emphasis supplied). Cf. Mann v. Dugger, slip op at 20 ("As you have been told, the final decisions to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you . . . and render . . . an advisory opinion . . ."). The prosecutor's statements were as egregious in Mr. Clark's case as those at issue were in Mann -- and the sanctioning instructions, Mann, supra; Caldwell, supra, were the same, if not worse:

> Then, the jury will go out and consider the evidence to make a recommendation of what the penalty should be, a recommendation of death or a recommendation of mercy. You will bring that back. That, however, is not binding. I am the one who finally decides what the penalty would be. I

could either go along with what you recommend, or I can impose my own sentence contrary to your recommendation.

(ROA 2766)(emphasis supplied).

D. RELIEF SHOULD NOW BE GRANTED

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2641-42 (1985)(emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Clark's jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on the deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by judge and prosecutor at every stage of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility, while the "critical" role of the jury, Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985), was substantially minimized.

The gravamen of Mr. Clark's claim is based on the fact that the prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi. There can be little doubt that the egregiousness of the jury-minimizing comments here at issue and the jude's instructions surpassed what was condemned in Caldwell.

Under Caldwell the central question is whether the prosecutor's comments minimized the jury's sense of responsibility. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Applying these questions to Mann, the Circuit Court found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Clark's trial, it is obvious that the jury was equally misled by the prosecutor, and that the situation was not remedied by the trial court.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 s. Ct. at 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The same vice is apparent in Mr. Clark's case, and Mr. Clark is entitled to the same relief.

ISSUE V

MR. CLARK'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE DIRECTED ATTENTION TO IMPERMISSIBLE "VICTIM IMPACT" EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Clark's jury and judge were urged to sentence him to death on the basis of the suffering of the victim's family and, in fact, the prosecutor specifically called the jury's attention to the victim's family in his closing argument. Booth v. Maryland, ___ U.S. ___, 107 S. Ct. 2529 (1987), requires the exclusion, in a capital sentencing proceeding, of evidence regarding "the emotional impact of the crimes on the family". A jury's discretion in imposing the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153 (1976)(joint opinion of Stewart, Powell, and Stevens, J.J.); California v. Ramos, 463 U.S. 992 (1963).

> And while this court has never said that the defendant's record, characteristics, and the circumstances of the crime are the only permissible sentencing considerations, a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.' Enmund v. Florida, 458 U.S. 782, 801, 102 S. Ct. 3368, 3378, 73 L.Ed 2d 1140 (1982). To do otherwise would create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.' See Zant v. Stephens, supra, [7862 U.S.] at 885, 103 S.Ct. at 2747.

Booth, supra, 107 S. Ct. at 2532-33.

The very matters paraded before the sentencing court and jury in Mr. Clark's case -- the victim's family's "sense of loss," Booth, 107 S. Ct. at 2534; the victim's personal characteristics as, inter alia, a "sterling member of the community" Id. at 2534 -- were the matters which Booth determined to be impermissible

at the penalty phase of a capital trial. The eighth amendment was violated here, as it was in Booth. At Mr. Clark's trial, the victim's son testified about his father's personal characteristics:

> Q Okay, thank you. I understand that in the long conversation you had, you asked why your father had been undressed, and you were told it was so he would cooperate, is that right?
>
> A That is correct.
>
> Q To which you responded, "You don't know my father"?
>
> A That is correct.
>
> Q What prompted that response?
>
> A My father, he would walk around Stark naked if had to.
>
> Q My father wasn't the type of person who would put up with that kind of stuff, is that right?
>
> A That's correct.
>
> Q Okay. He wasn't the type of person to react to a physical threat?
>
> A In other words, you are saying if you threatened him, would he respond?
>
> Q Not knowing him, I don't know how he would respond. I guess that's what I'm asking.
>
> A Okay. No. He was very intelligent. He would think before he would hit somebody or something of that nature.
>
> Q Okay. But it wasn't in his nature to take a lot of pushing around from anybody, was it?
>
> A No, it wasn't.

(ROA 1790-91).

Then in argument at the sentencing phase, the prosecutor urged that the jury impose death because of "cruelty" to the victim's family:

> Ladies and gentlemen, I ask you once again to consider the suffering that David Drake's family had to endure when this man has called them on the phone to tell them he was going to return when, in fact, false hope that man may someday return, after he was missing since April 27th, 1977. This man was merely inflicting punishment on the family. He already killed one man and he wanted to drive them through Hell as well. I suggest to you that is atrocious, that is heinous, and that is cruel.

(ROA 3177-78).

He also argued that it was "[t]ime for the family of David Drake to have justice," (ROA 3174) and that:

> The only other people that were hurt -- and not with risk of death and not the only other people -- citizens of this community and particularly Mr. Drake's family, the family that no longer has him around to provide for their comfort, provide their companionship.

(Id.) Next he argued:

> The next one, that the crime for which the defendant is to be sentenced was committed for pecuniary gain. We know that, because he tried to cash that $5,000 check. So we know he killed for money. But he didn't stop there. No, sir, he didn't stop there. He decided he was going to try to inflict pain on the family as well, try to get some money from them when he couldn't get any money at the bank. So he was going to leave them with the false hope that their husband and father might be returned to them with the simple payment of money when, in fact, Mr. Drake's body was rotting in the woods. There was not chance for him to return to them, none at all. [sic]

(ROA 3176).

And further,

> [A]nd that is reinforced when we find out he decides to take advantage of the death he created by attempting, once again, to inflict suffering on the family by holding out to them

> the false hope that their husband, their father would be returning safe and sound.

(ROA 3182).

Then, he urged the same considerations on the judge, who insisted upon conducting sentencing in front of the jury:

> Judge, I think the court is well aware that Mr. Drake had a fine family that's sitting here in front row of the courtroom, and suffered a tremendous loss by his murder.

(Id. at 3214).

He even urged that Mr. Clark should be sentenced to death because of the suffering he inflicted on the family of Marshall Taylor, the previous victim in California (ROA 3184).

In Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), the court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646 (emphasis added). Here, the jury deliberated for twelve hours at guilt-innocence and struggled at sentencing. The improper comments, as in Booth, assuredly must have had an effect.

The focus in Booth was the "impermissible risk that the capital sentencing decision will be made in an arbitrary manner." 107 S. Ct. at 2534 (emphasis added). That is the risk which Mr. Clark's motion sought to correct.

A. MR. CLARK'S CLAIM SHOULD BE HEARD

As stated, the Circuit Court ruled on the merits of Mr. Clark's claim.[16] Mr. Clark, however, acknowledges that this Court's holding in Grossman v. State, 13 F.L.W. 127 (Fla. February 18, 1988) required contemporaneous objection for preservation of this issue. This Court reached that conclusion by noting that "There is nothing in the Booth opinion which suggests that it should be retroactively applied to the cases in which victim impact evidence has been received without objection." 13 F.L.W. at 131. Since the issuance of Grossman, the United States Supreme Court rendered its decision in Mills v. Maryland, ___ U.S. ___ (No. 87-5367, June 6, 1988). There one of the issues presented concerned the retroactive application of Booth. Because the majority of the court reversed the sentence of death on other grounds, it did not reach the Booth issue. Slip op. at 16 n.16. However, the dissenting opinion which represented the views of four members of the Court did address the Booth claim. The dissenters accepted the retroactivity of Booth and went on to discuss why they would deny relief on the merits in that case. See Mills, slip op. at 7-9 (Rehnquist, C.J., dissenting)(reaching merits of unobjected-to Booth error in case tried prior to issuance of Booth). Of course, the fact that Booth does represent a retroactive change in law is supported by the fact that every eighth amendment decision issued by the United States Supreme Court has been given retroactive application due to the significance of the stakes involved in

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[16] With regard to this claim and the Caldwell claim, Issue IV, supra, it is worth noting again that Judge Schaeffer's affidavit (reproduced in its entirety in Issue II, supra) specifically detailed the fact that she was unable to present the claims at Mr. Clark's trial since their legal bases were unavailable.

such cases. Booth involves both retroactivity and novelty. See Reed v. Ross, 468 U.S. 1 (1984). The legal bases of the claim were unavailable at the time of Mr. Clark's trial and direct appeal. (See Affidavit of Judge Schaeffer, supra).

Moreover, Mr. Clark's claim involves a classic instance of a constitutional error which "perverted the jury's deliberations concerning the ultimate question of whether [Raymond Clark should have been sentenced to die]." Smith v. Murray, supra, 106 S. Ct. at 2668. Under such circumstances, no type of procedural bar can apply, for the ends of justice mandate that the merits be heard. See Smith v. Murray, supra; Moore v. Kemp, supra, 824 F.2d 847 (en banc).

The claim is before the Court on the merits, and because the State cannot carry its burden of showing that the prosecutor's reliance on victim impact did not influence the jury, the merits call for relief.

ISSUE VI

THE FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN UNCONSTITUTIONALLY OVERBOARD MANNER, AND THAT CIRCUMSTANCE WAS OVERBROADLY APPLIED TO THIS CASE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The United States Supreme Court has consistently held that a state must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular case meet the threshold below which the death penalty cannot be imposed. McClesky v. Kemp, ___ U.S. ___, 107 S. Ct. 1756, 1774 (1987). The purpose of aggravating circumstances is to narrow the class eligible for the death penalty. An aggravating circumstance is a legislative determination that a murder which involves such a circumstance is different, and that this difference

justifies "the imposition of a more severe sentence." Zant v. Stephens, 462 U.S. 862 (1983).

In Godfrey v. Georgia, 446 U.S. 420 (1980), the United States Supreme Court reviewed the Georgia courts' application of that state's version of the heinous-atrocious-and-cruel aggravating circumstance. The court there held:

> [I]f a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. It must channel the sentencer's discretion by 'clear and objective standards that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'

446 U.S. at 428. The court ultimately reversed because there was a failure by the Georgia Supreme Court to sufficiently narrow by construction, the aggravating circumstance and thus provide the objective standards it otherwise lacked.

This Court has consistently affirmed the application of Florida's "heinous, atrocious, and cruel" aggravating circumstance and affirmed its application in this case. With all due respect, Mr. Clark submits that this Court's analysis is no longer valid under the eighth amendment, given the Supreme Court's issuance of Maynard v. Cartwright, ___ U.S. ___ (No. 87-519, June 6, 1988). In Cartwright, the Court reviewed and struck down Oklahoma's application of its heinous, atrocious or cruel aggravating circumstance, a circumstance whose scope, breadth and application were patterned after and followed this Court's analysis with regard to the Florida "heinous, atrocious, and cruel" circumstance.

Cartwright represents the same type of change in law as Hitchcock. Mr. Clark's claim should now be heard, and relief should now be granted. In Cartwright, the Tenth Circuit Court of Appeals had previously reviewed the history of the

circumstance and its construction by the Oklahoma courts and found that its application violated the eighth amendment:

> The construction of "especially heinous, atrocious, or cruel" employed by the Oklahoma Court of Criminal Appeals in this case is a departure from the construction initially adopted in Eddings. The court no longer limits this aggravating circumstance to murders that are "unnecessarily torturous to the victim," one of the standards adopted in Eddings and previously approved by the Supreme Court in Proffitt. The court now relies upon the definitions of the terms "heinous," "atrocious," and "cruel," and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder. We must decide whether this construction serves to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. at 428, 100 S.Ct. at 1764 (footnotes omitted).
>
> Oklahoma has defined "heinous" as "extremely wicked or shockingly evil" and "atrocious" as "outrageously wicked and vile." These definitions fail for the same reason that the conclusory statement that the offense was "outrageously wicked and vile, horrible and inhumane" was inadequate in Godfrey: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428, 100 S.Ct. at 1765. A limiting construction of this aggravating circumstance is necessary precisely because adjectives such as "wicked" or "vile" can fairly be used to describe any murder. These terms simply elude objective definition. A state does not channel the discretion of a sentencer or distinguish among murders when "heinous" and "atrocious" are defined only as "extremely wicked and shocking" and "outrageously sicked and vile." "Heinous" and "atrocious" have not been described in terms that are commonly understood, interpreted, and applied. Vague terms do not suddenly become clear when they are defined by reference to other vague terms.

882 F.2d at 1489. The Tenth Circuit reversed the sentence of death holding:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be

> some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheet speculation." Godfrey, 428 U.S. at 429, 100 S. Ct. at 1765.

Id.

In the present case the trial court found the homicide to have been especially heinous, atrocious or cruel and this Court affirmed.[17] Specifically the lower court had found:

> F. The murder was committed by the Defendant in a cool, callous and heartless manner without mercy or compassion for the victim, and therefore, was an especially heinous, atrocious and cruel crime.

This violated Cartwright.

In Cartwright, the United States Supreme Court unanimously affirmed the Tenth Circuit's action writing,

> Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310 (Stewart, Jr., concurring); id., at 311 (White, Jr., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently

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[17]The prosecutor had argued for this aggravating circumstance primarily because of the suffering of the victim's family. However, in Riley v. State, 366 So. 2d 19 (Fla. 1978), and Clark (Larry) v. State, 443 So. 2d 973 (Fla. 1983), this Court had explained that "it is the effect upon the victim herself that must be considered in determining the existence of [the heinous, atrocious, or cruel] aggravating circumstance."

minimizing the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976)(opinion of Stewart, Powell, and Stevens, JJ.); id., at 220-222 (White, J., concurring in judgment); Spaziano v. Florida, 468 U.S. 447, 462 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___ (1988).

Godfrey v. Georgia, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (Footnote omitted).

> The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.
>
> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429. Likewise, in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P. 2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Cartwright, slip op. at 5-7.

Cartwright makes clear that the "especially heinous, atrocious and cruel" aggravating circumstance as enunciated in Fla. Stat. Ann. Sec. 921.141(5)(h), should not have been applied on the facts of this case as detailed in the trial court's sentencing order. Cartwright also makes clear that Mr. Clark's claim is before the Court on the merits and that the merits call for relief. In fact, the overbroad and/or improper application of an aggravating factor is a classic example of a situation wherein no procedural bar may constitutionally be applied. Moore v. Kemp, supra, 824 F.2d 847; see also is. at ___ (dissenting opinion of Judge Hill); cf. Murray v. Carrier, 106 S. Ct. 2639 (1986); Smith v. Murray, 106 S. Ct. at 2668. Resentencing is proper.

ISSUE VII

MR. CLARK'S RIGHT TO CONFRONTATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 18, SECTION 16 OF THE FLORIDA CONSTITUTION, WAS VIOLATED BY THE TRIAL COURT'S IMPROPER RESTRICTION OF CROSS-EXAMINATION OF THE CO-DEFENDANT AS TO THE BENEFIT HE WOULD RECEIVE FROM TESTIFYING AS THE STATE'S STAR WITNESS.

Beginning with pretrial deposition, counsel attempted to question Ty-Stick Johnston concerning the circumstances surrounding his decision to testify against Mr. Clark, in an attempt to discern his motivation. Each attempt resulted in objection by the state's attorney, as well as refusal to answer by Ty-Stick (ROA 1538-44; ROA 1135-38). The same result occurred when Ty-Stick's attorney was deposed (ROA 1150). (See Rule 3.850 motion, pp. 78-85, for relevant portions of testimony at issue). At trial, the court again ruled that defense counsel could not cross-examine Ty with regard to the circumstances surrounding his plea bargain. Defense counsel argued that Mr. Clark's rights to confrontation were superior to the attorney/client

privilege being asserted by Ty. (ROA 2000-03). Counsel's argument was then rejected. This Court should now take corrective action.

At the outset, it must be noted that there exists no procedural limitation on this claim. Under the constitution, no procedural bar to merits review can be applied where, as here, the constitutional errors precluded the development of true facts and perverted the jury's deliberations at trial and sentencing. Smith v. Murray, 106 S. Ct. 2261, 2668 (1986); Murray v. Carrier, 477 U.S. 478 (1986).

The questions which were asked of Ty included: What did your lawyer tell you about the State speaking on your behalf? The issue here involves the balance between the defendant's right to confrontation and the witness' limited attorney/client privilege. The sixth amendment's right of confrontation is a "fundamental right, essential to a fair trial." Pointer v. Texas, 380 U.S. 400, 403 (1965). This right includes the right to cross-examine witnesses in order for the jury to adequately consider their veracity. Davis v. Alaska, 415 U.S. 308 (174); see also California v. Green, 399 U.S. 149, 157-58 (1970); Barber v. Page, 390 U.S. 719 (1968); Baker v. State, 150 So. 2d 729 (Fla. 3rd DCA 1963); Coco v. State, 62 So. 2d 982 (Fla. 1953).

In Davis v. Alaska, supra, the Supreme Court held that an essential ingredient of the right to cross-examination is the right to impeach one's accusers by showing bias, impartiality, and by discrediting the witness. 415 U.S. at 316. Ty's credibility was the "linch-pin" of the state's case. The defense should have been allowed to effectively cross-examine him concerning his bias and credibility.

> [T]o make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Davis v. Alaska, 415 U.S. at 318.

Obviously, the attorney-client privilege is not absolute. Sepler v. State, 191 So. 2d 588 (Fla. 3d DCA 1966); Baird v. Koerner, 279 F. 2d 623 (9th Cir. 1960). The privilege may be outweighed by public interest in the administration of justice. Sepler, supra.

When balancing the interests here, Ty had already pled to second-degree murder and kidnapping; Mr. Clark was on trial for his life. A trial court should honor testimonial privileges if and only if "[t]he injury that would inure to the [attorney-client] relation by the disclosure of the communication [is] greater than the benefit thereby gained for the correct disposal of litigation." 8 Witmore, Evidence (McNaughton rev. 1961) sec. 2285(4), p. 527.

The harm to Mr. Clark is readily apparent. The benefit to Ty of maintaining his attorney/client privilege after he had already pled guilty is difficult to discern. This infringement constituted fundamental constitutional error. Under the sixth, eighth, and fourteenth amendments, relief is now proper.

ISSUE VIII

MR. CLARK WAS SUBSTANTIALLY PREJUDICED BY INTRODUCTION OF EVIDENCE ABOUT AND JUDGE COMMENT UPON HIS REFUSAL TO PROVIDE A VOICE EXEMPLAR, IN VIOLATION OF HIS FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The victim's family received telephone calls regarding extortion attempts after the victim's disappearance. A week before trial, the State requested that Mr. Clark provide a voice exemplar. Upon advice of counsel that his refusal would not be admissible against him, he refused to submit to the exemplar (R. 1933-35). Mr. Clark was then held in contempt of court for his refusal.

At trial, when Mr. Clark learned that the refusal was going to be admitted as evidence, he sought to purge the contempt and provide a voice exemplar. (ROA 1952). The court held that it was too late. The State then strenuously argued in closing that the refusal was evidence of guilt:

> Now I'm certain that you can go back and you can say, well, all he said was that it sounded like Clark. Well, of course, he can't be positive. But there is one way that we could have been positive, ladies and gentlemen. There is one way that we could have known for sure if that was Raymond Clark on those extortion calls to Greg Drake, and that is if Raymond Clark had given the voice samples he was ordered by the Court to give.
>
> Now, you'll be instructed, I believe, by Judge Beach, and in your written instructions, that Raymond Clark's refusal to give that voice sample is a circumstance you may consider in determining your verdict. You may give that refusal such weight as you think it deserves. Well, ladies and gentlemen, I submit to you that that refusal to give that voice sample, the weight it deserves, the one and only thing, guilty knowledge. That shows that Ray Clark did not want to be tied to this extortion. And why did he not want to be tied to this extortion? Because, ladies and gentlemen, it's ludicrous to believe that the murderer was anyone other than the extortionist.

(ROA 2385-86).

The court instructed the jury that it could consider Mr. Clark's refusal to give a voice exemplar in reaching a verdict: "You may give it such weight as you think it deserves, in light of all the evidence" (ROA 2466).

This claim involves fundamental constitutional error which resulted in the admission of false and misleading matters before the jury. See Murray v. Carrier, supra. Under such circumstances, no procedural barrier may constitutionally be applied. Id.; see also, Moore v. Kemp, supra.

In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held that the fifth amendment right against self-incrimination bars a state from compelling "communications" or "testimony", but not "physical or real" evidence such as a blood test. Id. at 762. The question left open in Schmerber was whether or not the refusal to submit to a "physical or real" test would be allowed to be used against a defendant at trial. This question was answered in South Dakota v. Neville, 459 U.S. 553 (1983), after Mr. Clark's initial appeal to this Court.

Neville makes plain that this Court's direct appeal analysis was inadequate. Specifically, the Court failed to consider whether the eighth amendment values at stake were hindered by the State's attempts to force Mr. Clark to repeat the precise words spoken by the caller on the tape. The Court also failed to consider that Mr. Clark had specifically been told by his court-appointed counsel that his refusal to submit to the exemplar could not be used as evidence against him. Finally, the court failed to note that Mr. Clark when informed that his refusal would be used against him sought to submit to the requested voice exemplar.

In Greer v. Miller, ___U.S. ___, 41 Cr. L. 3405, 3407 (1987), it was recognized that where there is post-arrest assurance that silence will not be used against a criminal defendant, that assurance must be honored and the silence may not be used at all. That is precisely the situation that Mr. Clark faced. He received advice that his refusal to submit to a voice exemplar would not be used against him and pursuant to that assurance he refused to provide the exemplar. When he learned at trial that the State would be allowed to use the refusal against him, he offered to submit. Under Neville and Greer, his fifth amendment rights were violated by the State's use of his refusal to speak.

This claim is also analogous to the issue decided in Merritt v. State, ___ So. 2d ___ (No. 69,353, April 21, 1988). There, the defendant escaped from custody while being transported from Virginia, where he was serving time, to Florida, for prosecution on charges involving an unrelated offense. The State introduced evidence of flight at trial and this Court reversed:

> Flight evidence is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. See Straight v. State, 397 So. 2d 903, 908 (Fla.), cert. denied, 452 U.S. 1022 (1981); State v. Young, 217 So. 2d 567 (Fla. 1968), cert. denied, 396 U.S. 853 (1969); Daniels v. State, 108 So. 2d 755 (Fla. 19590; Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920). However, flight alone is no more consistent with guilt than innocence. See Whitfield v. State, 452 So. 2d 548 (Fla. 1984).

In Merritt, as here, there was insufficient evidence that the defendant's flight/refusal was to avoid prosecution: "Such an inference would be the sheerest of speculation." Meritt, supra.

Likewise, Mr. Clark's refusal to submit to the voice exemplar was not evidence of consciousness of guilt, but was an action based on his reliance on counsel's advice. It was "sheer speculation" for the jury to infer guilt.

Accordingly, an evidentiary hearing and Rule 3.850 relief are warranted.

ISSUE IX

MR. CLARK'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

Mr. Clark was charged with premeditated and felony murder, pursuant to Florida Statute sec. 782.04. See Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). The prosecutor argued both theories, with emphasis on felony-murder, and the court instructed on both. A general verdict was returned.

Because felony murder could have been the basis of Mr. Clark's conviction, the subsequent death sentence is unlawful. See Mills v. Maryland, supra, slip op. at 8 (If two possible grounds for guilt verdict are presented and one of the two is legally insufficient, jury verdict must be set aside on basis of uncertainty; this analysis holds special significance in eighth amendment contexts), citing, Yates v. United States, 354 U.S. 298, 312 (1957) and Stromberg v. California, 283 U.S. 359 (1931). This is so because the death penalty in this case was predicated on an unreliable automatic finding of a statutory aggravation circumstance -- the felony murder finding that formed the basis for conviction.

Sumner v. Shuman, 107 S. Ct. 2716 (1987), stated that automatic death penalties upon conviction of first degree murder violate the eighth and fourteenth amendments. Here, the same felony supporting the felony-murder conviction was found as a statutory aggravating circumstance. Under this construction, every felony-murder would automatically qualify for a sentence of death. However, the Supreme Court has held that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty. . . . " Zant v. Stephens, 462 U.S. 862, 876 (1983).

Most recently, the United States Supreme Court addressed a similar challenge in Lowenfield v. Phelps, 56 U.S.L.W. 4017 (January 13, 1988). In Lowenfield, the petitioner was convicted of first degree murder under a Louisiana statute which required that he have "a specific intent to kill to inflict great bodily harm upon more than one person." This was also the same aggravating circumstance used to sentence him to death.

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant

> compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976).
>
> . . . .
>
> The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point.
>
> . . . .
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Id. at 4075 (emphasis added).

The operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were both predicated upon a non-legitimate narrower -- felony-murder. Relief is warranted at this stage.

Lowenfield represents a significant change in eighth amendment jurisprudence. It was unavailable in Mr. Clark's earlier proceedings. See Reed v. Ross, supra.

ISSUE X

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. CLARK OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, supra.[18] Mr. Clark's jury was unconstitutionally instructed, as the record makes abundantly clear (See ROA 3166; 3178; 3199; 3201). Relief is proper.

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[18] Caldwell is new law, and thus the merits of Mr. Clark's claim are cognizable in this action. Moreover, the unwarranted misinformation discussed herein perverted the jury's deliberations on the ultimate question of whether death was an appropriate sentence. Smith v. Murray. Again, the constitution requires that the merits of such claims be heard. Id.

ISSUE XI

THE TRIAL COURT'S INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT HAD TO BE RENDERED BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, IN VIOLATION OF MR. CLARK'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

"That a majority vote was required" (see Circuit Court Order, p. 3) is exactly what the jury was told (R. 3203-04; 3205). They were never told that in the event of a 6-6 vote, the sentence should be life. These instructional errors violated Caldwell and the eighth and fourteenth amendments for they provided the jury with misinformation of constitutional magnitude. These instructional errors also violated the standards enunciated just this week in Mills v. Maryland, ___ U.S. ___ (No. 87-5367, June 6, 1988).[19]

These instructional errors infected the sentencing process with unconstitutionality. An evidentiary hearing and Rule 3.850 relief are warranted.

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[19]Neither Caldwell nor Mills existed at the time of Mr. Clark's trial, direct appeal, or prior collateral proceedings. Each opinion constitutes new law making merits review at this juncture appropriate. Moreover, these instructional errors may well have resulted in an unwarranted sentence of death. The ends of justice thus require that the claim be heard. Moore v. Kemp, supra.

CONCLUSION

The reasons set forth herein and in Mr. Clark's Rule 3.850 motion demonstrate that the merits of Mr. Clark's claims are properly before the Court and that, on the merits, an evidentiary hearing and Rule 3.850 relief are more than proper.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
MARTIN J. McCLAIN
JULIE NAYLOR

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

By: _____
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by United States Mail, first class, postage prepaid, to Robert Krauss, Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, 1313 Tampa Street, Tampa, FL 33602, this 9th day of June, 1988.

_____
Attorney