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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Counsel for Mr. Clark initially would note a correction to an inadvertent error appearing at page 17 of Mr. Clark's initial brief. The quote from Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985)(en banc), appearing at page 17 of the initial brief should conclude immediately after the citation to Jacobs v. State, 396 So. 2d 713, 718 (Fla. 1981), appearing in the Songer quote. The language beginning with "and Harvard v. State, 486 So. 2d 540 (Fla. 1986) . . ." should be read as part of the text of Mr. Clark's brief and not as part of the quote from Songer. Counsel apologize for this inadvertent error, which, although not changing the substance of the brief, should now be noted.

The citation format employed herein shall be the same as that employed in Mr. Clark's initial brief. See Initial Brief of Appellant, p. i. The State's responsive brief in the instant appeal shall be cited as "State's Brief" with the appropriate citation following thereafter.

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INTRODUCTION: THE STATE'S STATEMENT OF THE CASE AND FACTS

The State's lengthy "Statement of the Case and Facts" as well as much of what is contained in the body of the State's brief provides very little by way of response to the issues which Mr. Clark has asserted in this proceeding. In everyday terms, what is clear is Mr. Clark's initial brief discussed "apples" -- i.e., the issues which Mr. Clark has presented in this proceeding -- while the State's brief discusses "oranges" -- i.e., factual and legal issues which have very little to do with this action. As a consequence, Mr. Clark will not take the Court's time by attempting in this reply to correct the various misstatements and overstatements of what the record in this case actually reflects which are contained in the State's "Statement of the Case and Facts" and throughout the State's brief. This Honorable Court is aware of what Mr. Clark's case involves and can discern for itself the irrelevancy of much of what the State wrote. There is no need to correct inaccuracies reflected in a discussion which is of very little relevance to the issues now before the Court.

We note at the outset, however, that contrary to the State's assertions, Judge Susan Schaeffer, Mr. Clark's former trial counsel, has consistently explained that she was precluded from developing and presenting evidence regarding non-statutory mitigation at the penalty phase of Mr. Clark's trial because of the preclusive effects of Florida's 1977 capital sentencing statute and because of the restrictive statutory interpretation given to the statute in the circuit in which she practiced as a public defender, and the trial judge in this case. This much is clear, and Judge Schaeffer's statements in this regard are consistent: she explained that her efforts were thwarted by the statute and that for that reason she never investigated,

developed, nor presented evidence of non-statutory mitigation at the evidentiary hearing held in 1983 even though this issue was not the claim litigated at that hearing[1]; Judge Schaeffer explained the preclusion on her efforts in an affidavit proffered before the federal district court in 1985 (see Initial Brief of Appellant, pp. 15-16 n.4);[2] Judge Schaeffer, post-Hitchcock, provided a detailed affidavit [3] describing the preclusion and its effects on her efforts to represent Mr. Clark at the penalty phase of his capital trial. As Judge Schaeffer has consistently explained, it was precisely because of the statute's preclusion that she neither investigated nor presented non-statutory mitigation. It was, in fact, because of the statute's preclusion on Judge Schaeffer that no non-statutory mitigation was "produc[ed]", Clark v. Dugger, 834 F.2d 1561, 1570 (11th Cir. 1987), at the penalty phase of Mr. Clark's trial. The Eleventh Circuit failed to recognize this in its opinion. The State now seeks to have this Court ignore this by ascribing tactical decisions to Judge Schaeffer's actions which never existed -- as Judge Schaeffer herself has time and again stated. The State's account is absolutely rebutted by Judge Schaeffer's sworn account. The State's statement of the case is simply wrong.

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[1]The claim became viable only after the United States Supreme Court's issuance of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987) which this Court has recognized as a substantial change in law. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

[2]The Eleventh Circuit incomprehensibly ignored all of this, as a review of its Clark opinion makes clear. See Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), discussed in Initial Brief of Appellant, Claim II.

[3]The affidavit has been reproduced in its entirety in Mr. Clark's Initial Brief, pp. 13-75, and was appended to that brief for the Court's review.

ISSUE I

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

Contrary to the argument which the State now parades for the first time on appeal, the State never asserted Rule 3.850's two-year limitation bar before the circuit court. The State's "Response in Opposition to . . . Stay of Execution and Motion for Summary Denial of . . . Motion for Post-Conviction Relief" asserted only that Mr. Clark's "claims were reviewed by both the federal district court and circuit court," id. at p. 15, and then asserted:

> In 1984, Rule 3.850 was amended and now provides, in pertinent part:
>
> > A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.
>
> Respondent respectfully submits that petitioner's claims fall into one of three categories, claims which were or should have been raised on direct appeal, claims which were decided on petitioner's previous 3.850 motions or claims which amount to an abuse of the 3.850 procedure.

(Id. at 16). This was the entirety of the State's procedural argument before the lower court. No two-year limitation bar was even referred to, much less asserted.

Similarly, as a review of the transcript of the emergency oral argument before the lower court makes abundantly clear, not once did the State orally assert a two-year limitation bar before the Rule 3.850 trial court. In failing to assert such a defense below, the State has now waived it. 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); see also, Initial Brief of Appellant, pp. 8-10 n.1, and discussion presented therein.

This Court in fact has recently explained that in the context of Rule 3.850 litigation it will not consider for the first time on appeal claims which a litigant has failed to assert before the lower court. See Cave v. State, No. 72,637 (Fla., July 1, 1988), slip op. at 9-10. The same analysis applies here: just as a defendant is not allowed to "sandbag" the court and State by withholding issues below and asserting them for the first time on appeal, the State must not be allowed to "sandbag" the court and defendant by withholding its procedural defenses below and asserting them for the first time on appeal. The State failed to argue a two-year bar below; it should not now be allowed to assert such a previously withheld issue.

Moreover, as discussed in Mr. Clark's Initial Brief (Issue I), Mr. Clark time and again requested a hearing before the Rule 3.850 trial court at which he could establish that due diligence was exercised, that the claims could not have been brought earlier, that the factual and legal bases of the claims were unknown and unavailable earlier, that no claim was intentionally withheld during the course of earlier litigation, and that the interests of justice called on the court to hear the merits of the claims presented.[4] Mr. Clark presented facts in support of this request. Counsel were ready to proceed on such a hearing during the pendency of the

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[4]Interestingly, with regard to Issue III, infra, it was the State's own misconduct that resulted in Mr. Clark's failure to urge the claim at trial, on appeal, or in earlier post-conviction proceedings.

death warrant and are ready to proceed on such a hearing now. The State, however, opposed the request.

Such a hearing was and is necessary in a case such as this -- a court should hear the evidence making it clear that the petitioner did not abuse his rights to post-conviction relief before ruling that a petitioner's claims are "abusive" or "untimely". See Sanders v. United States, 373 U.S. 1 (1963); Potts v. Zant, 734 F.2d 526 (11th Cir. 1984); cf. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). See also, Initial Brief of Appellant, Issue I and n.1 (discussing need for hearing in this regard).

As discussed in Mr. Clark's Initial Brief (Issue I), the lower court, however, ultimately ruled that no such hearing was necessary because it was going to rule on the merits of Mr. Clark's claims. The trial court then found no merit to Mr. Clark's claims and denied relief. As the lower court's order and its on-the-record pronouncements make evident, had the court deemed Mr. Clark's issues to be of merit, it would have conducted the requisite hearing on the procedural questions. It was, ultimately, the trial court's views on the merits which formed the basis of its denial of relief. It is, therefore, the merits of Mr. Clark's claims that are now before this Court.

On the merits the lower court erred, as discussed in Mr. Clark's initial brief and herein. This Court should now reverse and remand for the requisite hearing on the procedural questions attendant to this litigation and for the necessary evidentiary resolution (e.g., Issues II, III, infra) of the merits of Mr. Clark's claims.

ISSUE II

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

As indicated in the Introduction to this reply brief, Judge Susan Schaeffer's account of the preclusive effects of Florida's capital sentencing statute on her efforts to investigate, develop, and present non-statutory mitigation at Mr. Clark's capital trial has been consistent: she never attempted to investigate or develop such evidence because the statute precluded her. Her affidavit makes this undeniably clear:

> 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 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. . .

(Affidavit of Susan Schaeffer, Appendix to Rule 3.850 motion [hereinafter "Appendix"], Vol. I, Ex. 5). The affidavit of Judge Schaeffer provided to the federal district court in 1985 (see Initial Brief of Appellant, pp. 15-16 n.4 [reproducing affidavit]) makes it undeniably clear as well: Raymond Clark was denied an individualized capital sentencing determination because the 1977 Florida capital sentencing statute and the interpretation then given the statute tied his lawyer's hands. Even Judge Schaeffer's testimony at the 1983 evidentiary hearing, a hearing which did not involve this issue, made the same point (see, e.g., Record on Appeal of 1983 evidentiary hearing, pp. 81, 94-95). The Eleventh Circuit simply ignored this issue. This Court should not; at a minimum the interests of justice require that the claim be heard. Cf. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).

The State nevertheless baldly asserts, contrary to Judge Schaeffer's consistent sworn accounts, that Judge Schaeffer somehow tactically decided not to present evidence which she has explained was never investigated in the first instance. To credit the State's account (see State's Brief, p. 25 ["Despite collateral counsel's procurement of an 'eleventh hour' affidavit from trial counsel . . ."]) this Court must find that Judge Schaeffer has lied under oath every time she has been asked about this issue.[5] Judge Schaeffer, of course, has not lied. The files and records by no means show that her account is untrue; to the contrary they reflect that her under-oath account is the only true version of what transpired before and during the 1977 proceedings resulting in Mr. Clark's sentence of death. An evidentiary hearing is required. See Sireci, supra, 502 So. 2d at 1224.

Of course, Judge Schaeffer could not have tactically decided not to present non-statutory mitigation since, as she has explained, she never investigated such evidence.[6] Her omission was a direct result of the then-existing capital sentencing statute and its then-prevailing interpretation. The substantial non-statutory mitigation related in Mr. Clark's initial brief (pp. 23-37) never reached the 1977

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[5]It should be noted that this is no "eleventh hour affidavit." Judge Schaeffer has provided the same account of her understanding since 1983. The Eleventh Circuit chose not to listen to what Judge Schaeffer had to say. Mr. Clark respectfully prays that this Court listen and not ignore the facts.

[6]It is, in fact, Black Letter law that no tactical motive can be ascribed to an omission based upon the failure to investigate. See e.g., Kimmelman v. Morrison, 106 S. Ct. 2574 (1986); Strickland v. Washington, 466 U.S. 668 (1984). Here, counsel's omission resulted from the fact that the statute tied her hands (see Affidavit of Susan Schaeffer, supra).

jury charged with deciding whether he should live or die precisely because the statute tied Judge Schaeffer's hands. The State's Brief, however, ignores all of this, and the Eleventh Circuit incomprehensibly failed to recognize this claim. Now, post-Hitchcock, this Court should provide Mr. Clark with the corrective action which the eighth amendment requires. See McCrae v. State, 510 So. 2d 874 (Fla. 1987). An evidentiary hearing on the basis of Mr. Clark's allegations, see Cooper v. Wainwright, 807 F.2d 881 (11th Cir. 1986)(evidentiary hearings generally required in cases presenting Lockett issues), and thereafter Rule 3.850 relief are more than proper.

The legal analysis attendant to Mr. Clark's claim has been presented in his initial brief (Issue II) and will not be repeated here. We do note, however, that the en banc Eleventh Circuit's Songer v. Wainwright opinion presents a careful analysis of why relief is appropriate on the basis of Mr. Clark's claim which is well-worth repeating:

> These omissions [counsel's failures to present non-statutory mitigation] 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. . .
>
> * * *
>
> In addition to the trial judge's statements regarding what he believed the law to be regarding mitigating evidence at the time, as well as the instructions he gave and the verdict forms he utilized, we have Songer's counsel's testimony. He testified at a state post-conviction evidentiary hearing that he had not offered character or other mitigating evidence because he believed at the time that only evidence relevant to the statutory mitigating circumstances was admissible. He stated:

> The only recollection that I have is that the statute was new at that time,...going over the statutory grounds with him for aggravating circumstances and mitigating circumstances, and what would be available to us under the statutory language and what would be against us under the statutory language.... [I examined] all the factors we had available to us. . .
>
> * * *

[The Court's footnote at the end of the above quote explained that counsel also subsequently gave an affidavit in which he stated:]

> 8. That at the time of the defendant's sentencing hearing, Florida Statute 921.141 was relatively new. Your affiant in construing said statute reasonably believed that it precluded the consideration of any evidence except the statutorily enumerated mitigating circumstances.
>
> 9. Further, it was your affiant's belief that any evidence outside the scope of the statutorily enumerated circumstances was irrelevant, immaterial and patently inadmissible. . .
>
> * * *

[The Court's discussion further explained:]

> Of course, neither the state trial judge's nor Songer's counsel's construction of the Florida statute was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time. The new Florida death penalty statute was passed and became effective in December of 1972, shortly after the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The wording of the statute itself is logically interpreted consistently with their view; at least, the statute is very ambiguous. The Florida Supreme Court's subsequent rulings verified their conclusions. The Florida Supreme Court first construed the statute in State v. Dixon, 283 So.2d 1 (Fla. 1973). That court in describing the statute stated:
>
> > The Legislature has, ...provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.

283 So.2d at 7.

Later in the opinion the court reasoned:

> The most important safeguard presented in Fla.Stat. Section 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed.

283 So. 2d at 8.

Finally, before discussing each mitigating circumstance enumerated in the statute, the court said:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. Section 921.141 (7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

283 So.2d at 9.

The reasonableness of the trial judge's and Songer's counsel's view of the statute was further born out in Cooper v. State, 336 So.2d 1133 (Fla. 1976). The Florida Supreme Court in Cooper stated:

> The sole issue in a sentencing hearing under Section 921.141...is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding.... The Legislature chose to list the mitigating circumstances which it judged to be reliable..., and we are not free to expand the list.

336 So. 2d at 1139.

Thus, the majority's conclusion that there was no error in the jury sentencing phase of Songer's trial is not supported by the record in this case. However, the error was not due to the fault of either the trial judge or Songer's counsel. Florida law, as reasonably and logically construed by both, operated to preclude non-statutory mitigating evidence.

Songer v. Wainwright, 769 F.2d 1488, 1490-95 (11th Cir. 1985)(en banc)(Clark, Kravitch, Johnson, and Anderson, concurring). That analysis was confirmed by the United States Supreme Court in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

Of course, the standard Hitchcock harmless error analysis is inapplicable to this claim: it was as a result of the preclusion under which Judge Schaeffer was forced to operate that the mitigating evidence related in Mr. Clark's initial brief was never "produced" before the sentencing judge and jury. No evidentiary hearing has been held on this claim although it is clearly cognizable and although the files and records by no means show that Mr. Clark is entitled to no relief and much less so "conclusively" make such a showing. Sireci, 502 So. 2d at 1224. Now, post-Hitchcock, it is clear that such a hearing is necessary on the basis of the facts Mr. Clark has proffered.

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.

The Appellee's brief boldly asserts that "[t]here is no indication that this claim could not have been raised at an earlier stage of this protracted litigation. Appellant fails to show how the facts supporting this claim were unknown to counsel prior to the filing of the instant third 3.850 motion." (State's Brief, p. 28). This assertion is absolutely belied by the record and by the facts. In fact, the State's bold assertion completely ignores what was alleged in Mr. Clark's Rule 3.850 motion and supported by detailed affidavits, what was discussed at the emergency argument on Mr. Clark's motion held before the Rule 3.850 trial court, and

what was discussed in Mr. Clark's initial brief -- with appropriate citation to the affidavits and other facts presented to the lower court. The State's hyperbole (see State's Brief, p. 28) aside, what is clear is that Mr. Clark's former collateral counsel attempted to interview "Ty-Stick" Johnston but that Johnston then refused to be interviewed; that the State continues to withhold evidence and refuse to disclose its files as required by Fla. Stat. section 119.01, et seq. [Freedom of Information Act], see also, Tribune Co. et al. v. In re: Public Records, 493 So. 2d 480 (Fla. 2d DCA 1986); and, that the State continues to withhold evidence through Assistant State Attorney Allan Allweiss' refusal to disclose Johnston's file. (Allweiss, formerly Johnston's defense counsel and now an assistant state attorney refuses to disclose the file although his former client, Johnston, has provided Mr. Clark's present counsel with a release.)

Ty Johnston's testimony was the only item of direct evidence introduced at trial which implicated Mr. Clark in the instant offense. Johnston's testimony was the only reason Mr. Clark was convicted: the State had no confession, no tangible evidence, no identification; the State had nothing other than what Ty-Stick said. Similarly, Johnston's testimony was the only evidence which supported the aggravating circumstances found -- without Johnston there would have been no death sentence.

From the outset, pretrial, and on through the entirety of the post-conviction process, every attorney Mr. Clark has had has realized that there was something fundamentally amiss with Johnston's account; every attorney Mr. Clark has had has attempted to find out Johnston's motivation for presenting his shaded version of what happened on the day of the homicide. Every attorney Mr. Clark has had exercised more than due diligence in an effort to uncover the truth which the State all along has

known and withheld. As even the State concedes (State's Brief, p. 29), former trial counsel, Judge Susan Schaeffer, attempted to uncover Johnston's motivation during depositions and at trial. Johnston then lied about his motivation and the State sat idly by without correcting his account or disclosing the truth about why he was testifying. The State, of course, has known the truth all along -- it was the State's law enforcement officers, after all, who by lying to Mr. Johnston extracted from him the account of the events which the State later paraded before the jury at Mr. Clark's trial; it was, after all, the State's prosecutors who directed Mr. Johnston as to how he should testify:

> 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. . . .

(Affidavit of Ty Johnston, cited in Initial Brief of Appellant, pp. 40-41). Judge Schaeffer has explained:

> 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.

(Affidavit of Susan Schaeffer, cited in Initial Brief of Appellant, p. 39). To credit the State's account that Mr. Clark has "fail[ed] to show that the state

withheld anything from the defense" (State's Brief, p. 29), this Court would have to find that Judge Schaeffer's sworn affidavit is a lie. Obviously, the State does not like what Judge Schaeffer's affidavits explain regarding her efforts to represent Mr. Clark. See also, Claim II, supra. The State's disdain, however, is simply not enough to defeat Mr. Clark's claim. In this regard the law is clear: an evidentiary hearing is necessary at which the truth may be discerned, for the files and records by no means demonstrate that Mr. Clark is entitled to "no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988).

Judge Schaeffer's efforts were not the only step Mr. Clark has taken in exercising due diligence and seeking to discern the truth. Former collateral counsel attempted to interview Johnston. Johnston, then incarcerated, refused to talk. Present counsel then contacted Johnston. Johnston, now released, has finally provided his account. Present counsel also requested that the State disclose its files, a request which the State was required to comply with pursuant to Fla. Stat. section 119.01 et seq. and Tribune Co., supra. The State refused. Present counsel were provided with a release by Mr. Johnston and sought his files from his former defense attorney, Allan Allweiss. Allweiss, now an assistant state attorney, also refused.

It is remarkably ironic to hear the State assert that Mr. Clark's claim should not be heard because it was not brought earlier when it was the State itself that withheld the evidence at issue at trial, on appeal, and during the post-conviction process. If Mr. Clark had relied solely on the State's good faith, the claim would never have been discerned at all. The claim is before the Court because due diligence was exercised. The claim is before the Court because, finally, Johnston

agreed to be interviewed and provide the truth. For all of the Appellee's brief's hyperbole, the State still hides its files. If Mr. Clark's claim is as frivolous as the Appellee's brief would have this Court believe, why is it that the Pinellas County State Attorney's Office and Assistant State Attorney Allweiss continue to refuse to comply with the clear mandate of the law? Why do they continue to hide their files?[7]

At the emergency oral argument on Mr. Clark's Rule 3.850 motion conducted before the lower court, counsel specifically urged that the court conduct a hearing at which Mr. Clark would present the facts reflecting that due diligence was exercised, that the factual basis of this claim was withheld by the State, and that the claim could not have been brought earlier (Tr. 57). The trial court specifically denied the request for an evidentiary hearing[8] since the court went on to address the merits of the claim (Tr. 59) and found that the claim had no merit. In this regard the lower court erred.

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[7]Counsel cannot put this any other way. To the extent that this brief reflects an angry tone, that anger cannot be cured by polite professional writing. Mr. Clark's counsel are appalled by the State's actions and know of no other way to express their anger.

[8]As discussed herein and in Mr. Clark's Initial Brief (p. 39, n.12) neither Mr. Clark nor his counsel were aware of the factual basis for this Brady v. Maryland claim, and counsel is still not aware of all the information, as the State refuses to disclose it. A petitioner cannot be faulted for not raising a claim earlier when the state itself suppresses the "tools" upon which the claim can be based, see Walker v. Lockhart, 763 F. 2d 942, 955 n.26 (8th Cir. 1985), as the United States Supreme Court has recently confirmed. Amadeo v. Zant, ___ U.S. ___ (May 31, 1988). Is it too much to ask that a court conduct an expeditious hearing on a claim of this magnitude when it has been the State's own misconduct which prevented the petitioner from earlier bringing the claim? Is it too much to ask that Mr. Clark be heard on this issue before an execution forever forecloses presentation of the true facts? This is not rhetoric. It is an appeal to this Court's duty to see to it that justice is done.

In support of the trial court's merits ruling, a ruling made by a tribunal which never heard the facts, never conducted an evidentiary hearing, and never ordered the State to comply with Mr. Clark's legitimate requests for the information contained in the State's files to which he was entitled, the State argues that Ty Johnston was vigorously cross-examined by defense counsel, and that one aspect of the cross-examination was whether Ty believed it would be better for him if he cooperated. This, of course, ignores what is contained in Johnston's affidavit, as it ignores the facts of what transpired at trial. Of course, Judge Schaeffer attempted to fully cross-examine Johnston at trial. Johnston was the State's case. However, as discussed in Mr. Clark's initial brief and herein, Judge Schaeffer was never provided with critical evidence which would have undermined this key witness' credibility. Even without the disclosure, the jury deliberated for twelve (12) hours before reaching a guilty verdict. Had the evidence been disclosed there can be little doubt that the results of the proceedings would have been different. United States v. Bagley, 105 S. Ct. 3375 (1985). Prejudice here is more than apparent.

The files and records by no means show that Mr. Clark is "conclusively" entitled to "no relief" on this claim; an evidentiary hearing is more than proper, see Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Squires v. State, 513 So. 2d 138 (Fla. 1987), for all of the reasons discussed herein and in Mr. Clark's initial brief.

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.

Mr. Clark relies on the discussion presented in his initial brief. He notes, contrary to the State's assertion, that any reasoned review of this record leaves no doubt that Mr. Clark's case is absolutely dissimilar to Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(en banc), and that, in fact, there is no discernible difference between Mr. Clark's case and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc). See Initial Brief of Appellant, Issue IV.

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.

The State agrees that victim impact is a non-statutory aggravating factor, and that such is not permissible under Florida's capital sentencing statute (State's Brief, p. 35). However, strangely, the State denies that there was any victim impact material imparted to the sentencing body in Mr. Clark's case, and that comments made in closing argument during the sentencing phase were somehow relevant to aggravation.

This argument is contrary to the record. The prosecutor's argument was that "[t]his 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" (R. 3177-78). The prosecutor also argued:

> 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 no chance for him to return to them, none at all.

(R. 3176).

Then, he urged the same considerations to 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). These comments, among others reflected throughout the record, were precisely the type of impermissible victim impact information condemned in Booth v. Maryland, 107 S. Ct. 2529 (1987). The prosecutor even urged that Mr. Clark should be sentenced to death because of the suffering he inflicted on the family of Marshall Taylor, a previous victim of an offense Mr. Clark committed in California (ROA 3184).

Thus, improper victim impact was urged both upon the sentencing jury and the sentencing court. No objection was made to these comments at trial, and Judge Schaeffer's affidavit explains why: the legal bases for presenting such a claim were unavailable to her. See Initial Brief of Appellant, p. 64 n.16,; see also id. at p. 15 (Affidavit of Susan Schaeffer).

In Mr. Clark's case, such matters "perverted" the sentencer's weighing process, i.e., the sentencing jury's and judge's consideration "concerning the ultimate question whether in fact [Raymond Clark should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Accordingly, even on this basis alone the Statte's procedural default contentions must fail, for this Court's "refusal to consider the defaulted claim . . . [would] carr[y] with it the risk of a manifest miscarriage of justice." Smith v. Murray, 106 S. Ct. at 2668.[9] Mr. Clark's claim should be determined on the merits. The merits require relief.[10]

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[9]Counsel respectfully note that this argument was not presented and therefore not considered by the Court in Grossman v. State, 13 F.L.W. 127 (Fla., Feb. 18, 1988).

[10]In addition, it is again worth noting that the circuit court addressed this issue on the merits at the emergency hearing on Mr. Clark's Rule 3.850 motion. The court never held that this claim was barred in any regard (Tr. 63 et seq.).

ISSUE VI

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

As explained in Mr. Clark's initial brief, the issue raised by Mr. Clark's claim was identical to that raised in Maynard v. Cartwright, 822 F.2d 1477 (10th Cir. 1987), cert. granted, 56 U.S.L.W. 3459 (Jan. 11, 1988). The United States Supreme Court decided Maynard v. Cartwright, 43 Cr. L. 3053, on June 6, 1988. Under the Cartwright decision, Mr. Clark is undeniably entitled to post-conviction relief.

Oklahoma's application of its "heinous, atrocious, and cruel" aggravating factor was patterned on this Court's application of its counterpart in Florida. Maynard v. Cartwright, supra. The identical constitutional infirmity on the basis of which the United States Supreme Court struck down Oklahoma's application of that circumstance is evidenced by the application of that circumstance to Mr. Clark's case. Mr. Clark challenged this factor on his direct appeal to this Court. The Court then denied relief. Now, post-Maynard v. Cartwright, this Court should revisit the merits, and grant Mr. Clark the relief to which he is entitled.

Maynard v. Cartwright did not exist at the time of Raymond Clark's trial, sentencing, and direct appeal. Cartwright, issued just days ago, substantially alters the standard pursuant to which Mr. Clark's claim was determined on direct appeal. Like Hitchcock v. Dugger, Cartwright represents a substantial change in law requiring that Mr. Clark's claim be determined on the merits pursuant to Rule 3.850. See generally, Witt v. State, 387 So. 2d 922 (Fla. 1980); cf. Morgan v. State, 515 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). Just as

Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), fell within Witt's analysis because it altered the standard of review which this Court had previously applied to a class of constitutional claims, see Downs v. Dugger, supra, Cartwright has also altered the standard of review. The claim should now be heard and relief should now be granted.

Moreover, the new precedent involves the most fundamental of constitutional errors -- proceedings which violate the standards enunciated in Cartwright render any ensuing sentence arbitrary and capricious Id. For this reason also Mr. Clark's eighth amendment claim is properly before the Court. What Mr. Clark has presented involves errors of fundamental magnitude no less than those found cognizable in post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964) (denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966)(right to presence of defendant at taking of testimony). Moreover, because human life is at stake, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So. 2d 795, 801 (Fla. 1957) (overlook technical niceties where death penalty imposed); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963) (error found fundamental "in view of the imposition of the supreme penalty").

This Court, after all, exercises a very special scope of review in capital cases and carefully scrutinizes the proceedings resulting in sentences of death to

ensure reliability and to assure itself that those proceedings are free of error. See, e.g., Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1163, 1165 (Fla. 1985). This Court so reviewed the proceedings during Mr. Clark's direct appeal and did not recognize the fundamental unreliability of this death sentence -- the Court did not then have the benefit of Cartwright. Now, the United States Supreme Court's opinion establishes that Mr. Clark's death sentence was unreliable. Relief is now undeniably warranted.

Mr. Clark was denied the most essential eighth amendment requirement -- his death sentence was constitutionally unreliable. Here, the eighth amendment violations directly resulted in a capital proceeding at which the sentencer's weighing process was "perverted", i.e., the error directly affected the sentencer's consideration "concerning the ultimate question whether in fact [Raymond Clark should have been sentenced to die]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis in original). Given such circumstances, the Supreme Court has explained that no procedural bar can be properly applied. Id. Beyond all else that Mr. Clark discusses herein, the ends of justice require that the merits of the claim now be heard, and that relief be granted.

The State attempts to distinguish Mr. Clark's claim from that found meritorious in Cartwright because "the Oklahoma court's [had failed] to define the terms heinous, atrocious or cruel." (State's Brief at 39). The State further relies on the decision in Proffitt v. Florida, 428 U.S. 242 (1976), claiming that the decision there upheld the heinous, atrocious or cruel circumstance.

The State errs in its analysis. The prosecutor's argument, the penalty phase instructions, and the language of the trial court's sentencing order here are

virtually identical to the language condemned as vague by both the Tenth Circuit and the United States Supreme Court in Cartwright. The language approved in Proffitt appears nowhere in these proceedings.

In Proffitt v. Florida, 428 U.S. 242, the United States Supreme Court approved this Court's construction of the "heinous, atrocious or cruel" aggravating circumstance, holding:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted).

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. Clark's case. The jury was simply instructed that one of the aggravating circumstances was "the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel." (R. 1617). The trial court's sentencing order stated "the murder was committed . . . in a cool, callous and heartless manner without mercy or compassion for the victim, and therefore, was an especially heinous, atrocious, and cruel crime" (R. 2157, 2160). The explanatory or limiting language approved by Proffitt does not appear anywhere in the record. Nevertheless, on direct appeal, this Court affirmed.

Exactly the same scenario occurred in Cartwright: the jury found the murder to be "especially heinous, atrocious, or cruel," and the state appellate court affirmed, reciting facts which in its opinion supported the application of the circumstance. As in Mr. Clark's case, the focus of the Oklahoma courts was upon the cruelty to the victim who survived the attack and not upon the decedent who died instantaneously from a shotgun blast. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that the death sentence did not comply with the fundamental eighth amendment principle requiring the limitation of capital sentencers' discretion. Here the limiting language approved in Proffitt was ignored and the crime was found to be heinous, atrocious, and cruel on the basis of the suffering of the victim's family. The deletion of the Proffitt limitations renders the application of the aggravating circumstance in this case subject to the same attack found meritorious in Cartwright. The Supreme Court's eighth amendment analysis fully applies to Mr. Clark's case; the identical factual circumstances upon which relief was mandated in Cartwright are present here. The result here should be the same as in Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).
>
> 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, J., concurring); id., at 311 (White, J., 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 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 characterized 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. . . .
>
> Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court 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, supra.

In Mr. Clark's case, as in Cartwright, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion.

Likewise, here, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. Finally, the Florida Supreme Court did not cure the unlimited discretion exercised by the jury and trial court by its recitation of facts. Like Cartwright, Mr. Clark is entitled to relief.

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.

The State argues that this issue is an abuse of Rule 3.850 proceedings. The circuit court found it to be untimely (Tr. 68), but not abusive (Tr. 91). The State also argues in its brief to this Court that this issue has been raised previously in other forms. Notwithstanding the State's assertions, 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, 2268 (1986); Murray v. Carrier, 477 U.S. 478 (1986). Relief is 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 State may believe this issue to be an abuse of the Rule 3.850 process proceeding (State's Brief, p. 41), but the circuit court did not find it to be such (Tr. 91). The lower court ruled on the merits (Tr. 75). This Court should rule on the merits as well and grant Mr. Clark the relief to which he is entitled.

ISSUE IX

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

The State again argues an abuse of the Rule 3.850 process with regard to this issue. Again, here, the circuit court ruled on the merits (Tr. 82). On the merits, ironically, the State argues that three felonies (kidnapping, the forced writing of a check, and extortion) establish evidence of premeditation. The fact of the matter is that both felony murder and premeditated were argued to the jury, a general verdict was returned, and there is really no way to know the basis of that verdict. Under recognized constitutional principles, if one of two possible grounds for a verdict is legally insufficient or constitutionally improper, the jury verdict must be set aside. See Mills v. Maryland, ___ U.S. ___ (No. 87-5367, June 6, 1988), slip op. at 8, citing Yates v. United States, 354 U.S. 298, 312 (1957) and Stromberg v. California, 283 U.S. 359 (1931). Clearly then it is of no moment that the jury could have found premeditation; since they could have found felony murder, this issue must be addressed and relief must be granted.

The bedrock principle upon which the Supreme Court's modern capital punishment jurisprudence is founded is that a capital sentencing determination must be individualized. To this end,

> an aggravating circumstance 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, 876 (1983). An aggravating circumstance which fails under that test results in an arbitrary, freakish, and wrongful sentence of death.

In Mr. Clark's case, the aggravating circumstances found fail that test (See Initial Brief of Appellant, pp. 57-60). Consequently, Mr. Clark's death sentences are wrongful. See also Godfrey v. Georgia, 446 U.S. 420 (1980)(overbroad application of aggravating factors abrogates the eighth amendment).

Given the fundamental wrongfulness of these death sentences, the State's alleged procedural bars do not overcome Mr. Clark's right to post-conviction relief.[11] The Supreme Court has held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a . . . court may grant [relief] even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 106 S. Ct. 2639, 2650 (1986). Clearly, the errors in this case (the sentencing court's wrongful [overbroad] application of aggravating circumstances) meets that test, for Mr. Clark has been sentenced to death although he is innocent in the only sense meaningful to a capital sentencing determination:

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[11]Mr. Clark's Initial Brief explained why such procedural bars are unavailing. Here, he explains why, given the nature of the error at issue, this Court should not entertain the State's procedural default contentions.

> In the context of death penalty habeas corpus litigation, one may be guilty of murder and yet not subject to the death penalty. Thus, when I advocate that a district judge ought to be able to hear a petition brought by one claiming innocence, I would interpret "innocence", where the death penalty is involved as being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

Moore v. Kemp, supra, 824 F.2d at 878 (Hill, J., with Fay and Edmondson, JJ., dissenting). Mr. Clark's "claim of innocence" meets the test enunciated by the dissenting judges, as well as the majority, of the Moore v. Kemp en banc Court. See 824 F.2d at 856-57 (majority opinion), citing Murray v. Carrier and Smith v. Murray. In Mr. Clark's case, the wrongful application of aggravating factors "perverted" the sentencer's weighing process, i.e., the sentencing jury's and judge's consideration "concerning the ultimate question whether in fact [Raymond Clark should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Accordingly, the State's procedural default contentions must fail, for this Court's refusal to consider the claim "[would] carr[y] with it the risk of a manifest miscarriage of justice." Smith v. Murray, 106 S. Ct. at 2668.

Mr. Clark's claim must be determined on the merits. The merits call for relief.

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.

In his Rule 3.850 motion, Mr. Clark raised this issue as fundamental constitutional error. No procedural bar can be ascribed to Mr. Clark's claim: this constitutional error is of the type which "pervert[ed] the jury's deliberations

concerning the ultimate question whether in fact [Raymond Robert Clark should have been sentenced to die.]" Smith v. Murray, supra, 106 S. Ct. at 2668 (emphasis in original). Moreover, since Mr. Clark's claim is also founded upon Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), ample grounds exist demonstrating that the claim is not subject to procedural default. See Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). Obviously, neither Mills v. Maryland, 43 Cr. L. 3056 (June 6, 1988) nor Caldwell existed at the time of Mr. Clark's trial and direct appeal or previous Rule 3.850 motion. Mills and Caldwell demonstrate that no procedural bar can be applied to Mr. Clark's claim and that 3.850 relief is proper.

The focus of a jury instruction claim is the manner in which a reasonable juror could have interpreted the instructions. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). The gravamen of Mr. Clark's claim is that the jury was told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Clark proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty while at the same time understanding, based on the instructions, that Mr. Clark had the ultimate burden to prove that life was appropriate.

Affirming indisputable principles regarding the heightened reliability required in capital sentencing proceedings, the Eleventh Circuit has found a presumption such as the one employed here to violate the eighth amendment:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
>
> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F. 2d 1469 (11th Cir.), cert. denied, 43 Cr. L. 4051 (1988).

The Eleventh Circuit's concerns about such a presumption echo the concerns emphasized by the United States Supreme Court in its recent decision in Mills v. Maryland, supra. There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition

> of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, slip op. at 6 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

The Mills Court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, slip op. at 8-9 (footnotes omitted). The circuit court failed to apply that constitutionally mandated standard to Mr. Clark's case.

The effects feared by the Jackson and Mills courts are precisely the effects resulting from the burden-shifting instruction given in Mr. Clark's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Cf. Mills, supra. Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (1973), in considering the appropriate penalty. There is a "substantial possibility" that this understanding of the jury instructions by a jury which deliberated at great lengths resulted in a death recommendation despite factors calling for life. Mills, supra. Mr. Clark's sentence of death must be vacated.

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.

Mr. Clark respectfully submits that the merits of this issue must be addressed. Cause exists because an integral aspect of the eighth amendment analysis upon which Mr. Clark's claim is founded -- Caldwell v. Mississippi, 105 S. Ct. 2633 (1985)-- represents a substantial change in the law sufficient to establish "cause", see Adams

v. Dugger, 816 F.2d 1493 (11th Cir. 1987), as does Mills v. Maryland. Moreover, no procedural bar can be ascribed to this claim for it involves eighth amendment error which served to "pervert the jury's deliberations concerning the ultimate question whether in fact [Raymond Robert Clark should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986) (emphasis in original). In determining whether an instruction misled the jury, a court must determine how a reasonable juror would have understood the instruction. Mills v. Maryland, No. 87-5367 (June 6, 1988), citing, Francis v. Franklin, 471 U.S. 307 (1985) and Sandstrom v. Montana, 442 U.S. 510 (1979). In the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, slip op. at 8-9 (footnotes omitted).

The special danger of an improper understanding of jury instructions in a capital sentencing proceeding is that such an improper understanding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, slip op. at 6 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

In Mr. Clark's case, a "substantial possibility" exists that the jury understood its instructions to require a majority verdict for life. Despite the one correct statement that a life recommendation could be reached by "six or more votes," the remainder of the penalty phase instructions repeatedly emphasized that the jury must reach a majority verdict. A reasonable juror could certainly have understood these instructions to require a majority verdict.

A "substantial possibility" exists that the jury relied on its incorrect instructions and was effectively precluded from considering the factors before it

calling for a life sentence. Mills. Caldwell and Mills represent significant changes in the law demonstrating both "cause" and "prejudice", as well as showing that no adequate and independent state law procedural bar could be applied to Mr. Clark's claim. Adams v. Dugger, supra.[12] Mr. Clark's sentence of death should be vacated.

CONCLUSION

The reasons set forth herein and in Mr. Clark's Initial Brief and 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. The lower court's order should be reversed and Mr. Clark should be granted the relief to which he is entitled.

Respectfully submitted,

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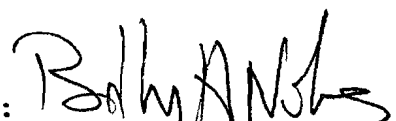
By: 
Attorney for Petitioner

[12]This analysis applies equally with regard to Issues X and XI.

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 11th day of July, 1988.

Attorney