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IN THE SUPREME COURT OF FLORIDA

Appellate Case No. 86,836

LARRY CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal From A Judgment Of The Circuit Court Of The Thirteenth Judicial Circuit of the State of Florida, Criminal Division, In And For Hillsborough County,

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INITIAL BRIEF OF APPELLANT LARRY CLARK

Patrick D. Doherty
619 Turner Street
Clearwater, FL 34616
(813) 443-0405
Florida Bar No. 0155447

Richard G. Parker
Thomas J. Karr
Matthew B. Pachman
Evelyn L. Becker
Brian P. Brooks
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004-1109
(202) 383-5300

Counsel for Larry Clark

June 24, 1996

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IN THE SUPREME COURT OF FLORIDA

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LARRY CLARK,,

Appellant,

v.

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Appellee.

Appeal From A Judgment Of The Circuit Court Of The Thirteenth Judicial Circuit of the State of Florida, Criminal Division, In And For Hillsborough County,

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INITIAL BRIEF OF APPELLANT LARRY CLARK

Mr. Clark appeals from the order of Judge J. Rogers Padgett denying Mr. Clark's first and only motion under Florida Rule of Criminal Procedure 3.850 to vacate or set aside his death sentence and underlying convictions.

Larry Clark was convicted of first-degree murder, attempted murder and robbery in the Hillsborough County Circuit Court on April 20, 1982. The trial court imposed the death sentence, which the jury had recommended by an 8-4 vote. This Court affirmed Mr. Clark's death sentence and first degree murder conviction on December 22, 1983. Clark v. State, 443 So. 2d 973 (1983). The Supreme Court of the United States denied certiorari on May 21, 1984. 467 U.S. 1210, 104 S. Ct. 2400, 81 L. Ed. 2d 356 (1984).

STATEMENT OF THE CASE

Mr. Clark raises several claims in this appeal which, Mr. Clark respectfully submits, merit relief. Two claims, both directed at his sentence, are of such overriding importance as to warrant particular attention:

First, a life sentence is legally compelled under Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), because Mr. Clark's equally culpable codefendant Davidson James has had his death sentence overturned and received a life sentence.

Second, the court below[1] refused to hear compelling evidence that Mr. Clark's trial counsel was utterly ineffective at sentencing. Trial counsel advised the jury in summation that this was the "most difficult" argument for life that he had ever made. Trial counsel failed to investigate and present a wealth of evidence that would have established several mitigating circumstances. Despite this, the jury vote recommending death was close (8-4), making patent the prejudice from these serious failures. In denying Mr. Clark's 3.850 motion, however, the court below ordered Mr. Clark to proffer testimony concerning ineffectiveness without hearing any of the proffered testimony, including that of attorney Robert Link, who would have given an expert opinion as to counsel's ineffectiveness.

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[1] "Court below" refers to the court which ruled on Mr. Clark's Amended Motion. "Trial court" refers to the court hearing his 1982 trial. Judge Padgett presided over both proceedings.

On the first claim, Mr. Clark is entitled to an order directing the court below to resentence Mr. Clark to life; failing that, on the second claim Mr. Clark is entitled to an evidentiary hearing on his claim that counsel was ineffective at sentencing.

* * * * *

This proceeding began in December, 1984, when Mr. Clark filed a pro se Rule 3.850 motion to vacate his conviction and sentence. The Hillsborough County Circuit Court denied the motion without an evidentiary hearing before Mr. Clark obtained counsel. This Court reversed that ruling, holding that the denial of Mr. Clark's claims of ineffective assistance of counsel was improper because the lower court failed to attach record excerpts showing conclusively that Mr. Clark was not entitled to relief. Clark v. State, 491 So. 2d 545, 547 and n.1 (Fla. 1986). The Court relinquished jurisdiction to permit Mr. Clark, through counsel, to raise additional claims. Id. at 547.

On August 8, 1986, Mr. Clark filed an augmented Rule 3.850 Motion, and subsequently filed discovery requests to which the court below in February 1989 ordered the State to respond. The State responded and made documents available in January 1992. Subsequently, Mr. Clark filed an Amended Motion for Post-Conviction Relief ("Amended Motion"), pursuant to Fla. R. Crim. P. 3.850, on July 23, 1992. The Amended Motion added no new claims. It separated out as a distinct claim the allegations in Count R, see R. 60-61, 75-76, deleted two claims, and added certain factual

allegations that came to light in discovery. Mr. Clark served additional discovery requests in February 1993. R. 121-208. On May 15, 1995, the court below ordered the State to respond to the discovery requests (as it again did on May 18, 1995, R. 209-11) and to respond to Mr. Clark's Amended Motion. It also ordered that an evidentiary hearing be held on Mr. Clark's claims. See R. 16A. Mr. Clark then filed a Motion for Directed Judgment based on the life sentence which the State gave Mr. Clark's equally culpable codefendant Davidson James following the reversal of James's death sentence in James v. State, 615 So. 2d 668 (Fla. 1993) ("James II"). R. 215-53.

On September 27, 1995 the court below denied all but one of Mr. Clark's claims without a hearing, ruling that many of these claims[2] were procedurally barred. R. 329-31.

Counts B, C and D, which attacked the State's failure to produce exculpatory evidence (including evidence relating to the

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[2] Counts A (race based use of peremptory challenges), B (destruction of exculpatory evidence), H (coercion of defense witness), I (allowing testimony that co-defendant was apprehensive at giving handwriting exemplar), J (no finding Mr. Clark killed or attempted to kill), K (invalid 1972 robbery conviction used as aggravating factor), L (merger of "pecuniary gain" and "in course of robbery" aggravators), M (improper finding of "for purpose of avoiding arrest" aggravator), N (improper instruction on vague "heinous, atrocious and cruel" aggravator), O (improper finding of "cold, calculated and premeditated" aggravating factor), P (violation of Caldwell v. Mississippi), Q (failure to instruct jury on option of recommending a life sentence), R (improper instruction that jury must disregard sympathy), T (death sentence here violates fundamental principles of proportional justice). R. 20-119, 326-29. Mr. Clark appeals each count except Count H.

jailhouse informant James Coleman and to the alleged identification of Mr. Clark), were dismissed on the ground that there was no reasonable probability that this evidence would have affected the outcome of the proceedings. R. 329. Mr. Clark's Counts E, F and G, claiming, inter alia that the State suborned perjury from Coleman, were dismissed on the ground that Mr. Clark had not shown an inability to investigate these matters at trial, R. 330, even though Mr. Clark had contended that this relevant and requested information had been withheld by the state. R. 37, 39-40.

The court also summarily denied Mr. Clark's claim of ineffective assistance of counsel at the guilt phase, holding that Mr. Clark "fail[ed] to show" prejudice from any deficient performance that might have existed. R. 331. Mr. Clark made a timely motion for reconsideration on October 12, 1995. Finally, the court held that because it "is unable to refute" Mr. Clark's claim for ineffective assistance of counsel at sentencing, "an evidentiary hearing will be held to address the merits" of this claim. Id. It also ordered Mr. Clark preliminarily to proffer the testimony which he intended present at the evidentiary hearing. The court advised that "[u]pon a determination by the court that a witness's proffered testimony is relevant . . ., the witness will then be permitted to testify at the . . . hearing." Id.[3]

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[3] Since the court below ruled that an evidentiary hearing "will be held," with the proffer only intended to allow the court below to make relevancy findings about Mr. Clark's witnesses, Mr. Clark did not include all documentary evidence buttressing his claim in his proffer. Had the court below indicated that it wanted this evidence before an evidentiary hearing would be granted, rather

On October 9, 1995, the court below heard argument on Mr. Clark's proffer and his Motion for Directed Judgment. The court below denied his motion because "I don't think there's any precedent for it." R. 609. On October 17, the court below denied Mr. Clark's motion for reconsideration. On October 31, the court below entered a one-paragraph opinion summarily denying Mr. Clark's Motion for Directed Judgment. R. 584. It also denied without an evidentiary hearing Mr. Clark's claim of ineffective assistance of counsel at sentencing. R. 585. Without appending any record excerpts pursuant to Fla. R. Crim. P. 3.850(d), the court held (1) that there was no reasonable probability that the outcome at the penalty phase would have been different had trial counsel remedied the performance deficiencies identified by Mr. Clark's proffered evidence, and (2) that trial counsel's performance of both phases of the trial[4] was not deficient, and that the deficiencies alleged by Mr. Clark did not create a reasonable probability that the outcome would have been different. Id. Mr. Clark timely appealed these rulings in an Amended Notice of Appeal filed on November 14, 1995. R. 587-89.

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than at the hearing itself, Mr. Clark would have gladly provided it.

[4] The court indicated that it was evaluating a proffer on both the guilt and penalty phases of Mr. Clark's trial. It wrote that it had considered trial counsel's preparation and presentation of "both phases of the trial," finding no reasonable probability that the outcome "of either phase of the trial" would have been different with the proffered testimony. R. 585. However, the court only requested a proffer on the penalty phase evidence.

STATEMENT OF FACTS

As the court below rejected many of Mr. Clark's claims on the face of his Amended Motion, the facts alleged therein will be presented in the arguments on those counts. Relevant facts are summarized below for those claims where adjudication in this Court requires examination of the proffer and other record evidence.

I. MR. CLARK'S EQUALLY CULPABLE CODEFENDANT WAS GIVEN A LIFE SENTENCE.

In a separate trial, Davidson James was convicted as a coconspirator and equal participant in the robbery and murder. While the state had argued that Mr. Clark was the gunman in the shootings, the prosecutor told both the court and jury that James was equally culpable and, like Mr. Clark, should be sentenced to die. The State told the jury that James "set it up. . . . He did everything. And you know what inequality and injustice is going to be: When Larry Clark is sentenced to death for the same crime as Davidson James." R. 242.

The trial court agreed with the state and found the same aggravating circumstances as were found in Mr. Clark's case[5] (along with no mitigating circumstances) and sentenced Mr. James to death. R. 407-15. Notably, James' trial court held that "[t]he acts of [James] reflect the highest degree of calculation and

[5] Indeed, while the State introduced one old conviction for Mr. Clark, it introduced four prior convictions for James, including ones for robbery and resisting arrest with violence. See R. 407-08.

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premeditation." R. 412. This Court underscored Mr. James' equal culpability in ordering his death sentence:

> it is clear that this entire episode was a joint operation by James and Clark. . . . Under these circumstances we find that the aggravating circumstances which arose because of the motive and method of the killing **are equally applicable to the two participants.**

James v. State, 453 So. 2d 786, 792 (Fla.) ("James I"), cert. denied, 469 U.S. 1098 (1984) (emphasis added).

In 1992, this Court overturned James' death sentence because the jury had been given an unconstitutionally vague instruction on Florida's "heinous, atrocious and cruel" aggravating factor (the "HAC factor"). See James II, 615 So. 2d at 669. Even though the court found no mitigating circumstances, and even though the HAC factor had already been struck on James' direct appeal, James I, 453 So. 2d at 792, the court ruled that the jury's recommendation of death might have been improperly influenced by the vague HAC factor instruction, and ordered a new sentencing hearing. See James II, 615 So. 2d at 669. Notably, the same vague HAC factor instruction was given by the trial judge in Mr. Clark's case, TR 1069[6], where it had likewise been struck by this Court as being unsupported by the evidence. See Clark, 443 So. 2d at 977.

Following James II, the state decided not to seek the death penalty against James and the trial court imposed a jail sentence on James for his capital murder conviction, consecutive to

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[6] "TR" refers to the 1982 trial record in Mr. Clark's case. Trial record excerpts are in the Appendix being filed with this brief.

his minimum three-year sentences for attempted murder and robbery. Thus, James may be eligible for parole in 2012.

II. TRIAL COUNSEL'S DEFICIENT PERFORMANCE AT SENTENCING.

Mr. Clark's trial counsel, appointed two months after the Public Defender's office had chosen to represent James and moved to withdraw from Mr. Clark's case, R. 1, 77, was a general practitioner who worked alone. When he was assigned to represent Mr. Clark, he was also handling several civil and criminal matters. R. 497-98. Counsel believed the statutory fee rate afforded him in capital cases interfered with the Sixth Amendment right to counsel and was confiscatory of his time. R. 468-69.[7] Counsel did not enlist a second attorney to handle the penalty phase, even though that was his typical practice and even though he believed that if he were to lose the guilt phase he would lack credibility with the jury at sentencing, impairing his ability effectively to represent his client. R. 467, 471-72. He did not hire an investigator even though the trial court would typically grant requests to hire investigators at state expense. R. 464-65; see also 569-78 (no time entries regarding seeking to hire investigator).

Brought in late, counsel focused on guilt phase issues, see R. 569-78, to the severe detriment of his penalty phase preparation. Beyond filing a few standard motions challenging the constitutionality of Florida's death penalty statute, see id.,

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[7] See Hillsborough County v. Unterberger, 534 So.2d 838, 840 (Fla. 2nd DCA 1988), review denied, 544 So.2d 201 (Fla. 1989).

motions paralleling those previously filed by James' counsel, counsel devoted virtually no time to making a mitigation case. For example, he did not contact Mr. Clark's family in Tampa to see if they could provide mitigating evidence or refer counsel to others who might. See id.; R. 354, 523. Indeed, trial counsel did not speak to Mr. Clark's mother until the morning of the sentencing hearing, a meeting that Mrs. Clark initiated. Counsel asked her nothing about Mr. Clark's history and advised her that her son would likely get the electric chair. R. 354.

Similarly, counsel did not contact Mr. Clark's long-time employer, Charles Rocker, to see if he might testify on Mr. Clark's behalf, even though counsel knew of Mr. Rocker, knew that Mr. Rocker was Mr. Clark's former employer and was present at Mr. Clark's trial. See R. 530.[8] Counsel's sworn time records reflect that he made no effort to contact other friends of Mr. Clark's who would have testified on Mr. Clark's behalf. R. 569-78. He did not even visit Mr. Clark's family's house. R. 523. Counsel's factual preparation consisted of sending a brief letter to Dr. Walter Afield (a psychiatrist whom he had retained) requesting that he examine Mr. Clark. He also asked Mr. Clark's girlfriend to testify.

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[8] The judge below (who also presided over Mr. Clark's trial), when told that Mr. Rocker was one of Mr. Clark's mitigating witnesses for the Rule 3.850 hearing, asked, "Didn't Mr. Rocker testify at trial?" R. 613. He had, as a state witness, identifying a photograph of Mr. Clark. R. 357. He was asked no questions on mitigation, however. Id.

As reflected in counsel's time records, which detail the full amount of work he did on this case, R. 564, counsel spent a total of 3.74 hours in preparing Mr. Clark's mitigation case. R. 572, 577.[9] Notably, all but fifteen minutes of that time came on April 16, the day of the penalty hearing. R. 577-78.

One principal effect of counsel's failure to prepare for the penalty phase was a very harmful closing argument. In his summation, counsel:

- told the jury "this is the most difficult case that I have ever had" to make a penalty phase argument on;
- said Mr. Clark wanted to live, "Not necessarily that he deserves it";
- lamented that he couldn't understand why anyone would shoot someone for ninety dollars, but that "it happens all the time with these types of people";
- opined that Mr. Clark was from "the underbelly of society," "must be classified as a bad person," and "comes from that group of people who create" the crime problem in the United States;
- agreed with the prosecutor "that people like Mr. Clark should be stopped";
- disavowed his expert testimony by telling the jury, "I am not saying that Larry Clark is the subject of or can be rehabilitated" and stressing that few

[9] On February 5, Counsel spent .25 hours drafting a letter to Afield; on April 16, he spent .41 hours preparing Marian Arnett and 3.08 hours "preparing penalty phase." Id. While counsel also spent approximately one hour (on February 9 and April 13) attending and reviewing the deposition of Ms. Arnett, see id., this dealt with guilt phase, not penalty phase, issues. Also, while on April 10 (three days before the guilt phase), there is an entry for 2.75 hours for "review depo[sition]" and death case," R. 575, there is nothing to suggest that this entry involved preparation of Mr. Clark's mitigation case.

persons sent to Florida State Prison are ever rehabilitated; and

- informed the jury that the only reason he was giving the closing was because "I am required to". TR 1054-67.

The other main effect of counsel's lack of preparation is that he presented inadequate mitigating evidence. Indeed, the penalty phase hearing was an exceedingly brief, perfunctory proceeding. Including sidebars, testimony, summations and jury instructions, it lasted just over two hours. TR 1001, 1045-46, 1073. Not surprisingly, what little testimony that was presented by Mr. Clark's counsel was given highly superficial treatment.[10]

As Mr. Clark's proffer to the court below shows,[11] a reasonable investigation, coupled with reasonably adequate preparation of his psychiatric expert would have yielded a wealth of mitigating evidence. In particular, Mr. Clark proffered the testimony of his mother Utah Clark, Charles Rocker (a Tampa businessman and attorney) and his longtime friend Ernest Gilyard. Trial counsel had made no effort to speak to any of these people, all of whom lived in Tampa. Had counsel done his job adequately and put on these witnesses, R. 351-59, the jury that narrowly

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[10] Counsel also diminished Marian Arnett's testimony, saying he called her "for one reason and one reason only. Yes, I wanted you to be aware of the fact Mr. Clark has a child." TR 1058.

[11] Because the Court below dismissed the Amended Motion without an evidentiary hearing, this proffer must be treated as proven. Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992).

recommended death would have learned the following things about Mr. Clark:

Mr. Clark was born into abject poverty in rural Mississippi. His biological father denied parenthood, and abandoned him to his mother. He grew up deprived and poorly educated in Tampa. He was severely asthmatic as a youth, missed a lot of school and was repeatedly hospitalized. Despite this, Mr. Clark helped his parents while they worked by taking care of his five siblings, cleaning, cooking and looking after them. He ran errands for neighbors, helped them with yard work, and assisted them with household tasks. Mr. Clark also showed artistic talent, but turned down a chance to study art out of state in order to stay with his family. As an older youth, Mr. Clark worked several jobs in the Tampa area, and regularly offered his family financial help. Friends knew him as an amiable, generous and peaceful person. He was also respectful and helpful toward the elderly people in the community. Id.

As a teenager, Mr. Clark was arrested for a non-violent offense, but was sent to the maximum security Union Correctional Institute ("UCI"), where he was beaten and abused. When he was later jailed for robbery, Mr. Clark strove to better himself, earning a G.E.D. in prison and securing early release. R. 25, 72, 353-55, 393.

Upon his release, Mr. Clark returned to work for Mr. Rocker. He did challenging physical labor, including sign pole maintenance and installing public bus benches. Mr. Rocker regarded him as trustworthy, and he worked unsupervised, handling valuable company property. Mr. Clark sought to improve his prospects by attending community college and by taking welding classes. He refused to take money from Mr. Rocker to pay for these classes. Mr. Clark looked out for Mr. Rocker's young son, Chad, and had a close relationship with the young son of another of Mr. Rocker's employees. R. 355-58.

Unfortunately, Mr. Clark's efforts to better his education and job skills were cut short when, while riding a motorcycle, he was severely injured when he was hit by a pickup truck. His leg and hip were so severely injured that amputation was contemplated. Mr. Clark was hospitalized for several months, and had to drop his welding classes and go on public assistance. When he finally emerged from the hospital with a pronounced limp, unable to do the strenuous physical labor to which he was accustomed, he nonetheless tried to undertake other work. R. 72, 353-55.

Beyond the lay testimony of those personally familiar with his life, Mr. Clark proffered the testimony of Dr. Harry Krop, a psychiatric expert. Dr. Krop has performed psychological evaluations in 552 first-degree murder cases, including 215

involving death row inmates, and has testified as an expert for both the state and the defense in criminal and civil cases.

Dr. Krop would have testified that the inadequacies in the psychiatric profile of Mr. Clark elicited in court resulted from counsel's inadequate preparation of Dr. Afield. Counsel did not obtain medical, employment, education or other historical records on Mr. Clark, including those which Dr. Afield specifically requested. R. 579. Dr. Afield also failed to perform a proper forensic psychological evaluation of Mr. Clark. While Dr. Afield found a need for a neuropsychological exam, R. 580, there is no indication that one was performed, and Dr. Afield was unqualified to perform one. This omission is critical, as neuropsychological examination of Mr. Clark would have helped give the jury a true picture of Mr. Clark's psyche. The jury would have learned that while Mr. Clark had experienced many psychologically significant events, he had definite potential for rehabilitation and the ability to function in an open prison population. R. 392-94.

Beyond failing to give Dr. Afield the materials needed to properly evaluate Mr. Clark, counsel's performance was deficient in preparing Dr. Afield for the witness stand. He prepared his questions for Dr. Afield the day of the penalty phase. R. 531. His time records reflect no meetings or conversations with Dr. Afield before the day of the penalty phase; he met with Dr. Afield in the courthouse hallway just before the hearing. See TR 1001.

Consequently, while Dr. Afield testified to the conclusion that Mr. Clark had a deprived childhood, counsel failed to elicit details concerning this deprivation and its significance. Had Dr. Afield been prepared adequately, the jury would have been given a much fuller picture: As Dr. Krop would testify, Mr. Clark in fact was severely emotionally deprived during his formative and adolescent years, a deprivation which rendered him unable to benefit from school (as confirmed by school records showing that Mr. Clark failed the first and the eighth grades). In turn, Mr. Clark developed poor self-confidence and poor self-esteem. R. 392-94.

Counsel also failed to elicit testimony from Dr. Afield (or anyone else) regarding the significant fact that, as a teenager, Mr. Clark was sentenced to three years at UCI for a non-violent offense. UCI was notorious for its violent, discriminatory nature, including the presence of the so-called "goon squad." Mr. Clark's ordeal in this violent environment likely caused potentially long-term adverse effects on his personality and psyche. Id.

Finally, Mr. Clark's proffered the testimony of capital defense expert Robert Link. Mr. Link has handled over 100 murder cases and prepared penalty phases in over 40 of them. From 1979-90, Mr. Link was an instructor for the Florida Public Defender Association's ("FPDA") "Life Over Death" capital defense seminars, and wrote the chapter on "Trial Tactics in Capital Cases" in the

FPDA's Death Penalty Manual (1982). He has been an expert witness on capital defense in Florida state courts and in federal courts in Jacksonville, Miami and elsewhere. See R. 342-43, 362-63.

Mr. Link would have testified that trial counsel's penalty phase performance fell well below a reasonable standard of competent representation, and that this deficiency prejudiced Mr. Clark, in at least the following respects: (i) by hiring no investigator, interviewing no mitigating witnesses, collecting no background records on Mr. Clark and doing minimal investigation on his own, counsel failed to conduct a reasonable investigation that would have revealed helpful mitigating evidence, such as Mr. Rocker, Mr. Gilyard and Utah Clark; (ii) counsel's performance was deficient in preparing and presenting Dr. Afield; (iii) counsel compounded his failure to investigate, and his failure to present significant and easily obtainable mitigation evidence, by giving "probably the worst summation" Mr. Link has ever seen. In sum, Mr. Link would have opined that trial counsel gave a deficient performance, and that this performance was prejudicial.

Counsel also failed to determine that codefendant James' I.Q. far exceeded that of Mr. Clark, negating the State's argument (retreated from in James' trial) that Mr. Clark, rather than James, was the leader in the crime. R. 72. Counsel also failed to determine that James had a long history of crimes of violence (including resisting arrest with violence), see R. 07-08, and thus

was more likely to have committed the violent acts attributed to Mr. Clark.

Finally, counsel did not object when the State in summation misled the jury (1) by arguing that the jury must ignore any sympathy for Mr. Clark, TR 1046, (2) by diminishing the jury's role in the sentencing process, TR 1049-50, and (3) by telling the jury that it should find the murder of Mrs. Satey to be cold, calculated and premeditated because it was not done in self-defense. TR 1052.[12]

III. EVIDENCE IMPEACHING THE JAILHOUSE INFORMANT AND THE IDENTIFICATION OF MR. CLARK.

Lacking physical evidence linking Mr. Clark to the crime, the State relied heavily on two items of direct evidence against Mr. Clark: (1) his purported confession to Coleman, an inmate placed in an overcrowded jail cell with Mr. Clark shortly after Mr. Clark was arrested, TR 704-05, 719, and (2) the identification of Mr. Clark by Mr. Satey. The state highlighted the testimony of these two individuals in its closing arguments, at both the guilt and penalty phases. See TR 928-32. As noted in the Amended Motion and reflected in the record, trial counsel (due either to neglect

[12] The Amended Motion noted other deficiencies as well. For example, counsel waived opening statement. R. 70. He did not investigate Mr. Clark's 1972 conviction; consequently, he failed to introduce the fact (found by the court in the 1972 case) that the gun used in the crime was unloaded and that Mr. Clark was released from prison early for good behavior, facts which would have mitigated the fact of that conviction. R. 71; see also R. 70-76 (listing other deficiencies at sentencing).

or to a failure of the State to disclose the information) did not introduce potent information that would have dramatically impeached the informant's credibility and story and raised serious doubt about the accuracy of the identification of Mr. Clark.

A. Jailhouse Informant James Coleman.

James Coleman had a long record of crimes of deceit, which was not presented to the jury. R. 37. Indeed, the full FBI rap sheet on Coleman (released by the State on September 6, 1995) shows that before his being jailed in Tampa, Coleman had at least 11 prior convictions for crimes of fraud, ranging from forgery to grand larceny to passing worthless checks to possession of stolen mail to credit card fraud, see R. 428-39. This long history of criminal deception led the police to conclude that "Mr. Coleman is a con man." R. 447, 551. He also had a history of bail jumping and escapes. See R. 433-35, 439.

Coleman repeatedly perjured himself on the stand. Coleman swore (and the State stressed) that he had only been convicted of crimes three or four times in the past, see TR 765, not well over a dozen times. He stated that he had never committed a crime of violence, id., even though he had been imprisoned for aggravated assault on a police officer. R. 438, 545. He testified to a false address, saying that he lived in Wisconsin, when he was living with (and defrauding) a Clearwater woman. R. 36, 551; TR 717. Coleman said the credit card abuse charge against him had been dropped before he got to Tampa, TR 735-36, when it had not

been dropped until after his statement to police.[13] The State's Attorney's Office ("SAO") had an FBI rap sheet and other information showing that many of these statements were false, R. 541-44, and its files on Coleman showed his aggravated assault conviction. R. 545.

While Coleman testified that he received no consideration for his testimony, (R. 35; TR 729, 766), and the State argued that Coleman "wasn't promised anything", TR 930, there is considerable evidence to the contrary that was not presented to the jury. Coleman had been returned to Tampa for several crimes, including an escape from police custody. R. 548. Because he presented an escape risk, R. 549, Coleman was ordered held without bond at the Hillsborough County Jail. R. 548. He also had a hold placed on his release by the Escambia County Sheriff's Office. R. 547. After he had given police his statement regarding Mr. Clark's "confession," his bail was reduced from "no bail" to $2,500, and the hold on his release was dropped. R. 35-36, 548. In addition, the SAO file on Coleman contains a reminder dated November 23, 1981 (when Coleman apparently made an appearance in court following his statement to the police) that "[defendant] helped [prosecutor]

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[13] R. 453. Coleman also testified that he knew "nothing" about the case of Willie Waldron, another jail inmate whom he was slated to testify against. TR 766. This was not true. In a deposition in Waldron's case, he said that Waldron had told him that

> he [Waldron] was coming up on a murder over some guy carrying money. Okay. He was carrying money and he tried to take it and the gun went off and killed him or something like that. He said, "Oh, I am going to beat the case." R. 94.

Nales[14] in murder trial." R. 550. Consequently, in December 1981 the State dropped the fraud, larceny and escape charges against him, without explanation. R. 36, 453. In addition, Coleman was operating at the behest of the police when Mr. Clark allegedly confessed to him, making Coleman an agent of the state and violating Mr. Clark's constitutional rights. R. 38-39.

B. **Discrepancies In The Identification Of Mr. Clark.**

The only other piece of direct evidence linking Mr. Clark to the shooting was Mr. Satey's in-court identification of Mr. Clark as one of the assailants. Either because of counsel's failure to investigate or to present such evidence, or because of the state's failure to disclose it, however, the jury did not hear evidence undermining the accuracy of the identification and of Satey's recollection concerning the crime.

Mr. Satey gave conflicting statements regarding his assailants. He first told police that he did not know his assailants. R. 65, 168. He also said suspect #1 (whom the State argued was Mr. Clark) drove an old pickup truck, R. 183, when Mr. Clark drove a green sedan. R. 170, TR 924. Also, Mr. Satey nowhere said that suspect #1 had a limp. However, as noted above,

[14] Prosecutor Dennis Nales took Coleman's statement. R. 110.

Mr. Clark had a pronounced limp, from having been run over in a motorcycle accident.[15]

In addition, Satey told the police at the hospital that suspect #1 was 5'9" and weighed 190 pounds. R. 183. Mr. Clark was actually about six feet tall and weighed about 240 pounds (indeed, patrons who saw Mr. Clark at a bar that day described him as being 6'2" and weighing 220-40 pounds, R. 170). He described suspect #2 as being slightly taller and 25 pounds heavier than suspect #1, R. 183, while James in fact was three inches shorter than Mr. Clark and weighed considerably less. James Trial Record 747. Other discrepancies abound in the description of suspect #1, purportedly Mr. Clark. Satey told the police that suspect #1 wore dark clothes, R. 183, while bar patrons testified that Mr. Clark was wearing a light pullover shirt and blue dungarees. R. 170. Satey also told the police that suspect #1 was wearing a hat. R. 183. At trial, however, he testified that suspect #2 wore the hat, TR 800, giving a hat found at Mr. Clark's home added significance. He also told the police that suspect #2 (James) had a small silver handgun, R. 178, but testified at trial that Mr. Clark, not James, had the gun. TR. 780.[16] This unused evidence would have

[15] TR 606. The State tried to gloss over this discrepancy by suggesting that Mr. Clark faked a limp at the bar that afternoon, TR 926-28, and had informant Coleman testify that Mr. Clark was encouraged to keep faking a limp to create confusion in his identification. <u>See</u> TR 760. This argument, however, was clearly at odds with the truth, although this was never told to the jury.

[16] Other differences between Mr. Satey's statements to police and his testimony never came to light at trial. He testified that he had crawled into the shop's dark room, within eight feet of his

buttressed the arguments noting that Mr. Satey failed to identify Mr. Clark from a photopack as one of his attackers, R. 189, instead picking out someone who was neither Mr. Clark nor James. Id.

SUMMARY OF ARGUMENT

Mr. Clark submits that he is entitled to a reversal of his life sentence as a matter of law; at minimum, he is entitled to a full evidentiary hearing on his claims. The principal reasons for reversal are as follows:

First, under Florida's principle of proportionality, the life sentence given Mr. Clark's co-defendant James requires that Mr. Clark's death sentence be reversed and remanded with orders to impose a similar sentence. The State argued that James was equally culpable, the trial court so found, and this Court concurred. The inexorable consequence of James' subsequent life sentence is that Mr. Clark can no longer be executed and also must receive a prison sentence.

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wife and separated by only a thin wall, and described hearing his wife being confronted and shot. TR 785-88. However, the crime scene diagram shows that the dark room was over 50 feet away and separated by two walls. R. 193-94. He also told the police that, contrary to his testimony, he did not hear his wife get shot. R. 179, 191. Also contradicting his testimony, he told the Florida Bureau of Crimes Compensation that he saw his wife get shot. R. 197. Finally, while Mr. Satey testified that Mr. Clark came back looking for him, he told no police officer this, only saying that he heard the side door close. R. 191. None of these changes in Mr. Satey's recollection made it to the jury.

Second, and alternatively, Mr. Clark is entitled to a hearing on whether he was denied effective assistance of counsel at sentencing. Trial counsel's closing, which effectively invited the jury to recommend death and disparaged Mr. Clark, constituted ineffective assistance per se, requiring a new sentencing hearing. At a minimum, Mr. Clark ought to be allowed to prove to the court below that trial counsel failed to do even the most rudimentary investigation or preparation on mitigation issues, work that would have revealed important mitigating evidence establishing multiple mitigating circumstances. The woefully deficient closing and failure to present readily obtainable mitigation evidence was patently prejudicial given the seriousness of the deficiencies and the fact that Mr. Clark still received four votes for life.

Third, the court below erred in dismissing Mr. Clark's claims concerning the improper finding of aggravating circumstances and disregard of nonstatutory mitigating circumstances. In particular, the jury was instructed with a vague "heinous, atrocious and cruel" aggravator; the same error resulted in the reversal of his co-defendant's death sentence. The trial court also ignored unrebutted evidence of nonstatutory mitigating circumstances, instead impermissibly focusing exclusively on statutory mitigators. As a result of each of these errors, Mr. Clark is entitled to a new sentencing hearing.

Fourth, the Court erred in dismissing Mr. Clark's guilt phase claims related to evidence seriously impeaching Coleman and

calling into question the identification of Mr. Clark by Mr. Satey. These claims also relate to the penalty phase inquiry, as any residual doubt on guilt in a jury's mind may affect its penalty recommendation, and evidence that should have been presented in the guilt phase directly affected the finding of aggravating or mitigating circumstances. More fundamentally, impeachment of these witnesses would have undermined the heart of the State's case. Consequently, it was error for the court below summarily to dismiss these claims, which should be sent back for an evidentiary hearing.

ARGUMENT

I. MR. CLARK MAY NOT RECEIVE A DEATH SENTENCE BECAUSE HIS EQUALLY CULPABLE CODEFENDANT WAS GIVEN A LIFE SENTENCE.

This Court already has held that Mr. Clark and Davidson James were equally culpable. James I, 453 So. 2d at 792 ("it is clear that this entire episode was a joint operation by James and Clark. . . . we find that the aggravating circumstances . . . are equally applicable to the two participants"). Although James was originally sentenced to death, the sentence was vacated on post-conviction appeals. See James II, 615 So. 2d 668. The State reconsidered and then reduced this sentence to life imprisonment. R. 231. Since this Court repeatedly has held, under fundamental proportionality principles, that a defendant may not receive a death sentence where an equally culpable codefendant receives a sentence of life imprisonment, Larry Clark's death sentence also must be reduced.

"Florida law is well settled that death is not a proper penalty when a co-perpetrator of equal or greater culpability has received less than death." Scott v. State, 657 So. 2d 1129, 1132 (Fla. 1995) (Kogan, J. concurring). This Court has "not hesitated to apply this standard even in collateral challenges long after the trial and direct appeals have ended." Id. (citing Scott v. Dugger, 604 So. 2d 465 (Fla. 1992)). Moreover, this Court has held that this standard is constitutionally mandated:

> The imposition of the death sentence [on only one of two equally culpable codefendants] is clearly not equal justice under the law. . . . We recognize the validity of the Florida death penalty statute as expressed in State v. Dixon, 283 So. 2d 1 (Fla. 1973), but it is our opinion that the imposition of the death penalty under the facts of this case would be an unconstitutional application under Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

Slater v. State, 316 So. 2d 539, 542 (Fla. 1975).

Following this fundamental tenet, in Scott v. Dugger this Court addressed facts indistinguishable from this case. Abron Scott and Amos Robinson, codefendants, were charged with first-degree murder, robbery and kidnapping. They were tried separately and both were convicted of first-degree murder and sentenced to death. Like Mr. Clark, Scott's direct appeal was heard and decided before his codefendant's. The Court affirmed his sentence. However, when Robinson appealed, the Court remanded his case for resentencing; at resentencing, the judge adopted a jury recommendation that Robinson receive life imprisonment. Scott v. Dugger, 604 So. 2d at 468. Scott subsequently filed a Rule 3.850 motion asking that his sentence be vacated as disproportionate.

The circuit court dismissed Scott's motion. This Court reversed. Following its earlier proportionality decisions, the Court held that when two defendants are equally culpable, and one receives a sentence of life imprisonment, it would be disproportionate, disparate and invalid to sentence the other to death. Id. at 469-70.

Mr. Clark's case is identical to Scott v. Dugger. In James' direct appeal, this Court held, as urged by the State, that Clark and James were equally culpable:

> [I]t is clear that this entire episode was a joint operation by James and Clark. . . . Under these circumstances we find that the aggravating circumstances which arose because of the motive and method of the killing **are equally applicable to the two participants**.

James I, 453 So. 2d at 792 (emphasis added). Similarly, the prosecutor at James' trial argued to the jury that both James and Clark should receive identical punishment: "[James] did everything else. He set it up. . . . He did everything. And you know what inequality and injustice is going to be: When Larry Clark is sentenced to death for the same crime as Davidson James." R. 421. The trial court accepted the State's argument, and found the same aggravating circumstances, and no mitigators, for both defendants. See R. 407-16, 244-52. Thus, the State cannot now argue otherwise.

While the State argued that Mr. Clark committed the actual murder, the same was true for Abron Scott. Moreover, that factor did not differentiate James and Mr. Clark in the

contemplation of either this Court or the prosecutor. The State cannot use it to differentiate them now.[17]

Scott v. Dugger follows this Court's longstanding commitment to equal treatment of capital defendants, especially defendants being charged with the same crime. In Slater, the Court explained the reasons for this strong commitment to proportionality as follows:

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

Slater, 316 So. 2d at 542. In accordance with these principles, Florida law mandates "a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)). Thus, in stating that Mr. Clark's proportionality arguments were not supported by precedent, R. 609, the trial court not only overlooked Scott, he ignored an important cornerstone of Florida capital punishment jurisprudence.

In sum, when the trial court sentenced Mr. Clark to death, and when this Court upheld that sentence, James' ultimate sentence was unknown. Mr. Clark's equally culpable codefendant has

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[17] The State agreed that a prisoner may not be sentenced to death if his equally culpable codefendant receives a life sentence. See R. 334. The State argued that the defendants in a felony murder case are not necessarily equally culpable. R. 333. Here, however, this Court and the trial court had found, and the State had conceded, that Mr. Clark and James are equally culpable.

since been given a sentence of life.[18] Consequently, Mr. Clark's sentence, as a matter of law, must be reduced to a life term.

II. MR. CLARK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

The Sixth Amendment to the United States Constitution and Article I, Section 16, of the Florida Constitution guarantee all criminal defendants the right to the effective assistance of competent counsel. McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970). This fundamental constitutional entitlement preserves "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 2045, 80 L. Ed. 2d 657 (1984). A claim of ineffective assistance of counsel must receive special scrutiny when a sentence of death is at issue. E.g., Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987).

"An ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in Strickland v. Washington, 466 U.S. 668, 687 [,104 S.

[18] In Scott, Scott's codefendant was resentenced by jury; here, James' life sentence resulted from the State's decision not to seek the death penalty on resentencing. This distinction does not affect Mr. Clark's entitlement to an equal sentence. See Slater, 316 So. 2d at 542 (court's decision to let one codefendant plead nolo contendere and receive life sentence meant other codefendant could not be sentenced to death). If anything, it strengthens it. Where, as here, the state consciously decides to spare one equally culpable codefendant, it would be particularly unjust and arbitrary to sentence the other to death. The requirement that punishments be proportionate cannot be overridden by backroom negotiations.

Ct. 2052, 2064, 80 L. Ed. 2d 674] (1984)." Rose v. State, No. 83,623, 1996 Fla. LEXIS 331, *8 (Fla. March 7, 1996), quoting Baxter v. Thomas, 45 F.3d 1501, 1512-13 (11th Cir. 1995). Under Strickland, a defendant establishes a deprivation of his constitutional right to the effective assistance of counsel where (1) counsel's performance is not "the result of reasonable professional judgment" and (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 690, 694. Such a demonstration is made if counsel's errors deprived the movant of a reliable sentencing phase proceeding. Rose, 1996 Fla. LEXIS at *8.

In determining whether Mr. Clark was denied the effective assistance of counsel, this Court should treat the allegations in Mr. Clark's proffer as true, because they are not rebutted at all by the record. See Mendyk v. State, 592 So. 2d 1076, 1079 (Fla. 1992). This Court also must look to the cumulative effect of counsel's errors, Harvey v. Dugger, 656 So. 2d 1253, 1257 (Fla. 1995). As the evidence proffered by Mr. Clark clearly establishes, trial counsel's performance at sentencing fell well outside the range of professionally competent assistance, and prejudiced Mr. Clark.

A. Trial Counsel's Closing Argument Made The Prosecution's Case.

1. Trial Counsel Effectively Advised the Jury that Mr. Clark Should Be Sentenced to Death.

Trial counsel gave "'probably the worst summation'" that Mr. Link (Mr. Clark's capital defense expert) has seen in over 20 years of practice. R. 347-48. Hearing this summation was a jury whose principal task was to assess whether this crime was comparatively so severe as to justify death. R. 348. Trial counsel -- who, to the jury, was an expert in capital cases -- answered that question in the affirmative by saying this case, by comparison, the worst case he ever argued:

> In the years I have been practicing law in Florida, this is the fourth time I have argued for a person's life. I must confess to you, **this is the most difficult case that I have ever had** in terms of making the argument on the death penalty." TR 1064-65 (emphasis added.)

Moreover, when trial counsel came to the very heart of the issue -- whether Mr. Clark deserved to live -- he told the jury that he had grave doubts:

> "But [Mr. Clark's] response, for whatever it was worth, is 'I would, given those choices, prefer to live.' **Not necessarily that he deserves it.**" TR 1064 (emphasis added).

It would have been unfairly prejudicial if the prosecution had made these arguments.[19] Tucker v. Kemp, 762 F.2d

[19] Indeed, the State made such remarks, impermissibly arguing that Mr. Clark "is no different" than Ted Bundy, Charles Manson or the Son of Sam. TR 1050. Mr. Clark's counsel did not object to this, however. Id.

1496, 1505 (11th Cir. 1985) (prosecutor's comment, suggesting that defendant's crime was one of the more serious ones that he had tried, was improper). It is infinitely more damaging for Mr. Clark's own advocate to "confess" this. See Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) (counsel was grossly ineffective in arguing that "[m]aybe [defendant] ought to die, but I don't know"), cert. denied, 503 U.S. 952, 112 S. Ct. 1516, 117 L. Ed. 2d 652 (1992). This damage was compounded by the fact the counsel never asked the jury to return a life sentence. R. 348. As Mr. Link would have testified, this omission was critical. Id. Mr. Clark's own counsel sealed his fate. Mr. Clark is entitled to a new sentencing hearing with counsel who will argue his side of the case.

2. Trial Counsel Separated Himself From Mr. Clark.

Trial counsel is prohibited from emphasizing his status as the defendant's appointed representative, or stating that he is representing the defendant by obligation rather than by choice. See Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983). Yet this is precisely what counsel did during the closing argument:

- "Now, in arguing the death penalty in this fashion, **as I am required to do**, sometimes I just speak about subjects which I wouldn't normally speak about." TR 1056-57 (emphasis added).
- "Now, I hope I do not seem to you to be a gouhl [sic], **but I have no choice**." TR 1057 (emphasis added).

Less egregious statements by lawyers in other cases have been found prejudicial. Horton, 941 F.2d at 1462 ("it becomes my turn to try and explain to you why you don't have to say [the defendant has] got to die"); see Goodwin, 684 F.2d at 805 n.13 ("I have been appointed by the Court to defend [the defendant]" and "[defendant] has got two Court appointed lawyers appointed by the Court to represent him to do the very best we can for him").

Counsel's statements violated Mr. Clark's Sixth Amendment rights because they constituted an "apology for having served as [defendant's] counsel," rather than the vigorous and loyal representation guaranteed by the Constitution. Mathis v. Zant, 704 F. Supp. 1062, 1064 (N.D. Ga.) (citing Goodwin, 684 F.2d at 806), amended in part on other grounds, 708 F. Supp. 339 (N.D. Ga. 1989), appeal dismissed, 903 F.2d 1368 (11th Cir. 1990); see also Osborn v. Shillinger, 861 F.2d 612, 628 (10th Cir. 1988) (counsel stressed the difficulty his client's behavior had presented to him); Wilson v. State, 771 P.2d 583, 587 (Nev. 1989) (finding ineffective assistance where counsel distanced himself from his client); State v. Davidson, 335 S.E.2d 518, 521 (N.C. App. 1985) (finding ineffective assistance where counsel stressed his appointed status and cast defendant in negative light).

Because trial counsel made clear to the jury that he was making arguments only because he had no choice, and that he did not actually believe them, counsel ceased to function effectively. See

Strickland, 466 U.S. at 687. Indeed, even if Mr. Clark's counsel's performance in other aspects of the sentencing were adequate (which they were not), his abrogation of his representative role by making statements separating himself from his client alone justifies a finding of ineffectiveness. Horton, 941 F.2d at 1463 ("[e]ven when we evaluate the performance in light of what [counsel] did well, we conclude that the performance was unreasonable"). By indicating that he reluctantly represented his client, it is readily apparent that trial counsel "caused his client more harm than good." King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S. Ct. 2020, 85 L. Ed. 2d 301 (1985).

3. Trial Counsel Denigrated Mr. Clark's Character.

For reasons that are unfathomable, trial counsel attacked his client's character at length during closing argument:

- **"[Mr. Clark] therefore is far from being a good person, and, therefore, must be classified as a bad person." TR 1059 (emphasis added).**
- "[Mr. Clark] is one of these people from the underbelly of society who, for whatever reason of background and upbringing, is unable to fully abide by the laws that the rest of us abide by." TR 1060.
- "But our society here in this country has clearly created an under class of people, unlike any other civilized Western Society, an under class of people who, for some reason are unable to abide by, or have not been imbued with, the values that the majority do abide by and have been imbued with." TR 1060.
- "We have a crime problem in this country, and perhaps Mr. Clark comes from that group of people who create that problem." TR 1062.
- "I agree that people like Mr. Clark should be stopped." TR 1061.

- "I am not saying that Larry Clark is the subject of or can be rehabilitated." TR 1063.

Courts have found similar statements to require resentencing because they "virtually encouraged the jury to impose the death penalty." See Horton, 941 F.2d at 1462 (reversing a death sentence where counsel stated "the one you judge is not a very good person... I ask you for the life of a worthless man"); Osborn, 861 F.2d at 628 (finding ineffective assistance where counsel stated that defendant was not amenable to rehabilitation); Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989) (ordering new sentencing where counsel "inexcusabl[y]" misrepresented his client's background and criminal record). By including Mr. Clark in a social under class whose members cannot be expected ever to obey the law, by stating that Mr. Clark was a bad person who must be "stopped", and by suggesting Mr. Clark could not be rehabilitated, trial counsel created a penalty stage that "clearly lost it adversary character." See Osborn, 861 F.2d at 625.

4. Trial Counsel Emphasized the Serious Nature of the Alleged Crime.

When trial counsel emphasizes the serious nature of the crime, he compromises his duty of loyalty to his client. King, 748 F.2d at 1464; Osborne, 861 F.2d at 628. Yet this is precisely what counsel did during his summation:

- "Ladies and Gentlemen of the Jury, you have found Larry Clark guilty of the crime of first degree murder. As a result of that finding, beyond and to the exclusion of a reasonable doubt, we are now

confronted with the task imposed upon you by the statutes of the State of Florida." TR 1054.

- "I am not condoning Mr. Clark's activities or actions. I, myself, certainly appreciate the seriousness of this offense, and I, myself, certainly feel the horror that a death has occurred." TR 1057.

- "Don't ask me, because I have no answer. What possesses anyone to go into a place of business with a firearm to steal one hundred dollars, and apparently to be prepared to use the firearms to steal one hundred dollars. I don't know the answer. I do not believe that you know the answer. The problem is that **it happens all the time with these type of people."** TR 1061 (emphasis added).

These statements, especially in combination with trial counsel's attacks on Mr. Clark's character, effectively gave the closing argument for the prosecution. By focusing on the seriousness of Mr. Clark's alleged crime, counsel failed to "require the prosecution's case to survive the crucible of meaningful adversarial testing." Cronic, 466 U.S. at 565. Where defense counsel essentially advocates the prosecution's position, the proceeding loses its adversarial character and the defendant's Sixth Amendment guarantee is violated. Id.; see also Kubat v. Thieret, 867 F.2d 351, 367 (7th Cir.) (finding ineffective assistance where counsel coupled failure to present mitigating evidence with closing argument that "'only could have benefitted the prosecution'"), cert. denied, 493 U.S. 874, 110 S. Ct. 206, 107 L. Ed. 2d 159 (1989).[20]

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[20] Counsel also told the jury he would "take issue" with the State's arguments on six aggravating circumstances. TR 1056. However, he only discussed the "HAC" aggravating circumstance. See TR 1057.

5. **Trial Counsel's Closing Ignored What Little Helpful Testimony Was Elicited At The Penalty Phase.**

As discussed below, counsel's investigation into possible mitigating evidence and his preparation of Dr. Afield was inadequate. Compounding this error was a failure effectively to present the limited helpful testimony of Dr. Afield that could have supported the following mitigating circumstances: (1) Mr. Clark had a low I.Q.; (2) Mr. Clark had been sufficiently self-motivated to get his GED degree while in prison; (3) Mr. Clark had a deprived background; (4) Mr. Clark had suffered severe asthma; (5) Mr. Clark had primitive parents; (6) Mr. Clark had a learning disability; and (7) Mr. Clark could be rehabilitated.

The only mitigating circumstance counsel even mentioned in closing was a passing reference to Mr. Clark's deprived childhood. As Mr. Link would have testified, counsel's failure to highlight valid mitigating circumstances allowed this evidence to pass unnoticed by the jury and by the Court. See R. 349. This prejudiced Mr. Clark since these were precisely the types of things that should have been considered by the jury in finding mitigating circumstances. See Stevens, 552 So. 2d at 1086.[21] Mr. Clark

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[21] Mr. Link also noted that counsel's argument criticizing the death penalty as allowing "premeditated murder" by the state and opining that Mr. Clark should be executed in a public square, was an unreasonable strategy to pursue before a jury that was already "death-qualified." See R. 348. Also, counsel was ineffective at closing for making contradictory statements that compromised his credibility before the jury. Counsel repeatedly emphasized that he thought Mr. Clark was guilty, see TR 1057-60, then inexplicably closed his argument by warning the jury that it might have the wrong man. TR 1066-67.

requests this Court to grant a new sentencing hearing, as trial counsel's closing constitutes ineffectiveness per se.

B. Trial Counsel's Failure to Investigate and to Present Available Mitigation Evidence Fell Below an Objective Standard of Reasonableness.

The harmful closing argument came after an abbreviated sentencing hearing, that was woefully deficient in presenting potent mitigating evidence that was there had counsel only looked.

1. Trial Counsel's Failed to Obtain Readily Available Mitigation Evidence.

"An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." Rose, 1996 Fla. LEXIS at *10, quoting Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). See also Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986) (counsel has a crucial "duty to investigate" mitigating evidence), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 825 (1987). "At the heart of effective representation is the independent duty to investigate and prepare." Goodwin, 684 F.2d at 805. Where counsel fails to do this, his failure to present witnesses and evidence cannot be deemed "tactical." See, e.g., Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993).

a. Mr. Clark's Former Employer, Charles Rocker.

A reasonable investigative effort, however, certainly would have located witnesses such as Mr. Clark's former employer, Charles Rocker, whose testimony Mr. Clark proffered below. Mr.

Rocker, a long time Tampa resident, is a lawyer and businessman who owns Junior Posters and Metropolitan Advertising, where he employed Mr. Clark. Mr. Rocker had been called as a state witness and the state thereby vouched for his veracity. Thus, according to Mr. Link, Mr. Rocker would have been a virtually unimpeachable witness on Mr. Clark's behalf. R. 344.

Mr. Rocker's testimony would have shown that Mr. Clark was a responsible employee who was capable of functioning in society. Id.; see also R. 356. Evidence of this respectable work history should have been considered in mitigation. See Johnson v. State, 660 So. 2d 637, 641 (Fla. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 1550, 134 L. Ed. 2d 653 (1996). In addition, Mr. Rocker's testimony would have demonstrated that Mr. Clark was both a trusted worker and a good friend -- someone whom Mr. Rocker entrusted with his son. R. 356-57. This, too, should have been considered in mitigation. See Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990). Finally, Mr. Rocker would have testified that Mr. Clark had undertaken to better himself by learning the welding trade. R. 356. This was yet another factor that should have been considered in mitigation. See Johnson, 660 So. 2d at 641

b. Mr. Clark's Mother, Utah Clark.

Counsel did not speak to Utah Clark, Mr. Clark's mother, until the day of the sentencing hearing. That was too late to make an informed strategic decision whether to call her and, if so, to

prepare her. It also was too late to obtain information from her concerning other possible mitigating evidence and witnesses.

Mrs. Clark would have testified to Mr. Clark's upbringing in poverty. R. 351-52; see Torres-Arboleda v. Dusser, 636 So. 2d 1321, 1326 (Fla 1994); Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990). She would have testified that Mr. Clark had suffered from severe asthma which required hospitalization. R. 352-53; see Dudlev v. State, 597 So. 2d 857, 859 (Fla. 1989). She would have described his talent and interest in art, and the related potential to make a meaningful contribution to society. R. 353; see Johnson v. State, 1995 WL 410691, *1 (Fla. 1995). Mrs. Clark also would have testified that Mr. Clark demonstrated love for, and was loved by, his family. R. 353; see Foster v. State, 654 So. 2d 112, 113 n.5 (Fla.), cert. denied, U.S. ___, 116 S. Ct. 314, 133 L. Ed. 2d 217 (1995). She would have testified to the fact that Mr. Clark made a substantial contribution to his family in helping to raise his siblings. R. 352; see Buford v. State, 570 So. 2d 923, 925 (Fla. 1990), Parker v. State, 643 So. 2d 1032, 1035 (Fla. 1994). She would have testified that, just as things appeared to be improving for Mr. Clark, he suffered a serious motorcycle accident which left him hospitalized and debilitated him such that he was no longer able to support his family. R. 354; see Foster, 654 So. 2d at 113 n.5.

c. Mr. Clark's Longtime Friend, Ernest Gilvard.

Counsel also was unreasonably deficient for failing to inquire if there were friends who might testify on Mr. Clark's behalf. Such inquiry would have yielded witnesses such as Mr. Clark's longtime friend Ernest Gilyard, who would have testified that Mr. Clark had a personable and non-violent disposition, See R. 358. Mr. Gilyard also would have testified that Mr. Clark was generous to his friends, respectful to the elderly, and protective of his younger sister. R. 359. His testimony would have established several recognized mitigating circumstances, including (1) that Mr. Clark was known in his neighborhood for being helpful and charitable, Maxwell, 603 So. 2d at 491, and (2) that Mr. Clark helped raise his siblings, Buford, 570 So. 2d at 925.

2. **Trial Counsel Failed Adequately to Develop And Present Psychiatric Testimony.**

Counsel also fell below reasonable performance standards in his handling of the psychiatric testimony. His preparation of Dr. Afield consisted of fifteen minutes writing a letter and a brief conversation just before Dr. Afield testified. The failure to prepare Dr. Afield resulted in a substandard psychological evaluation of Mr. Clark and incomplete testimony on crucial mitigating evidence related to Mr. Clark's mental condition and history. These deficiencies were exacerbated by counsel's failure adequately to use what little mitigating evidence he did obtain during Dr. Afield's testimony. R. 346-49. As Dr. Krop points out, Dr. Afield failed to perform and counsel failed to present a proper

psychological evaluation of Mr. Clark. R. 393. Dr. Afield was not given basic background materials (such as Mr. Clark's school, medical and other records. See page 15, above.[22]

Moreover, the testimony elicited from Dr. Afield omitted the crucial fact that Mr. Clark, at age 18, was sentenced to three years at UCI for a non-violent offense, and was then subjected to UCI's brutally violent atmosphere. R. 393-94; see also R. 353. Counsel also failed to elicit testimony concerning the physical and mental trauma that Mr. Clark suffered from his severe leg and hip injury in 1981.

In sum, the psychological testimony omitted mention of several mitigating circumstances that could have been proven. These include (1) Mr. Clark suffered from a deprived childhood, Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990); (2) Mr. Clark suffered from a brutally abusive incarceration at UCI as a teenager, Dillbeck v. State, 643 So. 2d 1027, 1028 n.2 (Fla. 1994), cert. denied, U.S. , 115 S. Ct. 1371, 131 L. Ed. 2d 226 (1995); and (3) Mr. Clark had potential for rehabilitation and productivity in prison. Torres-Arboleda, 636 So. 2d at 1324.

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[22] It was also deficient for counsel not to procure the neuropsychological testing that Dr. Afield suggested was needed. As Dr. Krop would have testified, this testing would have demonstrated Mr. Clark's strong potential for rehabilitation and an ability to function well in prison. R. 394; cf. Nibert v. State, 574 so. 2d 1059 (Fla. 1990) (recognizing the importance of neuropsychological testing).

The most prejudicial part of the presentation of Dr. Afield **was** one that counsel easily could have avoided with preparation: Dr. Afield told the jury that Mr. Clark had "several" prior convictions. TR 1036. In truth, Mr. Clark had only an old robbery conviction and a non-violent offense as a teenager. Trial counsel thus allowed Dr. Afield wrongly to portray Mr. Clark to the jury as a serial violent offender, This error was prejudicial. Davidson, 335 S.E.2d at 521 (counsel raised prior conviction); Stevens, 552 So. 2d at 1087 (counsel "inexcusabl[y]" overstated defendant's criminal history). This error easily could have been averted had Mr. Clark's counsel procured and given Dr. Afield records on Mr. Clark.

In sum, this failure as well created a sentencing proceeding that harmed Mr. Clark more than it helped him. See Osborn, 861 F.2d at 627 (finding ineffectiveness where "[a]lthough counsel called a psychiatrist who had examined [the defendant], he did nothing to prepare this witness").[23]

C. There Is A Reasonable Probability That Mr. Clark Would Not Have Received a Death Sentence Had Counsel Preformed Adequately.

The jury vote was close (8-4) despite counsel's arguing the state's case in his summation and despite his failure to prove

[23] Counsel's performance was also deficient in failing to inquire into the codefendant's past. "In a capital case, where a defendant's life may well depend on the extent and nature of his participation, the background of a codefendant could be crucial." Thompson v. Wainwrisht, 787 F.2d 1447, 1450 (11th Cir. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 825 (1987).

to the trial **court's** satisfaction <u>any</u> nonstatutory mitigating circumstances.[24] All that **was** required was a change in two votes, a result that seems quite probable had counsel's performance met constitutional standards. <u>See</u> <u>Hildwin v. Dugger</u>, 654 So. 2d 107, 109-10 (Fla.) (finding prejudice where trial counsel had called five mitigating witnesses, but failed to present substantial additional mitigation evidence, even though four aggravators existed and jury had voted 12-0 for death), <u>cert. denied,</u> U.S. , 116 S. Ct. 420, 133 L. Ed. 2d 337 (1995).

The prejudice to Mr. Clark from the closing argument -- the "worst summation" that an attorney of Mr. Link's experience ever has seen -- cannot be overstated, The jury faced the daunting task of determining whether the murder for which Mr. Clark was convicted was among those so reprehensible as to require a sentence of death. Counsel helped it to reach that decision affirmatively in Mr. Clark's case by offering his professional opinion that the case for Mr. Clark's life was the weakest he ever had to make, When counsel added the observations that Mr. Clark does not necessarily deserve to live, that he is a "bad person" who should be "stopped," even jurors who were sympathetic to Mr. Clark would predictably waver and those who were undecided would be expected to support the state's recommendation, Resentencing is particularly

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[24] Indeed, trial counsel effectively admitted the inadequacy of his effort to present mitigating evidence when he did not challenge on appeal the trial court's finding that no mitigating circumstances existed in Mr. Clark's case. <u>See</u> <u>Clark</u>, 443 So.2d at 977 n.1.

necessary where, as here, denigrating and damaging statements made by defendant's counsel in closing are combined with minimal evidence of mitigation. See Horton, 941 F.2d at 1463; Osborn, 861 F.2d at 626-27.

Counsel's abysmal summation undoubtedly was in part attributable to the fact he had learned very little that was positive to say about Mr. Clark. That calamity, however, was entirely due to his failure to look for available mitigating evidence. Such evidence would have shown that Mr. Clark had many positive characteristics, rather than being one of "these type of people" from "the underbelly of society." In the process, this evidence would have established several nonstatutory mitigating circumstances. See Stevens, 552 So. 2d at 1086 (family background, personal history, employment history and positive character traits all may be considered in mitigation).

Specifically, trial counsel could and should have established at least the following recognized mitigating circumstances: Mr. Clark (1) suffered from a deprived childhood; (2) suffered from an abusive and scarring incarceration at Union Correctional Institution for a non-violent offense when he was barely 18 years old, (3) demonstrated a love for, and was loved by, his family, (4) had artistic talent, a willingness to obtain training and hence the potential to function in society, (5) helped raise his siblings, (6) was known in his neighborhood for being helpful and charitable, (7) had a respectable work history, (8) was

trusted with other people's money and children, (9) undertook to learn the welding trade as a means of bettering himself and his family, and (10) suffered from a debilitating leg injury which deprived him of his ability to work or to continue the welding training which he undertook in order to support his family.[25]

Had counsel presented just one of these mitigating circumstances, the outcome in Mr. Clark's case would have been different. When this Court struck the HAC factor in Mr. Clark's case, it ruled that this was harmless error because no mitigating circumstances had been found to exist. Clark, 443 so. 2d at 977. If counsel had presented Mr. Rocker, Mr. Gilyard and Mrs. Clark, so that mitigating circumstances would have been established, a resentencing would have been required to weigh the mitigating circumstances against any remaining aggravating circumstances, See, e.g., Oats v. State, 446 So. 2d 90, 95-96 (Fla. 1984).

Mr. Clark respectfully submits that, on this record, the Court should not concur with the court's ruling below that "trial counsel's preparation and presentation of both phases of the trial was not deficient and that the deficiencies suggested by defendant do not create a reasonable probability that the outcome would have been different had counsel performed differently as suggested by defendant." R. 585. This is especially true since all evidence in

[25] The failure to adequately prepare and present Dr. Afield's testimony compounded the prejudice. See Holmes v. State, 429 So. 2d 297 (Fla. 1983) (ordering new sentencing hearing where counsel failed to present available expert evidence of appellant's mental and emotional condition in support of mitigating circumstances).

the proffers must be credited fully, and that a capital defense expert would have testified both that trial counsel's performance fell below an objectively reasonable standard **and** that these deficiencies prejudiced Mr. Clark. See King, 748 F.2d at 1464 (recognizing appropriateness of expert testimony on ineffective assistance of counsel).

III. ERRORS IN THE APPLICATION OF FLORIDA'S AGGRAVATING AND MITIGATING CIRCUMSTANCES REQUIRES RESENTENCING.

Aggravating circumstances must be established beyond any reasonable doubt. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993); Williams v. State, 386 So. 2d 538, 542 (Fla. 1980). Here, proof of several of those factors was either lacking on the trial record, lacking in light of evidence improperly withheld from Mr. Clark at trial, or tainted by unconstitutional jury instructions. Moreover, the trial court erred in its finding of no mitigating circumstances, rendering the errors on the aggravators not harmless and necessitating a resentencing.

A. The Jury Instruction On The "Heinous, Atrocious and Cruel" Aggravating Factor Was Unconstitutionally Vague.

Davidson James' sentence was vacated by this Court because the trial court had given an unconstitutional instruction on the "heinous, atrocious and cruel" aggravating circumstance, § 921.141(5)(h), Fla. Stat. As noted in Mr. Clark's Amended Motion (R. 55), his death sentence is void for the same reason.

In James II, this Court noted that the then-standard jury instruction, on the heinous, atrocious and cruel" aggravating circumstance was unconstitutionally vague, citing Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992) (per curiam). James II, 615 So. 2d at 669. The Court noted that (1) this aggravating circumstance had already been struck by this Court in affirming James' death sentence in 1984, and (2) even without the HAC factor, James had four aggravators and no mitigators. Despite the abundance of aggravators and lack of mitigators, it held that "[w]e cannot say beyond a reasonable doubt, however . . . that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." Id., citing James I, 453 So. 2d at 792,

The same unconstitutionally vague HAC factor instruction was given at Mr. Clark's trial. TR 1069. As in James' case, the HAC factor was struck by this Court as unsupported by the evidence. Clark, 443 So. 2d at 977. The same aggravators in James' case were found in Mr. Clark's, along with no mitigators. Id. at 976.[26] Given the close vote (8-4) on death in Mr. Clark's case, it cannot be said beyond a reasonable doubt that the unconstitutionally vague

[26] In Mr. Clark's case, however, the finding of no mitigating circumstances was in error, as Mr. Clark presented unrebutted evidence of at least three mitigating circumstances. See R. 223-24.

instruction did not sway the jury's consideration, and therefore prejudice Mr. Clark.

The only difference between the two cases is the way that Mr. Clark's trial counsel phrased his objection to the jury being instructed on the HAC factor, Trial counsel generally objected to the giving of this instruction, but offered no clarifying replacement instruction. TR 1072. In contrast, James' counsel objected on vagueness grounds. James II, 615 So, 2d at 669. This difference in form should not be controlling in a matter of this consequence; thus reversal of Clark's sentence is required on this ground as well.

Even if counsel's objection were deemed insufficient to preserve the vagueness objection, Mr. Clark should not be barred from making this argument, as his counsel's failure was purely the result of ineffectiveness. Hardwick v. Dugger, 648 So. 2d 100, 103-05 (Fla. 1994) (addressing ineffectiveness claim on issues otherwise procedurally bound). As Mr. Link noted in his proffer, nine years before Mr. Clark's trial, this Court had defined the crimes that the MC factor was meant to cover, State v. Dixon, 283 so. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974). There the Court limited the HAC factor to those homicides

> where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

In addition, two years before Mr. Clark's trial, the Supreme Court held that Georgia's standard instruction on one of its aggravators, an instruction similar to the charge to the jury in Mr. Clark's case, was unconstitutionally vague. Godfrev v. Georgia, 446 U.S. 420, 428-29, 100 S. Ct. 1759, 1763-64, 64 L. Ed. 2d 398 (1980) (Stewart, J.); see also 446 U.S. at 433 (Marshall, J., concurring). Thus, by the time of Mr. Clark's trial, the vagueness objection and clarifying instruction for the HAC factor were a fixture of the Florida Public Defenders' Association's Death Penalty Manual and were taught at the FPDA's "Life Over Death" training seminars of capital defense attorneys. R. 349-50. When Mr. Clark was tried, it was standard practice for defense counsel to seek a clarifying instruction of the HAC factor, Id.[27] Notably, Mr. Clark's trial counsel said he did not have "sufficient time to formally draw up" special requested instructions at the penalty phase. TR 1001.

Because reasonably competent capital defense counsel would have made the objection that James' counsel made, counsel's failure constitutes ineffectiveness. The prejudice of this error has already been proven; this Court held as much in reversing James' death sentence. See Vaz v. State, 626 So. 2d 1022, 1023 (Fla. 3rd DCA 1993) (where codefendant's attorney objected to trial

[27] Notably, this Court struck the HAC factor in Mr. Clark's case because the evidence presented failed to meet the definition set forth in State v. Dixon, the definition upon which James' counsel based his objection. See Clark, 443 So.2d at 977.

court ruling, which was ground for later reversal, and defendant's attorney failed to object, ineffectiveness of latter counsel was established).[28]

The evidence proffered in this case states a compelling argument that Mr. Clark's trial counsel was ineffective for not seeking this instruction.[29] As the HAC factor was equally invalid in both James' and Mr. Clark's cases; it would be the height inequity for James to get life based on his counsel's objection when that same counsel originally represented Mr. Clark (R. 77), and his replacement failed to couch his objection to the HAC factor in the same language. As this Court previously has heard claims that otherwise might be barred when they presented "unique circumstances," Darden v. State, 475 So. 2d 217, 218 (Fla. 1985), or "unique facts." Sireci v. State, 502 So. 2d 1221, 1224 (Fla. 1987), Mr. Clark submits that the identity of errors in his and

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[28] Mr. Clark is mindful of the fact that this Court has held in other cases that failure to make this objection before Essinosa did not amount to ineffective assistance of counsel. See, e.q., Harvev, 656 So.2d at 1258. The result in Espinosa however, should have been anticipated, as it flows directly from the decision in Godfrey 12 years earlier (as is suggested by the fact that Essinosa was a per curiam decision). In addition, none of the cases cited in Harvey upholding the HAC instruction was decided when Mr. Clark was tried. See 656 So.2d at 1258.

[29] Moreover, Mr. Link's proffer notes that counsel was not effective in failing adequately to rebut the argument that the crime was heinous, atrocious and cruel. He failed to cross-examine the medical examiner who testified on the state's behalf to elicit the fact that a victim who is shot in the head in the manner described here would have been rendered unconscious immediately, showing that the killing here did not meet this aggravating factor. He also failed to explain to and impress upon.the jury what heinous, atrocious and cruel means under Florida law. R. 349.

James' trial poses such circumstances. Consequently, Mr. Clark should have his death sentence vacated on this ground as well; at the very least, an evidentiary hearing would be needed to take evidence on the ineffectiveness issues **raised** in Mr. Clark's proffer.

B. **The Trial Court Erred In Failing To Consider And Find Nonstatutory Mitigating** Circumstances.

The defendant in a **death** case is entitled to present and have weighed **any** mitigating circumstance, not just those listed in the death penalty statute. Lockett v. Ohio, 438 U.S. 586, 98 S. ct. 2954, 47 L. Ed. 2d 973 (1978). As this Court has noted, the judge may not refuse to consider relevant mitigating evidence, but must consider "**any** aspect of [the] 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." Rogers v. State, 511 So. 2d 526, 534-35 **(Fla. 1987)**, (emphasis added), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988).

The trial court here simply proceeded seriatim through the statutory mitigating circumstances. R. 249-51, Based on this absence of statutory mitigators, the court found that "therefore . . . no mitigating circumstances exist," R 251. The court gave no indication that it had weighed the competent mitigating evidence that had been proffered. See id. That is constitutional error, since the trial court must expressly state what circumstances it has considered and weighed. In Mann v. State, 420 So. 2d 578, 581

(Fla. 1982), the Court ordered a resentencing, holding that "[t] he trial judge's findings . . . should be of unmistakable clarity so that we can review them and not speculate as to what he has found." See also Campbell v. State, 571 So. 2d 415, 419 (Fla. 1988) (subsequently requiring trial court to expressly state what mitigating circumstances it considered and weighed). While one can speculate about the trial court's consideration of nonstatutory mitigating circumstances, the "unmistakable clarity" required by Mann v. State is lacking.

Beyond this, as state offered no evidence to rebut the nonstatutory mitigating circumstances that were present, see TR 1046-54; R. 221-25, the court was duty bound to find that they existed and weigh them against the aggravating circumstances. Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) (mitigating circumstances must be found unless record contains competent substantial evidence to support trial court's rejection of them).

This error was extremely consequential. The Court upheld Mr. Clark's death sentence on direct appeal, despite striking the HAC factor, because it found that no mitigators existed. Clark, 443 so. 2d at 977. Had mitigators properly been found, the striking of the HAC factor would have required a resentencing. See, e.g., Oats, 446 So. 2d at 95-96 (remanding where three aggravators were struck, three aggravators remained, and one mitigator existed). Because the trial court's error occurred in its written sentencing order, trial counsel did not need to make a

post hoc objection to preserve this error for appeal, so that it is not procedurally barred,

C. The Trial Court Erred In Instructing The Jury On The Aggravators Found in Fla. Stat. § 921.141(5)(d) and (f).

In Count L, Mr. Clark appealed the jury instruction on the aggravating circumstances for a murder (1) during the commission of a robbery, and (2) for pecuniary gain. See R. 51. As the trial court correctly noted in its sentencing order, R. 246, these two aggravating circumstances merge, and thus can only count as one aggravator. Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 975 S. Ct. 2929, 53 L. Ed. 2d 1065 (1977). The judge nonetheless instructed the jury on both aggravators, without explaining to the jury that it could only find one of them. See TR 1067-71; Clark, 443 So. 2d at 977. This lack of instruction was done over trial counsel's objection. TR 1002, 1004. Compounding the prejudice, the State argued in depth that both circumstances existed. See TR 1051-52.

While this Court initially rejected this argument on Mr. Clark's appeal, Clark, 443 so. 2d at 977, it has subsequently agreed with Mr. Clark that it is error to instruct the jury on these two factors without explaining that they merge, Castro v. State, 597 so. 2d 259, 261 (Fla. 1992). While this Court subsequently held that Castro should have prospective application, Wuornos v. State, 644 So, 2d 1000 (Fla. 1994), cert. denied, U.S. ___, 115 S. Ct. 1705, 131 L. Ed. 2d 566 (1995), Mr. Clark

submits that it should also apply to prior cases, like Mr. Clark's, where trial counsel made timely objection to the error and preserved the error on appeal.

Indeed, the reasoning of James II demands this. Here, as in James II, the jury was instructed on an aggravating circumstance that it could not properly find, and which the evidence did not support, In both cases, the jury thus could have found more aggravating circumstances that could permissibly be found. Thus, as in James II, one "cannot say beyond a reasonable doubt" that the improper instruction of the jury "did not affect the jury's consideration or that its recommendation would have been the same" had it been properly instructed. 615 So. 2d at 669. An identical rationale was enunciated by this Court in Jackson v. State, 648 So. 2d 85, 90-91 (Fla. 1994), where the Court held that the standard instruction on the "cold, calculated and premeditated" aggravating circumstance (also given in Mr. Clark's case) was unconstitutionally vague and could mislead the jury.

Finally, as in James II, trial counsel preserved the objection, and raised it on appeal. See Clark I 443 So. 2d at 977. Thus, contrary to the ruling of the court below, there is no procedural bar.[30]

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[30] On this count, Mr. Clark also argues that the automatic death eligibility accorded persons convicted of felony murder violates the Eighth Amendment. R. 51-52.

D. The Trial Court Erred In Finding That The Murder Was Committed "For Purpose of Avoiding Arrest".

The aggravating circumstance that a killing was "for purposes of avoiding arrest," § 921.141(5)(e), Fla. Stat., requires "very strong" proof of the requisite intent to avoid arrest and detection. Riley v. State, 366 So. 2d 19, 22 (Fla. 1978). It must be clearly shown that the dominant or only motive for murder was the elimination of witnesses. Menendez v. State, 368 So. 2d 1278 (Fla. 1979). Logical inferences will not suffice. Clark, 443 So. 2d at 976-97. The evidence in Mr. Clark's case did not meet this stringent test, and certainly does not meet it when evidence wrongly withheld from Mr. Clark at trial is considered.

The trial court originally concluded that this factor was "a logical inference" from its subsidiary findings that (1) Mr. Clark was known by the victims, (2) he had previously been convicted of robbery, and (3) both victims offered no resistance. See R. 246. This Court rejected the trial court's analysis and added two findings: (1) that Clark allegedly made a statement to jailhouse informant that "one of them could identify him" and (2) that the victim "knew, or would soon know, that he had just committed a violent felony on her husband." Clark, 443 So, 2d at 977.

This Court's substitute findings, however, cannot provide the necessary "very strong" support the fact that a victim knew the defendant, has never been held to be enough to support a finding of

this factor. See, e.g., Jackson v. State, 575 So. 2d 181, 190 (Fla. 1991) ("The mere fact that Jackson once before had been in the store fails to satisfy this aggravating circumstance beyond a reasonable doubt"); Perry v. State, 522 So. 2d 817, 820 (Fla. 1988) ("The mere fact that the victim knew and could have identified his assailant is insufficient to prove intent to kill to avoid lawful arrest"). Motive cannot be so easily presumed. E.g., Garron v. State, 528 So. 2d 353, 360 (Fla. 1988) (holding that, where victim was shot while calling the police, "there is no proof as to the true motive for the shooting").

Similarly, a finding that a victim offers no resistance cannot establish that a murder was done to eliminate a witness. While motive to avoid arrest "is certainly a plausible inference, it is not the only one" from such a finding. Griffin v. State, 474 so. 2d 777, 781 (Fla, 1985), cert. denied, 474 U.S. 1094, 106 S. ct. 869, 88 L. Ed, 2d 908 (1986).[31]

The two substitute findings which the Court made cannot cure this flaw. First, the Court relied upon Mr. Clark's purported statement to the jailhouse informant that "one of them can identify

[31] Indeed, the fact that the assailants left the premises with the Sateys still alive argues against the finding of this factor. In Rembert v. State, 445 So.2d 337 (Fla. 1984), the defendant was convicted of killing an elderly shop owner in the course of a robbery. This Court nullified a finding of the "avoiding arrest" factor, noting that the "victim was alive when Rembert left the premises and could conceivably have survived to accuse his attacker. If Rembert had been concerned with this possibility, his more reasonable course of action would have been to make sure that the victim was dead before fleeing." Id. at 340.

me." Clark, 443 So. 2d at 977. The record is clear, however, that this vague quote attributed to Mr. Clark refers to Mr. Satev (for whom Mr. Clark had once worked, who had allegedly seen Mr. Clark enter the shop, and who later purportedly identified Mr. Clark), not his wife. See TR 722.[32] Further, even if credited, it is merely an observation after the fact that Mr. Satey can identify someone, not an explanation for the murder. Thus, the passage quoted by this Court, read in context, sheds absolutely no light on the motives behind Mrs. Satey's death.

Moreover, this finding was made before it was known that the State had failed to turn over a wealth of material impeaching the credibility of the jailhouse informant (whom the State had labelled a "con man," R. 551). Thus, this finding rests improperly on the credibility of an inherently suspect witness. If the trial court did not rely on Coleman's statement, this Court should not ex post assume its credibility.

The Court's substitute finding that the victim "knew or would soon know" that her husband was shot and robbed lacks record support. When Mr. Satey was attacked, Mrs. Satey was in the residential area of the shop, separated by a long distance and by

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[32] Actually, what the jailhouse informant testified to was that Mr. Clark "said something about one of them could identify one of them. And I don't know which one that he was talkinq about." Id. (emphasis added). This statement is even less focused on Mr. Clark. Indeed, the logical reading of it is that Mr. Satey could identify James (who worked in Mr. Satey's presence that day, while Mrs. Satey was in the residence in the back of the shop). Thus, it likely has nothing to do with either Mr. Clark or Mrs. Satey.

walls from her husband. TR 777-787; see also R. 194-95 (crime scene diagram showing where Mr. Satey was shot and where Mrs. Satey was found); she did not see what happened to her husband, and there is nothing in the record that she heard enough to enable her to identify anyone. It is thus a strained inference, not a "strong" one, that when Mr. Clark allegedly walked back to where Mrs. Satey was, it was done out of any concern that the victim had seen him.

Mr. Clark challenged this finding on appeal, thus it has not been **waived.** Neither is it repetitive. The specific findings which form the basis for this factor were not made until this Court issued its opinion affirming Mr. Clark's death sentence. Thus, this is the first time Mr. Clark has been able to challenge those findings. See Fla. R. Crim. P. 3.850(b) (claims are not barred where movant could not previously have asserted them).

E. The Trial Court Erred In Finding That The Crime Was Especially Cold, Calculated And Premeditated.

The trial court's finding that the crime was cold, calculated and premeditated was based on its "logical inference" that the murder was committed to eliminate a witness, plus the same facts as the court below cited in support of its findings on two other aggravating circumstances. R. 248. However, in Mills v. State, 462 So. 2d 1075 (Fla.), cert. denied, 473 U.S. 911, 105 S. ct. 3538, 87 L. Ed. 2d 661 (1985), the Court stated that findings in support of the death sentence must contain sufficient, distinct proof of each aggravating circumstance. Id. at 1081. As such

distinct proof was generally lacking in the trial court's finding of the "cold, calculated" factor, the finding was invalid. See also Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983) (noting that the same facts cannot support two aggravators, and separately noting that fact that murder was committed in course of burglary and to eliminate witness did not support finding of "cold, calculated" aggravating circumstance).

Second, the facts cited in support of this finding are insufficient to provide, beyond any reasonable doubt, that the murder was especially cold, calculated and premeditated, The record evidence is consistent with a typical robbery-murder in which the assailant panics, loses control or reflexively shoots the victim. See Thompson v. State, 456 So. 2d 444 (Fla. 1984); see also Jackson, 648 So. 2d at 89-90, (to meet this factor, murder must (1) be product of cold and calm planning, not act of emotional frenzy, (2) be product of careful plan or prearranged design to commit murder), and (3) show heightened premeditation). Even where there is a lack of resistance by the victim and evidence indicates the robbery was highly premeditated, that premeditation cannot automatically be transferred to the murder. Gorham v. State, 454 so. 2d 556 (Fla. 1984), cert. denied, 469 U.S. 1181, 105 S. Ct. 941, 83 L. Ed. 2d 953 (1985). Thus, the fact that Mr. Clark was

known to the victim, and that the victim offered no resistance, does not establish this factor beyond a reasonable doubt.[33]

This claim is not procedurally barred. First, counsel could not object to the finding at trial, since he was not aware of the trial court's impermissible double-counting of factors, Second, it must be re-evaluated in light of facts withheld, or that counsel was ineffective in failing to raise.[34]

IV. THE INSTRUCTION TO THE JURY THAT ITS RECOMMENDATION WAS PURELY ADVISORY, COUPLED WITH REMARKS BY THE PROSECUTOR DENIGRATING THE JURY'S ROLE, DEPRIVED MR. CLARK OF HIS RIGHT TO A RELIABLE SENTENCING DETERMINATION.

The prosecutor and trial court's admonishments to the jury that their role in recommending death was purely advisory provide a further basis for reversing Mr. Clark's death sentence. In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2533, 86 L. Ed. 2d 231 (1985), the Supreme Court held that juries must "view

[33] As for the trial court's noting that Mr. Clark had committed a robbery before, R. 244, this undercuts a finding that the murder was highly premeditated, In the prior robbery, Mr. Clark did not fire a gun. R. 73. The only inference that can be drawn from that conviction is that Mr. Clark did not plan to kill the victim, Thus, the evidence was insufficient to establish the aggravator.

[34] In addition, the trial court below counted as an aggravator Mr. Clark's 1972 robbery conviction. This was improper. As noted in Count K of the Amended Motion, this conviction was illegally obtained. See R. 47-51. The Supreme Court has since held that an illegitimate prior conviction cannot serve as an aggravating factor where there was only testimony to the fact of conviction, but not to the underlying conduct. Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575; Rivera v. Dugger, 629 So.2d 105 (Fla. 1993) (consideration of invalid prior conviction was error). As Johnson postdated Mr, Clark's direct appeal, this claim has not been defaulted. Thus, the court below erred in not refusing to consider it on the merits.

their task as a serious one of determining whether a specific human being should die at the hands of the State." 472 U.S. at 329. Where jurors are misled into believing their responsibility is less than it actually is, the Eighth Amendment is violated. 472 U.S. at 341.

Under Florida's capital sentencing scheme, Caldwell is violated where the jury is misapprised of its role in sentencing. Under Florida law, the jury bears the lion's share of the responsibility for any death sentence imposed. The trial court must give great weight to its recommendation, and can only override if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable jury could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Override is impermissible if there is any arguable basis for a life sentence. Shue v. State, 366 So. 2d 387, 390 (Fla. 1978).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071, 109 S. Ct. 1353, 103 L. Ed. 2d 821 (1989), the court found a Caldwell violation where a Florida jury was misled as to this standard, The court held that the prosecutor minimized the jury's sense of responsibility by repeatedly stating that its penalty phase verdict was "advisory" and by telling it that the burden of imposing the death sentence was "not on your shoulders." Id. at 1457. The trial judge failed to correct this, stating that the final sentencing decision rested "solely with the judge of this court." Id. at 1458; see also id.

at 1459-60 (Clark, J., concurring) (detailing improper comments to jury).

The prosecutor's and trial court's statements to the jury in Mr. Clark's case likewise diminished the importance of its sentencing recommendation. The state told the jury that it was "mak[ing] an advisory recommendation to Judge Padgett," and admonishing it that "I would remind you that sentence is in the discretion of Judge Padgett." TR 1046 (emphasis added). While it told the jury that its function was important, id., the state did nothing to correct the misapprehension it had created that the trial court was free to reject the jury's recommendation.

As in Mann v. Dugger, the trial court's instructions reinforced this misapprehension. He told the jury that he had the final decision on punishment and reiterated four times that the jury was recommending an "advisory sentence." TR 1067-68, 1071. The court did not inform the jury that its decision would carry great weight, nor that he could only override their recommendation in limited circumstances. This was error, Cf. Garcia v. State, 492 so. 2d 360 (Fla.) (judge instructed jury that its decision would not be overruled unless there was no reasonable basis for it), cert. denied, 479 U.S. 1022, 107 S. Ct. 680, 93 L. Ed. 2d 730 (1986). By repeatedly stressing that the jury was purely advisory and that imposition of sentence was at the judge's unfettered discretion, the state and the trial court breached Mr. Clark's

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rights under Caldwell. This diminishing of the jury's sense of responsibility cannot be deemed harmless.

The claim is not procedurally barred. Caldwell came down after Mr. Clark's trial; thus, counsel cannot have been expected to raise a Caldwell objection at trial, Mr. Clark raised the issue in his Rule 3.850 motion, his first chance to do so.[35]

V. THE PROSECUTOR VIOLATED MR. CLARK'S DUE PROCESS RIGHTS WHEN HE IMPROPERLY INSTRUCTED THE JURY THAT IT **MUST** IGNORE ANY **SYMPATHY** WHICH IT MIGHT FEEL FOR MR. CLARK.

The prosecutor, in closing, told the jury that its decision on whether to send Mr. Clark to death was "not to be based on your emotion or your sympathy," and told them that any sympathy for Mr. Clark "should not be considered." TR 1046, This statement went uncorrected by the Court

A defendant is constitutionally entitled to have the jury weigh as mitigating circumstances "any aspect of [his] character or record." Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S. Ct. 869, 876, 71 L. Ed. 2d 1 (1982), including any aspects of their life

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[35] Adams v. Dugger, 489 U.S. 401, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989), does not alter this result. In Adams, the Court held that for statements to the jury to violate Caldwell, they must misstate the jury's role in sentencing under state law, so that they would also have been improper under Florida law. 489 U.S. at 408, citing Pait v. State, 112 So. 2d 380 (Fla. 1958). While Mr. Clark's counsel did not object to this mischaracterization of Florida laws, this failure constitutes ineffectiveness under Strickland. Cause exists, as these comments were clearly erroneous under Tedder and its progeny. Moreover, as shown above, this error by definition is prejudicial.

story that might evoke sympathy, mercy or compassion from a jury. Indeed, recognized factors such as having a deprived or abused childhood, having suffered a serious injury, or having cared for loved ones, are essentially intended to provide bases for feelings of mercy towards the defendant. To simply tell a jury that they cannot be swayed by emotion or by sympathy, rather than tell them that they cannot be swayed by sympathy if no mitigating circumstances otherwise exist, improperly instructs the jury to discount or ignore entirely any mitigating circumstance which arouses its sympathy.

Mr. Clark is not barred from raising this claim. While the Supreme Court has long held that defendants were entitled to present any evidence pertaining to their life's record, it was not until California v. Brown, 479 U.S. 538, 542, 107 S. Ct. 837, 840, 93 L. Ed. 2d 934 (1987), after Mr. Clark's trial, that it distinguished between "mere sympathy," which juries were to disregard, and sympathetic responses to evidence presented at the sentencing phase, which juries must be allowed to consider. As Mr. Clark did not have the benefit of this decision at trial, he is not barred from raising it now.[36]

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[36] Moreover, later Supreme Court decisions hold that a jury may consider "mere sympathy." In Payne v. Tennessee, 501 U.S. 808, 111 s. ct. 2597, 115 L. Ed. 2d 720 (1991), the Court held that it was permissible for prosecutors to present "victim impact statements," i.e., statements concerning the impact of the victim's death. This serves but one purpose -- to arouse a jury's sympathy for the victim's friends and family, sympathy to be expressed in a recommendation of death. See Stein v. State, 632 So.2d 1361, 1367 (Fla. 1994) (permitting prosecutor's remarks seeking to evoke (continued...)

VI. THE COURT ERRED IN FAILING TO GRANT MR. CLARK AN EXIDENTIARY HEARING ON GUILT PHASE ISSUES.

At trial, the State presented only two witnesses to provide direct evidence of Mr. Clark's guilt: the purported jailhouse informant Coleman, and Mr. Satey. Counsel did not impeach either witness with materials that either were available to him, or were in the state's possession but not turned over.

Thus, the court below in this 3.850 proceeding erred in summarily dismissing Mr, Clark's claims relating to (1) the State's withholding of material exculpatory evidence, (2) the State's subornation of perjury regarding issues at the guilt phase, and (3) ineffectiveness at the guilt phase. Under Rule 3.850, the court below could not dismiss these claims unless the Amended Motion, files, and case record conclusively show no entitlement to relief, Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Nonetheless, it dismissed these claims on the premise that there was no reasonable possibility that the absence of the evidence affect the outcome at trial. R. 585-86.

In denying each of these claims without an evidentiary hearing, the court below erred in at least two distinct ways. First, these allegations were also relevant to penalty phase

[36](...continued)
sympathy for victim, citing Payne), cert. denied, 115 s. ct. 111, 130 L. Ed. 2d 58 (1994)). As calls for sympathy were made by the State in Mr. Clark's case, see TR 1048 ("Dorothy Satey had loved ones"), TR 1053-54, equity demands that the jury not be constrained in considering sympathy for Mr. Clark. See State v. Young, 853 P.2d 327, 380-81 (Utah 1993). (Durham, J., dissenting).

issues. It is well accepted that the strength of the guilt phase case can materially affect the penalty phase by leaving a residual or "whimsical" doubt as to the defendant's guilt that can be pivotal when the jury considers whether to condemn the defendant to death. See, e.g., Lockhart v. McCree, 476 U.S. 162, 181, 106 S. ct. 1758, 1769, 90 L. Ed. 2d 137 (1986) (defendant may benefit at sentencing from jury's residual doubts about evidence presented at guilt phase); Smith v. Wainwrisht, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1087, 105 S. Ct. 1853, 85 L. Ed. 2d 150 (1985).

Beyond this residual doubt, errors occurring at the guilt phase may relate to penalty phase issues as well. Thus, evidence of ineffective assistance of counsel at the guilt phase may impact on sentencing issues. See Magill, 824 F.2d at 888 (failures during guilt phase adversely affected penalty phase outcome). Similarly, this Court has noted that Brady violations like those alleged here may create prejudice at both the guilt and penalty phases. See Garcia v. State, 622 So. 2d 1325, 1330 (Fla. 1993). The court below crafted an artificial and improper partition between guilt and sentencing phase issues in refusing to hear evidence of these claims, particularly when evidence concerning guilt phase errors was equally applicable to the finding of aggravating circumstances.

Second, for the reasons set forth below, each of these claims would sufficiently undermine the state's guilt phase case against Mr. Clark so as to create a reasonable probability that the

outcome would have been different. In the aggregate, these claims most certainly could have affected the result at trial.

A. A Evidentiary Hearing Is Required On Mr. Clark's Claims That The State Withheld Exculpatory Evidence And Suborned Perjury Regarding Jailhouse Informant Coleman.

State witness James Coleman had a notorious history of criminal fraud. However, the State did not disclose its many records indicating Coleman's propensity for lying, despite the request of Mr. Clark's trial counsel for such records. With this impeachment, one cannot conclude that there was no reasonable probability that the outcome of Mr. Clark's trial (and especially sentencing) could have been different. See Aldridse v. Duqqer, 925 F.2d 1320, 1326 (11th Cir. 1991) (standard for Brady violations and for claims of ineffective assistance of counsel is whether it is reasonably likely a jury could have reached a different result).

The judge below declined even to hold an evidentiary hearing on the merits of this claim. This Court has specifically held that in a Rule 3.850 proceeding it is inappropriate to deny an evidentiary hearing to explore a claim based on the "State's alleged failure to disclose exculpatory . . . [evidence] in violation of Brady." Muhammad v. State, 603 So. 2d 488, 489 (Fla. 1992); see also Lightbourne v. Dugger, 549 So, 2d 1364 (Fla. 1989), cert. denied, 494 U.S. 1039 (1990) (accepting at face value allegations concerning Brady violation relating to jailhouse informant and ruling that evidentiary hearing was required). As Mr. Clark's allegations, taken at face value, Scott v. State, 657

So. 2d at 1131, state a claim for relief, Mr. Clark is due an evidentiary hearing on his Brady claims.

1. The State's Failure To Disclose Material Impeachment Evidence Regarding Jailhouse Informant James Coleman Violated *Brady v. Maryland*

In Brady v. Marvland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. Under Brady, failure by the state to disclose evidence tending to impeach prosecution witnesses constitutes just as serious a violation of due process as failure to disclose direct evidence of a defendant's innocence. See Marrow v. State, 483 So. 2d 17, 19 (Fla. 2d DCA 1985) (citing Gislio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)). If the state failed to disclose evidence favorable to the defense, a Brady violation has occurred if the suppressed evidence, if competently used, could be "sufficient to undermine confidence in the outcome" of the guilt or penalty phase, Marrow, 483 So. 2d at 19 (citing United States v. Baslev, 473 U.S. 667, 103 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)); Antone v. State, 355 So. 2d 777, 778 (Fla. 1978). This includes evidence creating "a reasonable doubt that did not otherwise exist." United States v. Asurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342 (1976).

Before trial, Mr. Clark's counsel requested that the government turn over all evidence potentially favorable to the defense, including information relating to the credibility of the state's witnesses, See R. 484. Despite this, the state failed to produce highly relevant material relating to Coleman. R. 33-37. The evidence not disclosed by the prosecution at Mr. Clark's trial would have dramatically undermined Coleman's credibility by revealing his 25-year history of criminal deceit, including:

- A four-page partial FBI "rap sheet" in the State Attorney's Office file on Coleman, covering Coleman's criminal activities through 1971, indicating that Coleman had been convicted of one count of grand larceny in Tacoma, Washington in 1957, two counts of grand larceny in Toledo, Ohio in 1958, two counts of forgery in West Palm Beach in 1963, one count of forgery in Tampa in 1964, one count of passing a worthless check in Tampa in 1969, and two other crimes. R. 541-44.

- A 13-page FBI rap sheet in the Hillsborough County Sheriff's Office, (R. 551) listed those convictions, plus ones in Tampa in 1971 for possessing stolen mail, in Maryland in 1973 for grand larceny, in Dallas, Texas in 1977 for credit card abuse (along with aggravated assault on a policeman and evading arrest), and in Arizona in 1978 for drawing a check on insufficient funds. R. 429-42. A complete rap sheet on Coleman was first given to Mr. Clark in September 1995. R. 428.

The State was "required to disclose to defense counsel any record of prior criminal convictions of . . . persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, if such material and information is within his possession." State v. Crawford, 257 So. 2d 898, 901 (Fla. 1972). Mr. Clark was thus entitled to receive the information described above, plus any other information relating to the credibility of Coleman in the

State's possession. Garcia, 622 So. 2d at 1331 n.12 (evidence in sheriff's office or state attorney's office subject to disclosure).

There can be no serious question that the nondisclosure of Coleman's FBI rap sheets and other complaints involving fraud materially harmed Mr. Clark's defense. Coleman testified that Mr. Clark "confessed" to him. The state showcased his testimony in its closing. TR 927-30.[37] It was cited by the trial court, R. 245, and this Court, Clark, 443 So. 2d at 977, in finding aggravating circumstances. As Coleman's testimony was unique and non-cumulative, nondisclosure of evidence impeaching him materially violated Mr. Clark's rights. See Marrow, 483 So. 2d at 19 (not disclosing impeachment evidence regarding one of two non-police witnesses was material); Scott, 657 So. 2d at 1132 (ordering evidentiary hearing on Bradv claim, noting close vote on jury recommendation).

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[37] The State sought to discount the fact that Coleman had access to newspapers from which he could have gleaned facts about the crime to report to police as part of Mr. Clark's alleged confession. It asked, "[d]o you think the paper . . . had that one guy was working on the roof; that ninety to a hundred dollars was taken." TR 929.

The jury was not told, however, that it had been reported, before Coleman spoke to police, that "[t]he burglars took approximately $90." Tampa Tribune, Nov. 1, 1981 at 2-B. As for his testimony regarding the roof, Coleman was led by the police on this, see R. 114, much as he was led at trial. See TR 727 (court noting that the State "ha[d] been leading [Coleman] all along" during his testimony).

2. Coleman's Testimony That He Was Not Treated Favorably by the Police, And His Testimony About His Record, Violated *Giglio v. United States.*

The trial court wrongly dismissed without evidentiary hearing the claim that the State suborned perjury from Coleman.[38] In Giglio, supra, the Supreme Court held that the state must disclose evidence of any promises of leniency or other promises made to state witnesses in exchange for testifying against the defendant. Gislio requires the prosecution not only to disclose evidence of "deals" made with witnesses, but also to correct any statements by these witnesses which are known by the prosecution to be false. United States v. Rivera Pedin, 861 F.2d 1522, 1530 (11th Cir. 1988); see Nasue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959).

The showing needed for new trial sentencing hearing for Gislio violations is even less than that required to justify relief for a Brady violation: if the prosecution knowingly failed to correct false testimony of one of its own witnesses at trial, the defendant is entitled to a new trial unless failure to do so was "harmless beyond a reasonable doubt." Rivera Pedin, 861 F.2d at 1530 (quoting Bagley, 473 U.S. at 680).

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[38] The court below dismissed this count (Count E) on the ground that Mr. Clark did not assert that he could not conduct discovery regarding Coleman's background. R. 330. But Count E incorporated allegations that the state withheld evidence, R. 33-37, and trial counsel requested this evidence. R. 484. Moreover, if trial counsel could have independently uncovered these facts (which he did not, see R. 574 (only investigation done regarding Coleman was review of court file on Coleman), the failure should be considered on Mr. Clark's ineffectiveness of counsel at trial claim.

Here, the information alleged and proffered by Mr. Clark, which the court below had to credit, show that evidence existed at the time of trial of a "deal" by the State with Coleman for his testimony against Mr. Clark, and that the State failed to correct false testimony by Coleman that was material to his credibility:

- Coleman was released on $2,500 bond shortly after he spoke to the police about Mr. Clark, despite the fact that Coleman was being held without bond in the Hillsborough County jail pending trial on an escape charge, and that jail records noted that Coleman was a significant escape risk with a long history of escapes and bail jumps. R. 549.

- A notation was made on Coleman's State Attorney's Office file, dated the day of a hearing in his case (November 23, 1981), stating that Coleman had "helped [Assistant State Attorney Dennis] Nales in [a] murder trial" -- that of Mr, Clark. R. 550.

- On October 27, 1981, the Escambia County Sheriff's Office asked that a hold be placed on Coleman. This "hold" was dropped shortly after Coleman spoke to the police about Mr. Clark's purported confession. R. 547-48.

At trial, James Coleman denied that he had made a deal with the prosecution in exchange for his testimony, and the prosecution stated that it had made "no promises" to Coleman. Florida courts have found Giglio violations and remanded for new trials both where there was an informal understanding rather than a firm agreement and where the testifying witness did not even know about the existence of a deal. See, e.g., Marrow, 483 So. 2d at 19 (witness had not been promised any specific deal in exchange for testimony). Porterfield v. State, 472 So. 2d 882, 884 (Fla. 1st DCA 1985) (witness's counsel purposely did not inform witness of deal with prosecution); see also Williams v. Griswald, 743 F.2d

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1533, 1541-42 (11th Cir. 1984) (false testimony that witness was under no pressure to testify from anyone).

In considering whether the State violated Gislio, a court must examine the record and the undisclosed evidence de novo. See Porterfield, 472 So. 2d at 884 (parsing evidence not disclosed at trial in appellate proceeding to determine whether it could have suggested to a jury the existence of a deal); Rivera Pedin, 861 F.2d at 1529 (court must perform "its own independent examination of the trial transcript" to assess materiality of nondisclosure). Here, Mr, Clark certainly could have raised a plausible argument to the jury that Coleman's testimony was colored by a promise of leniency in exchange for agreeing to testify against Mr. Clark. Nonetheless, none of this evidence was provided to Mr. Clark despite his request and despite the fact that it was clearly in the possession of the state. The court below thus clearly erred in summarily denying Mr. Clark's claim.

In addition to failing to provide evidence of a "deal," the prosecution violated Mr. Clark's Gislio rights by failing to correct several false statements made at trial by Coleman, the correction of which would have further destroyed Coleman's credibility. A state may not knowingly obtain a conviction based upon false testimony, including false testimony relating to the credibility of a state witness. Napue, 360 U.S. at 269. Despite this rule, the prosecution failed to point out several of Coleman's perjured statements. For example:

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- **Coleman** told the jury he had been convicted of "three or four" crimes, TR 765; he had been convicted of well over a dozen, including repeated crimes of fraud. R. 428-42.

- Coleman testified that when he was not extradited to Florida in 1977 he was working in Texas, TR 734; he was actually in prison in Huntsville, Texas. R. 437, 545.

- Coleman told the jury he had never **been** convicted of any crime of violence, TR 765; in fact, he had been convicted of aggravated assault on a police officer. R. 438, 545, 551,

Had the state fulfilled its duty of correcting Coleman's statements, Mr. Clark could have highlighted these misrepresentations as evidence of Coleman's propensity to lie. Taking the above allegations as true, it cannot possibly be shown that nondisclosure of the true facts behind the statements of Coleman, a star witness, TR 927-31, was "harmless beyond a reasonable doubt," Rivera Pedin, 861 F.2d at 1530.[39]

B. The Court Below Erred In Dismissing Mr. Clark's Claim Of Ineffective Assistance Of Counsel At The Guilt Phase.

Among the myriad deficiencies in trial counsel's guilt phase performance, see R. 62-70, trial counsel failed to discuss and to present available exculpatory evidence. This failure prejudiced Mr. Clark's defense and constitutes ineffective assistance of counsel. Strickland, 466 U.S. at 687,

[39] The court also erred in dismissing his Count G claim (informant Coleman was state agent). As noted in Arizona v. Fulminante, 499 U.S. 279, 311-12, 111 S. Ct. 1246, 1266, 113 L. Ed. 2d 302 (1991) (Kennedy, J., concurring), that claim is subject to a harmless error analysis. Further, this claim incorporated facts relating to Mr. Clark's Brady and Gislio claims, see R. 39, providing specifics concerning new evidence that the Court below wrongly held were lacking.

1. Counsel Deficiencies In Failing To Investigate And Present Evidence Affected The Outcome At Trial And At Sentencing.

As with sentencing, counsel's preparation for guilt phase was deficient. Beyond filing motions based on those filed by James' counsel and attending depositions of persons on the state's witness list, here, too, counsel did little independent investigation. See R. 563-68. Neither did he hire an investigator to interview witnesses or look into their backgrounds. Id.; R. 464-67.[40] As his time records show, he did not obtain medical records concerning Mr. Satey's condition when making the identification at the hospital. (see R. 65-66, R. 563-68).

These failures resulted in a deficient challenge to the accuracy of Mr. Satey's recollection. Counsel failed to use available materials that would have shown that Mr. Satey proffered highly inconsistent descriptions before testifying that Mr. Clark was one of his assailants, The unused evidence from police reports includes, for example, the following discrepancies in Mr. Satey's statements:

- Initial police reports state that Mr. Satey said he was shot and robbed by "two (2) unknown subjects." R. 65, 168.
- A police report taken at the hospital shortly after Mr. Satey arrived there recording his statements that suspect #1 (purportedly Mr. Clark) was "known

[40] Counsel also did not move to suppress a maroon jacket shown to the jury until the jury had already seen and heard about it, R. 64. Neither did he offer the admission by police that witnesses shown that jacket (taken from Mr. Clark's home and purportedly the codefendant's jacket, linking Mr. Clark to the crime) had said it was not the jacket worn by the codefendant that day, R. 37-38.

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to drive an old pickup truck". R. 174. **In** fact, Mr. Clark drove a green sedan. TR 924.

- A police report noted that Mr. Satey described suspect #1 ♋• 5'9" tall and weighed about 190 pounds, wearing dark clothes. R. 183. In fact, Mr. Clark was about 6'0" tall and weighed about 240 pounds at the time of the events in question, see R. 170, and was observed shortly before the crime took place as wearing a light pullover. Id.

- Mr. Satey initially told police that suspect #1 was slightly shorter and lighter than suspect #2, while Mr. Clark was taller and considerably heavier than James. R. 170, 183.

Counsel's failure to use this evidence was unreasonable. **As Mr.** Satey was integral to the State's case, it is impossible to imagine how a decision not to probe fully the accuracy of his recollections (especially given the discrepancies in his testimony) could be deemed reasonable under Strickland. See Collins v. Francis, **728** F.2d 1322, **1346** (11th Cir.) (failure to investigate lines of defense can support ineffectiveness claim), cert. denied, 469 U.S. 963, 105 S. Ct. 361, 83 L. Ed. 2d 297 (1984). On the contrary, Florida recognizes that failure to use available evidence to discredit a victim's testimony at trial, if proven, constitutes deficient performance. See, e.g., Rodriquez v. State, 592 So. 2d 739, 740 (Fla. Dist. Ct. App. 1992).

2. Mr. Clark Was Prejudiced At Both Phases By Counsel's Inadequate Performance At The Guilt Phase.

As a practical matter, it seems obvious that evidence of conflicting testimony in physical descriptions of the assailant who purportedly was Mr. Clark -- for instance, Mr. Satey's describing

the suspect as being 5'9" and 190 pounds and then identifying a man about three inches taller and about 50 pounds heavier, telling police that the suspect drove a pickup truck when Mr. Clark drove a green car, and telling police the suspects were unknown and then stating that one of them had been his employee -- would have significantly undermined Satey's identification. In Kyles v. Whitlev, ___ U.S. ___, 115 S. Ct. 1555, 1131 L. Ed, 2d 490 (1995), the Court found a reasonable likelihood that outcome was affected where the testimony of eyewitnesses who were integral to the State's case varied from their initial statements. One witness (like Mr. Satey) gave differing statements regarding the physical description of the assailant. See 115 S.Ct at 1569. Another witness testified that he had seen the shooting (he initially told police that he had only heard it[41]), and (like Mr. Satey) changed his description of the vehicle that the assailant was driving (from a Ford Thunderbird to a Ford LTD). Stressing that "the evolution over time of a given eyewitness's description can be fatal to its reliability," Id. at 1571, and the importance that the state placed on these witnesses, the Court found a sufficient probability to require a new trial. Id.[42]

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[41] Similarly, Mr. Satey first told the State that he did not see or hear his wife get shot, R. 179, 191, then told the State that he saw her get shot, R. 197, before testifying that he heard he get shot. TR. 785-88.

[42] Mr. Clark also appeals the denial of his claim concerning the State's racially discriminatory use of peremptory challenges. The prosecutor's systemic misuse of these challenges, R. 30-31, eventually was cited by this Court in reversing a conviction in Tillman v. State, 522 So. 2d 14, 16-17 (Fla. 1988). Thus, Mr. Clark states a claim under Swain v. Alabama, 380 U.S. 202, 85 S.
(continued...)

The conflicts in Mr. **Satey's** description of suspect #1 and in his recollection of events are equally significant. Together with the lack of physical evidence linking Mr. Clark to the crime, plus the other questions concerning the identification, **see** R. 62-70, those conflicts call into question whether Mr. Satey was correct in identifying Mr. Clark. At the least, Mr. Clark is entitled to an evidentiary hearing on whether the failure to present this evidence at the guilt phase impacted his conviction or sentence.

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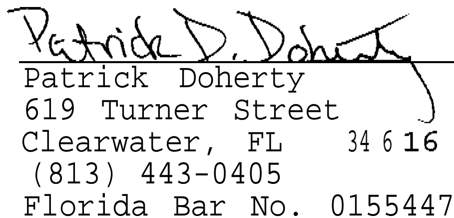
[42] (...continued)
Ct. 824, 13 L. Ed. 2d 759 (1964). See Horton, 941 F.2d 1449; State v. Washington, 375 So. 2d 1162 (La. 1979). As a Swain violation cannot arise from the facts of a single case, ~~Easter v. Estelle,~~ 609 F.2d 756 (5th Cir. 1980), Mr. Clark could not raise this claim until this pattern became apparent, so that this claim is not procedurally barred. See Fla. R. Crim. P. 3.850(b)(1).

Mr. Clark also appeals the denial of Count E (destruction of exculpatory phone records), R. 33, and Count I (testimony re: apprehension of codefendant). R. 42-43.

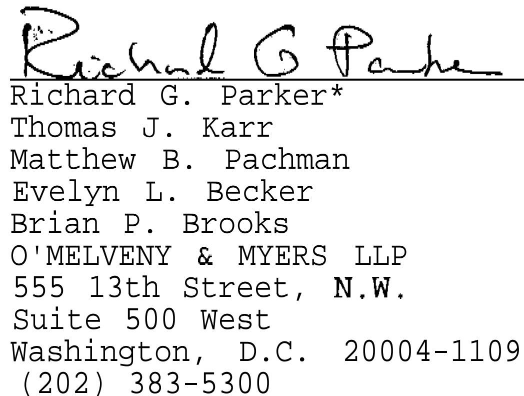
VII. CONCLUSION

For these reasons, Mr. Clark respectfully requests that his death sentence reversed and remanded with orders to impose a life sentence on his murder conviction. Alternatively, he asks that his sentence be vacated and the case remanded for a new penalty phase (in light of counsel's highly prejudicial summation) or, at minimum, that the court below be ordered to conduct a full Rule 3.850 evidentiary hearing on his sentencing and guilt phase claims,

Respectfully submitted,



Patrick Doherty
619 Turner Street
Clearwater, FL 34616
(813) 443-0405
Florida Bar No. 0155447



Richard G. Parker*
Thomas J. Karr
Matthew B. Pachman
Evelyn L. Becker
Brian P. Brooks
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004-1109
(202) 383-5300

* Counsel of Record

Counsel for Larry Clark

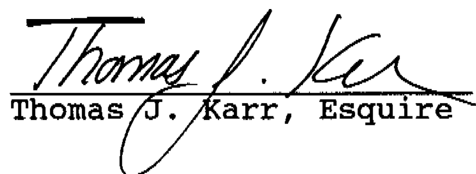
June 24, 1996

CERTIFICATE OF SERVICE

I do certify that a copy of the foregoing Initial Brief of Appellant Larry Clark has been furnished by First Class United States mail this 24th day of June, 1996 to:

Karen cox
Assistant State Attorney
State Attorney's Office
Thirteenth Judicial Circuit
Courthouse Annex
Tampa, Florida 33602

Robert J. Landry
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366



Thomas J. Karr, Esquire