IN THE SUPREME COURT OF FLORIDA

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Appellate Case No. 86,836

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LARRY CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.



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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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# REPLY BRIEF OF APPELLANT LARRY CLARK

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## INTRODUCTION

Appellant Larry Clark hereby replies to the arguments made by the State in its initial brief ("State Br.").

## ARGUMENT

### I. MR. CLARK CANNOT RECEIVE A DEATH SENTENCE BECAUSE HIS EQUALLY CULPABLE CO-DEFENDANT HAS BEEN GIVEN A LIFE SENTENCE.

Both parties agree that if Mr. Clark's co-defendant, Davidson James, is equally culpable for the crime for which Mr. Clark was sentenced to death, then because James was given a life sentence after Mr. Clark was sentenced, Mr. Clark must now receive a life sentence as well. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).[1] The only dispute is whether James is equally culpable. See State Br. at 11-13.

Under Florida law James must be regarded as equally culpable. This is so for two reasons. First, the State initially obtained a death sentence against James by forcefully arguing that he and Clark (who alone had been given the death penalty) were equally culpable. The trial court and this Court agreed with the State. Consequently, the State is estopped from now disclaiming its earlier position. Secondly, even if the State were not bound by its earlier statements, Florida precedent applied to the findings of the courts trying James and Mr. Clark dictates that James must be deemed equally culpable. Thus, under the teachings

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[1] "'[I]t is a well-known axiom of law that equally culpable defendants should receive equal sentences.'" Thomas v. State, 461 So. 2d 274, 275 (Fla. 5th DCA 1985) (quoting the State).

of Scott v. Dugger, the maximum penalty Mr. Clark may receive is a life sentence.

### A. The State Is Estopped From Denying That James and Mr. Clark Are Equally Culpable.

Glaringly absent from the State's brief is any effort to explain away its argument to the trial court and jury that James:

> set [the crime] 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 State does not and cannot deny that it had previously argued that James had equal culpability. That argument led (1) the jury to recommend a death sentence for James, (2) the trial court to impose the sentence, holding that "[t]he acts of [James] reflect the highest degree of calculation and premeditation, R. 412, and (3) this Court to affirm the sentence, holding that "this entire episode was a joint operation by James and Clark" and that the aggravating factors ("aggravators") linked to the actual crime "are equally applicable to the two participants." James v. State, 453 So. 2d 786, 792 (Fla.) ("James I").

The State cannot run from the record it created. Because the State argued equal culpability to obtain a death sentence against James, it is estopped from arguing otherwise now. Under Florida law "a litigant is estopped by the proceedings in a former suit from occupying an inconsistent position in another and subsequent suit." J. Schnarr & Co. v. Virginia-Carolina Chem. Corp., 159 So. 39, 41 (Fla. 1934). This doctrine applies in criminal cases. See, e.g., State v. Beamon, 298 So. 2d 376, 377

(Fla. 1974) (defendant estopped from taking inconsistent positions in subsequent prosecutions). It also applies against the State as much as any other litigant. See, e.g., State ex rel. Adams v. Lee, 171 So. 333, 335 (Fla. 1936). Having benefitted previously from arguing James' equal culpability, the State cannot now be heard to argue otherwise. Indeed, to permit the State, as an officer of the Court, to adopt contradictory positions whenever it serves its current intent would gravely undermine the integrity of the criminal process.[2] It would be especially unconscionable to permit such tactics when the State is asking for the death penalty.

In contending that no court ever found James equally culpable, the State misses the thrust of this Court's earlier ruling. It claims that this Court's holding that "the aggravating circumstances which arose because of the motive and method of the killing are equally applicable to the two participants," James I, 452 So. 2d at 792, only relates to the holding that James could be held "accountable for the first degree murder." State Br. at 12. This is not what the Court ruled. The Court in fact held that James could, consistent with Enmund v. Florida, be sentenced to death -- i.e., that he deserved to be treated the same as Mr. Clark. The Court's reasoning was that "the entire episode was a joint operation" and that James "actively participated" in the events. Crucially, the Court held that every aggravator concerning

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[2] "The [State] attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; [its] interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." Craig v. State, No. 82,642, 1996 WL 559888, *5 (Fla. 1996).

the murder applied with equal force to James as it did to Mr. Clark. Id. This can only mean that James is equally culpable. In short, the State offers no reason why it should be permitted to disclaim its earlier position that James was equally culpable.[3]

**B. James Is As Culpable As Mr. Clark.**

Every factor that this Court has used to gauge relative culpability demonstrates that there is no difference in the degree of culpability between James and Mr. Clark. As he has noted, the record compels the conclusion that James was an active participant who intended Mrs. Satey's death, and that he had the same aggravators and mitigators as Mr. Clark. See Clark Br. at 27.

The State's reply is to involve the finding that Mr. Clark was the "triggerman." That reliance is misplaced because the triggerman is not inevitably more culpable than his accomplice, as this case demonstrates. This Court has repeatedly held that persons other than the actual killers can be equally culpable. Scott, 604 So. 2d at 468; see Burch v. State, 522 So. 2d 810, 812-13 (Fla. 1988) (reversing override of life sentence, even though "[t]here was no doubt that Burch committed the killing," noting that jury may have found that "the acquaintances whose quarrel with the victim precipitated this homicide were never charged with any offense but were equally culpable"); Pentecost v. State, 545 So. 2d

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[3] This Court has underscored the impropriety of making contradictory statements about defendants' relative culpability. See Slater v. State, 316 So. 2d 539, 542 (Fla. 1975) (noting with disapproval that the judge who condemned Slater to death said he did not think Slater and his accomplice should receive disparate sentences, yet approved the accomplice's plea to a life sentence).

861, 863 (Fla. 1989); Neary v. State, 384 So. 2d 881, 887 (Fla. 1980) (accomplice played "significant role" in murder). Indeed, this Court ruled in Eutzy v. State that a codefendant is "equally as culpable of the homicide as the defendant" if he is "a principal in the first degree." 458 So. 2d 755, 759 (Fla. 1984). Thus, whether a defendant is the actual killer does not determine relative culpability among codefendants. Instead, the inquiry must focus on the following considerations, all of which result in the conclusion that Messrs. James and Clark are equally culpable.

First, a defendant may be more culpable if he was a dominant or controlling force in the crime, i.e., if he was primarily responsible for the crime occurring. See Larzelere v. State, 676 So. 2d 394, 398 (Fla. 1996) (defendant other than actual killer "was the dominating force behind this murder"); Bush v. State, No. 89,118, 1996 WL 592935, *2 (Fla. Oct. 16,) (upholding death sentence of person other than actual killer who "played a predominant role in th[e] crime"), cert. denied, 117 S.Ct. 355 (1996); Spivey v. State, 529 So. 2d 1088, 1095 (Fla. 1988) (reversing death sentence for triggerman where codefendants "were the primary motivators in this murder").

This Court has already held that Mr. Clark was not a dominating force, but that James (who was also convicted of first-degree murder) was at least an equal participant. See James I, 453 So. 2d at 792 ("this entire episode was a joint operation"). In fact, the record amply proves the State's argument to the jury that James "set it up" and "did everything." James was also far more

intelligent than Mr. Clark. R. 72. Thus, if anyone was a dominant force here, it was James.

The State cites cases where the codefendant was plainly not the dominant force, distinguishing them from this case. In Steinhorst v. Singletary, 638 So. 2d 33, 35 (Fla. 1994), the other defendant was convicted of second-degree murder; by definition, he was less culpable than Steinhorst, who was convicted of first-degree murder. In Coleman v. State, 610 So. 2d 1283, 1287-88 (Fla. 1992), Coleman killed four victims. The codefendant who received a lesser sentence was "less involved" in one murder, and was only convicted of second-degree murder on the other three killings; by definition, he, too, was less culpable. Similarly, in Hannon v. State, 638 So. 2d 39, 44 (Fla. 1994), cert. denied, 115 S.Ct 1118 (1995), a codefendant stabbed one of two victims. Hannon was deemed more culpable not just because he killed the first victim (whom the codefendant had stabbed) but because he also shot and killed another victim. In each case, it was evident the defendant had a greater role in the crimes than the codefendants; moreover, in none of these cases did the state ever argue that the other defendant was equally culpable.[4]

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[4] Moreover, in each case the disparate sentences were known when the defendant received a death sentence. See Steinhorst, 638 So. 2d at 35 (Court knew of codefendant's life sentence when imposing death); Coleman, 610 So. 2d at 1285 (codefendants tried, sentenced with defendant); Hannon, 638 So. 2d at 40 (judge "considered the fact that Hannon's original co-defendant" pled to accessory after the fact). Here the jury recommending death was unaware that (1) James got a life sentence, (2) the State deemed him equally culpable, or (3) the State believed it would be the height of inequity for Mr. Clark to be sentenced to death if James' life was spared.

Second, the trial court found identical aggravating factors relating to the circumstances of the crime for James as for Mr. Clark. Compare R. 407-12 (James' aggravators) with R. 244-49 (Clark's aggravators). As this Court held, "the aggravating circumstances which arose because of the motive and method of the killing are equally applicable" to James and Mr. Clark. James I, 453 So. 2d at 792. The jury also found that James fully intended the death of Mrs. Satey. See id. at 791.

Third, the aggravators relating to prior criminal conduct weigh more heavily against James, who had been convicted of multiple violent felonies, including assaulting a policeman with a gun, R. 407-08; Mr. Clark, in contrast, had a single robbery conviction, during which he caused no violence and only carried an empty gun.[5] R. 50. Nor was James less culpable because he had more or stronger mitigators -- he had none. R. 414.[6] Thus, under all tests of culpability, James must be regarded as equally culpable (if not more so) as Mr. Clark. In sum, the criteria for measuring relative culpability for death sentence purposes point with equal, if not greater, force to James than to Clark. This was

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[5] See Demps v. State, 395 So. 2d 501, 506 (Fla. 1981) (death sentence appropriate where defendant, unlike codefendant, had prior murder conviction); Thomas, 461 So. 2d at 275 (equal sentences for same crime were inappropriate where only one defendant had extensive criminal history); Terry v. State, 668 So. 2d 954, 966 (Fla. 1996) (in imposing life sentence, Court discounted Terry's prior violent felony (robbery) conviction, stressing how "we cannot ignore" fact that the robbery "involved the threat of violence with an inoperable gun," in contrast to those cases where the defendant committed a crime of actual violence, such as a prior homicide).

[6] But Mr. Clark submitted unrebutted evidence of mitigating factors. See Clark Br. at 52-54. With effective counsel, he could have proved over ten other mitigators. See id. at 38-46.

recognized by this Court when it first reviewed James' case. The State aggressively argued that James had an equal role in the crime and had the same aggravators and mitigators. Nothing has changed these facts, which compel, under Scott v. Dugger, a reversal of Mr. Clark's death sentence.[7]

## II. MR. CLARK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

None of the State's inventive justifications for counsel's errors and omissions at the penalty phase can obscure the fact that Mr. Clark did not receive the effective counsel guaranteed him by the Sixth Amendment. By telling the jury at sentencing that this was the most difficult capital case he ever argued, that his client did not necessarily deserve to live, and by never asking that Mr. Clark's life be spared, counsel abdicated his duty to Mr. Clark. This alone renders Mr. Clark's sentencing void. Counsel's utter failure to investigate and to present available evidence, as set forth in Mr. Clark's 3.850 motion and proffer, confirms the Sixth Amendment violation and provides an additional reason for having a new sentencing hearing.

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[7] While Scott v. Dugger requires that Mr. Clark receive a life sentence, even if that were not the case, James' sentence is a powerful mitigator that a jury must hear before sentencing Mr. Clark. See Brookings v. State, 495 So. 2d 135, 142 (Fla. 1986), (reversing jury override for killer with five aggravators, as State let one codefendant plead to second degree murder and gave another immunity); Pentecost, 545 So. 2d at 863; O'Callaghan v. State, 542 So.2d 1324, 1326 (Fla. 1989) (reversing killer's sentence, despite four aggravators and no mitigators, where jury was not allowed to hear about lesser sentences given codefendants); McCampbell v. State, 421 So. 2d 1072, 1075-76 (Fla. 1982); Messer v. State, 330 So. 2d 137, 142 (Fla. 1976) (jury must hear sentence given to accomplice in robbery, in deciding sentence for triggerman).

### A. Counsel's Closing Argument Abandoned His Client And Made the Prosecution's Case.

While the State now strains mistakenly to rewrite counsel's statements against his own client, the jury never heard these tortured explanations for counsel's attacks on Mr. Clark. What the jury did hear included counsel:

- advising the jury Mr. Clark should be sentenced to death by stating that Mr. Clark's case, compared to all of his other death penalty cases, was "the most difficult case that [counsel] ever had," and by stating that, despite Mr. Clark's wish to live, Mr. Clark didn't "necessarily deserve[] it;"
- repeatedly reminding the jury that he was arguing Mr. Clark's case out of by obligation rather than by choice;
- stating that Mr. Clark "must be classified as a bad person" and that "these people" (like Mr. Clark) were responsible for the lack of values and the crime problem in our society;
- repeatedly emphasizing the serious nature of the crime in a manner supporting the conclusion that this was the type of crime deserving of the death penalty; and
- ignoring what little helpful testimony that was elicited at the penalty phase.

Any of these statements, standing alone, represents an unjustified abandonment of counsel's role as a zealous advocate. Taken together, they reveal a summation that bolstered the prosecution's case against Mr Clark. The State desperately tries to twist these statements and argue that they were somehow "effective" and "subtl[e]" defense devices. While perhaps creative, the State's interpretations border on utter nonsense.

What the jury heard was "the worst summation" that Robert Link, an expert in capital defense, has ever heard.[8]

Counsel's comment that "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, is described by the State as "an effective device whereby counsel subtly reminded the jury how serious their responsibility was and not to blithely accept the prosecutor's argument." State Br. at 18. But counsel's statement was utterly silent regarding the seriousness of the jury's responsibility and the prosecutor's arguments. Rather, it highlighted to the jury counsel's belief that Mr. Clark's case was the worst he had tried "[i]n the years I have been practicing law in Florida." TR 1064. The jury was thus told that, compared with all of the other capital defendants this experienced criminal defense attorney had defended, Mr. Clark was the most deserving of death. In so arguing, counsel was assisting the prosecutor, providing a benchmark that could have resulted in a mistrial had the prosecutor made the same point.

Counsel also effectively urged the death penalty when he told the jury his frank opinion that Mr. Clark did "not necessarily deserve" to live. The State implicitly concedes that this statement is indefensible by claiming that counsel only "reported what Clark had said" and arguing that "he was not commenting that

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[8] The State responds to Mr. Link's unrebutted expert opinion by stating "it is unfortunate that his experience has been so limited." State Br. at 17-18 n.4. Mr. Link has been involved in defending over 100 capital cases and has given expert testimony in many other ineffective assistance cases. See R. 342-43, 362-63.

as an advocate he did not believe life was inappropriate." State Br. at 18. But this reading is absolutely refuted by the transcript, which has quotation marks that clearly identify which words were Mr. Clark's and which words were counsel's.[9] Mr. Clark's words were that he would prefer to live. Counsel's words were "not necessarily that he deserves it."[10] Such an admission -- that counsel did not think that his client necessarily deserves to be spared the death penalty -- is as damning as anything that one can imagine a defense attorney can say about his client in a capital case. 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").[11] Here, too, counsel effectively advised the jury to sentence Mr. Clark to death.

Beyond these egregious errors, the State attempts to excuse counsel's statements separating himself from Mr. Clark by

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[9] The court reporter transcribed this passage as follows:

> But his response, for whatever it was worth is, "I would, given those choices, prefer to live."
>
> Not necessarily that he deserves it. We didn't discuss that. His preference is to live, even in jail, for the rest of his life.

TR 1064. The State cannot point to a shred of evidence in the record supporting its implausible interpretation.

[10] Even if the State's implausible reading of this statement were correct, it would be equally egregious. If counsel told the jury that Mr. Clark himself doubted that he deserved to live, this would have (1) violated Mr. Clark's attorney-client privilege, (2) violated Mr. Clark's Fifth Amendment rights, and (3) told the jury that even the defendant felt he should die.

[11] This is the same as counsel telling the jury at the guilt phase that he thinks his client is guilty, which is presumptively ineffective. See, e.g., Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Young v. Zant, 677 F.2d 792, 799-800 (11th Cir. 1982).

noting that one such statement occurred when counsel was addressing whether the crime met the heinous, atrocious and cruel ("HAC") aggravator.[12] The State misses the context of the statement -- counsel was addressing whether the crime was comparatively so severe as to justify the death penalty, the heart of a defense lawyer's job in a capital case. At that crucial moment, it was impermissible for counsel to avow that he was only making this argument because he was "required" to do so or because he had "no choice." It is not effective for counsel to apologize to the jury for making having to make his argument.[13]

In trying to explain away counsel's incessant attacks on Mr. Clark's character during closing argument, the State points to yet another example of counsel's abandonment of his advocacy role. Counsel stated "Mr. Clark . . . is far from being a good person, and, therefore, must be classified as a bad person." TR 1059. The State correctly notes that this statement was made in a sentence where counsel also states "despite all of that, in the worst of us there is a little bit of good." Id. (emphasis added). Yet it is nothing short of appalling for counsel, charged with telling the jury why Mr. Clark should live, essentially to state that Mr. Clark is one of the "worst of us." The best spin that the State could

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[12] Of course, the State offers no post hoc explanation for why counsel did not even attempt to rebut any of the other aggravating factors which the State urged the jury to find.

[13] The State also questions why trial counsel was not asked to explain his closing. State Br. at 19. Any hindsight reasons for his statements are utterly irrelevant. The jury never heard these explanations; it only heard counsel's actual statements. Besides, if the State thought counsel's explanations were probative, it could have explored them, but declined to do so. See R. 538.

put on this statement is that it is an argument against the death penalty generally. Because the death penalty exists in Florida, and because this jury by definition had no philosophical opposition to the death penalty, counsel was obliged to respond to the question of whether Mr. Clark was deserving of being spared death, or was one of "the worst of us." It was patently prejudicial for Mr. Clark's own counsel to answer that question against his client.

Moreover, counsel repeatedly and methodically, dehumanized Mr. Clark by emphasizing the serious nature of the crime and how horrible Mr. Clark was for committing it. The State asserts that counsel simply stated "the obvious -- that they (the jury) had determined Clark to be guilty." In fact, counsel went far beyond acknowledging the guilty verdict.[14] His comments amounted to a prosecutorial emphasis of how horrible he thought the crime was. He emphasized that jury's finding was "beyond and to the exclusion of a reasonable doubt;" said he could "appreciate the seriousness of this offense;" stressed his "horror that a death has occurred;" recounted the crime in detail and stated that he did not know "[w]hat possesses anyone to" commit such a crime, but that it happens all the time "with these types of people"; suggested that people like Mr. Clark are out in society committing these types of crimes "all the time;" and implored the jury that Mr. Clark "should be stopped." TR 1054-67. In short, counsel repeatedly in closing made statements supporting the prosecutor's case. See King v.

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[14] Moreover, counsel closed his argument by telling the jury that it might be making a mistake, completely contradicting his repeated reminders that he felt Mr. Clark was guilty. See TR 1067.

Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (counsel ineffective for conveying to jury that he reluctantly represented a defendant who had committed a reprehensible crime).[15] Tellingly, counsel never asked the jury to spare his client's life.

In sum, counsel's statements against his client were not excusable slips of the tongue, nor were they isolated lapses in an otherwise strong summation. On the critical issue of whether Mr. Clark deserved the death penalty or whether he deserved to live, Mr. Clark's counsel time and again told the jury that death was not an inappropriate punishment. This *per se* ineffectiveness entitles Mr. Clark to a new sentencing hearing. See United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (where defense counsel fails to provide meaningful adversarial testing of state's case, the process is presumptively unreliable).

**B. Trial Counsel Failed to Investigate and to Present Available Mitigation Evidence.**

The State's answer to counsel's failure to call Mr. Clark's former employer Charles Rocker, his mother Utah Clark, and his long-time friend Ernest Gilyard is to call it a "tactical" decision. The record shows, however, that no tactical decision could be made with respect to these witnesses, as counsel was totally ignorant about what they could say.[16] They in fact were

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[15] This Court has "condemn[ed]" arguments by a prosecutor "which tend[] to dehumanize a capital defendant." Bonifay v. State, 680 So. 2d 413, 418 n.10 (Fla. 1996). Surely it was worse for Mr. Clark's own advocate to dehumanize him before the jury.

[16] As the court below dismissed Mr. Clark's 3.850 motion without an evidentiary hearing, his allegations must be presumed true for purposes of this appeal, Mendyk v. State, 592 So. 2d 1076,

not called as witnesses simply because of sloth -- counsel did not bother to investigate their existence or possible testimony. Where counsel fails to conduct an independent investigation and preparation of witnesses, failure to present these witnesses cannot be deemed "tactical." See, e.g., Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996) (there can be no strategic choice if "there was no investigation of options"); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993). The 3.74 hours spent preparing for the penalty phase, all but 15 minutes of which came on the day of the penalty hearing, was simply inadequate to render a "thorough investigation" of potential mitigation witnesses.

The State's "tactical" explanations for counsel's failure to present the witnesses are not even plausible. Take, for example, Mr. Clark's former employer, Charles Rocker. The State argues that his presence would have reminded the jury of the facts of the case. Of course, the jury had these facts well in mind before Mr. Rocker would have taken the stand, and Mr. Clark's own counsel reminded the jury of these facts during the closing argument. Regardless, it would have been an incompetent decision to fail to put on a character witness who (1) was an upstanding member of the Tampa community, (2) had been a State witness and thus was, in Mr. Link's unrebutted expert opinion, "virtually unimpeachable;" and (3) would have testified passionately and from personal experience to at least three important mitigation factors

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1079 (Fla. 1992), and the State's attacks on witness credibility and reliance upon record excerpts not attached by the court below must be disregarded. Fla. R. Crim. P. 3.850(d).

-- that Mr. Clark had been a long-time responsible employee capable of functioning in society, that Mr. Clark was a trustworthy friend, and that Mr. Clark strived to better himself by learning the welding trade. That would have been more than an answer to the State's argument that Mr. Clark was a virtual monster or the equivalent of Ted Bundy, Charles Manson or the Son of Sam. TR 1050. As it was, counsel had no chance to make that tactical choice, as he never tried to find evidence to refute it, evidence that any reasonable lawyer would have found and used.

The State's explanation for counsel's failure to call Mr. Clark's mother, Utah Clark, is equally implausible. Counsel did not speak to Mrs. Clark until the morning of the sentencing hearing (when he was preoccupied with the only penalty phase preparation he engaged in, R. 577-78) and then only at Mrs. Clark's initiative. R. 354. Even accepting counsel's claim that he formed an initial impression that Mrs. Clark was "not articulate" in this exceedingly brief meeting, counsel asked her nothing about Mr. Clark's history, but simply advised her that her son would likely get the electric chair, a defeatist attitude that may explain his incredibly prejudicial closing argument. It is apparent that counsel never learned what Mrs. Clark could say or how she would be perceived as a mitigation witness. Had he done so, he would have realized that Mrs. Clark could establish considerable mitigating evidence. He also would have learned that Mrs. Clark would have been able articulately to testify directly to Mr. Clark's extremely deprived upbringing, or, through her very inarticulateness, she would have suggested much the same. R. 345.

The record also amply shows that counsel was ineffective for failing to call Ernest Gilyard, Mr. Clark's good friend. The State again suggests counsel made a tactical choice where no such tactical choice was possible due to his failure to investigate. The State's proposed "tactical" decision is implausible anyway. First the State contends that Mr. Gilyard's testimony of Mr. Clark's non-violence would have been at cross-purposes with Dr. Afield's testimony. It is either wrong (or further proves the ineffective representation that Mr. Clark received) to presume Dr. Afield was called to testify that Mr. Clark had a violent history.[17] The State further speculates that Mr. Clark's respect for the elderly would have reminded the jury of the crime. Even if this bizarre theory found support in the record, it would only suggest a decision to focus the examination away from that issue. Finally, the State suggests that Mr. Gilyard's testimony would have been duplicative of Ms. Arnett's as proof of Mr. Clark's caring nature. However, it is quite different to testify, as Mr. Gilyard would have, to Mr. Clark's ability to care not just for family, but for others in society. Furthermore, corroboration of Mr. Clark's

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[17] While Dr. Afield exaggerated Mr. Clark's record by stating that he had "several" prior convictions, he never claimed that Mr. Clark told him this (which seems quite improbable). Regardless, it is inexcusable that counsel did not prepare Dr. Afield on as crucial a fact as the number and type of Mr. Clark's prior convictions. See Duest v. Singletary, 997 F.2d 1336, 1339 (11th Cir. 1993) (reversing sentence where evidence wrongly indicated defendant had armed assault convictions, portraying defendant to jury "not only as an individual with the propensity for criminal violence, but a recidivous killer"), cert. denied, 510 U.S. 1133 (1994); State v. Gunsby, 670 So. 2d 920, 921 (Fla. 1996) (noting circuit court's finding of ineffectiveness where counsel failed to object to false statements about defendant's criminal history).

ability to exhibit caring would have helped to humanize Mr. Clark and establish a recognized mitigator, one which the trial court refused to recognize based on Ms. Arnett's testimony.

Lastly, counsel's 15-minute preparation of Dr. Afield was woefully and obviously inadequate. This inadequacy went well beyond a failure to ask "detailed questions propounded to Dr. Afield so that he could be more expansive." A witness as important as Dr. Afield simply cannot be adequately prepared in 15 minutes. Further, Dr. Krop (whose proffer must be treated as unrebutted) unequivocally states that Dr. Afield failed to perform and counsel failed to present a competent psychological evaluation of Mr. Clark. R. 393. Basic materials such as school and medical records were never obtained.[18] Neuropsychological testing recommended by Dr. Afield was never performed. As Dr. Krop would testify, this omission was crucial, as the testing would have proven Mr. Clark's strong potential for rehabilitation and ability to function well in prison. R. 394. In turn, per the State's own argument, this would have rectified counsel's portrayal of Mr. Clark as part of the "underbelly of society." State Br. at 20 ("[t]hat counsel could not predict whether Clark could be rehabilitated comported with Dr. Afield's testimony that it seemed an open question.") Reasonable preparation would also have avoided Dr. Afield's prejudicial statement exaggerating Clark's criminal record.[19]

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[18] Rose, 675 So. 2d at 572 (counsel ineffective where he failed to obtain school, hospital, prison other records and materials).

[19] While one cannot control what a prosecutor asks, minimal preparation would have insured that, no matter what was asked, Dr. Afield would not wrongly testify that Mr. Clark had more

### C. Counsel's Performance Prejudiced Mr. Clark.

The State does not even attempt to refute that counsel's statements prejudiced Mr. Clark. State Br. at 31. Additionally, the State does not take issue with the fact that the mitigation witnesses that should have been presented would have established no fewer than ten recognized mitigators, a failure that grew even more critical when this Court struck the HAC factor. See Rose, 675 So. 2d at 573-74 (in finding IAC, noting that on direct appeal death sentence had only been sustained because of lack of mitigators). Moreover, counsel's ill-prepared, weak mitigation presentation was compounded by his deficient closing argument.

Given the jury's 8-4 vote on the death penalty, a shift in just two votes would have resulted in a recommendation of life. In this light, it is beyond serious dispute that counsel's deficient performance prejudiced Mr. Clark. This Court has found similar deficiencies in penalty phases sufficient to require new trials.[20] Mr. Clark's allegations are certainly enough to merit an evidentiary hearing. See Harvey v. Dugger, 656 So. 2d 1253,

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convictions than he actually had.

[20] See Rose, 675 So. 2d at 572-74 (reversing sentence where counsel "never attempted to meaningfully investigate mitigation," even though multiple aggravators were found previously, in light of "the substantial mitigating evidence identified at the hearing . . . as compared to the sparseness of the evidence actually presented" at trial); Hildwin v. Dugger, 654 So. 2d 107, 109 & n.7 (Fla.) (counsel was "woefully inadequate" where he "failed to unearth a large amount of mitigating evidence," despite calling five witnesses and despite fact that court had found four aggravators), cert. denied, 116 S.Ct. 420 (1995); Cave v. Singletary, 971 F.2d 1513, 1519 (11th Cir. 1992) (reversing sentence when counsel failed to contact relatives who could provide mitigating evidence, noting close jury vote on death sentence).

1257 (Fla. 1995); Cherry v. State, 659 So. 2d 1069, 1074 (Fla. 1995). Mr. Clark is thus entitled to a new sentencing hearing or, at the very least, to an evidentiary hearing on this claim.

## III. THE UNDISPUTED ERRORS IN APPLYING FLORIDA'S AGGRAVATING AND MITIGATING FACTORS TO MR. CLARK'S CASE REQUIRE RESENTENCING.

Tellingly, the State does not challenge the merits of these claims by Mr. Clark. Instead, the State argues Mr. Clark "simply chants the mantra of 'ineffective counsel.'" State Br. at 33. Yet the State, not Mr. Clark, is guilty of rote incantation by chanting the mantra of "procedural bar." As shown in Mr. Clark's opening brief, Clark Br. at 49-52, 53-55, 59-61, this challenge cannot hold water and each of these claims clearly has merit.

### A. Mr. Clark's Sentence Was Tainted By The Impermissibly Vague "HAC" Factor Instruction That The Jury Was Given.

The HAC factor instruction given at Mr. Clark's trial was unconstitutionally vague. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). It is also undisputed that the HAC factor cannot be found in his case. Clark v. State, 443 So. 2d 973, 977 (Fla. 1983). Thus, the improper instruction may have affected the jury's recommendation, see James v. State, 615 So. 2d at 668, 669 (Fla. 1992), a critical error in light of the jury's close vote on the sentence and the fact that the HAC factor is one of the "most serious" aggravators. Maxwell v. State, 603 So. 2d 490, 492 & n.3 (Fla. 1994).

The State agrees with all of this, but argues that (1) counsel failed to object properly to instructing on this factor, and (2) this critical omission by counsel was excusable. As Mr.

Clark has argued, counsel's general objection to this instruction, on the ground (later vindicated by this Court) that the evidence of the HAC factor could not meet the requirements of State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), was sufficient to preserve the issue. See Clark Br. at 48-49.

Even if this Court could hold that the objection was not sufficiently clear, counsel's failure to make this basic objection was ineffective. As Mr. Clark has shown, the holding in Essinosa flows directly from Godfrey v. Georgia, 446 U.S. 420 (1980), 100 S.Ct. 1759, 64 L.Ed.2d 398.[21] Moreover, a decade earlier, in Dixon (which affirmed the constitutionality of Florida's death penalty statute), this Court held that the HAC factor could only be found under conditions far narrower than those contemplated in the jury instruction given at Mr. Clark's trial. See Clark Br. at 49. The state does not contest that the objection which counsel failed to make was a standard one, based on Dixon and Godfrey. Found in the public defender's handbook, it was taught at all training seminars. Mr. Clark's counsel had access to this instruction, but did not use it because of a professed lack of time to prepare special requested instructions. See Clark Br. at 49-50. Mr. Link would testify that any properly trained counsel would have made this objection. Thus, counsel was deficient for failing to do so. This failure was undeniably prejudicial. See id. at 50.

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[21] Indeed, the U.S. Supreme Court recently granted certiorari to decide whether Espinosa's invalidation of Florida's HAC and "cold, calculated and premeditated" aggravators (both of which were given in Mr. Clark's case) was preordained by Godfrey. See Lambrix v. Singletary, 66 U.S.L.W. 332 (U.S. Nov. 1, 1996).

B. The Trial Court Impermissibly Failed to Consider Non-Statutory Mitigating Circumstances In Wrongly Finding That There Was No Evidence In Mitigation.

The State totally ignores this argument, conceding that (1) the trial court only looked at statutory mitigators, (2) this violated both Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 47 L.Ed.2d 973 (1978) (requiring sentencer to consider non-statutory mitigators) and Mann v. State, 420 So. 2d 578, 581 (Fla. 1982) (reversing sentence where trial court did not state what factors it considered); (3) unrebutted record evidence, which the trial court could not disregard, Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990) established some mitigating factors, and (4) the trial court's error was not harmless. See Clark Br. at 52-54.

Contrary to the State's argument, Mr. Clark did not default on this claim. Trial counsel could not contest this ruling, as it came at the close of sentencing; thus, it was not waived at trial. Even if trial counsel failed to preserve the issue, Mr. Clark is not barred from raising it now. Hitchcock v. Dugger, 481 U.S. 393, 394, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987), which held that "the sentencer may not refuse to consider . . . any relevant mitigating evidence," applies retroactively. Kennedy v. Herring, 54 F.3d 678, 685 (11th Cir. 1995); see Maxwell, 603 So. 2d at 492-93 (Hitchcock error occurred where court did not expressly weigh nonstatutory mitigators in order).

As Hitchcock, Lockett and Maxwell suggest, failure to weigh nonstatutory mitigators deprives a defendant of due process in sentencing, a fundamental error which cannot be procedurally barred. See Mordenti v. State, 630 So. 2d 1080, 1084 (Fla.)

(defendant is not procedurally barred from challenging denials of due process), cert. denied, 114 S.Ct. 2726 (1994). Thus, Mr. Clark is entitled to a resentencing due to this error as well.

### C. The Trial Court Impermissibly Failed To Instruct The Jury That The Aggravating Circumstances Found in Fla. Stat. § 921.141(5)(d) and (f) Must Merge.

The trial court erred in instructing the jury on both the robbery and pecuniary gain aggravators, Fla. Stat. § 921.141(5)(d) and (f), without instructing the jury that the two factors merge, so that only one could be found for sentencing purposes. See Clark Br. at 54-56 (citing Castro v. State, 597 So. 2d 259, 261 (Fla. 1992).)[22] The State does not dispute that this error occurred, or that it prejudiced Mr. Clark.

Instead, the State argues that "collateral challenges are not a vehicle for reasserting previously rejected claims." State Br. at 34. In so arguing, the State willfully ignores how it was only after Mr. Clark's direct appeal, in Castro, that this Court finally acknowledged that Mr. Clark was correct when he first raised this argument. This mirrors the circumstances in James II.

Moreover, the State never disputes that the result which Mr. Clark urges here is identical to the one reached in James II. There the jury was instructed on an aggravator that it could not properly find. See 615 So. 2d at 669. That is true here. In both

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[22] The State argues that "as in Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), cert. denied, 115 S.Ct. 1705 (1995), this Court noted that the trial court's order did not improperly count these factors twice." State Br. at 34. As Castro points, out, however, see 597 so. 2d at 261, the error is committed if the jury is not properly instructed about the merger of aggravators; Mr. Clark's jury was not. See TR 1067-71.

cases, one "cannot say beyond a reasonable doubt" that the improper instruction did not affect the jury recommendation. See id. In both cases, trial counsel preserved the issue, and raised it on appeal. In short, there is no principled distinction between the holding in James II and the result which Mr. Clark seeks.

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

The State does not dispute the merits of Mr. Clark's claim that this aggravating factor was improperly found because (1) the trial court's findings were insufficient to establish that the murder was committed to avoid arrest, (2) the substitute findings made by this Court lack record support, and (3) these substitute findings rely upon the testimony of the jailhouse informant, whose credibility would have been undermined had the State not violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See Clark Br. at 56-59.

There is no procedural bar to this argument. This claim was not waived, as Mr. Clark raised the issue on direct appeal. See 443 so. 2d at 976-77. Nor is it duplicative, as Mr. Clark could not previously challenge the Court's substitute findings. See Clark Br. at 59. Finally, as the substitute findings are undermined by evidence that the State improperly withheld during the first trial, the procedural bar cannot apply. Id. at 57-59.

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

The State likewise does not dispute that the cold, calculated and premeditated aggravator was improperly found. With

regard to the State's claim that this argument had been waived, Mr. Clark notes this argument could not have been raised at trial, since the findings came at the end of the trial.

## IV. THE JURY'S ROLE IN SENTENCING WAS IMPROPERLY DENIGRATED BY THE PROSECUTOR AND THE TRIAL COURT.

Mr. Clark has demonstrated, without contradiction by the State, that the prosecutor and judge both improperly diminished the jury's role in sentencing. Clark Br. at 61-64. While the State claims procedural bar, Mr. Clark has shown why this issue may be raised on collateral challenge. Id. at 64; see also Hildwin, 654 so. 2d at 109 (claims that might otherwise be procedurally barred can be heard on a 3.850 motion if counsel was ineffective).

## V. IT WAS ERROR TO TELL THE JURY THAT IT MUST IGNORE ANY SYMPATHY THAT IT MIGHT FEEL FOR MR. CLARK.

Mr. Clark has shown how the trial court erred in letting the State tell the jury that it must not consider any sympathy that it felt for Mr. Clark. Clark Br. at 64-65. The State's response is to claim that this argument is foreclosed by Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). State Br. at 37. But Saffle concerns retroactivity under federal habeas laws, not under Florida law. Thus, it cannot bar Mr. Clark's claim.[23]

[23] The state also appears to claims Mr. Clark cannot raise this issue because counsel failed to object to this argument, and that Mr. Clark is not entitled to a merits ruling on whether counsel was ineffective for failing to object. This court recently held otherwise. See Harvey, 656 So. 2d at 1257 (granting evidentiary hearing on miscellaneous claims of ineffectiveness, even though none standing alone appeared to warrant relief under Strickland, where "the cumulative effect of such claims, if proven, might bear on the ultimate determination of" effectiveness).

VI. **AN EVIDENTIARY HEARING IS REQUIRED ON GUILT PHASE ISSUES.**

The State's attack on Mr. Clark's guilt phase claims has three fatal flaws. First, by premising its arguments on what Mr. Clark "failed to demonstrate,"[24] it forgets that the court below refused Mr. Clark's evidentiary hearing. In this posture, it is irrelevant what Mr. Clark has proven; all that matters is what he alleges. Fla. R. Crim. P. 3.850(d). Thus, the State's disputes with Mr. Clark's allegations should be disregarded. Reed .

Second, the State's arguments that Mr. Clark has not proven either that it withheld evidence (Coleman's rap sheet), or that counsel had evidence (Mr. Satey's conflicting statements) and did not use it, are wholly irrelevant. When there is relevant exculpatory evidence that was not raised at trial, it does not matter whether or not trial counsel had access to it. If it was withheld, then it was a Brady violation; if counsel had access to it, then his failure to use it constitutes ineffectiveness. See Smith v. Wainwrisht, 741 F.2d 1248, 1251 (11th Cir. 1981) (noting the relation between ineffectiveness and Brady issues); Gunsby, 670 So. 2d at 924 (if counsel could have obtained Brady information with due diligence, failure to do so was deficient under first prong of Strickland).[25] As IAC and Brady claims have the same

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[24] Thus, the State argues Mr. "Clark has failed to demonstrate suppression by the prosecutor," State Br. at 41; his "failure to establish" the State's nondisclosure is "fatal to his Brady claim," id. at 41 n.11; and that "[t]o establish a Giglio violation," Mr. Clark must "demonstrate that the testimony was false." Id. at 47.

[25] See also Clemmons v. Delo, 1996 WL 673369, *2 n.3 (8th Cir. Nov. 22, 1996) (finding "little need to resolve" whether Brady material was available to counsel; if it were, an ineffectiveness claim would be just as strong as Brady claim raised by petitioner).

materiality test, Kyles v. Whitley, 115 S. Ct. 1555, 1565-66, 131 L.Ed.2d 490 (1995), the question is simply if there is a reasonable probability that the evidence may have affected the outcome. Id.

Third, the State wrongly argues that these claims have no bearing on penalty phase issues. While residual doubts are not a mitigating factor per se, the U. S. Supreme Court has recognized that evidence adduced at the guilt phase may impact the penalty phase. See Lockhart v. McCree, 476 U.S. 162, 181, 106 S.Ct. 1758, 137 (1986); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). That is especially true here, since the issues that Mr. Clark's guilt phase claims attacks -- the credibility of jailhouse informant Coleman, and the accuracy of Mr. Satey's recollection -- are critical to the findings at the penalty phase. Thus, even if the Court were persuaded that the errors that Mr. Clark alleges are not material enough to warrant a new guilt phase, it must independently evaluate whether these allegations, in combination with the other penalty phase errors, warrant a new sentencing hearing.

A. The State Withheld Crucial Evidence And Suborned Perjury Resardins The Veracity of Its Star Witness James Coleman.

After Maharaj v. State, No. 85,439, 1996 WL 528458 (Fla. Sept. 19, 1996), there can be no doubt that by sufficiently alleging the elements of Brady and Giglio[26] violations, Mr. Clark is entitled to an evidentiary hearing on these violations. In Maharaj, the trial court denied the petitioner an evidentiary hearing on his Bradv claim (that the State withheld material

[26] Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

information), and his Giglio claim (that the State knowingly presented perjured testimony). See Maharaj, 1996 WL 528458, at *2. This Court ruled that these claims, once alleged, cannot be disposed of without an evidentiary hearing. See id. Moreover, as shown below, Mr. Clark's Brady claim and his Giglio claim are both meritorious enough to warrant an evidentiary hearing.

### 1. Mr. Clark's Allegations Of A *Brady* Violation Are Sufficient To Require An Evidentiary Hearing.

As explained previously, Mr. Clark's rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated when the State did not disclose (1) a four-page rap sheet revealing the multiple fraud convictions of Coleman, who testified to Mr. Clark's purported jailhouse confession, (2) a 13-page rap sheet on Coleman showing a dozen-plus fraud convictions spanning a quarter century,[27] and (3) a leniency agreement between the State and Coleman entered into in return for his testimony.

Rather than deny these violations, the State argues that (1) trial counsel testified could not recall if he was provided with these materials, so that Mr. Clark "has failed to demonstrate suppression" sufficient to invoke Brady, State Br. at 40-41; and (2) failure to disclose them was immaterial. Id. at 42.

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[27] The State contends that Mr. Clark claims that the State did not turn over a May 28, 1982 police report on Coleman. State Br. at 42. That is not what he claims. The May 28 report refers to the 13-page rap sheet on Coleman that was already in the files of Hillsborough County Sheriff's office, and logically had to have been there when Coleman was in jail before Mr. Clark's trial.

The first argument is without merit. See page 26, above.[28] Trial counsel certainly did not testify that he had seen the materials in question, If anything, his testimony raises a dispute over an issue of fact -- whether the prosecution turned over the materials or not. In such a situation, an evidentiary hearing is required. See Maharaj, 1996 WL 528458, at *2 (citing Way v. State, 630 So. 2d 177 (Fla. 1993)).[29] Moreover, as the materiality standards for Brady and ineffectiveness claims is the same, it does not matter whether Mr. Clark can prove suppression.

Perhaps recognizing the meritless nature of the foregoing arguments, the State also contends that its Brady violations are not material -- that is, no reasonable likelihood exists that the suppressed evidence could have affected the judgment of the jury, either at guilt phase or penalty phase. See State Br. at 42.

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[28] Cf. Craig, No. 82,642, 1996 WL 559888, at *5 (Fla. Oct. 3, 1996) (government attorney has special responsibility to be solicitous of interests of justice, rather than mere victory, in context of alleged Bradv violation).

[29] The cases cited by the State on this issue further proves this point. In Atkins v. State, 663 So. 2d 624, 625-26 (Fla. 1995), the relevant materials had been disclosed to defense counsel. In Routly v. State, 590 So. 2d 397 (Fla. 1991) and Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), a Brady claim was rejected only after an evidentiary hearing. See Routly, 590 So. 2d at 399; Hildwin, 654 So. 2d at 109. The State turns next to Heswood v. State, 575 So. 2d 170 (Fla. 1991). Hegwood, however, says nothing about whether a Rule 3.850 movant sufficiently alleges a Brady violation to merit an evidentiary hearing, as it was a direct appeal. Finally, in Felker v. Thomas, 52 F.3d 907, 910 (11th Cir. 1995), cert. denied, 116 S.Ct. 956 (1996), no such hearing was required only because the evidence, viewed in the light most favorable to Felker, could not establish a Brady violation. Here, in contrast, Mr. Clark alleges he was denied access to the rap sheet of a key State witness. This alone satisfies Brady. See Gunsby, 670 So. 2d at 923 (Fla. 1996) ("no question exists that Brady violations occurred when the State failed to disclose the criminal records of two key witnesses").

The materiality standard for Brady violations is not high, however -- and for obvious reasons, as the very nature of a Brady violation is such that no factfinder ever had the opportunity to consider the case in light of the suppressed evidence. Indeed:

> materiality under Bagley[30] is not a sufficiency of the evidence inquiry -- favorable evidence is material when it reasonably could be taken to put the whole case in a different light so as to undermine confidence in the conviction.

Frierson v. State, 677 So. 2d 381, 383 (Fla. 4th DCA 1996).

The question is whether evidence that the only witness to Mr. Clark's purported jailhouse confession had over a 25 year history of fraud, with over a dozen fraud-related convictions and multiple other convictions, could possibly put the State's case "in a different light." The Court should not, as the State suggests, weigh the strength of the suppressed evidence; that is a job for the trier of fact. Moreover, suppression cannot be considered in a vacuum. A Brady violation has occurred if the cumulative weight of all guilt-phase issues (or, in this case, guilt and/or penalty phase issues) is perceived to undermine confidence in the trial outcome, even if the specific evidence alleged to be suppressed is not enough by itself to be material. See Gunsby, 670 So. 2d at 924. Here, the fact that the jury, while hearing that Coleman had a few worthless check or credit card fraud convictions, did not hear that he was a career "con man," doubtless suffices to satisfy the materiality element of Brady by itself. Had the jury heard chapter and verse about Coleman's criminal history, particularly

[30] United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

after Coleman baldly lied about his record on the stand, his credibility would have stood in shambles. Moreover, his dubious claim that Mr. Clark asked him to arrange an attack on the surviving victim, which no doubt inflamed the jury and influenced its 8-4 vote at the penalty phase, would have been discredited.

### *2.* Mr. Clark's *Giglio* Claim Requires An Evidentiary Hearing.

Gislio bars the State from using perjured testimony or failing to correct such testimony. As Mr. Clark has explained, the bases for his Giglio claim are that the State failed to correct Coleman's false testimony concerning his own criminal record (including fraud crimes) and that the State did not inform the jury of its apparent "deal" pursuant to which Coleman was released from jail shortly after alleging that Mr. Clark confessed to him, with no other apparent justification.[31] Clark Br. at 72-75.

The State does not argue that Mr. Clark's allegations do not demonstrate a Giglio violation. Instead, it attempts to take issue with a few of these allegations. See State Br. at 43-48. The Court should not seek to resolve these evidentiary disputes. Rather, in determining if an evidentiary hearing below is required, the Court should merely determine if Mr. Clark's allegations might cause the jury to question Coleman's motivation for testifying against Mr. Clark -- in other words, whether the claims, if fully

[31] "The thrust of Gislio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." See a i q , 1996 WL 559888, at *2.

supported at an evidentiary hearing, could possibly have cast the prosecution's case "in a different light."

B. Evidence Undermining The Accuracy Of The Identification Of Mr. Clark Was Not Brousht To The Jury's Attention.

Mr. Clark also claimedthattrial counsel was ineffective at the guilt phase, in particular for failing to present evidence that severely would have undermined the accuracy of Mr. Satey's identification of him. Beyond disputing Mr. Clark's allegations, the State argues that (1) counsel weakened the identification in other ways, (2) counsel was not asked in deposition if he had any "tactical" reasons for failing to present this evidence, and (3) the inconsistencies were "slight." State Br. at 49-51.

None of these arguments can defeat Mr. Clark's right to an evidentiary hearing. It is true trial counsel pointed out how Mr. Satey's identification was suspect as he (1) could not make an initial identification, (2) was confused at his deposition, and (3) was confused about the name of his accuser. Id. at 49 and n.15. The fact that counsel presented these deficiencies at trial cannot excuse his failure to present other, graver inconsistencies. If anything, they make his failure to tip the scale by casting further doubt on the identification of Mr. Clark all the more critical.

The State's pointing to Mr. Clark's current counsel not having asked trial counsel in deposition to explain his tactical reasons for these omissions is totally irrelevant. Counsel has no obligation to ask questions simply because the State would like to know the answer, but chose not to ask the question itself.

Finally, the State's claim that the discrepancies are slight is belied by the record. To summarize:

- Mr. Satey testified he recognized one of his assailants as Mr. Clark (who worked had for him) when the assailant entered his store. Yet Mr. Satey initially told the police, however, that he did not know who the suspects were. See R. 65, 168.

- Mr. Clark drove a green sedan. Yet Mr. Satey initially told the police that the suspect who shot him (Suspect #1, whom the State at trial claimed was Mr. Clark) "is known to drive an old pickup truck." R. 183.

- Mr. Clark was wearing a light pullover at a bar shortly before Mr. Satey was shot. Yet Mr. Satey initially told the police that Suspect #1 wore dark clothes.

- Mr. Clark was about six feet tall and weighed 240 pounds. Yet Mr. Satey initially told police that Suspect #1 was 5'9" tall and weighed about 190 pounds.

- Mr. Clark was taller and heavier than his codefendant. Yet Mr. Satey initially told police that Suspect #1 was shorter and lighter than the other assailant.

- Mr. Satey testified, in graphic detail, that he heard his wife being attacked and shot. Yet Mr. Satey he initially told the police that he did not hear his wife get shot. Further, he later swore that he saw his wife get shot.

Clark Br. at 77-79. In sum, Mr. Satey initially told the police that the assailant whom the State later claimed was Mr. Clark was smaller, lighter, wore different clothes, and drove a different car than Mr. Clark, and (unlike Mr. Clark) was unknown to him. The U.S. Supreme Court has said that inconsistencies of this sort, if unexplored at trial, warrant retrial. See Kyles, 115 S. Ct. at 1569-71 (ordering retrial where witnesses gave police different physical descriptions of the assailant thantheytestified to, told police that the assailant drove a different car than the defendant, and told police that he only heard shooting but later testified that he saw it); Gunsby, 670 So. 2d at 923 (remanding for new trial

where the evidence presented at a 3.850 hearing revealed a "number of" inconsistencies in eyewitnesses' descriptions of assailants). This alone is enough to warrant a retrial, Along with the other instances of ineffectiveness alleged by Mr. Clark, see R. 62-70, and with the Brady violations alleged by Mr. Clark, these errors are easily warrant an evidentiary hearing on these claims. See Gunsby, 670 So. 2d at 924 (vacating conviction in light of overall effect of counsel's deficient performance and Brady violations).[32]

[32] The State tries to dismiss Mr. Clark's argument regarding the discriminatory use of peremptory challenges in his trial, by reference to Duest v. Dugger, 555 So. 2d 849 (Fla. 1990). Duest only found waiver where a defendant cited arguments raised below without further elaboration, Seed . at 852. As Mr. Clark did more than this, see Clark Br. at 78-79 n.42, Duest is inapposite.

## 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,


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November 29, 1996

**CERTIFICATE OF SERVICE**

I do certify that a copy of the foregoing Reply Brief of Appellant Larry Clark has been furnished by First Class United States mail on the 29th day of November, 1996, and by Federal Express on the 30th day of November, 1996, to:

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