IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 01-1874

LANCELOT URILEY ARMSTRONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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THE JOHNSON V. MISSISSIPPI CLAIM

The State admitted that Mr. Armstrong's jury was improperly instructed with an unconstitutional prior violent felony aggravator at trial. See, State's Answer Brief at page 11. On direct appeal, this Court conceded that Mr. Armstrong's jury was improperly instructed to double two aggravating circumstances and that the same jury was not properly allowed to consider a limiting instruction that the judge failed to give. See Armstrong v. State, 642 So.2d 730 (Fla. 1994).

In conducting a harmless error analysis, this Court also found that there was "negligible" mitigating evidence admitted at penalty phase and therefore, was satisfied in finding that the instructional errors to the jury were harmless. Armstrong v. State, 642 So.2d 730, 739 (Fla. 1994).

However, when this Court made those legal and factual decisions in 1994, it did not know that one of the aggravators was unconstitutional, and that a mountain of mitigation existed but was not presented due to ineffective assistance of counsel. Nor did this Court know that Ring v. Arizona, 536 U.S. 584 (2002) would make proper instructions to the jury an essential element of Mr. Armstrong's trial. The State in its Answer has conveniently ignored the implications of Ring and consciously avoided the obvious.

Current caselaw precludes the imposition of a procedural bar on Mr. Armstrong when one has never been imposed in the past. Any argument about what the State "could" have presented in aggravation is irrelevant, and such a prospective treatment is not supported by any current caselaw.

In order for the State's argument to be correct, this Court would be compelled to overturn the United States Supreme Court decision in Johnson v. Mississippi, 108 S. Ct. 1981 (1988) and its own precedent in Duest v. Singletary, 997 F. 2d 1336 (11th Cir. 1993) and in Rivera v. State, 629 So. 2d 1261 (Fla. 1993).

Even though the State argues this Court should conduct a harmless error analysis on this claim, under Ring and prior caselaw, Mr. Armstrong suggests that the instructional errors in his case rise to the level of a structural defect. There is no way to assess the impact of the Massachusetts victim's testimony and no way to discover how much consideration the jury gave to the instructions it doubled and what it would have done had it been given a limiting instruction.

Under even a cursory cumulative analysis of the case, it is difficult to ignore the impact of trial counsel's failure to explore and present compelling mitigation. Even when improperly instructed and without significant mitigation presemted, three jurors voted for life. If this Court is to consider for the first time what the jury

would do with a different prior violent felony aggravator, then it also must imagine what the jury would have done with the mitigation presented by post-conviction counsel at the evidentiary hearing. Cf. Gunsby v. State, 670 So.2d 920 (Fla. 1996).

The lower court properly found that no procedural bar applied to Mr. Armstrong. It held that Duest v. State, 555 So. 2d 849, 851(Fla. 1999) controlled because this Court rejected an identical procedural bar argument by the State. As the lower court stated, "As related to the issue of a procedural bar, the facts in Duest and Armstrong are virtually indistinguishable" (PC-R. 782).

In both Duest and Armstrong, the State claimed that the Johnson claim was procedurally barred because of the delay in vacating the prior felony conviction after the sentence of death was imposed. However, the Johnson issue did not become ripe until the Massachusetts felony was actually vacated. Because the claim was not procedurally barred in Massachusetts, it is not barred in Florida. The lower court agreed citing that under Massachusetts law there was no procedural bar (PC-R. 783). Thus, no authority supports a procedural bar in Mr. Armstrong's case.

Mr. Armstrong's Massachusetts conviction was vacated in 1999. He raised it in a Rule 3.850 motion in 2000, at the earliest opportunity. It is the date of the vacated conviction that is significant. The lower court specifically found this Court’s opinion

in Duest v. State, 555 So. 2d 849 (Fla. 1999) controlled (PC-R. 782-783) [1] Mr. Armstrong's claim is not procedurally barred.

If not procedurally barred, the State then suggests that any Johnson error is harmless. Mr. Armstrong has repeatedly argued that this error is not subject to harmless error analysis when it constitutes a structural error. The State failed to address the potential structural defect at all.

The lower court also failed to address whether the error was structural. Instead, it simply conducted a harmless error analysis. Both the lower court and the State have ignored the substantial case law that plainly states that harmless error analysis is not appropriate where Johnson claims are involved. In Johnson, the United States Supreme Court held that it would not have been appropriate to subject this error to a harmless error analysis. As the Court held

> ...the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. **Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate**.

(Johnson v. Mississippi, 108 S. Ct at 1988)[emphasis added].

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[1] See also Rivera v. State, 629 So. 2d 105 (Fla. 1993); Preston v. State, 564 So. 2d 120 (Fla. 1990); See also Johnson v. Mississippi, in which the United State Supreme Court rejected that a procedural bar should be relied on by the Mississippi Supreme Court because it had not been "consistently or regularly applied." Johnson v. Mississippi, 108 S. Ct. at 1988.

The Supreme Court made this distinction before the advent of Ring v. Arizona, which now mandates that a jury must be properly instructed because the aggravators are an element of the charged offense.

Here, the penalty phase jury did not know that the prior violent felony was unconstitutional. The jury was confronted not only with testimony of John Clough, Assistant Clerk Magistrate from Massachusetts, to authenticate a certified copy of Mr. Armstrong's unconstitutional conviction for felony indecent assault and battery of a fourteen-year-old, but also graphic and emotional testimony from Rose Flynch, the alleged victim of the sexual battery. It is irrelevant whether the State now believes that it did not give the case "undue emphasis." The jury considered an unconstitutional aggravating circumstance.

The lower court failed to consider the weight that this improper aggravator had on the jury and failed to address the issue that this inadmissible testimony could have swayed the jury to vote for death. The jury's ignorance of essential facts skews the weighing process to the extent that it becomes a structural defect for eighth amendment due process purposes. Even given the graphic testimony of Ms. Flynch and Mr. Clough, three jurors voted against the imposition of the death penalty.

Further support for Mr. Armstrong's argument that harmless error analysis is not appropriate in this context can be drawn from

the case of Ring v. Arizona 536 U.S. 584 (2002). As Ring makes plain, an aggravating factor constitutes an element of the offense rather than a mere "sentencing enhancer" (The aggravating factor is an element of the aggravated crime) Ring v. Arizona, 536 U.S. at 574. This Court's direct appeal opinion held that the prior violent felony aggravating factor still applied because of the Massachusetts conviction. See Armstrong v. State, 642 So. 2d 730, 738 (Fla. 1994). Eliminating the Massachusetts conviction takes away an "element of the offense" and is not mere "trial error." Even if a harmless error analysis were the appropriate standard, the lower court still erred.

The State maintains that the error was harmless because there was no undue emphasis placed on the sexual assault conviction; that there were still two violent felony convictions to establish the aggravator; and that the trial court could consider an additional violent felony that was prosecuted after the murder case. State's Answer Brief at page 11. This reasoning is contrary to the law and facts.

The law is not concerned with whether the State believes it has "unduly emphasized" the Massachusetts conviction. The State introduced two witnesses to testify about the Massachusetts conviction and no one knows the impact their testimony had on the jury. The State downplays the importance of these witnesses when it

went to the time and expense of transporting the victim from Massachusetts, paying for her stay in Florida and preparing her to relive the crime in front of the jury. Clearly, the State believed it was worth time and effort to introduce the fourteen-year-old victim's testimony to the jury. The State chose to present Ms. Flynch's testimony to support the Massachusetts prior as an aggravating circumstance. If the State were so confident of its two contemporaneous felonies, it would not now seek to resurrect its invalid aggravator with a robbery it did not even prosecute until **after** the murder trial.

The State chose to present Rose Flynch's testimony on the same day the prosecutor gave his closing argument urging the jury to give Mr. Armstrong death. The prosecutor specifically referred to "the indecent assault on Rose Flynch that you have heard this morning" (R. 1933) The State's claim that it did not give "undue emphasis" to the Massachusetts conviction is simply not true. It specifically chose that case and that victim to maximize the emotional impact on the jury. It cannot now pretend it would not have made a difference to the jury when it was so carefully orchestrated in the first place.

Under Chapman v. California, 386 U.S. 18 (1967), the State, as beneficiary of the error, is required to prove beyond a reasonable doubt that the error did not contribute to the verdict. It cannot make that claim when it brought in two live witnesses to describe the

circumstances of the unconstitutional aggravator in vivid detail to the jury. The other two convictions used to support the prior violent felony aggravating factor arose out of the same episode that resulted in the murder conviction. That is why the Massachusetts prior felony was so important to the State. The sexual assault prior felony was the sole conviction that would show prior criminal history **before** the night of the crime. The State cannot show that it is harmless beyond a reasonable doubt.

Further, the State suggests that the two contemporaneous felony convictions of attempted murder and robbery were enough to support the prior violent felony aggravator. The analysis should not be on what is left over, but whether the jury considered the appropriate information. The same issue arose in Rivera v. State, 629 So.2d 105 (Fla. 1993). In Rivera, an invalid felony was struck, but contemporaneous convictions for armed robbery and attempted armed robbery were present. This Court considered the nature of aggravators that remained, whether the invalid prior was a focus of prosecution's case and what the jury vote was as determining whether the error was harmless.[2]

Here, the circumstances are even more egregious. The trial court gave instructions on four aggravating circumstances. These

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[2]Rivera was also decided without the benefit of the U.S. Supreme Court's decision in Ring.

were (1)"committed for the purpose of avoiding arrest;" (2) "murder of a law enforcement officer engaged in the performance of official duties;" (3)"committed during a robbery or flight therefrom;" and (4) "prior conviction of a violent felony." (R.2429). The State argued three violent felonies as a basis for the "prior conviction of a violent felony" aggravating circumstance, the contemporaneous attempted murder and robbery, and the prior Massachusetts conviction for indecent assault and battery on a fourteen-year-old.

On direct appeal, Mr. Armstrong argued that the lower court's finding of these four aggravating circumstances was error because it was based on two instances of improper doubling. Mr. Armstrong argued that the "committed for the purpose of avoiding arrest" and the "murder of a law enforcement officer engaged in the performance of official duties" aggravating circumstances were improperly doubled because they were based on the same aspect of the crime. In addition, Mr. Armstrong argued that the "committed during a robbery or flight therefrom," was based on the same facts as the "prior conviction of a violent felony," namely the contemporaneous attempted murder and robbery convictions.

This Court agreed that "committed for the purpose of avoiding arrest" and the "murder of a law enforcement officer engaged in the performance of official duties" aggravating circumstances were improperly doubled. However, it found that:

> Armstrong's argument, however that the "committed while engaged in the commission of a robbery or flight therefrom" and "prior conviction of a violent felony" aggravators are also duplicative is without merit because **the record reflects that Armstrong had a previous felony conviction for indecent battery on a fourteen-year-old child.**

Armstrong v. State, 642 So.2d 730, 738 (Fla. 1994)[emphasis added].

Thus, the "prior violent felony aggravating circumstance was still valid **because of** the Massachusetts prior felony. Arguably, without the Massachusetts conviction, this Court may have found that the contemporaneous attempted murder and robbery convictions were duplicative of the "commission while engaged in the commission of a robbery or flight therefrom." This Court never addressed whether the contemporaneous convictions standing alone would have caused the court to strike another aggravator because they arose out of the same set of facts used to support the “commission of a robbery or flight” aggravator.

Because that analysis was not done, this Court found that although the trial court had improperly doubled the "committed for the purpose of avoiding arrest" and the "murder of a law enforcement officer engaged in the performance of official duties" aggravating circumstances, it was:

> ...harmless error beyond a reasonable doubt in the light of the remaining three valid aggravating circumstances and the negligible mitigating evidence in this case.

Armstrong v. State at 739.

The sole basis for this Court upholding the "prior violent felony" aggravating circumstance was the unconstitutional Massachusetts conviction. Given the elimination of the Massachusetts conviction, the contemporaneous convictions cannot support both the prior violent felony and during the commission of a felony or flight aggravating factors. The existence of these simultaneous felonies does not show that the error is harmless beyond a reasonable doubt under these circumstances because two aggravators of the four are now invalid. In addition, three jurors voted for life while considering the improper aggravators. The lower court specifically noted that "[i]f the harmless error analysis ended here, this Court would have to find that the error cannot be deemed harmless beyond a reasonable doubt." (PC-R. 786). Even with a harmless error analysis, Mr. Armstrong is entitled to a new sentencing proceeding.

Knowing this, the State bolstered its case by claiming that hypothetically, if a resentencing were to occur today there is no question Mr. Armstrong would be sentenced to death because it had another robbery conviction, obtained **after** the death sentence was imposed, that could be used as an aggravator.

Having found the State's arguments on procedural bar and harmless error unpersuasive, the lower court denied relief to Mr. Armstrong solely on how a hypothetical jury would sentence based on a

subsequent robbery conviction. This prospective analysis is not based on any caselaw or precedent from any court, but merely speculation. This approach to sentencing is the “mere caprice” that U.S. Supreme Court specifically denounced in Johnson v. Mississippi, 486 U.S. at 585 (quoting Zant v. Stephens, 462 U.S. 862 (1983); Cf. Rivera v. State, 629 So.2d 105 (Fla. 1993).

The lower court erred by finding that "the parties agree that the [robbery conviction] would be admissible at a resentencing penalty phase hearing" (PC-R. 789). Mr. Armstrong merely stated that the "State could bring in whatever they wanted at a new resentencing” (PC-R. 808). Whether the new conviction would be admitted would depend on whether the future defense counsel objected, the basis for any such objection, and the ruling by any future court. Mr. Armstrong did not concede the admissibility of the conviction, merely that the State could **try** to get it in as supporting an aggravating circumstance.

A competent defense attorney would object strenously to the admission of such a felony to support a prior violent felony aggravator on the basis that it was not a “prior” at all. Though the State argues that the robbery occurred 13 days before the instant case, the State **chose** not to prosecute it until after the sentencing in this case. Therefore, it is not a “prior” felony conviction under the definition of that aggravating circumstance because he was not

“convicted” of the crime until after the instant case. Defense counsel would argue that even if the resentencing occurred, the court should not consider a felony that the State chose to prosecute after the murder conviction.

The prosecution was responsible for when and how it prosecuted the case. The State cannot now complain that it is somehow wronged by not being able to use a subsequent robbery conviction as a prior violent felony. It failed to prosecute the case first in order to use it as a prior violent felony, therefore, it should suffer the consequences of its decision now.

The lower court further speculated as to the weight that such a subsequent robbery conviction would have on a hypothetical future jury. If under Johnson, Duest and Rivera, it is impossible to assess the weight that the actual jury gave to the unconstitutional aggravating factor, then it is equally impossible to surmise what a hypothetical jury would do with the presentation of different aggravators.

In addition, the State contends that the lower court was correct in its attempt to distinguish Rogers v. State 783 So. 2d 980 (Fla. 2001) from the instant cause. In doing so it noted that because the case was on direct appeal, the "subsequent first-degree murder conviction was not part of the record" (PC-R. 788).

The lower court distinguishes Mr. Armstrong’s case because the

subsequent robbery conviction was introduced by the State as part of the post-conviction record. However, the fact that the State introduced it does not mean it will be valid or it will be considered by a future court. The subsequent robbery conviction occurred **after** the murder case. It is irrelevant to the analysis of whether the jury considered an invalid and unconstitutional aggravating factor.

The United States Supreme Court's opinion in Ring v. Arizona 536 U.S. 584 lends further weight to Mr. Armstrong's argument. While the lower court did not have the benefit of Ring to guide its analysis, the absence of any discussion of Ring in the State's Answer is baffling. Ring makes clear that an aggravating circumstance constitutes an element of the offense. The jury heard testimony and was instructed on a conviction that was invalid. The subsequent robbery conviction could not have been utilized at the time of the original murder trial because it did not exist. Because it did not exist at the time of Mr. Armstrong's penalty phase, it could not have been considered by the penalty phase jury.[3] The trial judge who imposed sentence could not consider it. That particular element of

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[3] Mr. Armstrong has claimed that the Florida sentencing statute is invalid, pursuant to Ring. See Petition for Writ of Habeas Corpus. Nothing in this argument should be construed as any departure from that argument. Mr. Armstrong merely seeks to draw the Court's attention to the fact that since Ring explained that aggravating circumstances are not mere "sentencing enhancers" but constitute an element of the capital crime, a felony conviction that was not in existence at the time of such crime could not have been considered by the original jury.

the offense was non-existent at the time of the trial. It was not an element of the crime. It cannot now be used *ex post facto* substitute for an invalid element.

The lower court acknowledged that its decision creates a "path that has not been traveled before, but is a path based on record evidence" (PC-R.780). Once again, just because the State introduced a certified conviction at an evidentiary hearing does not mean it would be admissible at a new penalty phase. The reason this "path" may not have been traveled before is because it not based on any law. The Attorney General conceded in the Rivera oral argument that there was no precedent it was aware of that allowed for the prospective consideration of aggravating factors. See, Rivera v. State, 629 So.2d 105 (Fla. 1993).

It cannot be said that the jury's consideration of Mr. Armstrong's vacated Massachusetts conviction, together with its consideration of a doubled aggravator, and the judge's failure to give a requested limiting instruction to the jury is harmless error. When the Johnson error is considered cumulatively with the inadequate performance of counsel in obtaining mitigating evidence, it cannot be said that Mr. Armstrong's Eighth Amendment rights were not violated. A new sentencing proceeding is warranted.

ARGUMENT 1B

INEFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE CLAIM

The State claims that "[t]he entire focus of [Mr. Armstrong's] argument centers on the actions or strategy that collateral counsel suggests should have or could have been done and completely ignores what information was available at the time of the trial and what thought processes strategies and decisions followed from that information." Answer Brief at 27. The lack of information was due to counsel's failure to investigate, not that the information did not exist. Cf. Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989).

Here, trial counsel Edward Malavenda failed to investigate even the areas he had permission from the court to investigate. He asked for and received permission to travel to Jamaica to speak with Mr. Armstrong's family members but did not go. He failed to talk to many family members, such as Ms. Weir, who lived in North Miami. He failed to put on available mental health mitigation because he did not understand the difference between competency and mitigation. Dr. Seligson gave mental health statutory mitigation in his competency report, yet Malavenda did not call him (PC-R. Vol. XII, page 86).[4] Dr. Appel said she could have testified to mitigation testimony, and

[4]Even though Dr. Seligson's competency report gave statutory mitigation, Malavenda never discussed this mitigation with Dr. Seligson because it was more aggravating. Malavenda claimed that presenting testimony that Mr. Armstrong was a "good" man was more compelling than presenting mental health mitigation (PC-R. Vol. XII at pages 124-125). However, this tactic was decided without ever asking for a mitigation evaluation by any of the mental health experts or discussing the possibility of mitigation.

was sitting in the hallway, but was not asked to evaluate for that purpose or to testify (PC-R. 1195).

Malavenda testified that he did not present these experts because they would have “hurt more than helped.” (PC-R. 87). However, Malavenda obviously did not know the difference between competency, an insanity defense and mitigation evidence (PC-R. Vol. XII at page 119). These failures were not strategic because they were based on misconceptions of what mitigation was. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986).

The State argues that Malavenda's decision not to investigate in Jamaica was reasonable because he got no additional information from Mr. Armstrong's family or friends that would cause him to think it was necessary.[5] This is contrary to the State's own characterization of the testimony presented at the evidentiary hearing as "the debilitating conditions under which Armstrong suffered while he lived in Jamaica." State’s Answer Brief at 24.[6] The State ignores Mr. Moldof’s expert testimony that in 1990 it was

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[5]This argument ignores the fact that Malavenda asked for and received permission and funds to travel to Jamaica by the trial court. If there was no need to go to Jamaica, then there would not have been a need to request permission to go.

[6]Even in the lower court, the State acknowledged that Mr. Armstrong's “abject poverty, physical maladies and abuse” were "compelling" (PC-R. 756).

common practice in the Ft. Lauderdale community to gather everything on your client's background (PC-R. 1173). He also said it was **not** the practice for effective counsel to rely only on his client or one family member for mitigation investigation (PC-R. 1173).

According to Mr. Moldof, Malavenda should have known that Mr. Armstrong's childhood needed to be investigated for mitigation as background for any mental health evaluation. Cf. Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Williams v. Taylor, 120 S. Ct. 1495 (2000).

The State suggests that Malavenda was competent at penalty phase because he had "many conversations" with family members, especially his mother." State's Answer Brief at 28. Yet, Malavenda could not remember who these people were (PC-R. Vol. XII at page 126). However, the State fails to mention that Mr. Armstrong's mother, Dorrett English, was absent during much of Mr. Armstrong's childhood because she worked in Kingston while he remained with an aunt and step-father in Montego Bay. The conversations with other family members were so superficial he never knew what information existed. Malavenda focused only on what a "good boy" the defendant was.

Harlo Mayne, Mr. Armstrong's brother, testified Malavenda never asked him anything about Mr. Armstrong's childhood, nor did he ask him to testify at Mr. Armstrong's penalty phase. (PC-R. 1349).

Marcel Foster, the youngest brother who did testify at penalty phase, emphasized that the only time that Malavenda talked with him was in the hallway in the courthouse **immediately before** to the penalty phase (PCR. 1370). Malavenda did not talk with "many family members" as the State argues. He spoke to whomever the defendant's mother got for him.

The State argues that Malavenda was effective because he spoke with Ms. English. What the State does not mention is that Ms. English was not Mr. Armstrong's primary caretaker during the majority of his childhood. At penalty phase, Ms. English testified that she left Jamaica in 1978.(R. 1910). She had no first-hand knowledge of any of the traumatic occurrences that Mr. Armstrong experienced after the age of fourteen. Even before she left Jamaica, Ms. English attended nursing school in Kingston and was away from the family home for long stretches of time. Pamela Weir Mitchell and Mr. Armstrong's grandmother, Menda Golding were the primary caregivers for the majority of Mr. Armstrong's childhood (PC-R. 1312). Malavenda knew so little about his client that he did not even know who took care of him when he was a child.

Even a basic conversation with Ms. English would have revealed that she was not in the best position to know the details of Mr. Armstrong's traumas during his childhood and teenage years. Ms. Mitchell testified that she would have been willing to testify at

penalty phase, but she was never contacted by Malavenda even though she lived in North Miami.

Any purported "strategy" on the part of Malavenda in not going to North Miami or Jamaica is clearly based on a failure to conduct an in-depth interview with the witnesses he did know about. His failure to investigate constitutes deficient performance pursuant to Strickland v. Washington, 466 U.S. 668 (1984). See also, Williams v. Taylor, 120 S. Ct. 1495 (2000).

Contrary to the State's argument, this is not an instance of current counsel disagreeing with a different strategy. There was no reasonable strategy because Malavenda did not know what mitigation existed. As Marcel Foster and Harlo Mayne's testimony indicates, there was a wealth of information about Mr. Armstrong's early life of poverty, abuse and neglect which Malavenda completely failed to explore. Had he done so, he would not only have been able to elicit this testimony from Mr. Mayne and Mr. Foster, but he would have gone or sent an investigator to Jamaica.

At the evidentiary hearing, expert witness Moldof testified that in 1990, in Ft. Lauderdale attorneys investigating for penalty phase should have gone to the "ends of the earth" to gather information about a client's early life (PC-R 1165). A plethora of continuing legal education courses were given on death penalty litigation in Ft. Lauderdale in 1990 that Malavenda could have

attended (PC-R. 1170-71). Those seminars explained the differences between competency, insanity and mitigation. At the post-conviction hearing, Malvenda still could not explain the differences. It was patently unreasonable for Malavenda not to know this basic area of law when conducting a capital penalty phase. Cf. Rivera v. State, 629 So.2d 105 (Fla. 1993).

Malavenda claimed his trial strategy was to “humanize” his client to the jury. However, in order to humanize he had to know about Mr. Armstrong’s upbringing. Mr. Armstrong was a Jamaican foreign national. Mr. Armstrong came from a third world country with a culture and history very alien to the experiences of most Americans. Even Mr. Armstrong's native language is unfamiliar to the majority of Americans, a fact which both Malavenda and the State completely overlooked. The fact that Mr. Armstrong's upbringing was in Jamaica made it even more imperative that counsel find out as much as possible. He knew Mr. Armstrong had reading and learning impairments, yet he did nothing to find out the source of these impairments.

Evidence was introduced at the evidentiary hearing that as a child Mr. Armstrong ate lead paint chips off the walls of the shack where he lived, ate marl (white rock) and suffered from Pica as a result of eating chicken excrement (PC-R. 1311-13). See also Defense exhibits 25-34. Mr. Armstrong also banged his head against the floor

and walls to the extent that he bled (PC-R. 1310). Malavenda's failure to investigate and present this mitigation information was not strategic. He did not know about it.

The State claimed in its Answer Brief that Malavenda had sound strategic reasons for not pursing or presenting evidence of Mr. Armstrong's numerous mental health problems, including his brain damage, seizure disorder, and psychiatric illnesses. However, the record clearly rebuts the State's assertion. Malavenda did not know Mr. Armstrong was brain damaged. He thought that anything other than evidence of what a good boy Armstrong had been was aggravating and would open the door to more damaging information. He was wrong. The jury had just convicted Mr. Armstrong of murder, attempted murder, robbery and had heard the testimony of a fourteen-year-old victim who claimed that she had been sexually assaulted by him.

The State claims that "the evidence completely contradicts" that Mr. Armstrong suffered from seizures. This is false. Unrebutted testimony of Harlo Mayne and Pamela Weir Mitchell showed that Mr. Armstrong suffered from grand mal seizures, known as "fits," as a child (PC-R.1305; 1333-35). Furthermore, proffered affidavits of Memry Weir and Menda Golding relied upon by Dr. Dudley describe these episodes during which Mr. Armstrong lost consciousness and had no recollection of the seizures afterward (PC-R. 1260,1286-87). There was no strategic reason not to present such evidence because

Mr. Malavenda admitted that he would "probably present" evidence of a seizure disorder had he known about it. (PC-R. Vol. XII at page 36).

The State claims that Malavenda offered three specific reasons for not calling Dr. Appel, the neuropsychologist he requested to be appointed for the defense: (1) That Dr. Appel had "not been forceful in her assessment of brain damage" during the competency hearing; (2) that Malavenda "feared that Dr. Appel was trying to run the show;" and (3) the divergence between her opinion and the other competency doctors. Answer Brief at 41.

Contrary to the State's argument, Malavenda's testimony shows he simply did not know how to use a mental health professional to develop mitigation. He repeatedly confused the standards for competency and sanity as precluding presentation of mitigation evidence. Malavenda's focus was to ask Dr. Appel to look at the issues of competency and sanity, not mitigation.[7]

Dr. Appel's testimony at the competency hearing was vastly different from the testimony she would have been able to offer at penalty phase. She was not asked to do a mitigation evaluation. Malavenda simply did not know what she could say at penalty phase because he did not ask. He assumed that all proceedings involving

[7]Malavenda stated that he didn't remember whether he asked her to look at mitigation (PC-R. Vol. XII at page 16). Dr. Appel, however, remembered that he did not ask her for whatever mitigation evidence she could provide (PC-R.1195).

mental health issues were the same, which they clearly are not. Malavenda's “strategic” reason for not calling Dr. Appel in penalty phase was based on his failure to ask for a mitigation evaluation by the defense expert he chose (PC-R. 1195). Instead, Malvenda blamed Dr. Appel.

Even if, as Malavenda suggested, Dr. Appel's opinion differed from the other competency doctors, that did not preclude him from asking for mitigation assistance or requesting a different mental health expert. Malavenda failed to realize that competency evaluations are different from mitigation evaluations.

Dr. Appel testified about the differences at the evidentiary hearing. She said competency evaluations relate to the specific time of trial whereas mitigation investigation covers the subject's entire life to the time of the alleged offense (PC-R. 1195). For Mr. Armstrong’s competency hearing, she was only provided with Massachusetts General Hospital records from Malavenda (PC-R. 1196-98). She sought records of a car accident in which Mr. Armstrong suffered head injuries. With the exception of a call to a civil attorney, Dr. Appel’s requests for more information from Malavenda were unanswered (PC-R. 1196-98).

None of the other doctors involved in the competency evaluations were neuropsychologists, and none of them conducted the type of neuropsychological testing that could show brain damage.

Malavenda's purported strategy shows his lack of understanding of mental health issues such as competency, sanity and mitigation. He did not know the difference between the detailed testing performed by Dr. Appel and the superficial competency interviews conducted by the court-appointed experts. Once again, Malavenda's purported strategy could not be reasonable because it was based on ignorance of the law.

Malavenda testified that he and Dr. Appel were at odds. As a result, he chose not to present **any** mental health mitigation. While Malavenda could have requested a different mental health expert, he did not. He also did not take the time to work with Dr. Seligson on developing mitigation. Even if Malavenda chose not to use Dr. Appel, there was no tactical reason not to gather the information she obtained and give it to another mental health expert. Malavenda testified that he would have presented statutory mitigation if he had it (PC-R. Vol. XII at page 32). He would have presented evidence of seizures if he had it. Yet, he did nothing to get statutory mitigation, even when Dr. Seligson indicated it was present in his competency report. Dr. Appel testified that significant statutory mitigation was present, but Malavenda never asked her for it.

Malavenda decided not to present any mental health mitigation on Mr. Armstrong’s behalf. This was precisely the same situation in Williams v. Taylor, 120 S. Ct. 1495 (2000). In Williams, trial

counsel did not begin to prepare for the penalty phase of the proceeding until a week before trial. Trial counsel failed to conduct an investigation that would have uncovered extensive records describing the client's background. Counsel failed to introduce evidence that Williams was mentally retarded and failed to seek prison records about Williams helping prison officials crack a prison drug ring. Counsel failed to return a phone call of a CPA who offered to testify for Williams as part of the prison ministry program. While the Court said that not all the evidence was favorable to Williams -- his juvenile record showed the had been committed to the juvenile system on three occasions -- but failure to introduce the voluminous amount of material in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. "Whether or not these omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." Id. At 1515.

The same was true here. Had Dr. Appel been used, her findings of neurocognitive defects were supported by reports from the Massachusetts General Hospital, accident reports, affidavits from family and friends, and from subsequent tests of Mr. Armstrong's brain functioning, conducted by Dr. Goldberg, a neuropsychologist, and Dr. Hyde, a behavioral neurologist who testified at the

evidentiary hearing.

The State argues that these experts are not to be believed because they were not familiar with the details of the crime. However, the crime had no bearing on the testing of the cognitive functioning Mr. Armstrong’s brain. Nothing in the State's Brief rebuts the findings of Dr. Goldberg or Dr. Hyde. The findings of both of these experts are entirely consistent with those of Dr. Appel, who was intimately familiar with the crime.

Malavenda's purported "strategy" was clearly based on a personality clash between himself and Dr. Appel. Yet, he took no steps to get another expert nor did he pass her findings to another expert or try to present the mental health mitigation in another way. According to Mr. Moldof, Dr. Appel was well respected, a tough expert who was not shaken on cross-examination and was not considered a “loose cannon,” as Malavenda contended (PC-R. 1176).

The State argued that little weight should have been given to Dr. Goldberg and Dr. Hyde as well as the psychiatric testimony of Dr. Dudley. The lower court explained that it gave "little weight to the experts' conclusion that the shooting was impulsive because the Defendant by plan intentionally placed himself in the stressful situation where it was likely that the police would respond." The lower court's logic is flawed.

The fact that this crime was ill planned supports rather than

diminishes the mental health experts' opinions. If he allegedly did not anticipate a police response to a robbery, then he certainly would not have planned for the stressful situation he found himself in, nor could he have judged how he might react to such a stressor.

The lower court and the State both miss the distinction between lack of judgment during stress and non-stress situations. The testimony of the three experts supported the proposition that Mr. Armstrong's judgment became impaired during stressful situations. His ability to do carpentry work during non-stressful situations is not indicative of impulse control at times of confrontation or stress.

The State also ignores that Mr. Armstrong was not that successful at his carpentry business. According to Alton Beech, Mr. Armstrong was hired for jobs but had difficulty keeping them because he was unable to prioritize and he lacked concentration. He also could not deal with the business side of the operation because "I think he was more illiterate" (PC-R. 1381). This testimony was supported by Marcel Foster, who referred to Mr. Armstrong's inability to meet deadlines. He said Mr. Armstrong had poor time management and was unable to understand the importance of getting a job finished on time (PC-R. 1353). Had Malavenda asked the appropriate questions or investigated, he would have discovered that Mr. Armstrong’s

business abilities were a myth.[8] The State makes no mention of this unrebutted testimony.

The obligation to investigate and prepare for the penalty phase portion of a capital trial cannot be overstated --this is an integral part of a capital case State v. Lewis, 27 Fla. L. Weekly S1032 (December 12, 2002). An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background for possible mitigating evidence. The failure to do so may render counsel's assistance ineffective" Rose v. State, 675 So. 2d 567, 571 (Fla. 1996).

Trial counsel breached his duty to look for possible mitigating evidence. His failure to look at Mr. Armstrong's early life in Jamaica precluded a significant portion of his deprived background from being presented. His failure to work with Doctors Seligson or Appel or to understand mental health mitigation was based on ignorance.

The prejudice from counsel's omissions was that Mr. Armstrong's already ambivalent jury did not know about his brain damage, the deprivation in which he was raised and the mental health issues that plagued him his entire life.

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[8]Malavenda contended that he was told by friends and family that Mr. Armstrong's work history was very good because he had a beeper, nice clothes and a car (PC-R. Vol. XII at page 121-122). In fact, Mr. Armstrong was indigent. Alton Beech testified to Mr. Armstrong's inability to manage the business.

This is not merely a case in which more detailed mitigation could have been presented with hindsight. It is a case in which counsel was derelict in his duty to his client. The trial court erred in denying relief to Mr. Armstrong. Relief is warranted.

ARGUMENT II

SUMMARY DENIAL OF GUILT PHASE CLAIMS

The State argues that the ineffective assistance of counsel, Brady and newly-discovered evidence claims are refuted by the record or were insufficiently pled. Thus, the lower court's summary denial was correct.

However, Mr. Armstrong sufficiently pled his Brady[9] claim regarding the eyewitness account of Officer Noriega. The Brady material is contained in an internal affairs file from the Plantation Police Department, which is an account of Noriega's recollection of the events at the homicide scene. It differs dramatically from Noriega's testimony at his deposition.

Mr. Armstrong discovered the Brady material through a public records request made to the Plantation Police Department. The State contends that the lower court's summary denial of the claim was correct because "the record supports the lower court's findings." Answer Brief at 64. However, the record does not contain the internal affairs file from the Plantation Police Department. Because

[9]Brady v. Maryland, 373 U.S. 83 (1963)

the record does not conclusively rebut the allegation, an evidentiary hearing is required. Under Rule 3.850, a post conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. Gaskin v. State. 737 So. 2d 509 (Fla. 1999); Rivera v. State, 717 So. 2d 177 (Fla. 1997). This is not the case with regard to Mr. Armstrong's Brady claim.

The lower court's purported reason for denying a hearing is different from that argued by the State. The lower court first found that no Brady violation existed because Noriega was listed as a State witness (PC-R 650). This is not true. Noriega was a police officer. The only way that defense counsel had access to Noriega was through taking a deposition, which was done. Defense counsel was not provided with the information in the internal affairs report and could not ask questions on something that was withheld from him. The fact that Noriega was available for a deposition does not preclude the Brady claim. It is the State's obligation to turn over impeachment or exculpatory information. It is not the defense counsel's burden to find the information. Cf. Kyles v. Whitley, 514 U.S. 419 (1995).

Nothing in the record shows that the State turned over the internal affairs file it generated on Officer Noriega.[10] The State

failed to turn over material in its possession which casts doubt on the deposition testimony of a material witness. The claim can only be resolved by holding an evidentiary hearing.

The State also complains that "Armstrong has not established that the substance of Mr. Noriega's statements was in any way exculpatory under Brady." Answer Brief at 65. But, Mr. Armstrong did meet the pleading requirements of Rule 3.850. He has shown that the internal affairs statements differ from the testimony he gave at his deposition. It is impeachment evidence that would have been favorable to the defense and may have led to further investigation of the police story about the details of the crime. The trial court should have accepted this allegation as true. Valle v. State, 705 So. 2d 1331(Fla. 1997). A hearing was warranted.

The State also argued at the Huff hearing that Malavenda was aware that there had been an internal affairs investigation from the deposition (PC-R. 1038). However, awareness of the investigation and receipt of impeachment or exculpatory evidence are distinct matters. It is the State's continuing duty to disclose. Even if it were not, then Malavenda was ineffective for failing to investigate Noriega's statements during the internal affairs investigation. If this matter is not Brady, then it represents a properly pled claim of ineffective assistance of counsel which is not rebutted by the record. Indeed the lower court's finding that "Defense counsel had equal access to

Noriega", (PC-R 650) reflects its misunderstanding of Brady and supports Mr. Armstrong's argument.

Mr. Armstrong also raised a claim of newly-discovered evidence which the lower court summarily denied. The trial court made the same error in evaluating the newly-discovered evidence claim regarding Anthony Cooper. Again, the trial court applied the wrong standard in determining whether an evidentiary hearing should be granted. Under Rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record show that the defendant is entitled to no relief. Gaskin v. State. 737 So. 2d 509(Fla. 1999); Rivera v. State, 717 So. 2d 177 (Fla. 1997) Both the State and the lower court rely on the evidence adduced at trial to support their argument that the files and records conclusively support that Mr. Armstrong is not entitled to relief. The issue is whether the testimony of Anthony Cooper as to Coleman's confession to him is conclusively refuted by the record. Coleman's testimony is not conclusively rebutted by the record, and therefore an evidentiary hearing was merited. The lower court erroneously made credibility findings against witnesses who had not testified. Mr. Armstrong met his burden under Rule 3.850 and the files and records do not conclusively refute the allegations supported by the evidence of Anthony Cooper. An evidentiary hearing should be granted on these

claims.[11]

ARGUMENT III

THE PUBLIC RECORDS ISSUE

The State argued that Mr. Armstrong waived his original public records claim, but the record reflects that the original Motion to Compel public records was **never** heard due to the tolling of Rule 3.852 by this Court on March 14, 1997. When this Court lifted the stay of Rule 3.852, the lower court ordered Mr. Armstrong to file a second Motion to Compel which dealt with additional demands. That motion underscored that there was still an outstanding Motion to Compel from 1997, which due to the tolling of Rule 3.852, had never been heard. The lower court erroneously found the original Motion to Compel waived. At the time of the original Motion to Compel, Mr. Armstrong was litigating pursuant to Chapter 119 Fla. Stat. Mr. Armstrong could not set a hearing on the motion because of this Court's suspension of Rule 3.852 on March 14, 1997. Once the stay was lifted , Mr. Armstrong brought the matter to the court's attention at the next hearing. Cf. Fuster Escalona v. Wisotsky, 781

[11]At the beginning of the evidentiary hearing, counsel became aware from a newspaper article that the State had re-opened the investigation of the lead detective Scheff and intended to conduct DNA testing. A request for continuance and for any new information regarding this new "investigation" was made and denied (PC-R. Vol. XII at page 3-5). As of this date, no information has been provided, and no evidentiary development has been granted. Summary denial is not appropriate when the case continues to be under "investigation."

So. 2d 1063, (Fla. 2000). Mr. Armstrong was not responsible for the time period during the transition between the two rules.

A hearing on the 1997 Motion to Compel was warranted.

CONCLUSION

Mr. Armstrong submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, a full evidentiary hearing should be ordered. As to those claims not discussed in the Reply Brief, Mr. Armstrong relies on the arguments set forth in his Initial Brief and on the record.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing corrected reply brief has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio Esq., Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33340-3432 on March 27, 2003.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

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