

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC 14-787**

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**CHARLES GROVER BRANT**

**Appellant,**

**v.**

**STATE OF FLORIDA**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH  
JUDICIAL CIRCUIT, HILLSBOROUGH COUNTY, FLORIDA**

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**REPLY BRIEF OF APPELLANT**

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**MARIE-LOUISE SAMUELS PARMER**  
**Florida Bar No. 0005584**  
**The SAMUELS PARMER LAW FIRM,**  
**P.A.**  
**P.O. Box 18988**  
**Tampa, FL 33679**  
**(813)732-3321**  
**marie@samuelsparmerlaw.com**  
**Counsel for Appellant**

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## INTRODUCTORY STATEMENT

Charles Brant was sentenced to death after pleading guilty and waiving a sentencing jury. The trial judge sentenced Brant to death based on a constitutionally deficient mitigation presentation. In spite of clear evidence of counsel's specific failings and compelling new mitigation evidence, the post-conviction court entered an Order denying Brant's motion for post-conviction relief. The post-conviction court made detailed factual findings which support granting Brant's motion and found counsel deficient in some aspects. However, the lower court denied his motion by analyzing the new mitigation evidence piece-meal. In so doing, the court misapplied the *Strickland* standard. The State, in its Answer Brief, offers no substantive response to the charge that the post-conviction court's improper analysis violates *Strickland*. As was shown in his Initial Brief, Mr. Brant identified specific acts or omissions by trial counsel that fell below prevailing norms and further demonstrated that when considering *all* the evidence presented in post-conviction and adding it to the evidence produced at trial, Brant has demonstrated *Strickland* prejudice. The State's Answer Brief fails to refute Brant's charges.

Brant does not waive any arguments not addressed and relies on his Initial Brief as to those claims.

## REPLY TO STATE'S STATEMENT OF FACTS

In its Answer Brief, the State offers its own version of the facts but fails to identify any perceived factual errors by Brant. However, the State omits significant and relevant testimony necessary to a full and fair consideration of Brant's claims by this Court. This Court should rely on Brant's factual recitation as well as the factual findings in the post – conviction court's Order. The State's omissions render its factual recitation unreliable.

On pages 21-22 of its Answer Brief, the State provides a summary of the lay witness testimony. The State asserts: "Brant had the following friends and relatives, who had never met or barely knew Brant, testify at the post –conviction evidentiary hearing [.]” *Id.* The State then lists the names of the 13 witnesses and their relationship to Brant. *Id.* The State then describes a small portion of the testimony of four of those witnesses. *Id.* at 21-22. By its characterization of the testimony, the State suggests the testimony was irrelevant and lacking in compelling factual detail. A review of the post-conviction court's Order and the specific pages of the transcript cited in the Order, demonstrates that all of the 13 lay witnesses' testimony provided relevant and compelling mitigation evidence. PCR V. 18, p. 3423 – 3432.

By way of example, Dawn Masters and Nita Mezaros are two of the 13 lay witnesses the State identified as testifying at post – conviction. The State summarized Mezaros’ entire testimony in a single sentence: “Ms. Mezaros testified that Marvin Coleman was never abusive to their children.” Answer Brief, p. 22. Mezaros’ Daughter, Dawn Masters also testified but the State doesn’t describe *any* of her testimony.

By contrast, the post –conviction court’s Order describes the testimony of Mezaros and Masters and references specific relevant pages in the transcript. PCR V. 18, p. 3428-29. The court describes Masters’ testimony about Marvin offering her marijuana as a teenager and also references her description of Marvin physically beating Crystal. The court additionally cites to specific pages of her testimony in the post-hearing transcripts. A review of those pages, PCR V. 49, p. 1331-1333, points to Masters’ description of how Marvin smoked marijuana with her and that she witnessed and listened to Marvin cruelly beat Crystal throughout the night because there was a dirty bowl in the sink. Masters further described that Garret, Brant’s half-brother who was seven years old at the time, watched “cartoons nonchalantly” as if nothing out of the ordinary was happening. *Id.* at 1332. Masters then described that the next day Crystal put on her “big, dark sunglasses like an owl and went on to work [as if the physical and emotional abuse she had suffered all night long] was no big deal.” *Id.* at 1333.



By way of further example, the post-conviction court specifically references how Mezaros' testified that Marvin was "insanely jealous." PCR V. 18, p. 3429. The court also referenced references specific portions of Mezaros' testimony. *Id.* A review of those pages, PCR V. 49, p. 1301-02, shows that Mezaros described how Marvin "would smell at her privates," when he accused her of cheating, *id.* at 1302, and cruelly beat her. Mezaros and Masters offered vivid details that would convey to a jury a visceral sense of Marvin's cruelty and depravity and further lend support to Crystal's description given at post –conviction that Marvin beat her every night and ended the beatings with unwanted sex. PCR V. 50, p. 1502-05. Likewise, the other lay witnesses offered compelling testimony establishing, *inter alia*, that in both sides of the family it was common knowledge Eddie Brant was not Brant's father, that, shortly before the crime Brant was so strung out he was eating meth in his pancakes for breakfast and a wealth of other mitigation as set out in Brant's Initial Brief and the post – conviction court's Order.

The State's description of the record below is unreliable due to omission. The State is entitled to make arguments but is not entitled to its own version of the facts. Mr. Brant urges this Court to reject the State's factual assertions and rely on a full and fair reading of the record, the facts presented in his Initial Brief, and the facts set out in the lower court's Order.

## ARGUMENT

*CLAIM I – Counsel was ineffective in failing to research jury decision-making and thus misadvising Brant to enter a guilty plea based on an uninformed belief that by pleading guilty, Brant was less likely to incur the jury’s anger. Counsel was further deficient in failing to investigate mitigation prior to advising Brant to enter a plea. But for counsel’s deficient performance, Brant would not have pled guilty.*

The State asserts that counsels’ decision to advise Brant to plead guilty is “virtually unchallengeable” under *Strickland v. Washington*, 466 U.S. 690-91, 668 (1984) and because counsel considered alternative strategies, citing *Long v. State*, 118 So. 3d 798, 805 (Fla. 2013) (quoting *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2001)), their decision was reasonable. Answer Brief, p. 32, 40. But the whole point of a proper *Strickland* analysis is that counsel cannot make a valid strategic judgment without first conducting a reasonable investigation. *Id.* at 680-81. Simply talking about other options – *without investigating the course of action you advise your client to take* – does not amount to an informed strategic decision under *Strickland*. Applying *Strickland* to the facts of this case, it is virtually indisputable that counsels’ decision-making process to just talk about other options – without investigating them through reading, research or consulting with a capital jury selection expert was objectively unreasonable. Counsel cannot responsibly advise a client about the merits of different courses of action and the client cannot make informed decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case. *See e.g. Wiggins v. Smith*, 123 S.Ct. 2526 (2003); *Powell v.*

*Alabama*, 287 U.S. 45, 57 (1932) (a “thorough-going investigation” is “vitaly important.”).

In support of the argument that counsel performed within prevailing norms, the State quotes from counsels’ letter memorializing the basis of their advice to plead guilty. PCR V. 10, p. 1880-83. But, the State fails to include that the material basis of counsels’ advice was the uninformed belief Brant was less likely to “incur the jury’s ire” and that “having a full-blown trial on guilt would predispose the jury to impose death.” *Id.* As noted above, this strategy decision was wholly unsupported by any meaningful investigation.

The State’s suggestion that Fraser completed and prepared a meaningful juror questionnaire, Answer Brief, p. 17, is contradicted by the record. The post –conviction court made a factual determination to the contrary. PCR V. 17, p. 3387. The juror questionnaire prepared in this case addressed only the duration of the trial. RV. 9, p. 1112-1117; V. 19, p. 3608-12.

In addition, Fraser told Brant that there “really wasn’t much mitigation to be found.” PCR V. 43, p. 524. Such an assessment was predicated on the constitutionally deficient investigation conducted in this case as set out fully in Brant’s Initial Brief to this Court. Counsels’ assessment of the mitigation in Brant’s case, and his resulting strategy advice to plead guilty, cannot be said to rest on a constitutionally sound mitigation investigation. Counsels’ investigation fell outside the wide range

of prevailing norms when counsel did no inquiry or research into such an obviously deficient and ill-advised strategy.

The State's argument that Brant has not disputed his trial attorney's assessment of Brant's guilt, Answer Brief, p. 37, is mistaken and misses the point. Brant's claim is not simply that he wouldn't have been convicted (although he could have argued for second-degree murder and challenged the kidnapping charge) Brant's claim is that but for his counsel's uninformed advice, Brant would not have pled guilty and would have exercised his right to a jury trial. Because this is a capital case, in considering Brant's claim, this Court must assess how counsel's deficient advice contributed to Brant's death sentence. By proceeding to trial, Brant would likely have been able to have a jury empanelled and thus had a jury consider his sentence. Counsel's deficient advice created a domino-effect resulting in the constitutionally infirm non-jury proceeding that resulted in a sentence of death.

The State also argues there was no likelihood counsel could have obtained a plea bargain. Answer Brief, p. 38. This argument misses the point. Brant is not claiming counsel could have obtained a plea, Brant charges that but for counsel's non-existent investigation into widely known scientific studies on jury decision-making and the resulting advice to plead guilty, Brant would have exercised his right to a jury trial for guilt and sentencing and would likely not have been sentenced to death.

The State's argument that Brant was "given an advantage" by pleading guilty because the plea showed "remorse" which was "one of the strongest of all of Brant's mitigators" fails even the most casual analysis. Answer Brief, p. 39. As argued in his Initial Brief, such an "advantage" is illusory almost to the point of farce. When a human being is faced with execution as a result of waiving a series of fundamental constitutional rights, credit for passively submitting to the ultimate punishment is a pyrrhic benefit. Additionally, the State's argument serves to reinforce Brant's charge that counsels' deficient mitigation presentation prejudiced him. The fact Brant's waiver of his fundamental rights was one of his "strongest" mitigators makes clear that trial counsel failed to present meaningful and compelling mitigation to the trial court. And, lastly, the State is mistaken in suggesting that Brant's "remorse" was given moderate weight. The record establishes that the trial court gave Brant's guilty plea in conjunction with his "cooperation with law enforcement," his admission to the crimes, and his waiver of a jury "moderate weight." PCR V. 19, p. 3474. The trial court gave Brant's "remorse" "little weight." *Id.*

The State's arguments lack merit and must fail.

*CLAIM II – Counsel rendered ineffective assistance in the penalty phase by failing to investigate and present mitigation which prejudiced Mr. Brant.*

As noted above, the State offers no substantive response to Brant's argument that the post-conviction court engaged in an improper *Strickland* analysis. This is unsurprising in light of the post-conviction court's piece-meal approach, including

denying the overall claim by rejecting some allegations on performance and others on prejudice. Notably, the post –conviction court in its Order cites to *Strickland* and other cases from this Court, but fails to include the relevant language from *Strickland* requiring a court to consider “all” the mitigation. PCR V. 17, p. 3381-82. “[W]e evaluate the totality of the evidence—both that adduced at trial, *and the evidence adduced in the habeas proceeding[s]*.” *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (emphasis in original) (quoting *Williams v. Taylor*, 529 U.S. at 397-98).

As to the sub-claim regarding counsel’s failure to adequately investigate Brant’s background, the State makes the remarkable argument that the “fact that Brant was conceived in a rape ‘is of negligible value.’” Answer Brief, p. 50 (citing *State v. Conaway*, 453 S.E. 2d 824, 854 (N.C. 1995)). Not even the post- conviction court went that far, having denied counsel’s failure to do anything to investigate Brant’s father and the fact that he was conceived during a rape on the deficient performance prong. PCR V. 18, p. 3476. Regardless, “It is unreasonable to reduce to irrelevance” mitigating evidence of a disadvantaged or abusive childhood when “that kind of history may have particular salience for a jury evaluating [Brant’s] behavior . . .” *Porter v. McCollum*, 558 U.S. 30, 38 (2009).

And, the post- conviction court’s determination, that counsel did not perform deficiently in failing to investigate Brant’s father is also an unreasonable application of *Strickland* as set out in Brant’s Initial Brief. The need to investigate a capital

defendant's life, from "the moment of conception" to the present, is one of the most basic principles of capital defense. *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases (2003)*, Guideline 10.7 (Commentary), 31 Hofstra L. Rev. 913, 1022; *see also* Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, *The Champion*, Jan./Feb.1999, at 35. "A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction . . ." *ABA Guidelines*, 31 Hofstra L. Rev. at 1025. Further, it was uncontradicted at the hearing that prevailing norms require counsel to investigate a capital defendant's father, even if he is deceased. PCR V. 44, p. 706-09, p. 778, 780; PCR V. 14, p. 524-25, 526-27; PCR V. 15 p. 668. The record, the expert testimony, United States Supreme Court decisions, the ABA Guidelines, and even the testimony of trial counsel themselves demonstrate the post-conviction court's legal conclusion as to counsel's performance is unreasonable. "Counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not fulfilled [his] obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

The State also flatly asserts, in an attempt to establish counsel rendered a reasonable investigation, that "trial counsel hired experts to assess Brant's moral culpability and presented that at trial." Answer Brief, p. 52-53. However, the post –

conviction court made an opposite finding. The court found “trial counsel did *not* introduce expert testimony explaining how Defendant’s history/background affected his psychological and emotional development, and therefore, Defendant’s moral culpability . . .” PCR. V. 18, p. 3477 (emphasis added). Instead, the post – conviction court denied this claim on prejudice. That analysis, as was argued extensively in Brant’s Initial brief, was a fundamentally flawed piece-meal analysis which failed to consider the totality of the mitigation evidence as a whole as required by *Strickland* and its progeny.

The State attempts to argue that there was no need to present expert testimony regarding Brant’s background relying on *Wong v. Belmontes*, 558 U.S. 15 (2009). Answer Brief, p. 52-53. But *Wong* does not help the State. In *Wong* the Court recounted “[s]ubstantial evidence indicat[ing] that Belmontes had committed a prior murder,” and that counsel had limited his mitigation case to avoid opening the door to this evidence. *Id.* at 17-18. Reaffirming that the *Strickland* prejudice analysis makes it “necessary to consider *all* the relevant evidence that the jury would have had before it,” the Court faulted the lower court for ignoring the new *aggravating* evidence the State would have been entitled to introduce. *Id.* at 20 (emphasis in original). Unlike in *Wong*, however, the post-conviction court and the State never suggested that Brant’s newly admitted evidence would have opened the door to addi-



tional aggravating evidence. There is none. Brant has no prior record and was a devoutly religious, non-violent person until his descent into methamphetamine addiction.

The State makes the remarkable argument that counsel reasonably failed to develop detailed expert testimony about Brant's drug use because "over-emphasizing it would highlight his propensity to commit violence (sic) acts toward women." Answer Brief, p. 61. But this suggestion must fail. First, trial counsel presented testimony that Brant used methamphetamine – and that evidence was going to be introduced regardless of defense counsels' decision due to the facts of the crime and Brant's confession. But, without an adequate explanation of the ravaging and uncontrollable effects of methamphetamine as described in post –conviction by Dr. Morton, and the genetic components of addiction, the synergistic effect of brain damage and methamphetamines as described by Drs. Gur, Wu and Wood, and the contributory effects of Brant's neglected and troubled childhood as described by Dr. Cunningham – the trial court simply did not give this evidence the weight it deserved. Had a reasonable juror been given this evidence, along with *all the other mitigating evidence presented at trial and in post –conviction*, there exists a reasonable probability that the result of the proceedings would have been different.

Second, there was simply no testimony at post-conviction which suggested Brant had a tendency towards violence against women that was not already presented

extensively at trial. The only evidence at trial of that nature was limited to the crime itself and Brant's practice of acting out rape fantasies within the confines of his marriage. And, importantly, the post-conviction court did not rest its decision on such a premise. The court presumably did not rest its decision on that claim because there is no record support that this was trial counsel's consideration in failing to obtain a methamphetamine expert or present more vivid and compelling testimony on Brant's unparalleled methamphetamine binge as described in post-conviction. The record shows that trial counsel, based on the advice of a circuit judge, identified the need for, but made only feeble attempts to find, a specialist methamphetamine expert. When those minimal efforts failed, trial counsel simply relied on the generalist Dr. Maher. There was no strategic reason offered. Counsel's decision, as argued in Brant's Initial Brief, was the result of inattention and neglect, not a reasoned informed judgment premised on a constitutionally reliable investigation.

As to the positive prison evidence, the State asserts an incorrect prejudice standard and repeats the post-conviction court's error when it argues Brant was not prejudiced by counsel's failure because the positive prison evidence "would not change the outcome." Answer Brief, p. 53-55. This is not the correct *Strickland* standard. As stated in *Rompilla v. Beard*, 545 U.S. 374, 393 (2005), "although we suppose it is possible that a jury could have heard it *all* and still have decided on the

death penalty, that is not the test. It goes without saying that the undiscovered ‘mitigating evidence, taken as a whole, “might well have influenced the jury’s appraisal,” of [the defendant’s] culpability,’ and the likelihood of a different result if the evidence had gone in is ‘sufficient to undermine confidence in the outcome’ actually reached at sentencing.” (internal citations omitted) (emphasis added).

Further, the State repeated another error by the post-conviction court when the State gauged the weighing of the prison testimony in isolation and then simply recited the conclusory fact that the trial court found the Heinous, Atrocious and Cruel and During the Course of a Felony aggravators during trial. Answer Brief at 54-55. As set out extensively in Brant’s Initial Brief, this is an unreasonable analysis under *Strickland*.

The State also attempts to argue counsel was not deficient in failing to investigate and present positive prison evidence asserting, “Brant has failed to demonstrate deficiency of counsel.” Answer Brief, p. 54. Although, in the same argument, the State block quotes the post –conviction court’s analysis of this claim where the court found counsel deficient. *Id.* at 53. The post –conviction court stated “it is unclear” why counsel didn’t present this evidence and further describes counsel’s deficiency as a “failure.” *Id.* at 53; PCR V. 18, p. 3477. The State’s attempt to assert counsel met prevailing norms in this regard is contradicted by the post –conviction

court and the block quote in its own brief. Further, the record establishes counsel's deficiency.

The State's arguments must fail. Brant has established deficient performance and prejudice. This Court should conduct de novo review of the post –conviction court's analysis, and apply the analysis required by *Strickland*.

### *CLAIM 3*

*Counsel's performance in failing to investigate and prepare for jury selection and develop and inform Mr. Brant of mitigation in the penalty phase fell below prevailing professional norms. But for counsel's deficient performance, Mr. Brant would have exercised his right to a sentencing phase jury. Confidence in the outcome is undermined.*

As in Claim 2, the State does not attempt to squarely refute Brant's charges that the post –conviction court misapplied *Strickland* and misstated the prejudice standard. In fact, the State repeats the error when it argues, citing *Winkles v. State*, 21 So. 3d 19, 24 (Fla. 2009), that “Brant has not explained how conducting the penalty phase before a jury would have affected his sentences.” (Answer Brief, p. 71) This is the wrong standard as set out in Brant's Initial Brief. Further, the State does not attempt to defend the post –conviction court's failure to assess all the mitigation as argued throughout this Brief and Brant's Initial Brief, nor does the State engage in any kind of meaningful analysis to attempt to establish that counsels' investigation was sufficient. This is not surprising in light of the record below.

Save the inclusion of a block quote of the lower court's Order (Answer Brief, p. 69-70), the State does not address Brant's arguments or case law regarding the

lower court's analysis. The State does not concede that the *Hill v. Lockhart*, 474 U.S. 52 (1985) prejudice standard applies, Answer Brief, p. 70-71, but does argue that Brant presented "no evidence or testimony" to demonstrate that absent counsel's deficient performance he would not have waived a penalty phase jury. *Id.* at 70. It is difficult to fathom how the State could make that argument in light of the record. Brant swore in his 3.851 Motion that, but for counsel's failure to develop and identify mitigation, Brant would not have waived his right to a sentencing phase jury. And, as the post-conviction court found, Brant testified at the evidentiary hearing that he would not have waived a sentencing phase jury if he had known about all the mitigation presented in post-conviction. PCR V. 18, p. 3485; V.17, p. 3391 ("Defendant testified that he would not have pled guilty and waived the jury if he had known about all of the mitigation presented throughout the evidentiary hearing.").

Further, a necessary part of the court's analysis requires an objective consideration of what Brant knew at the time of trial about the available mitigation and what he subsequently learned and presented in post-conviction. The facial sufficiency of the trial court's colloquy of Brant's waiver does not refute the fact that Brant did not, and could not, make an informed choice because his trial counsel failed to conduct a constitutionally sufficient mitigation investigation. There is an abundance of evidence demonstrating in an objective manner - as a reviewing court is required to consider - that Brant's decision to waive a jury was not knowing and

voluntary under the federal Constitution. Brant could not possibly have known and considered the weighty mitigation in his case because counsel unreasonably failed to discover it. In fact, counsel did just the opposite; he told his client there was not much mitigation to be found. PCR V. 43, p. 524.

The State's reliance on *Griffin v. State*, 820 So. 2d 906, 912 (Fla. 2012) and *Dessaure v. State*, 891 So. 2d 455, 472 (Fla. 2004) is misplaced. Answer Brief, p. 72. Neither of these cases involve an ineffective assistance of counsel claim in failing to investigate and inform a client prior to a jury waiver. Both cases are direct appeal cases. While those appellants did challenge the waiver of the sentencing phase jury, the cases do not inform the court as to the proper legal analysis on a post –conviction claim. The same is true for the State's reliance on *State v. Partlow*, 840 So. 2d 1040, 1042 (Fla. 2003).

The State does rely on this Court's decision in *Grim v. State*, 971 So. 2d 85, 101 (Fla. 2007). In *Grim*, this Court addressed an ineffective assistance claim regarding the waiver of a penalty phase jury and applied the *Strickland* prejudice standard. However, Brant has consistently asserted *Hill* is the correct standard.

The State also argues that waiving a jury didn't result in Brant losing his right to challenge his death sentence. The State's argument lacks merit. A criminal defendant facing the death penalty has a fundamental right to a sentencing jury - the consolation that Brant could still, as the State describes, "contest his death sentence"

in a proceeding lacking the fundamental “bulwark” of a jury, *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968), doesn’t cure Brant’s unconstitutional loss of his fundamental right.

*CLAIM IV: The State violated Brady v. Maryland in failing to disclose Garret Coleman’s status as a CI at trial. Further, Mr. Brant was denied a full and fair hearing on this claim when the state continued to refuse to disclose evidence which would have substantiated Garret’s status as a CI.*

The State argues that Garret’s status as a Confidential Informant was not relevant, relying on *Breedlove v. State*, 580 So. 2d 605, 609 (Fla. 1991). *Breedlove*, however, does not involve the withholding of mitigating evidence in a capital sentencing proceeding. The Eighth Amendment requires that the sentencer be allowed to consider as a mitigating factor any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604. “[I]n a capital case, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.” *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (internal quotations omitted)). A defendant has a virtually unrestricted right to present any circumstance to a jury for consideration as a reason to spare his life. *Smith v. Texas*, 543 U.S. 37, 44 (2004). “[T]he jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a ‘low threshold for relevance,’ which is

satisfied by ‘evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.’” *Id.* (citing *Tennard v. Dretke*, 542 U.S. 274 (2004) in turn quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). See also *Eddings v. Oklahoma*, 455 U.S. 104, 112, (1982) (death sentence unconstitutional when trial judge believed he was prevented by state law from considering mitigation of a defendant’s age and mental health). A death sentence must be premised on accurate sentencing information. *Gregg v. Georgia*, 428 U.S. 153, 189-90 (1976). Garret’s status as a CI, either at the time of arrest, trial, or both, is mitigating evidence within the meaning of the Eighth Amendment. Garret was a CI because he had a drug problem and knew all the drug dealers and where to find drugs. Garret’s addiction, and his activity in the seedy side of narcotics investigations, speaks volumes about the dysfunction of the Coleman family.

The State next argues that Brant has not shown that the “prosecution team” had knowledge of Garret’s CI status. However, even if the prosecutor himself did not know of Brant’s status, the Orange County Sheriff’s Office worked directly with the Hillsborough County Sheriff’s Office on Brant’s case. And, that neither the prosecutor himself nor anyone in his office knew of Brant’s illegal activity does not end the inquiry. *Brady* applies to exculpatory and impeachment information that is in the possession of the “prosecution team,” which includes investigators and the



police. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (rejecting state's argument that evidence known only to police but not prosecutor should escape *Brady*'s disclosure requirements); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (“*Brady* and its progeny apply to evidence possessed by a district's ‘prosecution team,’ which includes both investigative and prosecutorial personnel.”) (citing *United States v. Antone*, 603 F.2d 566, 569 (5th Cir.1979)), *cert. denied*, 493 U.S. 932 (1989); *Porter v. White*, 483 F.3d 1294, 1305 (11<sup>th</sup> Cir. 2007) (“[I]rrespective of the good faith or bad faith of the prosecution,” “the prosecution is charged with a *Brady* violation” when “favorable, material evidence exclusively in the hands of the prosecution team fails to reach the defense.”); *see also United States v. Reyerros*, 537 F.3d 270, 281 (3rd Cir.2008) (explaining that *Brady* requires disclosure of evidence known to prosecutor as well as “others acting on the government's behalf in the case” (citing *Kyles* ), including evidence known to state police officers investigating the case); *Antone*, 603 F.2d at 569 (finding information known only to two investigators should be imputed to prosecutor; noting that “this Court has declined to draw a distinction between different agencies under the same government”).

Further, the State’s argument that Brant has not established materiality must fail. “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence;” thus,

Brant may demonstrate a *Brady* violation by “showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 434 (footnote omitted).

*Claim V: Cumulative Error.*

The State makes the remarkable argument that Brant’s cumulative error claim is procedurally barred because any of his trial error claims could have been raised on direct appeal. (Answer Brief, p. 79). Yet, the State has not shown how any of Brant’s claims could reasonably be perceived to be procedurally barred or identified any claim as “trial error.” Florida law has long held that ineffective assistance of counsel claims must be raised through a post –conviction motion. A claim of ineffective assistance of counsel is generally not cognizable on direct appeal. *See Kelley v. State*, 486 So.2d 578, 585 (Fla.1986).

In Brant’s case, the synergistic effect of counsel’s uninformed advice to plead guilty to “avoid the jury’s ire,” coupled with the jury selection capped by angry jurors promising to sentence Brant to death and laughing about it, coupled with counsel’s wholly deficient mitigation investigation and advice that Brant he did not have much weighty mitigation, and including the failure to disclose Garret’s status as a CI, is so troubling in this case that confidence in the outcome is undermined. Looking at trial counsel’s failures as a whole, through guilt and sentencing, Brant’s waiver of virtually every fundamental right, and the State’s concealment of Garret’s status

as a CI, it is clear Brant was deprived of the constitutionally reliable adversarial testing to which he was entitled under the federal and Florida constitutions. No defendant should be sentenced to death on such a constitutionally infirm record.

The State's argument is completely devoid of merit. This Court should find cumulative error in the case as a whole.

*Claim VI: Brant's Eighth Amendment right against cruel and unusual Punishment will be violated as Brant may be incompetent at the time of execution.*

Mr. Brant stands on his Initial Brief as to this issue.

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Sara Macks, Assistant Attorney General at sara.macks@myfloridalegal.com and CapApp@myfloridalegal.com, on this 20th day of March, 2015.

**/s/ Marie-Louise Samuels Parmer**  
Marie-Louise Samuels Parmer  
Florida Bar No. 0005584  
The Samuels Parmer Law Firm, P.A.  
P.O. Box 18988  
Tampa, FL 33679  
813-732-3321  
marie@samuelsparmerlaw.com  
Counsel for Appellant

**CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

**/s/ Marie-Louise Samuels Parmer**  
Marie-Louise Samuels Parmer  
Florida Bar No. 0005584  
The Samuels Parmer Law Firm, P.A.  
P.O. Box 18988  
Tampa, FL 33679  
813-732-3321  
marie@samuelsparmerlaw.com  
Counsel for Appellant