IN THE SUPREME COURT OF FLORIDA

RAYMOND ROBERT CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 72,303

APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY

AMENDED (SUPPLEMENTAL) BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

RAYMOND ROBERT CLARK will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal developed for use in the direct appeal will be referenced by the symbol "R" followed by the appropriate page number. References to the transcript of the first 3.850 proceedings conducted in 1983 will be made by the symbol "Tr" followed by the appropriate page number. References to the transcript of the third 3.850 proceedings which are the subject of the instant appeal will be made by the symbol "3rd 3.850 Tr" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment filed on May 24, 1977, with the offenses of first degree murder, kidnapping and extortion. (R 5 - 6) At arraignment, Clark plead not guilty.

Trial by jury was held before the Honorable Robert E. Beach, Judge of the Circuit Court of the Sixth Judicial Circuit of Florida, in and for Pinellas County. The jury found Clark guilty of first degree murder, kidnapping with intent to commit a felony and extortion, as charged. (R 1471 - 1473) Following the penalty phase of the trial, the majority of the jury recommended the death penalty. (R 1474) The trial judge immediately adjudicated Clark guilty and imposed the death penalty on the appellant for the first degree murder. (R 1477, 1513, 1523 - 1524) The court also sentenced Clark to life imprisonment on the kidnapping conviction and fifteen years on the extortion conviction, sentences to run consecutively. (R 1478 - 1479, 1513)

On November 21, 1979, the Florida Supreme Court affirmed the judgment and sentences, Clark v. State, 379 So.2d 97 (Fla. 1979), and the United States Supreme Court thereafter denied certiorari on February 23, 1981.

On or about November 10, 1982, Clark filed a Motion to Vacate, Set Aside, Or Correct Conviction and Sentence, pursuant to Rule 3.850, Fla. R. Crim. P. A hearing was held before the trial court on March 23, 1983. On April 27, 1983, Clark's motion was denied.

Appellant appealed the denial of the Rule 3.850 motion to the Supreme Court of Florida, which affirmed the trial court's decision on October 18, 1984. Clark v. State, 460 So.2d 886 (Fla. 1984).

On March 13, 1985, Florida Governor Bob Graham signed appellant's death warrant. Clark's execution was set for April 16, 1985.

On April 8, 1985, Clark filed a second Rule 3.850 Motion to Vacate and Set Aside Sentence. On April 10, 1985, the trial court heard oral argument on appellant's motion. It then denied the requested relief.

Appellant appealed the trial court's denial of his second Rule 3.850 motion to the Florida Supreme Court.

On April 12, 1985, the Florida Supreme Court heard oral argument on this appeal. On the same date, the court affirmed the decision of the trial court denying the requested relief. Clark v. State, 467 So.2d 699 (Fla. 1985).

On April 12, 1985, appellant filed a 28 U.S.C. §2254 Petition for Writ of Habeas Corpus with the Federal District Court, Middle District of Florida, Tampa Division. On the same date, the District Court issued an Order staying Clark's execution. Appellant presented fourteen claims of alleged constitutional deprivation. The Petition was denied and Certificate of Probable Cause granted on December 12, 1985.

The Eleventh Circuit Court of Appeals affirmed the denial of relief on December 15, 1987. Rehearing was denied on February 1, 1988.

On February 5, 1988, the United States Supreme Court granted appellant's Application for Stay pending consideration of a petition for writ of certiorari. On March 28, 1988, the United States Supreme Court denied the petition for writ of certiorari and the stay of execution was terminated.

On April 6, 1988, the Governor of Florida signed a death warrant and execution was scheduled for 7:00 a.m. on Wednesday, April 27, 1988. On April 25, 1988, a hearing was held on appellant's third 3.850 motion before the Honorable Robert E. Beach, Circuit Judge for the Sixth Judicial Circuit. The third 3.850 motion was denied that evening by Judge Beach and this appeal ensued. On April 26, 1988, this Honorable Court granted appellant's motion for stay of execution pending disposition of this appeal.

Appellee will rely on the Florida Surpeme Court opinion (cited at Clark v. State, 379 So.2d 97 (Fla. 1979)) for a statement of the facts:

> Raymond Clark first met his accomplice, Ty Johnston, in California when Johnston was fourteen years old and was living at a juvenile group home. Clark, who was then thirty-four, lived with Johnston in California for two years prior to the murder. He fed, clothed and sheltered Johnston and introduced himself as Johnston's father, but, in fact, the pair had a homosexual relationship. Clark was the first and only person with whom Johnston had a homosexual relationship. Because the group home was being closed down and Johnston would have to move to a juvenile detention center, Clark decided to take Johnston to St. Petersburg, Florida where the two of them moved in with Clark's girlfriend.
>
> Because he was in need of money, Clark formulated a plan to kidnap someone at a bank

and to demand money from that person. In furtherance of Clark's plan, on April 27, 1977, Clark and Johnston drove into several bank parking lots looking for a victim. Clark was armed with a .38 caliber pistol. They finally parked Clark's Chevrolet Blazer in the parking lot of a bank next to a white Cadillac and awaited the return of the owner of the Cadillac. The victim was a forty-nine-year-old businessman who had been to the bank to arrange a real estate closing. When he returned to his automobile, the victim was ordered by Clark to get into his own car. Clark then got into the passenger's side of the vehicle and ordered the victim to drive to several different locations in search of a deserted area. Johnston followed in Clark's Blazer. After an hour and a half of driving, the victim was finally directed to park his automobile in a secluded spot where he was ordered at gunpoint to get out of the vehicle. Clark commanded him to disrobe with the exception of his undershorts and then forced him to write a check on his personal account, payable to cash, in the amount of five thousand dollars. Clark proceeded to tie the victim's hands behind his back with wire and then asked Johnston whether he wanted to shoot the victim. Johnston replied that he did not. Clark then marched the victim into the bushes, made him kneel down, and shot him twice in the back of the head. When the victim's body was later found, his undershorts were down around his knees.

Clark, driving the Cadillac, and Johnston, driving the Blazer, drove back to Clark's girfriend's residence where they left the Blazer. They proceeded to the bank in the victim's Cadillac to cash the check. At the bank, Clark attempted to cash the check, but the teller refused. The Cadillac was then driven to a secluded location where Clark and Johnston wiped it down to eliminate any fingerprints.

Thereafter, concerned that he could face kidnapping charges for taking Johnston, a minor, from California, Clark drove Johnston back to California on the same day as the murder. Several days later Johnston went to live with his parents in California.

> On May 9, 1977, before the victim's body had been found, Detective San Marco received a telephone call from a man, whom he testified sounded like Clark, inquiring as to the status of the police investigation relating to the disappearance of victim. Thereafter, Clark made several threatening phone calls to the victim's son demanding ten thousand dollars for his father's safe return. In these phone calls, Clark described several items contained in the victim's car, including a V-neck tee shirt which he had used to wipe the fingerprints from the car and which had not been mentioned in newspaper accounts which had described the articles of clothing found in the victim's car. Several of these phone calls were traced to Clark's girlfriend's residence. This residence had been placed under police surveillance. At the times the calls were made from this residence, there is evidence to place Clark in the residence, and at the time the calls were placed outside this home, there is evidence to show that Clark had gone out.
>
> During the investigation of these extortion threats, the police developed the identity of Clark's accomplice, Ty Johnston, whom they brought back to Florida. Johnston described the kidnapping and murder and Clark's primary role in the incident and led the police to a wooded area where they found the victim's badly decomposed body lying face down in a patch of palmettos with two bullet wounds in the back of the head, with his hands wired behind his back, and with his undershorts down around his knees. (emphasis added)

In April of 1977, Circuit Court Judge Susan Schaeffer was employed as an Assistant Public Defender for the Sixth Judicial Circuit. (Tr 67) During this employment, she represented appellant in a case in which he was charged with murder and the state was seeking the death penalty. (Tr 67 - 68)

Judge Schaeffer began practicing law in 1971. (Tr 83) Prior to handling Clark's trial, she had been with the Public

Defender's Office for approximately two years and had handled only felony cases. (Tr 83) This was her first capital case that reached the penalty phase. (Tr 84) She had either won the others or the jury had returned verdicts on lesser offenses. (Tr 84)

At one point in time Judge Schaeffer was handling all of the capital cases in the Public Defender's Office. In appellant's case, she had the assistance of ten lawyers on the public defender's staff, including Martin Murry who was appointed as co-counsel. (Tr 85 - 86, 99) She also utilized the services of investigators on the staff. This included one major investigator and three minor investigators. (Tr 85)

In preparing appellant's defense, Judge Schaeffer supervised the filing of a Motion for Change of Venue. (Tr 68) One of the other assistants in the office, Murry, prepared this motion. Actually, every felony lawyer in the public defender's office was involved in some fashion in appellant's case. (Tr 84) The assistant handling the hearing not only introduced newspaper articles into the record, he called various media people from the newspaper, radio and television. (Tr 68 - 69) There were also two affidavits filed by local attorneys expressing their opinion on the issue. (Tr 68) The trial judge denied the initial motion without prejudice to renew it at the voir dire selections. (Tr 69 - 70) The motion was never renewed, however, because they had a very large panel of jurors and Judge Beach had excused any member who had any knowledge of the case. (Tr 70)

Judge Schaeffer and Assistant Public Defender Martin Murry carefully discussed whether it would be wise to use their last peremptory challenge, excuse the tenth juror and request additional panel members. (Tr 71 - 72) As best as Judge Schaeffer could recall, they decided not to exercise their last challenge because they were satisfied that they had the best panel they could get. (Tr 72) They had also discussed the possibility that they would waive the venue motion by not exercising their last challenge, but decided the motion was probably well founded. (Tr 72)

Several pre-trial motions filed by the defense were denied. These included: Motion to Dismiss or Quash Indictment (R 692 - 693, 931), Motion for Appointment of Expert Psychiatrist (R 10, 180), Motion to Compel Discovery of Police Reports (R 524, 525, 930), Motion for Change of Venue (R 880 - 883, 1247, 1252), Motion to Exclude Entire Jury Panel (R 986 - 987, 1248, 1253), Motion for Statement of Particulars for Potential Aggravating Circumstances (R 991, 1093), Motion to Sever Offenses (R 995, 1090), and Motion to Declare Cameras in the Courtroom Unconstitutional or to Exclude the Cameras. (R 1080 - 1084, 1245)

The trial court granted the State's motion to compel Clark to submit to voice exemplars, ordering him to recite the exact words uttered by the perpetrator of the alleged extortion. (R 866 - 867, 875) On the advice of counsel, Clark refused to recite the exact words used by the perpetrator and the trial court held him in contempt of court for his refusal. (R 990, 1079, 1161 - 1169)

Judge Schaeffer discussed Clark's appearance with him prior to trial and the necessity to appear a certain way. (Tr 74) She informed him that he would be facing a rather conservative jury in Pinellas County and she was afraid that his appearance would not only shock, but would also be very detrimental to his case. (Tr 75) Clark told her that he believed he would be found guilty and sentenced to death, and he wanted to do it his own way. (Tr 75)

At trial, Clark chose to wear slacks or jeans and a sport shirt. (Tr 96) Judge Schaeffer attempted to have him modify his hair and beard which are very noticeable, however, he did not wish to do that. (Tr 97)

Judge Schaeffer filed a motion for the psychiatric evaluation of appellant. (Tr 75) She requested that they be allowed to have a doctor appointed to assist her in this regard and asked that his evaluation be confidential. (Tr 75) Her request was contrary to the rule in effect at the time, which provided that the psychiatrist's report would be furnished to the Court, the state and defense counsel. (Tr 75 - 76) Schaeffer asked for the psychiatric evaluation after she had received information that Clark had committed a homicide in California ten years earlier. The doctor that had examined him believed Clark was incompetent at the time of the offense. (Tr 76 - 80) Judge Shcaeffer felt that this alone raised an obligation on her part to inquire into his present status to stand trial and any possible insanity defense. (Tr 76) The trial judge informed her that if she wished

to have a psychiatrist appointed under the rules, he would grant their request, however, he would not provide a confidential expert. (Tr 76) Based on the judge's ruling, Schaeffer decided that she did not wish to have Clark examined. (Tr 77) She renewed her motion when Judge Beach was about to impose sentence, however, she did not feel that she had any theory of defense which would have required the use of a psychologist or psychiatrist. (Tr 77 - 78)

Judge Schaeffer was aware that there were two persons in holding cells with the co-defendant, Ty Johnston, who allegedly heard him make statements regarding his participation in this offense. (Tr 78, 101) She did not put them on in the defense case because when she followed up these leads, she discovered that these witnesses were equivocating on the content of their statements. She was not certain that their testimony would have even been admissible and even if they were to say what she hoped they would, she did not think in all candor that it would have been worth giving up closing argument for. (Tr 79) There were no other witnesses to call. (Tr 101)

During the penalty phase, Judge Schaeffer entered into a stipulation with the prosecutor whereby it was announced to the jury that the defense would waive the presentation of live testimony of Dr. Henninger from California. The jury was told that if the doctor had been called to testify, he would have said it was his opinion that at the time of the previous offense Mr. Clark was insane and should not have been held accountable for his

actions. (Tr 79) There was a further stipulation as to the age of appellant. (Tr 79)

Judge Schaeffer did not seek a sanity inquisition after Judge Beach denied her request for a confidential psychiatrist. (Tr 86) Her reasoning was as follows:

> " . . . I knew this was a case where a state was actively seeking the death penalty. I thought that the state had enough ammunition without having further ammunition that could further be made to the Court and to the state regarding the occurrences of this particular offense.
>
> It was my candid opinion, having talked with Mr. Clark, that he was quite competent. In fact, I found him to be, and still do, to be an intelligent man. He was, in my candid opinion, having dealt with numerous defendants, some of whom, I believe, to be not competent, I believed he was competent to stand trial. I did not believe, after discussing this with him, there was any issue as to his competency at the time of the offense at all, and I felt that to pursue this in a fashion that would allow the state to know the facts of the case as related to me by Mr. Clark, which is the only way that the evaluation could have been done, would have been detrimental to his case."

(Tr 90 - 91)

Other than the report issued by Dr. Henninger ten years earlier, there were no facts that were developed during discovery or in conversation with Clark, that indicated that a sanity inquisition was warranted. (Tr 91) It was everyone's recollection that Clark would not allow his attorneys in California to put forth an insanity defense. (Tr 104) Even in the California case in which Dr. Henninger testified, Clark was found guilty. (Tr 91 - 92)

Judge Schaeffer explained that she did not discuss a potential insanity defense with Clark because she did not believe that a lawyer discusses pertinent defenses that do not exist. (Tr 92) She simply had no reason to believe this defense was possible. (Tr 92 - 93) Clark never indicated that he did not know what was happening. (Tr 92) He was able to relate coherently at the time and there was nothing to indicate a derangement. She found, and still finds, Clark to be an extremely intelligent and coherent individual. (Tr 93) Judge Schaeffer noted that she had tried first degree murder cases where the insanity defense was presented and she had never lost one. (Tr 93) She had also tried one hundred to one hundred and fifty cases, of which forty to fifty of these were felony jury trials and she had won a very high percentage. (Tr 100 - 111) She had tried between ten and fifteen capital cases and she had assisted in close to one hundred capital cases. (Tr 171)

To develop mitigating evidence, Judge Schaeffer and an investigator went to California to speak with friends of Clark. (Tr 94) She located some of these people and had conversations with them. (Tr 94) They all liked him and thought he was a fine fellow, but the problem was he had told them he had gone to prison the first time for killing his wife. (Tr 94) They were not aware that he had actually killed a 14 year old boy. (Tr 94) Once this story became public, the people in Clark's home town were no longer well-disposed toward him. (Tr 94 - 95) Even if they would have been willing to testify that they liked Clark and

thought he was a nice man, Schaeffer said that if this kind of testimony would have been available, she would have pursued it. (Tr 95)

Judge Schaeffer considered calling Mrs. Jean Dupree as a potential witness. (Tr 95) Mrs. Dupree would have testified that in her opinion Ty was more dangerous than appellant, (Tr 95), however, she had no first hand knowledge of this offense. (Tr 108) Other than this witness, Judge Schaeffer did not discover anything even post-Lockett that she would have put on. (Tr 95, 109) While Schaeffer was never able to locate Clark's family, Clark did not assist her in this regard. (Tr 96, 107) Even if Schaeffer did not put Clark's family on the stand, she would have preferred to have his family present and standing behind him at trial. (Tr 96, 107)

With regard to the allegation that Martin Murry handled the penalty phase without Clark's approval, Judge Schaeffer noted that Mr. Murry was co-counsel throughout the entire case. He communicated with Clark during the entire trial. (Tr 97) Judge Schaeffer decided that Mr. Murry would better handle the penalty phase because she was going to have to make certain statements to the jury during the closing statement that would probably cause her to lose her credibility if Clark was convicted. (Tr 98 - 99) During the course of their representation, Mr. Murry had contact with Clark on numerous occasions. They would both visit Clark at the jail and spend countless hours with him. (Tr 179) Mr. Murry and Clark would often times exchange ideas on books,

their likes and their dislikes. (Tr 179) On several occasions, Mr. Murry, Clark and Judge Schaeffer met for extended periods of time at night and talked about Clark's background and his life. (Tr 180) Mr. Murry spent countless hours in his representation of Mr. Clark. (Tr 180) Mr. Murry always appeared to be available for Clark. (Tr 180)

Judge Schaeffer discussed the facts of this case with Clark throughout each investigation she conducted. (Tr 101) She took extensive depositions of all state witnesses, including potential witnesses in California in the hope of finding anything to indicate Clark was in error in his recitation of the facts. (Tr 101) She could not find anything that was helpful. (Tr 101)

Judge Schaeffer never talked with Clark about his testifying, because if he would have done so, he would have convicted himself. (Tr 109 - 110)

Judge Schaeffer acknowledged that she had not objected to several statements made by the prosecutor during his closing argument. (Tr 171) She believed that there were two ways to try a case, with few objections or with every objection possible. (Tr 171 - 172) In the instant case, she felt that she would be far more effective giving an uninterrupted closing. She had found that the way you obtain this is to allow the other side the same courtesy. (Tr 172 - 173) There were several prosecutorial comments that warranted an objection, however, she felt it was always a lawyer's decision whether or not to object. (Tr 172) She had also found that there can be a negative effect upon the

defense case by raising objections at certain times. (Tr 173) In her opinion, anyone who would object to a prosecutor commenting on the tragedy that the killing had on the victim's family would turn the jury off so fast your head would spin. (Tr 173)

Judge Schaeffer acknowledged that she did not present the facts of the California case (homosexual suicide pact). She explained that she had spent at least three (3) days in California taking depositions; interviewing all potential defense witnesses; speaking with Clark's prior defense counsel and doctor; and reviewing the California appellate decision. She believed that to have presented these witnesses at trial would have had a devastating effect on appellant's trial. (Tr 1774) The California opinion indicated this was one of the most brutal and aggravated homicides ever commited. It also refuted the idea that this was a legitimate suicide attempt. (Tr 174) While she did not agree with this conclusion, there was no way to rebut it through the witnesses who were available to her. (Tr 175) Since the prosecutor gave her the option of either staying away from the crime or going into <u>all</u> the facts, they decided after much consideration, that they would be better off sticking to the bare record. (Tr 175) She reached an agreement with the prosecutor in which he agreed that he would not call any of the California witnesses if the defense would simply stipulate to the prior conviction. (Tr 175) The prosecutor also agreed to stipulate that the doctor in California believed appellant was insane at the time of the commission of the offense. (Tr 176) Judge Schaeffer

felt that it was in Clark's best interest to avoid the California testimony. (Tr 176)

As previously noted, Judge Schaeffer considered having Mrs. Jean Dupree testify. There was a possibility that her testimony might have lent itself to a mitigating factor, to wit: the substantial domination of one person over another. (Tr 176, 185 - 186) This course of action was ruled out. First of all, this testimony would not have been as accurate as Judge Schaeffer knew the facts to be. (Tr 175 - 176) Second, there was some concern because there were taped conversations between appellant and Mr. Johnston in which they conspired to kill Mrs. Dupree's daughter. (Tr 178) If she put Mrs. Dupree on the stand to testify what a fine fellow appellant was, the judge might inquire as to whether her opinion was changed. (Tr 178 - 179) She believed that these tapes would have been devastating to their case at the sentencing phase. (Tr 179, 185 - 186) The trial judge agreed with her. (Tr 190)

It was suggested by one of Clark's experts that when their motion for confidential report was denied, they should have proceeded with the court's offer for a sanity inquisition so that they could properly evaluate what Clark told them. (Tr 181) Judge Schaeffer, however, felt that they did not have any trouble in evaluating what their client told them. (Tr 181) She did not feel that they needed the assistance of a psychiatrist, because they had a lengthy discussion with appellant about the facts of the case and he appeared to be very clear and honest with her

about what happened. (Tr 182, 185) She also checked out his honesty through extensive depositions of every witness and in particular the medical examiner. (Tr 182) After conducting this research, she had no reason to believe that anything he had told her was untrue. (Tr 182) She also felt that appellant would have told a psychiatrist the same things he told her, and she was not willing to allow this. Judge Schaeffer added that she did not think any other defense counsel in her position would have been willing to expose the sentencing court and the prosecuton to the knowledge she had, unless the evaluation would have been done confidentially. (Tr 183)

Michael Van Zamft, a Miami attorney was called as an expert witness for the defense to testify on the issue of ineffective assistance of counsel. (Tr 115 - 122) It was Mr. Van Zamft's opinion that trial counsel was ineffective for failing to have a private psychiatrist appointed in the penalty phase or for investigation and information. (Tr 126 - 127) His conclusion was based on a Third District Court of Appeal decision in Pouncy v. State, 353 So.2d 640 (Fla. 3d DCA 1977). This decision was issued three months after Clark's trial. (Tr 150, 151)

Mr. Van Zamft determined that trial counsel was deficient in failing to explain or put on evidence to explain the killing appellant was involved in California. (Tr 151) However, he was not aware that counsel had entered into a stipulation with the state not to go into the facts of this homicide. (Tr 152) Even Van Zamft acknowledged that the reason for such a stipulation

would have been to avoid going into the facts of a very brutal killing. (Tr 156) While Mr. Van Zamft agreed there may have been valid reasons why defense lawyers would not want the fact known that this victim was 14 years old and involved in a homosexual affair with appellant, it was still his opinion that it would have been more favorable to present the reason why there was a killing. (Tr 153) The trial judge found that he was simply attempting to second guess defense counsel's trial strategy. (Tr 153 - 154)

Mr. Van Zamft opined that counsel never spoke with appellant about his life, background, or the California killing. (Tr 140) This opinion, however, was not based on fact. He acknowledged that he really could not say whether or not they talked. (Tr 140)

Mr. Van Zamft criticized Mr. Murry's use of the term "California cuckoo or weirdo" which the State Attorney had used in describing Clark. (Tr 155 - 156) However, he had never seen pictures of Clark as he looked at the time of the trial. (Tr 155) He had been told that appellant looked similar to Charles Manson. (Tr 155)

Michael Zelman was also called by the defense to testify on the issue of ineffective assistance of counsel at the pre-trial stage. (Tr 158 - 159, 162) Mr. Zelman testified that he had been lead counsel in a capital case on only one occasion. (Tr 161) He also acknowledged that he had not reviewed the entire court file in Clark's case, only select documents and parts of

the transcript. (Tr 162) He had not even received all the transcripts of the motion hearings. (Tr 163) The court still allowed Mr. Zelman to testify, noting that his knowledge of the case did not affect the admissibility of his testimony, but rather its weight and sufficiency. (Tr 163)

With regard to the Motion for Change of Venue, Mr. Zelman had reviewed portions of this motion and was aware that there were many articles as well as radio and televisions broadcasts that made a part of it. (Tr 164) It was his opinion, however, that community witnesses such as newspaper, TV and radio personalities should have been brought in to discuss their effect on the community.

SUMMARY OF THE ARGUMENT

Rule 3.850, Fla. R. Crim. P., is designed to give a criminal defendant an opportunity to present to the courts alleged constitutional errors affecting his judgment and/or sentence. Where there is no serious inquiry to be made, a defendant should not be allowed to use the rule to indefinitely delay execution of a valid sentence. Thus, this Court has held the failure to follow the post-conviction rules procedurally bars relief even in death penalty cases. See, e.g., White v. State, 511 So.2d 984 (Fla. 1987).

Sub judice, all of the claims raised in appellant's third 3.850 motion are matters which were or should have been raised on direct appeal, matters which were decided on appellant's previous 3.850 motions, claims which amount to an abuse of the 3.850 procedure or claims which were untimely filed. None of the issues raised herein are cognizable on this 3.850 motion, with the possible exception of the Hitchcock claim, a claim which has been thoroughly litigated in the federal courts; therefore, the trial court was correct in summarily denying each claim and denying 3.850 relief.

Inasmuch as it is clear that the trial court correctly denied all of Clark's claims for procedural reasons, no summary of the argument is being offered as to the substantive claims. However, in an abundance of caution your appellee has briefed all substantive issues in the Argument portion of this brief as an alternative basis for denial of relief.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY SUMMARILY DENIED RELIEF UNDER RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE, SINCE THIS THIRD 3.850 MOTION IS AN ABUSE OF THE PROCEDURE AND THE CLAIMS RAISED BY APPELLANT ARE PROCEDURALLY BARRED.

It has long been the law in this state that a defendant may not raise via a motion pursuant to Rule 3.850, Fla. R. Crim. P. claims which were raised or should have been raised on direct appeal. See, e.g., Christopher v. State, 416 So.2d 450 (Fla. 1982); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980) and Alvord v. State, 396 So.2d 194 (Fla. 1981). Additionally, a trial court need not entertain a successive 3.850 motion which raises grounds previously raised and disposed of on the merits in a prior proceeding. McCrae v. State, 437 So.2d 1388 (Fla. 1983); State v. Washington, 453 So.2d 389 (Fla. 1984) and Dobbert v. State, 456 So.2d 424 (Fla. 1984). This is true even if new facts are adduced in support of the previous claim. Cf. Sullivan v. State, 441 So.2d 609 (Fla. 1983). The purpose of motions pursuant to Rule 3.850 is to provide a means of addressing alleged constitutional errors in a judgment or sentence, not to review errors which are cognizable on a direct appeal. McCrae v. State, supra. For example, in Blanco v. State, 507 So.2d 1377, 1380 (Fla. 1987), this Honorable Court held the following issues had been procedurally barred because they either were or should have been presented on direct appeal:

> 1. Did the trial court err in permitting appellant to call witnesses against the advice of counsel;
>
> 2. Did the trial court conduct critical stages of the trial in the absence of appellant or an interpreter;
>
> 3. Did the trial court err in questioning appellant concerning the presentation of his defense;
>
> 4. Did the instructions to the jury unconstitutionally denigrate the jury's role in recommending life or death;
>
> 5. Did the trial court improperly instruct the jury on the number of jurors required to return a life recommendation;
>
> 6. Did the trial court improperly rely on the conviction for armed burglary as an aggravating factor;
>
> 7. Did the trial court improperly rely on a previous conviction for armed robbery as an aggravating factor; and
>
> 8. Did the prosecutor use inflammatory closing arguments.

These issues were not cognizable in post-conviction motion.

We have the same situation here. The defendant alleges ten (10) grounds for relief. The state submits that all of these issues are not cognizable in this third 3.850 proceeding. These issues were or should have been raised on direct appeal or should have been raised in the prior 3.850 proceedings.

In 1984, Rule 3.850 was amended and now provides, in pertinent part:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds

> that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

In addition, it must be noted that the trial court specifically found that the claims raised by appellant were not timely filed. Thus, appellant's assertion in footnote 1 of his brief that the state waived the application of the two-year limitation bar pursuant to Rule 3.850, Fla. R. Crim. P., is totally belied by the record of the instant 3.850 proceedings. For example, with respect to the alleged Brady claim, the state offered the following argument concerning the purported unavailability of this claim:

> Mr. Johnston has been incarcerated for many, many, many years. There's no reason somebody could not have talked to him about these matters somewhere during the protracted terms of litigation . . . . (3rd 3.850 Tr 53)
>
> * * *
>
> More importantly, we're asserting at this time this Court should not use or allow the defense to use the 3.850 process to present a claim which there is no doubt could have been discovered, investigated and brought before the Court's attention at any time during the 11 years of this litigation. (3rd 3.850 Tr 54)

The Rule provides that a 3.850 motion should not be considered if filed more than two years after the judgment and sentence became final unless it is alleged, inter alia, that "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." The state's argument focused upon these matters

and, more significantly, the trial court made express findings of untimeliness, findings which necessarily denote the failure to comply with the time provisions of Rule 3.850. Specifically, the trial court opined:

> Okay. Well, again, I don't think this is timely raised and for that reason I'm denying it. (3rd 3.850 Tr 55)
>
> * * *
>
> The ruling is he has been available to obtain this information for quite some time, and to raise it for the first time three days, or two days before the execution when he has been available, is not timely. (3rd 3.850 Tr 58)

The trial court's express rulings concerning the untimely filing of 3.850 claims leads to the inescapable conclusion that Rule 3.850 bars consideration of these claims.

Appellee respectfully submits that appellant's claims fall into one of several categories: claims which were or should have been raised on direct appeal, claims which were decided on appellant's previous 3.850 motions, claims which amount to an abuse of the 3.850 procedure, or claims which were untimely filed. Thus, the trial court correctly summarily denied appellant's third 3.850 motion.

ISSUE II

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM PREDICATED UPON HITCHCOCK V. DUGGER.

Appellant's Lockett/Hitchcock claim was previously raised in the trial court, the Florida Supreme Court, the United States District Court, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. The Eleventh Circuit Court of Appeals, although finding that the jury instructions given in the instant case were virtually identical to those in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), held that any Hitchcock error was harmless beyond a reasonble doubt. Clark v. Dugger, 834 F.2d 1561, 1570 (11th Cir. 1987).

Despite collateral counsel's procurement of an "eleventh hour" affidavit from trial counsel, the facts of this case overwhelmingly support the Eleventh Circuit Court of Appeals' rejection of appellant's Hitchcock claim. Trial counsel's testimony adduced at the 3.850 evidentiary hearing conducted in 1983 was relied upon by the Eleventh Circuit when that court found harmless error beyond a reasonable doubt.

A review of trial counsel's testimony at the first 3.850 hearing reveals that she pursued non-statutory mitigating evidence. However, she made a tactical decision not to present this testimony. Appellant would not assist her in locating his family. In fact, he specifically told counsel that he did not want his family notified. (Tr 96, 107)

Trial counsel decided not to present evidence of appellant's suicide attempt because the California opinion indicated that this was not a legitimate suicide attempt. (Tr 174) She believed that to have presented the facts of the California case (homosexual suicide pact) would have had a devastating effect on appellant's trial. (Tr 174)

Trial counsel considered calling Jean Dupree as a potential witness. Dupree would have testified that Ty Johnston was more dangerous than appellant. (Tr 95) Schaeffer rejected this course of action when it was learned that this testimony was not as accurate as she knew the facts to be. (Tr 175-176) There was also some concern, because there were taped conversations between appellant and Johnston because they conspired to kill Dupree's daughter. (Tr. 178) If Schaeffer put Dupree on the stand to testify what a fine fellow appellant was, she was afraid that the judge may have allowed the state to play the tapes and then inquire as to whether her opinion had changed. (Tr 178-179) She opined that these tapes would have been devastating to their case, and the trial judge agreed with her. (Tr 179, 185-186, 190) Other than this witness, trial counsel did not discover anything, even post-Lockett, that she would have put on. (Tr 95, 109)

While Ms. Schaeffer spoke with some of appellant's friends in California and they all liked appellant, the problem was that he had told them that he had gone to prison for killing his wife. (Tr 94) They were not aware that he had killed a fourteen-year-

old boy. (Tr 94) Once this story became public, the people in his home town were no longer well-disposed toward him. (Tr 94-95) Even if they had been willing to testify that they liked Clark and thought he was a nice man, trial counsel did not feel that this type of testimony would have been relevant to the penalty phase. (Tr 95) In any event, trial counsel said that if this testimony would have been available, she would have pursued it. (Tr 95)

It is apparent from the context of the above facts related by trial counsel that her decision not to introduce evidence of appellant's background was based on strategic considerations, and not on her perception of the effect of Florida law.

The Eleventh Circuit Court of Appeals relied on these facts in rejecting appellant's Hitchcock claim. Clark v. Dugger, 834 F.2d 1561, 1568-1569 (11th Cir. 1987). The finding of harmless error beyond a reasonable doubt is clearly supported by the record and circumstances of the instant case and is in accord with numerous decisions of this Honorable Court. See, Hall v. Dugger, 13 F.L.W. 320 (Fla. May 12, 1988); White v. Dugger, 13 F.L.W. 270 (Fla. April 13, 1988); Tafero v. State, 520 So.2d 287 (Fla. 1988); Ford v. State, 13 F.L.W. 150 (Fla. Feb. 18, 1988); Booker v. Dugger, 520 So.2d 246 (Fla. 1988); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987); Delap v. Dugger, 513 So.2d 659 (Fla. 1987). The instant case, as observed by Chief Justice McDonald, Justice Overton and Justice Grimes in the dissenting opinions rendered from the granting of a stay in this case, is clearly one which calls for the application of the harmless error doctrine.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM PREDICATED UPON BRADY V. MARYLAND.

Appellant's Brady claim is not properly before this Honorable Court. There is no indication that this claim could not have been raised at an earlier stage of this protracted litigation. Appellant fails to show how the facts supporting this claim were unknown to counsel prior to the filing of the instant third 3.850 motion.

Especially significant is the timing of this claim in view of the eleven years this case has been litigated. Was it coincidental that this Brady claim first rears its head only several days prior to a scheduled execution of the death sentence? The state submits not! Ty Johnston's affidavit was executed on April 22, 1988, three days before the scheduled hearing in the Circuit Court and five days prior to the scheduled execution. It is ludicrous to even contend that this claim could not have been discovered until immediately prior to an imminent execution. Certainly there were no allegations in the 3.850 motion sufficient to suggest that, had due diligence been exercised, the facts supporting this claim would have been unavailable at an earlier point in time during the protracted litigation of this cause. Thus, the trial court undoubtedly was correct when he summarily denied this claim as being untimely filed.

As an alternative ruling (in the event a reviewing court overruled the untimeliness finding) the trial court also found that the Brady claim could not be sustained on the merits. The facts as alleged did not warrant either an evidentiary hearing or 3.850 relief. The trial court opined:

> Okay. Well, again, I don't think this is timely raised and for that reason I'm denying it. Even if it was timely raised, the cross-examination by Judge Schaeffer of Mr. Johnston was vigorous, thorough, to the point and she was able to bring out Ty's hostility toward Raymond and certainly there was every indication that he was in there trying to possibly save his own neck, and that's why he was testifying in the case, cooperating with the police. (3rd 3.850 Tr 55)

This ruling by the trial court is clearly supported by the record. See, R 2100-2104. The record reveals that Johnston was vigorously cross-examined by defense counsel and that one of the aspects of cross-examination was whether Johnston believed it would be better for him if he cooperated with the police. These matters were raised at trial because pretrial depositions of Johnston showed that there may have been some cause to support a deal or some sort of motivation for Johnston to testify. It is clear, therefore, that a Brady claim could not be established by the allegations of the 3.850 motion. In addition to the failure to show that the state withheld anything from the defense, it is also clear that the allegations, even if they could be proven to be true, are insufficient to show that the use of this impeachment material would have resulted in a reasonable probability that the results of the trial would have been

different. The trial court made an express finding that the outcome of the proceeding would not have changed (3rd 3.850 Tr 57). See United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Arango v. State, 497 So.2d 1161 (Fla. 1986).

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM PREDICATED UPON CALDWELL V. MISSISSIPPI.

Based upon Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 251 (1985), appellant claims he is entitled to relief. For the reasons expressed below, appellant's point must fail. Appellant's argument that the judge's and prosecutor's statements diminished the jurors' sense of responsibility has not been preserved for appellate review. There was no objection made before the trial court to any of these comments and, indeed, no argument has been raised in any court previous to the submission of this claim in appellant's supplemental brief before the Eleventh Circuit. Your appellee, therefore, submits that the procedural default doctrine as enunciated by the Supreme Court in Wainwright v. Sykes, 433 U.S. 72 (1977), is applicable to this claim. It has long been the law in the State of Florida that a party cannot raise on appeal an issue he has not presented to the trial court. See, e.g., Lucas v. State, 376 So.2d 1149 (Fla. 1979), and Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Recently, this Honorable Court has had occassion to consider a Caldwell claim which had not been raised before the trial court. In ruling, this Court opined that the tools were available to construct a Caldwell-type claim for many years. With respect to the defendant's claim that he could raise a Caldwell claim where no objection had been made at trial, this Honorable Court in Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), held:

> [4] Appellant argues that the lack of objection at trial and argument on appeal does not preclude consideration of the issue now because **Caldwell v. Mississippi** was a fundamental change in the constitutional law of capital sentencing thus creating a new legal right that may form the basis for post-conviction litigation. We find that this contention is without merit. The extreme importance of the jury's sentencing recommendation under our capital felony sentencing law has long been recognized, having emerged from early judicial construction of the statute. **McCaskill v. State**, 344 So.2d 1276 (Fla. 1977); **Chambers v. State**, 339 So.2d 204 (Fla. 1976); **Thompson v. State**, 328 So.2d 1 (Fla. 1976); **Tedder v. State**, 322 So.2d 908 (Fla. 1975); **Taylor v. State**, 294 So.2d 648 (Fla. 1974). Thus if defense counsel at trial had believed that the prosecutor and judge were denigrating the jury's role to his client's prejudice he could have objected and received corrective action based on the well known **Tedder** rule. The matter could then have been argued on appeal in the absence of adequate corrective action by the trial court. The lack of objection at trial followed by argument on appeal constitutes a waiver of the objection. The trial court was correct in summarily denying this ground of the motion as procedurally barred. (text at 427 - 428)

It is clear, therefore, that the claim now raised by appellant is one which the State of Florida regularly and consistently bars based upon failure to in some form object to the purported denigration of the jury's role in the sentencing process. Thus, the procedural default should be given credence by this Honorable Court. See Jackson v. State, 13 F.L.W. 146 (Fla. Feb. 18, 1988); Ford v. State, 522 So.2d 345 (Fla. 1988); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Foster v. State, 518 So.2d 901 (Fla. 1988); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987). It is significant to note that no Caldwell claim was raised in the

second 3.850 motion. Raising the issue at this point is the kind of abuse of the procedure the Rule is designed to end. Likewise, the claim was not raised in his federal habeas petition, and the Eleventh Circuit would not consider it.

Even if the merits of this claim could be reached, it is clear that Clark would be entitled to no relief. The law in the State of Florida is clear -- when a Florida jury is told its sentencing function is to advise the court of the appropriate sentence, this is a correct statement of the law. The Florida Supreme Court has indicated that it is not error to inform the jury of the limits of its sentencing responsibility. Darden v. State, 475 So.2d 217, 221 (Fla. 1985); Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986). Thus, the defendant's reliance upon decisions of the Eleventh Circuit Court of Appeals is misplaced. Courts of this State are mandated to follow the law of this State rather than the conflicting opinions of an inferior federal court. The Eleventh Circuit decisions in Mann and Adams conflict irreconcilably with every decision of the Florida Supreme Court on this point. See Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988); Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988); Jackson v. State, supra; Ford v. State, supra; Aldridge v. State, supra; Pope v. Wainwright, supra; Smith v. State, 515 So.2d 182 (Fla. 1987). Also, factually this case is more akin to Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc), than to Mann or Adams. In Harich, the Eleventh Circuit is consistent with Florida law by holding that comments by the prosecutor and in-

structions of the trial court did not mislead the jury as to its role in violation of the Eighth Amendment. Clark's Caldwell claim was correctly summarily denied by the trial court. See e.g., Aldridge, supra; Copeland, supra; Ford, supra.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM PREDICATED UPON BOOTH V. MARYLAND.

Appellant contends that the precepts of Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2527, 96 L.Ed.2d 440 (1987), were violated where the prosecutor made allegedly improper comments concerning the victim's family. Because it is clear that this claim is procedurally barred, this point was properly summarily dismissed.

The Florida Supreme Court has had the recent occasion to consider a claim under Booth as is now asserted. In Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988), the court ordered that supplemental briefs be submitted concerning the Booth issue. The court noted that, "The state correctly points out that appellant made no objection, whereas in Booth there was an objection to such evidence." 13 F.L.W. at 131. Your appellee submits that in the instant case no objection was made as to the introduction of any of the "victim impact" evidence. In finding a procedural bar in Grossman, the court observed that victim impact is not one of the aggravating factors enumerated in our capital sentencing statute upon which a death sentence may be predicated, citing Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So.2d 882 (Fla. 1979); and Riley v. State, 366 So.2d 19 (Fla. 1978). Thus, a criminal defendant should object to evidence of a non-statutory aggravating factor and, consequently, the court held that in the absence of a timely objection to the use of "victim

impact" evidence, a defendant is procedurally barred from claiming relief under Booth. On this basis alone, appellant is entitled to no relief on this point. See also Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987).

Even if this claim could be addressed on its merits, it is clear that the defendant is entitled to no relief. Factually, this case does not present a Booth claim. In Booth, the United States Supreme Court was concerned with victim impact evidence presented at the sentencing hearing which might focus the sentencer's attention to factors which are not relevant to the sentencing decision in a capital case. Here, no claim is made that impermissible aggravating factors seeped into the sentencing process. Rather, Clark now makes reference to testimony adduced from the victim's son which, in part, referred to the victim's personal characteristics. It must be observed that this testimony was adduced by the defense, not the state. Even if these matters were proscribed by Booth, a doubtful proposition, it is clear that these matters were injected into the trial by defense counsel and such "invited error" will not support a claim for relief. Clark also makes reference to certain comments of the prosecutor made during the penalty phase. These comments were not the type condemned in Booth as being irrelevant to sentencing factors. Rather, the comments of the prosecutor were relevant with respect to the aggravating circumstance of "pecuniary gain." Clark cannot even allege that improper Booth material was considered by the trial court when that court weighed the

aggravating and mitigating circumstances. Thus, Clark's Booth claim was correctly denied by the trial court.

Appellant's reliance on Mills v. Maryland, 56 L.W. 4503 (1988) to support his contention that he is entitled to be heard on his Booth claim is not well-founded. It is unmistakably clear that the court did not rule on the Booth issue since the jury instruction matter was dispositive. Statements by the minority of the court in a dissenting opinion is not law. Additionally, it must be noted that the dissenter's assertion that, "The issue is thus properly before this Court . . ." is based on the fact that the Maryland Court of Appeals addressed the issue on the merits despite the lack of an objection at trial. 56 L.W. at 4511.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THIS HONORABLE COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER.

Appellant next claims that he is entitled to 3.850 relief based upon the United States Supreme Court's recent granting of certiorari in Maynard v. Cartwright, 108 S.Ct. 693 (1988). The United States Supreme Court has agreed to hear only whether Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor has been interpreted by the Oklahoma Court of Criminal Appeals in an unconstitutionally broad manner. See 56 U.S.L.W. 3459 (1988) (limiting grant of certiorari petition). This claim, as are all the others raised herein, is procedurally barred. This claim is not so novel that it couldn't have been raised previously. See Dobbert v. State, 409 So.2d 1053 (Fla. 1982). Also, in Magill v. State, 428 So.2d 649 (Fla. 1983), the court observed that our "especially heinous, atrocious or cruel" aggravating circumstance has been upheld against constitutional attacks. The court specifically noted:

> **[3-6]** We have provided guidance for determining whether section 921.141(5)(h) is applicable. As was noted in **State v. Dixon**, 283 So.2d 1 (Fla. 1973):
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of

> others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> 283 So.2d at 9. Since **Proffitt,** our application of the above reasoning has not rendered the statute unconstitutionally vague and overbroad.

Inasmuch as a claim based upon the purported unconstitutionality of the "especially heinous, atrocious or cruel" aggravating circumstance has been available to capital defendants for many years, the failure to raise this claim previously results in a clear procedural bar. Consequently, appellant abuses the 3.850 vehicle by raising this claim at this time.

The Supreme Court's granting of relief in Maynard v. Cartwright, 56 L.W. 4501 (1988) does not affect the Florida decisions. Relief in Maynard was based on the Oklahoma court's failure to define the terms heinous, atrocious and cruel. These terms have been defined in Florida. See, State v. Dixon, 283 So.2d 1 (Fla. 1973). Moreover, the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 254-256 (1976) upheld this aggravating circumstance in Florida against a vagueness attack and this was expressly noted in Maynard where the Court compared Proffitt with Godfrey v. Georgia, 446 U.S. 420 (1980).

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE CONFRONTATION CLAUSE WAS VIOLATED BY PURPORTEDLY IMPROPER RESTRICTION OF CROSS-EXAMINATION OF THE CODEFENDANT.

Appellant bases a claim under the Confrontation Clause that he was hindered in his cross-examination of co-defendant Ty Johnston concerning Johnston's psychiatric and juvenile history and any "deals" that were made with Johnston. This claim, although not previously denominated as arising under the Confrontation Clause, was raised both on direct appeal to the Florida Supreme Court and in a habeas petition filed with the federal court. It is a clear abuse of the 3.850 proceedings for appellant to raise a claim previously raised under the guise of a new title. Appellant attempted to raise an issue concerning cross-examination of Ty Johnston in his supplemental brief before the Eleventh Circuit Court of Appeals even though he had raised this issue in another form in his initial brief. The Eleventh Circuit would not consider this claim.

ISSUE VIII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HE WAS IMPERMISSIBLY PREJUDICED BY EVIDENCE AND COMMENT UPON HIS REFUSAL TO SUBMIT TO A VOICE EXEMPLAR.

Appellant again raises a claim concerning the use of a voice exemplar by the state. Again, this claim, or a form thereof, was raised on direct appeal and in the federal courts. The Eleventh Circuit would not consider this claim where it had not been previously raised in the federal district court. Thus, it is a clear abuse of the 3.850 proceedings for appellant to raise a claim which has, in some form, been already litigated.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT HIS DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

Appellant next claims that he was subjected to an automatic aggravating circumstance by the finding that the murder was committed during the course of certain enumerated felonies. In a convoluted argument he contends that the precepts of Lowenfield v. Phelps, 484 U.S. ___, 108 S.Ct. ___, 98 L.Ed.2d 568 (1988) were violated where an aggravating circumstance is predicated upon the same factors as is the murder. In other words, appellant contends that this aggravating circumstance is precluded where a defendant is convicted of felony murder. This argument, never having been presented before, is procedurally barred and abuse of the 3.850 process occurs. In any event, there is no indication that appellant was convicted of a felony murder. Rather, the evidence adduced at trial clearly supports a finding of premeditation. Clark committed a cold and calculated execution-style murder. The record supports a clear finding of premeditation: the kidnapping at random of Mr. Drake, the forcing of Mr. Drake to execute a $5,000 check, the forcing of Mr. Drake into the woods after he was stripped of clothing and his hands were secured behind his back, and the shot to the back of Mr. Drake's head. The attempt to extort $10,000 from the victim's family also serves to show that premeditation was established beyond and to the exclusion of any reasonable doubt.

We submit that raising this issue is a clear abuse of the 3.850 process where this claim could have been raised on direct appeal or in prior collateral proceedings and was not. Nevertheless, this Honorable Court has determined that the argument now advanced by appellant is unworthy of relief. In Clark v. State, 443 So.2d 973 (Fla. 1983), the court rejected a contention that our capital sentencing statute creates an "automatic" aggravating circumstance. Accord, Squires v. State, 450 So.2d 208, 212 (Fla. 1984); Toole v. State, 479 So.2d 731, 733 (Fla. 1985).

The defendant's reliance on Lowenfield v. Phelps, supra, does not change the results reached by the Florida Supreme Court in the above-cited cases which dealt with this issue. Lowenfield states succinctly that the class of murders eligible for a death sentence can be narrowed by either the statute itself or the sentencer's finding of aggravating circumstances. The court specifically pointed to the Florida scheme as illustrative of the second category. 98 L.Ed.2d at 581-582. It should be noted that to some extent Section 782.04(1)(a)2., Florida Statutes, which defines felony-murder limits the class of cases which are potentially deserving of death. Not all felonies will support first degree felony murder, only the felonies outlined; commission of any other felony will support only third degree murder. See, Section 782.04(4), Florida Statutes. It is clear that the trial court correctly summarily denied this claim.

ISSUES X AND XI

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING TWO CLAIMS MADE BY APPELLANT PERTAINING TO THE JURY INSTRUCTIONS GIVEN AT THE PENALTY PHASE OF TRIAL.

Appellant lastly makes two claims concerning the alleged impropriety of some of the jury instructions given in this case. Capital defendant Frank Smith has raised these types of claims in his collateral proceedings. In Smith v. Dugger, 2 F.L.W. Fed. C 278 (11th Cir. March 9, 1988), the Eleventh Circuit rejected these claims and noted that they were raised for the first time in Smith's 3.850 motion. The court noted that the Florida Supreme Court refused to address the merits of these arguments because they "could have been presented on appeal" and were not, citing Smith v. State, 457 So.2d 1380, 1381 (Fla. 1984). As in Smith, appellant in the instant case attempts to first raise these points in a 3.850 motion. In Smith, the defendant raised as two of his claims:

> . . . (2) that the jury instructions given on the process of weighing aggravating and mitigating circumstances placed the burden on the defendant to prove that death was not the appropriate penalty; [and] (7) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; ....

These are the same claims being made by Clark for the first time in his third 3.850 motion. This Honorable Court held that these claims were properly summarily denied as improper grounds for a Rule 3.850 motion where they could have been raised on direct appeal. Smith v. State, 457 So.2d at 1381. The same result should obtain in the instant case.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the trial court's summary denial of appellant's third 3.850 motion should be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facimile machine and/or by hand delivery, to the Office of the Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32301 this 20th day of June, 1988.

OF COUNSEL FOR APPELLEE