IN THE SUPREME COURT OF FLORIDA

LARRY CLARK,

Appellant,

v. CASE NO. 86,836

STATE OF FLORIDA,

Appellee,

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

1. **The Trial** -

Larry Clark was charged in a three count indictment with first degree murder of Dorothy Satey, attempted murder of Felix Satey, and robbery (OR 6-7).[1] Trial by jury resulted in guilty verdicts and an 8-4 recommendation that the death penalty be imposed (OR 122-125). The trial judge agreed with the death recommendation and entered his written findings in support of the death penalty (OR 139-146). The lower court also imposed life sentences on the other two counts (OR 132-135).

A-1 Decal store employee Marilyn Reinbolt testified that a new employee began work on October 30, 1981 (OR 462) and she recalled that a green car was parked next to her own vehicle and a man was sitting in it (OR 465-466). The new employee was still there when she left the store at five o'clock (OR 469-470). Clark's fingerprints were lifted from the car (OR 482-483). Sergeant H. R. Sanders recovered a job application form at the shop listing the name Robert Gibbs (OR 495). Store employee Noel

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[1]Appellee will use the designation "OR" when referring to the original record on Clark's direct appeal, Florida Supreme Court case 62,126. Appellee will use the designation "R" when referring to the post-conviction appellate record, Florida Supreme Court case no. 86,836.

Snyder testified that the new employee told him his name was Robert (OR 504) and he identified Exhibit 22 as a photo of that new employee (OR 509). Store employee Verna Tschappatt testified that victim Dorothy Satey was crippled and moved about in a chair (OR 522).

Douglas Randolph Clark at the nearby Silver Dollar tavern testified that Larry Clark would come in and go out and sit on the porch overlooking the A-1 Decal shop; a green car was parked near him (OR 528-531).

Charles Rocker, Jr., a former employer of Larry Clark, testified that appellant had a green Chrysler product (OR 543).

Employer Tim Medaugh at A&J Signs testified Clark was employed there October 30 but did not return after twelve noon (OR 549).

Detective McAllister testified that on November 10, 1981 Davidson James requested that Mr. Clark's vehicle be released to him (OR 565-566). James fit the description of the second man wanted in the shooting and his photo was taken (OR 569). Other witnesses at the Silver Dollar bar -- Yocum, Henry, and LaPlant -- testified they saw appellant come and go October 30 (OR 575-607).

Detective Reynolds also related that on November 10 Davidson James attempted to obtain custody of Clark's car (OR 637). Richard Casey, an expert in the field of examination of questioned documents, testified that the application form with the name Robert Gibbs was written by Davidson James (OR 669); Exhibit 28 checks written by Dorothy Satey to Larry Clark were signed by Clark (OR 670); and that Clark signed the property release form, Exhibit 29, which James took to the police (OR 670).

James Coleman testified that he was in the same cell with appellant Clark who told him that a murder was committed, that he shot a man and a lady and they got ninety to a hundred dollars from the printing place. Clark mentioned that the victims could identify him, one of the perpetrators had worked on the roof and his colleague had not been caught (OR 718-726).

Surviving victim Felix Satey testified that shortly after five o'clock two men (one a former employee and the second who had worked that day) approached him (OR 779). Clark fired a gun at him, grazing the top of his head (OR 780). Clark fired again striking him in the collarbone (OR 782). The other man, "Robert" closed the door. He did not observe any weapon in Robert's hand (OR 784). Satey gave them money and fell, pretending to be dead.

He heard shots followed by his wife moaning (OR 785-787). Clark returned, looking for Mr. Satey, asking "Where is you?" (OR 789). Satey identified a photo of the man with Clark who began employment under the name Robert Gibbs (OR 806-807).

Detective Fletcher testified that Mr. Satey had identified appellant and Davidson James as the perpetrators (OR 887, 892).

The jury returned guilty verdicts (OR 998-999).

In the penalty phase the defense called as witnesses Marian Arnett with whom Clark had had a child (OR 1042-44) and psychiatrist Dr. Walter Afield who performed a character analysis on Clark (OR 1024-1041).

2. **The Post-conviction Motion** --

Appellant filed an Amended Motion for Post-Conviction Relief (R 20-120), the state filed a response to motion to vacate (R 284-306). The trial court reviewed the approximately twenty claims asserted and concluded that most of the issues were not cognizable on Rule 3.850 and were procedurally barred. The Court also concluded that an evidentiary hearing was not required on the Brady claim;[2] that an evidentiary hearing was not required on the claim of ineffective assistance of counsel at the guilt phase

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[2]Brady v. Maryland, 373 U.S. 83 (1962).

since Clark had failed to assert how the alleged deficiencies resulted in prejudice, but that an evidentiary hearing would be appropriate on the claim of ineffective assistance of counsel at penalty phase (R 326-331).

At a hearing on October 9, 1995 the court heard argument on the defense motion that he should receive a life sentence because the co-defendant got life and denied the motion (R 600-609). The defense also proffered on the ineffective assistance of counsel at penalty phase claim that they would like to call witnesses regarding impoverished childhood, psychologist Dr. Krop to testify that trial counsel inadequately prepared Dr. Afield and attorney Robert Link to opine on trial counsel's effectiveness (R 611-618). The prosecutor argued that an expert was not necessary to help the court understand what trial attorneys do, that the jury previously heard Dr. Afield's testimony about Larry Clark, that Dr. Krop would only say he could better say what Afield had said, and that having another employer testify about Clark would have been "offensive" to the jury that heard and convicted Clark of murdering employer Mrs. Satey and wounding employer Mr. Satey (R 619-622). The court said it would take the matter under advisement (R 623).

Clark submitted a supplement to his proffer consisting of the deposition and exhibits of trial counsel Simson Unterberger which had been taken August 17, 1995 (R 456-580).

Thereafter the trial court entered an order, after consideration of the proffered testimony and Unterberger's preparation, finding that counsel was not deficient and there was no reasonable probability of a different outcome (R 585-586).

In his deposition trial defense attorney Simson Unterberger testified that it became more common in later years to utilize investigators and two attorneys, especially in capital cases (R 466). There was no second chair counsel in the Clark trial (R 467). Unterberger was involved in litigation over the method of compensating court-appointed lawyers in Hillsborough County (R 488); he was ultimately unsuccessful in the Florida Supreme Court (R 469). Unterberger believes it is better to have two attorneys on the case because your credibility can suffer after an adverse verdict in guilt phase, irrespective of the competence of the attorney (R 471). He was a part time public defender for five or six years and had a civil practice (R 472). He explained there are a whole series of considerations including the willingness to lose closing argument by using other witnesses to ponder when deciding how or whether to prove a witness lied (R 477). He

could not recall whether the prosecutor had furnished Coleman's rap sheet (R 481) and did not recall if he used "open file" discovery with the prosecutor in the Clark case (R 482). He could not recall whether he received other exhibits (R 485-492). Unterberger was with the public defender's office from 1973 through 1978 when the death penalty was starting up and not as highly developed as subsequently (R 494). He updated his files to keep current when he left that office (R 494). Unterberger had a full Florida library and his office was directly across the street from the courthouse which housed the county law library (R 500).

He contacted Dr. Walter Afield, an expert with whom he had had prior dealings (R 516). He could not recall what he told Afield but routinely he would not provide very much since he did not want to influence him; he did not want to expose the expert to cross-examination on how much was Unterberger's information. Afield knew why he was there (R 517-518). Unterberger did not recall having any medical records (R 519). He recalled using Marian Arnett as a penalty phase witness (R 521). He did not wait for conviction to begin penalty phase preparation -- he prepared for phase two before trial (R 522). He recalled also having talked to Clark's mother and that she would have been

difficult because she was inarticulate (R 526). Unterberger recalled that Dr. Afield had difficulty coming up with any strong stuff (R 527). Charley Rocker testified in the guilt phase (R 530).

SUMMARY OF THE ARGUMENT

Issue I. Appellant Clark is not entitled to a reduced sentence of life imprisonment on the basis that the co-defendant James has received a life sentence since the culpability of the two is not equal. Clark was the actual triggerman. See Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994).

Issue II. Trial counsel did not render ineffective assistance of counsel. He performed as an advocate in his closing argument, provided available mitigating evidence including a lay witness who knew Clark and a mental health expert and the current complaint is merely hindsight second-guessing.

Issue III. Clark's challenges to the aggravating and mitigating circumstances are issues which were or could have been asserted on direct appeal and are not cognizable collaterally.

Issue IV. The challenge to the jury recommendation instruction and to prosecutorial remarks is procedurally barred.

Issue V. Prosecutorial remarks about sympathy are not cognizable on Rule 3.850 challenge.

Issue VI. The lower court did not err in denying appellant an evidentiary hearing. The court considered trial counsel's deposition which adequately demonstrates the failure to show a

Brady violation and that trial counsel did not render ineffective assistance.

ISSUE I

THE CO-DEFENDANT'S LIFE SENTENCE.

Clark contends that his death sentence may not stand since his co-defendant Davidson Joel James subsequently received a life sentence and, he contends, their culpability is equal. The trial court denied Clark's motion for directed judgment (R 584).

The prosecutor argued below (R 332-335) that relief must be denied since co-defendant Davidson James was not of equal or greater culpability. A similar argument as presented by Clark was argued in Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994) and this Court rejected the contention since the record revealed that Steinhorst was the person who shot and killed the victims; thus, "when co-defendants were not equally culpable, the death sentence of the more culpable co-defendant is not unequal justice when another defendant receives a life sentence." Id. at 35. Even a trial judge's affidavit expressing the view that he believed both defendants were equally guilty and deserving of the same punishment did not suffice for reduction of Steinhorst's sentence.

Similarly, in Hannon v. State, 638 So. 2d 39 (Fla. 1994) this Court rejected an argument that death was an inappropriate sentence when a co-defendant participated in stabbing one of the

victims but Hannon delivered the fatal blows and killed a second victim by shooting. See also Coleman v. State, 610 So. 2d 1283 (Fla. 1992).

In the instant case Larry Clark is clearly more culpable than co-defendant Davidson James -- he was the triggerman who killed Mrs. Satey and wounded and tried to kill Mr. Satey. Felix Satey identified him as the man who shot him twice (OR 780, 782, 805, 842), the same gun was used to kill Dorothy Satey (OR 866-67), Clark searched for Mr. Satey to finish his job after Mrs. Satey was executed (OR 789-790). No evidence suggested Davidson James was in possession of a firearm during the commission of the crime (OR 784, 839) and no evidence he directed the murder of Mrs. Satey. Clark admitted to a cellmate that the victim could identify him (OR 722-723, 725).

Appellant's reliance on Scott v. State, 604 So. 2d 465 (Fla. 1992) is unavailing since there the two defendants were in all respects equally culpable, warranting a similar reduction to a life sentence as the accomplice had obtained.

Similarly, the decision in James v. State, 453 So. 2d 786 (Fla. 1992) does not aid Clark. This Court in the context of the language relied on by appellant was merely holding that under the law of principals James like Clark was accountable for the first

degree murder of Mrs. Satey; for that analysis it was irrelevant that Mrs. James did not actually commit the killing. However, in determining the propriety of the death sentence in a proportionality type analysis, the culpability of the two actors is not the same and when a merely present non-triggerman subsequently achieves reduction to a life sentence, neither Scott nor any other precedent mandates such a windfall profit to the actual killer.

Clark incompletely cites excerpts of this Court's prior opinion. At page 27 of his brief he includes a partial quote of James v. State, 453 So. 2d 786 at 792, omitting this Court's statement:

> "The jury found that James met the Enmund test. Although Clark did the actual killing, James was present and actively participated in the events. In such a situation we have held that who is the actual killer is not determinative because each participant is responsible for the acts of the other."

Since this Court both acknowledged that Clark "did the actual killing" and since the context of the entire quote establishes that it was a rejection of the defense "Enmund" argument, it is difficult to understand Clark's argument that the state may not rely on his greater culpability as Steinhorst, supra, recognizes.

ISSUE II

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The courts have repeatedly acknowledged that highly deferential review of counsel's conduct is warranted in an ineffective assistance challenge especially where strategy is involved; intensive scrutiny and second-guessing of attorney performance are not permitted. Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994); Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994). Judicial scrutiny is highly deferential because the craft of trying cases is far from an exact science and is replete with uncertainties and obligatory judgment calls. Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994). The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992).

The standard is not how present counsel would have proceeded in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different outcome. Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

A court considering a claim of ineffective assistance of counsel need not determine whether counsel's performance was deficient when it is clear that alleged deficiency was not prejudicial. Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994). The court must determine whether the alleged omissions are of such magnitude as to constitute serious error or substantial deficiency falling measurably outside range of professionally acceptable performance and whether the deficiency compromised the process to such a degree as to undermine confidence in the correctness of the result. Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1993).

(A) Closing Argument

Appellant next argues that he was denied effective assistance of counsel at penalty phase because, he contends, counsel's closing argument "made the prosecution's case" and that counsel failed to utilize friends and relatives for mitigation testimony and failed adequately to utilize mental health expert Dr. Afield.

Clark first maintains that his trial counsel in closing argument effectively advised the jury that Clark should be

sentenced to death.[3] A review of the closing argument -- Petitioner's Appendix TR 1054-1067 -- demonstrates that counsel first reminded the jury that they had just convicted Clark of first degree murder, attempted murder and robbery and that it was unlikely he would soon see freedom ("if Larry Clark was not sentenced to die, is that he would be sentenced to three life terms, one of which would preclude him from even being considered for parole for twenty-five years" [TR 1055]). Counsel reminded the jury that the judge was the sentencer but that he must give great weight and consideration to their recommendations (TR 1055), that they should take seriously the state's attempt to premeditatedly kill Mr. Clark (TR 1056), responded to the prosecutor's argument and argued that the Satey killing was not especially heinous, atrocious or cruel [a conclusion subsequently concurred in by this Court](TR 1057). Trial counsel pointed out that through Marian Arnett's testimony Larry Clark was the father of a child (TR 1058), that "there is a little bit of good" in the worst of us and that Clark had undertaken responsibility for, and displayed affection for, that child (TR 1059). He argued that

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[3]Appellee notes that collateral counsel deposed counsel Unterberger and proffered that deposition to the court (R 456-540), yet did not inquire of him anything pertaining to his closing argument.

from Dr. Afield the jury had learned that Clark was educationally-deprived, that he came from the underbelly of society where some do not have the same values that a majority do abide by (TR 1060). Had Clark received more assistance earlier in his life, he argued, he might not be here today (TR 1061). He further argued that society was ambivalent about the death penalty as a deterrent since executions were not done with greater publicity, that Mr. Clark was impaired and that the state had not used a psychiatrist to rebut Dr. Afield (TR 1062).

While rehabilitation could not be assured Clark assuredly would be spending many years in prison and if released would come out "as probably a helpless old man." (TR 1063). Counsel argued this was his "most difficult case" (TR 1064), that most of the aggravation cited by the state concerned this episode, and that no one really knew whether the facts occurred as hypothesized by the state so that if a mistake were made now there would be no future remedy (TR 1066-1067).

It is absurd when examining trial counsel's argument in its totality and in context to suggest that he did not act as an advocate and that he "made the prosecutor's case."[4] Appellant

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[4]Clark informs us that his "expert" attorney Link believes Unterberger gave probably the worst summation that Link had seen.

takes issue with the "most difficult case" remark, an effective device whereby counsel subtly reminded the jury how serious their responsibility was and not to blithely accept the prosecutor's argument.

Appellant complains of the remark at TR 1064 in which Clark interprets the remark to be counsel's assessment that his client does not deserve to live. But the context of the remark was counsel's informing the jury of a conversation he had with Clark about whether Clark preferred to live or preferred to die. Clark and his collateral counsel, do not include the entire quote in their brief:

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

(emphasis supplied)(TR 1064). Counsel only reported what Clark had said, he was not commenting that as advocate he did not believe life was inappropriate.

Clark next contends that his trial counsel "separated himself" from Clark. The remark at TR 1056 ("in arguing the death penalty in this fashion as I am required to do") follows

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It is unfortunate that his experience has been so limited.

the immediately preceding sentence wherein counsel announced his disagreement with prosecutor Ober's discussion of aggravating circumstances. Similarly, the "I have no choice" comment at TR 1057, in context, relates to his obligation to correct the prosecutor and to explain to the jury that this killing did not qualify for "HAC" treatment. There is no impropriety in reminding the jury that he hopes they do not regard him as a "ghoul" for explaining the significance appellate courts have ascribed to the specific factors of aggravation. Clark completely reads these comments out of context to create the sense -- not present in the text -- that counsel did not believe in his client's cause.[5]

Clark next maintains that counsel denigrated his client's character several times at TR 1059-63 in closing argument. He did not. The first challenged comment ("far from being a good person . . . must be classified as a bad person") occurs in the sentence reminding the jury that they have concluded that Clark was the perpetrator of the Satey shootings and that -- in the same sentence -- there is good in all of us, and in Clark's case in being the caring father of an infant. The comments about the

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[5]And it is understandable why then collateral counsel did not ask Unterberger at his deposition to explain his closing argument.

underbelly of society at TR 1060 tie in with counsel's reliance on Dr. Afield who had discussed Clark's problems, the possibility that earlier intervention might have broken the cycle and the possibility of change in prison (R 1029-1038). That counsel could not predict whether Clark could be rehabilitated comported with Dr. Afield's testimony that it seemed an open question (R 1034-1038). Agreeing that murderers should be stopped is not an abandonment of the role of advocate especially since counsel immediately followed it with a comment about society's ambivalent view of capital punishment as a deterrent and that Clark could be a "helpless old man" if ever released from prison (R 1062-63).

Clark maintains that counsel improperly emphasized the serious nature of the alleged crime. (The crime was not alleged, it was proven). It is true that counsel began his argument by stating the obvious -- that they (the jury) had determined Clark to be guilty. That certainly was not any kind of revelation and one wonders if additional mileage could have been gained for the client by blasting the fact finder for being wrong. The comment at TR 1057 about "horror that death has occurred" was a prelude to explaining to the jury that the legislature had sought to distinguish degrees of horror in the HAC factor, which is what defense lawyers are supposed to do in explaining the operation of

the statute. The remark challenged at TR 1061 -- asking why people are prepared to **use** a gun to steal a hundred dollars -- again in context constituted counsel's reliance on Dr. Afield's testimony:

> "But it is Mr. Clark who, nevertheless, has been educationally deprived, who early on in his time was in trouble. And Dr. Afield is unable to detect any time prior when Mr. Clark, while in the hands of officers of our state, has received any type of positive assistance or help to perhaps break -- and I say perhaps -- break the cycle."

(TR 1061).

Appellant says that by acknowledging at penalty phase that a serious crime had occurred (which the jury presumably knew with the return of their guilty verdicts), counsel failed to "require the prosecution's case to survive the crucible of meaningful adversarial testing." Counsel did act as an advocate -- he explained that this homicide, unlike others, was not especially heinous, atrocious or cruel (TR 1057), that analysis of aggravating and mitigating circumstances was a quality not quantity determination, i.e., not a counting process (TR 1065), that most of the aggravation argued by the state occurred within this episode lasting only a few minutes and to accept Dr. Afield's view of Clark's problems. Appellant's thesis that

counsel acted merely to ratify the prosecutor's request for imposition of the death penalty does not fairly or adequately describe defense counsel's closing argument.

Finally, collateral counsel engages in hindsight second-guessing that his argument would have been better in demonstrating mitigation. The fact remains that counsel presented a portrait of his client as a caring parent to his infant child (TR 1059), that Clark was "deprived" who because of his background and upbringing was unable fully to abide by the laws (TR 1060), that Clark had not received the 'positive assistance or help" to break the cycle (TR 1061), that Afield had testified there were gaps in Clark's personality and ego and balance system which the state had not contradicted (TR 1062), that it was possible for rehabilitation if not entirely predictable (TR 1063). That new counsel now would have added or changed a paragraph in closing argument does not render trial counsel ineffective under the Sixth Amendment.

Appellant is not entitled to relief by citing cases such as Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) and Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). In Horton, the defense attorneys did not call any witnesses or introduce any evidence at penalty

phase and performed little investigation into mitigation prior to or during trial. Counsel merely asked defendant's mother to sit among the spectators and the Court concluded that the defense theory that mitigation was only important in torture cases was unreasonable. Additionally, counsel encouraged the jury in closing argument to impose death, calling his job virtually impossible to explain why death was not appropriate and arguing that his representation of the defendant was his civic duty and that there was peer pressure and it **was** important to be in good stead with the prosecutors whom he worked with daily. In Goodwin, counsel repeatedly told the jury of his appointed status because he lived in that community and did not want the reputation of representing everybody that killed somebody. In Osborn, defense counsel's strategy was to talk the prosecutor out of seeking the death penalty prior to or at the sentencing proceeding and then was unprepared when the prosecutor did not accede. Counsel did little in preparation, the client had plead guilty, and he publicly chastised his client by making statements to the press that there was no evidence to support his claims on a plea withdrawal request contending that the client was playing games to draw attention. Additionally, he did not seek to discover ex parte information furnished by the prosecutor to the

sentencing judge which included information that was a key factor convincing the judge to impose a sentence of death and completed his disloyalty at the sentencing trial by stressing the brutality of the crimes and the difficulty his client had presented throughout his representation.

In contrast, trial counsel in the instant case, Simson Unterberger, did not wait until the conclusion of the trial before commencing preparation of penalty phase (R 522) and in fact used both a lay witness, Marian Arnett, to humanize Clark by eliciting that he was a loving father to his child and a mental health expert, Dr. Walter Afield, to describe his deprived personality. He considered and chose not to have appellant's mother testify because she was inarticulate (R 526), a judgment confirmed by Afield's description of the family as primitive.

As stated above, appellant isolates and removes from context a few of defense counsel's comments at closing argument, overlooking that counsel did act as an advocate by pointing out the length of incarceration resulting from a life sentence (OR 1055), that the jury had a serious responsibility whether to accede to the state's request for a premeditated killing of appellant Clark (OR 1056), that the instant homicide did not qualify for an HAC finding (OR 1057), that there is good in all

of us (a loving father to Marian Arnett's child) (OR 1058-59), that Dr. Afield had described Clark's deprived environment (OR 1060), that society had some ambivalence regarding capital punishment and that Clark had gaps in his personality (OR 1062), that Clark would be helpless if ever released from prison (OR 1064), that the instant homicide and surrounding aggravators was an episode lasting only a few minutes (OR 1065), that other crimes by others who received life were more horrible and that if the jury made a mistake the result would be irrevocable (OR 1066-67). Counsel hardly abandoned his client.[6] Cf. White v. Singletary, 972 F.2d 1218, 1224 (11th Cir. 1992).

(B) Alleged Failure to Present Available Mitigating Evidence

To evaluate counsel's performance we must first examine what counsel did. Trial counsel called Dr. Afield, an expert in the

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[6]Nor can appellant take comfort in King v. Strickland, 748 F.2d 1462 (11th Cir. 1984). The court pointed out there that trial counsel had never tried a capital case and was unassisted; Unterberger, in contrast, had experience previously as an assistant public defender and this was his fourth capital case (OR 1064). In King, counsel had done little to search for mitigating evidence; sub judice, counsel called a mental health expert and Marian Arnett after determining that Clark's mother would not make a good witness. The King court approvingly cited Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984) as involving an argument to humanize the client -- as Unterberger did here -- and a residual doubt argument -- as Unterberger made here.

field of psychiatry, to the stand (Petitioner's Appendix TR 1028-1041). Dr. Afield testified that he saw Mr. Clark in the jail setting, talking with his family, doing an extensive battery of psychological testing and attempting to learn about him (his strengths and weaknesses) (TR 1028). Afield testified that Clark was a man of marginal intelligence, low IQ with probably learning disability from early childhood, seriously depressed (TR 1029). Clark had spent considerable periods of his life in jail settings with really no treatment; he suffered from problems that he did not have good control over (TR 1030). His family was primitive although stable in many ways. Clark was deprived, depressed and angry (TR 1031-32). If there had been early intervention they might not be there today (TR 1033). The possibility of rehabilitation existed but it would take a long period of time (TR 1034). On cross-examination Afield admitted that Clark posed a danger without any kind of treatment and in the Florida state prison system depending on the location there is non-existent, marginal or pretty decent help (TR 1036). Exposure to other people in prison could be beneficial or negative and he might not voluntarily submit to treatment while in prison (TR 1037). He could not say with certainty what would happen in twenty-five years (TR 1038). On redirect Afield opined that propensity for

danger dissipates with age (TR 1044).

Trial counsel also elicited the testimony of Marian Arnett who bore Clark's ten-month-old daughter (TR 1042). Clark always contributed financially to the support of the child (TR 1043). He was a loving, caring father (TR 1044).

Appellant now argues that trial counsel was derelict in failing to call as a mitigation witness former employer Charles Rocker. Rocker had testified at guilt phase as a state witness identifying appellant's vehicle and providing his address to the police (OR 543-544). Appellant argues that Rocker could have testified to Clark's good qualities as an employee and expert attorney Link comments that as a prior state witness he would have been "virtually unimpeachable."

Suffice it to say that the prosecutors would have been ecstatic to have the jury reminded of the very facts of the crime -- killing a former employer for money and because the victim could identify him -- and to be told what a valued and trustworthy worker he was. Appellee does not know whether Rocker would have been an "unimpeachable witness" but almost certainly no cross-examination would have been necessary.[7]

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[7]The tactic advanced by collateral counsel approaches a mitigation argument that the Menendez brothers are orphans in

Appellant next asserts that counsel was deficient in not utilizing his mother, Utah Clark. Trial counsel Unterberger specifically testified that he had talked to Mrs. Clark and she would have been a poor witness because she was not articulate (R 526), confirmed by Afield's trial testimony that the family was primitive (TR 1031). As the Supreme Court noted in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984):

> ". . . strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."

(80 L.Ed.2d at 695). Accord, Porter v. Singletary, 14 F.3d 554, 556-600 (11th Cir. 1994).

Next Clark contends that counsel should have utilized longtime friend Ernest Gilyard to testify to his non-violent disposition and respect for the elderly. Counsel did not inquire of Mr. Unterberger at deposition concerning Mr. Gilyard. It should be noted that Gilyard's innocuous proffered testimony of non-violent behavior seemingly would have been at cross-purposes with Dr. Afield's testimony; Clark's respect for the elderly would -- yet again -- have reminded the jury of his 'respect" for the elderly helpless Mrs. Satey. Adequate evidence of his caring

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California.

nature was provided through the testimony of Marian Arnett.

Appellant complains that trial counsel failed adequately to develop and present psychiatric testimony; apparently, collateral counsel would have preferred more detailed questions propounded to Dr. Afield so that he could be more expansive. Dr. Afield testified that he performed a battery of psychological tests and was able to testify to Clark's low IQ and problems with learning from early childhood. He was able to testify that Clark dropped out of school, got his G.E.D. in prison and was deprived (TR 1028-1030). That other counsel might have asked additional questions to elicit the same type of testimony does not render trial counsel Unterberger ineffective. See King v. State, 597 so. 2d 780 (Fla. 1992) (rejecting contentions that trial counsel was ineffective for failing to provide more information to mental health experts); Bottoson v. State, __ so. 2d , 21 Florida Law Weekly S205, 206 (Fla. 1996) (court could not say evidence raised reasonable probability that result would have been different if defense attorney had introduced mental health testimony or called witnesses regarding a troubled childhood).

Counsel does not render ineffective assistance merely by failing to offer cumulative mitigation on the theory that 'more is necessarily better." Woods, 531 So. 2d 79, 82 (Fla.

1988); Maxwell v. State, 490 So. 2d 927, 932 (Fla. 1986) ("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to imagine a more thorough job being done than was actually done. Moreover, it is highly doubtful that more complete knowledge of appellant's childhood circumstances, mental and emotional problems, school and prison records, etc. would have influenced the jury to recommend or the judge to impose a sentence of life imprisonment rather than death.")

Appellant mentions that the most prejudicial part of the presentation of Dr. Afield was "one that counsel easily could have avoided with preparation" (Brief, p. 43). He complains that Afield said Clark had several convictions, citing TR 1036. Actually, at TR 1036, Afield was responding to a question by the prosecutor on cross-examination regarding Clark being in prison and Afield answered:

> 'He told me his history. I don't remember all the specifics. I knew he had been in and out several times."

(TR 1036). Appellant does not explain how trial defense counsel could by preparation control a prosecutor's question and obviously, Afield answered as to what Clark had told him. There

was nothing damaging that trial counsel did that was wrong or prejudicial unlike the situation in Stevens v. State, 552 So. 2d 1082 (Fla. 1989).

There was no deficiency in performance by Mr. Unterberger; thus, it is really unnecessary to address the second "prejudice" prong of the Strickland analysis.[8] Had counsel adopted the hindsight strategy now urged -- using a former employer to attest to his trustworthiness, etc. -- the death recommendation could as likely have been unanimous rather than eight to four.

[8]But clearly there is no prejudice to satisfy the Strickland test. Counsel now merely engages in second-guessing hindsight criticism because the best possible result was not achieved. Subsequent counsel's judgment is not better nor would the use of cumulative witnesses have changed the result.

ISSUE III

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

Appellant contends next that the HAC jury instruction was vague, that the trial court erred in failing to consider and find nonstatutory mitigating circumstances, that the trial court erred in instructing the jury on aggravators (5) (d) and (5) (f) of F.S. 921.141, that the trial court erred in finding that the murder was committed for the purpose of avoiding arrest, and that the court erred in finding the CCP aggravator.

The lower court correctly ruled that issues which were or could have been raised on direct appeal are not cognizable on 3.850 and are procedurally barred:

> "Post conviction motions are not to be used as second appeals. Medina v. State, 573 So. 2d 293 (Fla. 1990). Issues that were or could have been raised on direct appeal are not cognizable in a Rule 3.850 motion. Cherry v. State, Fla. L. Weekly S451 (Fla. Aug. 31, 1995), citing Boyle v. State, 526 So. 2d 909, 911 (Fla. 1988); Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1993), citing Johnson v. State, 593 So. 2d 206 (Fla. 1992, cert. denied, --- U.S. ---, 113 S.Ct. 119, 121 L.Ed.2d 75 (1992). Under the authority of these Florida Supreme Court opinions, the court finds that the following

> claims are procedurally barred: A, I, J, K, L, M, N, 0, P, Q, R and T."

(R 329).

Unlike co-defendant James, Clark did not object to the constitutional validity of the HAC instruction or raise the claim on direct appeal, as he acknowledges in the accompanying habeas corpus petition. Clark, since he cannot allege sufficient cause and prejudice to excuse the procedural defaults under Wainwright v. Svkes, 433 U.S. 72, 53 L.Ed.2d 594 (1977), simply chants the mantra of 'ineffective counsel." This Court has held that counsel at trial is not deemed ineffective for failing to object to HAC and CCP instructions on vagueness grounds in cases prior to Espinosa v. Florida, 505 U.S. , 120 L.Ed.2d 854 (1992). Harvey V. Dugger, 656 So. 2d 1253, 1258 (Fla. 1995). And this Court has additionally determined that appellate counsel is not deficient under Strickland prior to Espinosa since the Court would have rejected the claim on direct appeal. Lambrix v. Singletary, 641 So. 2d 847, 849 (Fla. 1994).

Appellant mentions at page 52 of his brief that an evidentiary hearing should be ordered. Clark submitted to the trial court as a proffer the deposition testimony of trial counsel Simson Unterberger -- and the state stipulated to its

admissibility -- which the trial court considered in denying relief (R 456-580, R 585-586). No further hearing is necessary.[9]

Clark's attempt in sections B, C, D and E to have this Court either reconsider prior decided issues or consider for the first time issues that could or should have been urged on initial direct appeal must fail. Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989).

Clark argues that there is no procedural bar since counsel did object and this Court previously considered and rejected his doubling up of robbery and pecuniary gain argument. 443 so. 2d at 977. But the lower court correctly understood and applied Florida law that collateral challenges are not a vehicle for reasserting previously rejected claims. And, as in Wuornos v. State, 644 So. 2d 1000 (Fla. 1994), this Court noted that the trial court's order did not improperly count these factors twice.

In footnote 34 of his brief Clark contends that his 1972 robbery conviction was illegally obtained; his casual footnote observation without brief does not satisfy the requirements of Duest v. Dugger, 555 So. 2d 849, 851-52 (Fla. 1990) and must be

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[9]This court is well aware that trial counsel objected to sufficiency of the HAC evidence and successfully urged this Court to reject the trial court's findings. Clark v. State, 443 So. 2d 973, 977 (Fla. 1983).

deemed waived. In any event Clark's prior convictions have not been vacated and thus Johnson v. Mississippi, 486 U.S. 578, 100 L.Ed.2d 575 (1988) is inapplicable. See Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993).

ISSUE IV

WHETHER THE INSTRUCTION TO THE JURY THAT ITS RECOMMENDATION WAS ADVISORY COUPLED WITH REMARKS BY THE PROSECUTOR DEPRIVED APPELLANT OF A RELIABLE SENTENCING.

In ground P of his motion to vacate appellant complained about improper instructions and improper prosecutorial argument concerning the jury's sentencing role. The prosecutor correctly argued that these claims were not subject to collateral challenge (R 295-296) and the trial court correctly determined that such claims were matters for direct review and not subject to challenge via Rule 3.850 (R 329).

Appellant half-heartedly intimates that no procedural default impediment stands in his way because Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed 231 (1985) was decided after his trial and appeal. But the same can be said of the defendant in Dugger v. Adams, 489 U.S. 401, 103 L.Ed.2d 435 (1985) where the Supreme Court enforced the state court's application of the procedural default policy.

ISSUE V

WHETHER THE PROSECUTOR VIOLATED CLARK'S DUE PROCESS RIGHTS BY HIS COMMENTS REGARDING SYMPATHY.

The prosecutor correctly argued below that this claim was procedurally barred from collateral challenge since it could have been raised previously citing James v. State, 615 So. 2d 668, 669 (Fla. 1993) (R 297-298). The trial court **also correctly denied the claim** as barred since post-conviction motions are not to be used as second appeals (R 329).[10]

[10]Appellant attempts to avoid the procedural bar resulting from trial counsel's failure to object and appellate counsel's failure to argue the issue on appeal by incanting counsel's ineffectiveness as cause but he cites no decision by this Court suggesting that failure to object to such a prosecutor's remark would be constitutional deficiency mandating relief under Strickland. To the extent that appellant is arguing that California, 479 U.S. 538, 93 L.Ed.2d 934 (1987) affords him relief, essentially his argument was foreclosed in Saffle v. Parks, 494 U.S. 484, 108 L.Ed.2d 415 (1990).

ISSUE VI

WHETHER THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON GUILT PHASE ISSUES.

Appellant mentions that the failure to accord Clark an evidentiary hearing on guilt phase issues affects penalty phase issues since it is "well accepted that the strength of the guilt phase case can materially affect the penalty phase by leaving residual or 'whimsical' doubt as to the defendant's guilt that can be pivotal when the jury considers whether to condemn the defendant to death" (Brief, p. 67). Appellee notes that this Court stated in King v. State, 514 So. 2d 354, 358 (Fla. 1987):

> "This Court, however, has consistently held that residual, or lingering, doubt is not an appropriate nonstatutory mitigating circumstance. Aldrich . State 503 So. 2d 1257 (Fla. 1987); B u r r : 466 So. 2d 1051 (Fla.), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985); Buford v. State, 403 So. 2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982)."

Accord, Waterhouse v. State, 596 So. 2d 1008, 1011 (Fla. 1992); Bogle v. State, 655 So. 2d 1103, 1107 (Fla. 1995); Sims v. State, So. 2d , 21 Florida Law Weekly S320, (Fla. July 18, 1996).

Appellant contends that the lower court erred in its treatment of claims and an evidentiary hearing is required relating to (1) an alleged withholding of material impeachment

evidence of witness James Coleman and (2) alleged subornation of perjury by Coleman. He also contends in the last section that trial counsel was ineffective at the guilt phase.

A. Withheld Evidence and Perjury -

(1) Clark first contends that the state failed to disclose material impeachment evidence regarding jailhouse informant James Coleman which violated Brady v. Maryland, 373 U.S. 83. 10 L.Ed.2d 215 (1963) and its progeny (Claim D, below). The lower court ruled:

> "The court also finds that an evidentiary hearing is not required upon the claims raised in B, C, and D. In order to establish a Brady violation, the defendant must show: (1) that the State possessed evidence favorable to the defendant; (2) that the evidence was suppressed; (3) that the defendant did not possess the favorable evidence nor could he obtain it with any reasonable diligence; and (4) that had the evidence been disclosed to the defendant, a reasonable probability exists that the outcome of the proceedings would have been different. Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991). Reviewing the face of the motion, the court finds that Defendant does not meet the fourth prong of the Hegwood test in Claims B, C, and D. Although he claims in Paragraph 37 of Claim D that until February 4, 1985, counsel **was** unaware of the existence of **a** deposition of Coleman made in connection with two other **cases,** Defendant fails to show how such a deposition would have provided exculpatory evidence, or how it would have affected the outcome of the proceedings. The

court therefore denies relief upon Claims B, C, and D."

(R 329).

Appellant contends that the state violated the precepts of Brady V. Maryland, 373 U.S. 83, 10 L.Ed.2d 215 (1963) and its progeny by failing to produce relevant material pertaining to the credibility of James Coleman. Specifically, he alleges that the state failed to provide a four-page partial FBI rap sheet in the State Attorney's office file on Coleman (R 541-44). At his deposition which was submitted to the lower court for its consideration, trial counsel Simson Unterberger gave the following testimony:

> "Q. I'm going to show you something which I'm going to have marked Exhibit 1. And, unfortunately, the reproduction is not the greatest, but it's the best we can do.
> She's going to be marking the copy. It is a four-page FBI report on James Edward Coleman.
> A. Commonly known as a rap sheet.
> Q. Yep, that's it.
> (THEREUPON, Deposition Exhibit Number A was marked for identification.)
> Q. Just take a look at it and let me know when you finish looking at it.
> A. (Witness complies.) Okay. I've looked at it.
> Q. Okay. Did the state turn this document over to you in Mr. Clark's case?

A. I have absolutely no recollection."

(emphasis supplied) (R 480-481).

Unterberger further explained that he could not categorically say whether -- had he received such a rap sheet -- he would have asked questions of Coleman about it at his deposition (R 481). Unterberger thought that he and the prosecutor might have engaged in open file discovery (R 482). His time sheets reflected that he did spend time to 'check out file on Coleman" (R 566, 574).[11]

Clark has failed to demonstrate suppression by the prosecutor. See Atkins v. State, 663 So. 2d 624 (Fla. 1995) (evidence of autopsy photos not withheld); Routly v. State, 590 so. 2d 397, 399 (Fla. 1991) (to establish a Brady violation one must prove . . . that the prosecutor suppressed the evidence); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (No Brady violation where no indication evidence withheld from the defense); Beawood

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[11]Appellee respectfully submits that Clark's failure to establish that the prosecution did not disclose requested information on Coleman's rap sheet is fatal to his Brady claim. If the Court determines that the absence of recollection by trial counsel Unterberger is sufficient prima facie to satisfy that prong of Brady, appellee would request an opportunity at an evidentiary hearing to contest the assertion that the prosecution withheld pertinent information.

v. State, 575 So. 2d 170 (Fla. 1991); Felker v. Thomas, 52 F.3d 907, 910 (11th Cir. 1995) (Brady claim fails on inability to establish that prosecution suppressed evidence which was material).

In any event, it does not seem that there would be any appreciable difference in result if, assuming arguendo, that the prosecutor refused to furnish the four-page rap sheet to defense counsel, since Coleman acknowledged in his trial testimony that he thought he had three or four convictions but did not know (OR 736) and that those convictions were for fraud-related offenses (OR 765).

Appellant also alleges that the prosecutor failed to provide a thirteen-page FBI rap sheet in the Hillsborough County Sheriff's Office at R 551 (Exhibit F attached to the Unterberger deposition). That document is a one-page "supplemental report" of a Pinellas County officer dated May 28, 1982 referring to a thirteen-page FBI rap sheet on Coleman, which Unterberger testified at deposition that he had no recollection whether he received (R 492). If Clark is complaining that his trial counsel did not receive this "supplemental report" at or prior to trial, that would be understandable since the report states that it was prepared on May 28, 1982 -- weeks after the April 15, 1982

verdicts were returned by the jury in the Clark case (OR 122-124), weeks after the jury recommended a sentence of death on April 16, 1982 (OR 125) and a month after Mr. Unterberger sought compensation for attorney fees in this case (R 563, Exhibit I attached to Unterberger deposition) .[12]

(2) The claim that the state suborned perjury by Coleman in violation of Giglio v. United States, 405 U.S. 150, 31 L.Ed.2d 104 (1972).

In claim E below Clark made the brief bare allegation with respect to Mr. Coleman that:

> 'Testimony given by James Edward Coleman at trial contained several falsehoods (See, e.g., R 731, 742, 745)."

(R 37).

The trial court denied relief stating in its order:

> "Claims E, F, and G essentially challenge the veracity of witness James Coleman, and the constitutionality of employing 'jailhouse

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[12]Appellee notes that in the lower court pleadings on this Brady claim (R 33-37, Ground D) Clark primarily argued that Coleman had testified against two other persons although he testified at trial that he had not communicated with authorities concerning a similar confession made by someone else. Clark does not reassert that claim here, presumably abandoning it. As the state responded below (R 284-306) and as Coleman's trial testimony makes clear (OR 765-766) he was inadvertently called for a deposition on the prosecutor's mistaken belief that he had information in an unrelated case.

> informants' to elicit confessions. Defendant does not assert in any of these three claims that his attorney was unable to conduct discovery regarding witness Coleman's background or the circumstances surrounding the 'jailhouse confession', nor does Defendant assert that he was unable to cross-examine Coleman at trial upon such matters. While Defendant alleges in Paragraph 57 of Claim G that '[n]ew evidence makes it clear just how unreliable Mr. Coleman's testimony was, and Mr. Clark's trial counsel could not reasonably have been expected to have developed this evidence through due diligence', the motion does not specifically allege any new evidence or demonstrate how Defendant's attorney was unable to conduct discovery upon the witness Coleman. The court therefore denies relief upon Claims E, F, and G."

(R 330).

Appellant contends (1) that the Escambia County Sheriff's office asked that a hold be placed on Coleman on October 27, 1981 and that the hold **was** dropped shortly after Coleman spoke to the police about Clark's confession (R 547-548); (2) that Coleman **was** released on $2500 bond shortly after he spoke to police about Clark although being held in jail on an escape charge and jail records noted that he was an escape risk (R 549); and (3) a notation in Coleman's state attorney's office file indicated that Coleman helped prosecutor Nales in a murder trial (R 550).[13]

[13]It was Mr. Ober, not Mr. Nales, who prosecuted the Clark case.

From this Clark concludes that Coleman lied in his trial testimony that he had not been promised anything for his testimony and that the prosecutor knew about it and failed to correct it. Coleman testified at trial that pending charges had been dismissed by Judge Woods because of the lapse of time and speedy trial (OR 729-731). Coleman was cross-examined and testified that he originally had a public defender while in jail but was able to switch to a private attorney, Mr. Sims; that his 'escape" charge involved leaving a police car; that he was able to make bond about four weeks after informing police of the Clark conversations and that charges were dropped when "they got the records straight in Texas about the, my charges, where they wouldn't come and get me and extradite me. That is when Judge Woods dropped the charges" (OR 734). Coleman was arrested in Escambia county and Judge Woods dismissed the escape and grand larceny charges (OR 735). On redirect Coleman reiterated that prosecutor Ober did not promise to drop charges or reinstitute charges unless he testified (OR 766).

None of the factors argued by Clark demonstrate either that Coleman lied in his trial testimony or that the prosecutor was aware of such perjured testimony and refused to correct it;

rather Clark simply suggests by innuendo that he does not believe Coleman's testimony.

Clark contends that Coleman testified that he had been convicted three or four times when he in reality had been convicted of well over a dozen. At trial Coleman initially responded that he had three or four convictions but added immediately afterward that he did not know how many (OR 736). Trial attorney Unterberger testified that he had no recollection of receiving "rap sheets" from the prosecutor (R 492). Apparently the prosecutor -- even in 1995 -- did not have an FBI rap sheet on Coleman (R 538-539); obviously, the state cannot be held to have suborned perjury or failed to correct any erroneous information it did not have at the time.

Clark claims that Coleman testified that he was working in Texas in 1977 when he was actually in prison. Coleman's testimony was that after he had given police the information about Clark, which would have been in 1981 that "I had done my time in Texas. I had been out three **years"** (OR 734). Coleman's trial testimony that he was in Texas and not extradited (OR 730) and that he had been out three years (OR 734) at the time of the disposition of his Florida charges is consistent with the rap sheet recitation of **a** two-year sentence in Texas in 1977 (R 438).

Clark's allegation is meritless. And the rap sheet indicating an arrest -- not a conviction -- for aggravated assault (R 438) and a disposition of a sentence for credit card abuse does not render incorrect his testimony that he was not convicted for an act of violence (OR 765).[14]

To establish a Giglio violation, a defendant must demonstrate that the testimony was false, that the state knew the testimony was false, and that the false testimony was material, i.e., there was a reasonable likelihood that the false testimony could have affected the judgment of the jury. Routly v. Singletary, 33 F.3d 1279, 1286 (11th Cir. 1994); Phillips v. State, 608 so. 2d 778, 781 (Fla. 1992) (noting that ambiguous testimony does not constitute false testimony, rejecting as immaterial a witness's misstatement since it could have been corrected by the defense who was aware of it, and that incorrect statements as to their records would not have affected the judgment of the jury who was 'made aware that these witnesses were convicted felons" and admission of more would have added

[14]It is not clear what relevance a Pinellas County Sheriff's report prepared a month after Clark's trial has to any issue (R 551).

virtually nothing to further undermine their credibility); Routly v. State, 590 So. 2d 397 (Fla. 1991).

In the instant case Clark's pleadings, exhibits and proffer of trial counsel's deposition testimony do not demonstrate the need for an evidentiary hearing. Clark has failed to establish that Coleman lied, or that if he did that the prosecutor knew about it, or that it was material and could have affected the jury's conclusion.

B. INEFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE.

Clark's assertion that counsel did little preparation is erroneous. As the appellate record from Clark's direct appeal (Case No. 62,126) demonstrates, Mr. Unterberger filed a number of motions to have Florida Statute 921.141 declared unconstitutional, he filed two motions to dismiss the indictment, and a motion to suppress statement (OR 18-31, 109, FSC Case No. 62,126). Trial counsel participated in the depositions of relevant witnesses including Detective B.D. Fletcher who had interviewed victim Mr. Satey (OR 1087-1168) and Detective M.W. McAllister (OR 1179-1201). Other depositions in the file include those of Officer Vickers, Detective Reynolds, and Officer Penichet (OR 1257-1262). Unterberger's notes reflect that he

spent time reviewing depositions of various people (R 565-577). Mr. Unterberger deposed surviving victim Felix Satey, as his cross-examination of Mr. Satey makes clear (Respondent's Appendix 1).

Appellant mentions that counsel failed to discuss and to present available exculpatory evidence. Clark argues that counsel failed to do enough to challenge the accuracy of surviving victim Felix Satey's recollection. The appellate record on Clark's direct appeal (Fla. S.Ct. Case No. 62,126) reflects vigorous cross-examination of Mr. Satey (OR 807-838, 842-843) which included impeaching the witness from his deposition and challenging the witness's inability to make a positive photographic identification at the hospital.[15]

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[15]Appellee is submitting as an appendix herewith the entire cross-examination of Mr. Satey by trial counsel since appellant's appendix does not include its totality. The trial transcript reflects defense counsel's competent cross-examination challenging the identification testimony of witness Felix Satey (OR 807-838, 842-843, Reap. Ex. 1). Counsel explored with the witness possible inconsistencies in his pre-trial deposition (OR 816-826, 832-837). Satey explained that initially he could not make an identification because he did not have his glasses and the pictures were distorted so that he was not positive (OR 817-818), that he did not recall whether he had been given a sedative when awakened by police (OR 820), that he could have been confused the day of the deposition (OR 823), that he had made a tentative identification of Clark but could not be positive because he lacked glasses and the picture was distorted (OR 825), that at deposition he confused the names (OR 837).

Appellant criticizes trial counsel for failing to get hospital records concerning Satey's condition at the hospital but trial counsel was aware from Detective Fletcher's deposition and trial testimony that Satey was groggy (OR **1101,** OR 883, OR 887).

Clark asserts that a police report taken at the hospital after Satey arrived records that suspect #1 (purportedly Mr. Clark) was 'known to drive an old pickup truck" and he cites R 174. He further notes that in fact Clark drove a green sedan. A review of appellant's cite at R 174 reveals it to be notes of a police interview with witness Yocum which contains no description of a vehicle.[16] In any event witness testified regarding the presence of a green car, including **A-l** Decal store employee Marilyn Reinbolt (OR 465-468); Douglas Randolph Clark at the nearby Silver Dollar Bar (OR 531); Charles Rocker described Clark's car as a green Chrysler product (OR 543).

Clark also alludes to police reports at R 170, 183. On the first page the writer described the suspect as weighing 220-240 pounds, whereas Officer Vickers' report on the latter page states that Satey described him as 5'9" and 190 pounds. Vickers had

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[16]A police report by Officer Vickers at R 183 alludes to an old pickup truck but does not identify who so described it and adds that the complainant (presumably Satey) could not describe the truck.

testified in a pre-trial deposition that Mr. Satey was in a great deal of pain and he didn't talk to him very long (OR 1231). Irrespective of whether there is a slight discrepancy between what Vickers wrote and another officer's report, trial counsel acted adequately as an advocate in his cross-examination and challenge to Satey's identification.

Appellant criticizes the trial court for failing to conduct an evidentiary hearing on the ineffective counsel at guilt phase claim. Clark filed a motion for order to perpetuate testimony of trial counsel Simson Unterberger who was living in Colorado, arguing that his testimony was "material and necessary" (R 254-255). The trial court granted the motion (R 263). Unterberger was deposed on August 17, 1995 and his deposition was submitted as a defense proffer with the state's concurrent stipulation to the trial court on October 16, 1995. Curiously, although Clark argued that Unterberger's testimony was material and necessary when given the singular opportunity Clark's current counsel chose not to examine Mr. Unterberger regarding his cross-examination of Mr. Satey or other identification of the perpetrator matters. Since appellant chose not to seek an explanation on these matters and since Unterberger's testimony was submitted to and considered by the trial court, appellee would respectfully submit that Clark

has had his evidentiary hearing on the ineffectiveness of trial counsel at guilt phase issue and appellant's claim that he is entitled to more is meritless.

Appellant criticizes trial counsel with a footnote observation that he did not move to suppress a maroon jacket until the jury had seen and heard about it. The trial court granted defense counsel's request that the jacket should be excluded since it had not been shown to the defense prior to trial (OR 910). And on Clark's direct appeal this Court stated:

> "[3, 4] The second claimed error concerns the denial of a motion for mistrial when, during its deliberations, the jury requested that it be allowed to look at a windbreaker, allegedly belonging to the co-defendant James. The jacket had been excluded from evidence because it had not been exhibited to defense counsel prior to trial. Although the trial court denied the motion for mistrial, it acceded to the defense request that the jury be instructed that its members not concern themselves with the jacket because it had not been admitted into evidence. The court further instructed the jury that it should not draw any inferences from anything said about the jacket, nor should it speculate as to why the jacket was not in evidence. Clark speculates that the excluded jacket must have assumed a particular significance in the minds of the jury. Whatever prejudice may have been caused Clark by the jurors' interest in the jacket was cured by the trial court's response to their request to view it. In any event the jury's request does not demonstrate

> the sort of prejudicial impact which would make a mistrial an absolute necessity."

(443 so. 2d at 976). The trial court correctly concluded that no evidentiary hearing was required (R 330-331). Counsel's total performance was not deficient and appellant has failed to demonstrate that counsel's inactions resulted in prejudice.

Finally, Mr. Clark's observation at footnote 42 that he seeks to appeal the trial court's ruling on a number of other issues is insufficient. See Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990) ("Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to be waived."); Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990).

CONCLUSION

Based on the foregoing arguments and authorities, the lower court's order denying relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Patrick D. Doherty, 619 Turner Street, Clearwater, Florida 34616; and Richard G. Parker, O'MELVENY & MYERS LLP, 555 13th Street, N.W., Suite 500 West, Washington, D.C. 20004-1109, this 27th day of September, 1996.

COUNSEL FOR **APPELLEE**

IN THE SUPREME COURT OF FLORIDA

LARRY CLARK,

Appellant,

v. CASE NO. 86,836

STATE OF FLORIDA,

Appellee,

APPENDIX TO

ANSWER BRIEF OF THE APPELLEE

(TRIAL RECORD EXCERPT)

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