IN THE SUPREME COURT OF FLORIDA

VIRGINIA LARZELERE,
Petitioner, **Case No. SC06-148**

v.

STATE OF FLORIDA,
Respondent,
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

RESPONSE TO PRELIMINARY STATEMENT

To the extent that the "Preliminary Statement" set out on page 1 of Larzelere's petition claims that the petition contains "substantial claims" which are a basis for relief, that statement is argumentative and is denied.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The Respondents recognize that oral argument is routinely granted in death penalty cases. However, the issues contained in Larzelere's petition are not complex, and are limited in scope. The Respondents defer to the judgment of the Court.

RESPONSE TO INTRODUCTION

The "Introduction" set out on page 2 of the petition is argumentative and is denied.

RESPONSE TO STATEMENT OF THE CASE AND FACTS

The "Statement of the Case and Facts" contained in the petition is argumentative and misleading and is denied in all

respects. The Respondents rely on the following facts, which are taken from this Court's decision on direct appeal:

> The appellant was married to Norman Larzelere (the victim), a dentist, and she worked as the office manager for his dentistry practice. On March 8, 1991, at approximately one o'clock in the afternoon, a masked gunman came into the victim's dental office, chased the victim, shot him with a shotgun, and fled. The victim died within a short time after being shot. At the time of the shooting, a dental assistant, a patient, and the appellant were in the office.
>
> The appellant and her adult son, Jason Larzelere, [FN1] were charged with the victim's murder. The State's theory was that the appellant and Jason conspired to kill the victim to obtain approximately $2 million in life insurance and $1 million in assets. Jason and the appellant were tried separately. The appellant was tried first.
>
> > [FN1] Jason Larzelere was adopted by the victim after he and the appellant were married.
>
> The State presented the following evidence at the appellant's trial. Two men testified that they had affairs with the appellant during her marriage to the victim and that the appellant asked them to help her have her husband killed. Two other witnesses, Kristen Palmieri and Steven Heidle, were given immunity and testified to a number of incriminating actions and statements made by the appellant and Jason regarding the murder. Specifically, their statements reflected that the night before the murder the appellant sent Jason to a storage unit to pick up documents, which included the victim's will and life insurance policies; that the appellant told Jason after the murder, "Don't worry, you'll get your $200,000 for taking care of business"; that the appellant told both witnesses that Jason was the gunman and that he "screwed up . . . he was supposed to be there at 12:30, but he was a half hour late, so [the dental assistant] and a patient were there. That's why I had to fake a robbery."; that the appellant directed the two witnesses to dispose of a shotgun and a .45

handgun by having them encase the guns in concrete and dump them into a creek; and, that, in the days following the murder, Jason and the appellant reenacted the murder, with Jason playing the role of the gunman and the appellant playing the role of the victim. With Heidle's assistance, police recovered the guns from the creek but were unable to conclusively determine whether the shotgun was the murder weapon.

Additional testimony reflected that the appellant gave several conflicting versions of the murder to police, with differing descriptions of the gunman and the vehicle in which he left. The patient who was present at the time of the murder heard the victim call out just after he was shot, "Jason, is that you?"

It was further established that over the six-year period preceding the murder, the appellant obtained seven different life insurance policies on the victim and that within the six months preceding his death, the appellant doubled the total amount payable on his life from over $1 million to over $2 million. Although the victim assisted in obtaining these policies, it was shown that the appellant was the dominant motivator in securing the policies. In addition, evidence was introduced to show that the appellant gave false information and made false statements to obtain the policies (in securing the policies she falsely represented to several insurance agents that pre-existing policies had been cancelled, did not exist, or were being replaced by the new policy). Further, soon after the victim's death, the appellant filed a fraudulent will, which left the victim's entire estate to the appellant. The fraudulent will was prepared on the same date one of the largest insurance policies on the victim's life became effective.

In her defense, the appellant presented evidence in an attempt to show that her inconsistent versions of the murder were due to her state of mind due to the distress of having just lost her husband; that the victim assisted in obtaining all of the insurance policies; that the appellant's lovers did not think she was serious about having her husband killed; that Heidle and Palmieri were not believable and perjured themselves; and that Heidle and Palmieri were unable

> to obtain incriminating statements from the appellant after they had been requested to do so by police.
>
> The jury found the appellant guilty as charged.
>
> No evidence was presented by either side at the penalty phase proceeding. The jury recommended death by a seven-to-five vote. In his sentencing order, the trial judge found the following two factors in aggravation: cold, calculated, and premeditated and committed for financial gain. He found no statutory mitigating factors, but he did find the following nonstatutory mitigating factors: ability to adjust and conform to imprisonment (marginal weight); and the appellant was not the shooter (insignificant weight due to fact that appellant was the mastermind behind the killing). Finding that the two aggravating factors outweighed the relatively minor mitigating evidence, the trial judge sentenced the appellant to death.
>
> Following the appellant's trial, Jason was tried and acquitted of all charges.

Larzelere v. State, 676 So. 2d 394, 398-399 (Fla. 1996).

The "Facts from the Evidentiary Hearing and Postconviction Proceedings" set out on pages 6-11 of the petition are argumentative and are denied. In any event, the purpose of a state habeas corpus petition is to address claims of ineffectiveness of appellate counsel -- the facts from the evidentiary hearing have nothing to do with that claim, and are irrelevant to the issue before this Court.

RESPONSE TO JURISDICTIONAL STATEMENT

The jurisdictional statement set out on pages 11-12 of the petition correctly states that the Court has jurisdiction to entertain this petition. To the extent that the jurisdictional

statement claims that Larzelere is entitled to relief, the statement is argumentative and is denied.

RESPONSE TO GROUNDS FOR RELIEF

I. THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM.

On pages 12-32 of the petition, Larzelere claims that she is entitled to relief because "appellate counsel failed to raise on appeal meritorious issues." *Petition*, at 12. The petition contains only **one** claim of appellate ineffectiveness -- that appellate counsel should have raised a claim that the State "unconstitutionally amended the indictment" through the jury instructions. To the extent that this portion of the petition contains claims other than the appellate ineffectiveness claim, such claims are not available to Larzelere.[1] No substantive claims are available, and Larzelere can only obtain relief if she can carry her two-part burden under *Strickland v. Washington*, 466 U.S. 668 (1984).[2] For the reasons set out below,

[1] Much of the petition is devoted to criticism of the circuit court's denial of relief on this claim as it was raised in the Rule 3.850 proceeding. Those findings are not before this Court, and it is presumptuous to suggest, as Larzelere does, that the alternative merits ruling of the Circuit Court can be reviewed both on appeal from the denial of Rule 3.850 relief, and in a state habeas corpus petition. *Knight v. State/Crosby*, 923 So. 2d 387 (Fla. 2005).

[2] The law is well-settled that the *Strickland* standard is in two parts. To prevail, the defendant must demonstrate not only deficient performance, but also resulting prejudice. *Nixon v.*

Larzelere can demonstrate neither deficient performance nor prejudice.

The purpose of the rule requiring that the indictment comport with the proof at trial is:

> A material variance between the name alleged, and that proved, is fatal. Primarily, it is a question of identity and the essential thing in the requirement of correspondence between the allegation of the name in the indictment and the proof is that **the record must be such as to inform the defendant of the charge against him and to protect him against another prosecution for the same offense.**
>
> It is general knowledge, and we take judicial notice of the fact that a person named "Michael" is generally referred to as "Mike." We hold that the proof of the identity of the deceased was established beyond a reasonable doubt. The defendant could not have been embarrassed in the preparation of his defense, and the identity of the victim as alleged in the indictment with the person who was shot by the defendant is clearly shown by the record. This protects the accused against another prosecution for the same offense.

Raulerson v. State, 358 So. 2d 826, 830 (Fla. 1978). (emphasis added). Larzelere cannot be prosecuted for a different offense arising out of the murder of her husband, nor can she reasonably assert that she did not know the offense with which she was charged.

The indictment in this case reads, in pertinent part, as follows:

> VIRGINIA GAIL LARZELERE and JASON ERIC LARZELERE did, on the 8th day of March, 1991, in Volusia County,

---

State/McDonough, 31 Fla. L. Weekly S245, 249 (Fla. Apr. 20, 2006).

> Florida, in violation of *Florida Statute* 782.04, from a premeditated design to effect the death of NORMAN LARZELERE, murder NORMAN LARZELERE in the County and State aforesaid, by shooting him with a firearm.

(R2915).[3] The indictment is certainly sufficient to allege liability as a principal, and the claims to the contrary are based on a misreading of the indictment. Larzelere's argument, as understood by the State, is that because a limited instruction on conspiracy was given in the course of defining the law of principals and the admissibility of a co-conspirator's statement (which Larzelere herself requested), there was either a fatal variance from, or a constructive amendment to, the indictment. The record demonstrates that Larzelere **requested** a part of the standard jury instruction on conspiracy and co-conspirator's statements (R5718, 5874), and that the trial court gave the standard accomplice (principal) instruction. (R5739). The trial court has wide latitude in instructing the jury, and, in this case, the instructions about which Larzelere complains were necessary to fully explain the legal principles that the jury was called upon to decide. The evidence at trial clearly showed that one or more persons in addition to Larzelere were involved in the murder of the victim, and, because that is so, there can be no error from the giving

[3] Jason Larzelere was tried separately and acquitted.

of the principal instruction.[4] *Martin v. State*, 218 So. 2d 195, 196 (Fla. 3rd DCA 1969) ("In view of the showing at trial that others were involved, the trial court did not commit error in charging the jury regarding aiding and abetting, under § 776.011 *Fla. Stat*., F.S.A.").[5] Further, given that Larzelere requested that conspiracy instruction, it is disingenuous for her to now complain that she received what she requested.[6]

Moreover, there is no question but that the jury was necessarily instructed on the rule governing the admissibility of a co-conspirator's statement -- that was at Larzelere's request, and she cannot complain about it.[7] (R5876). It makes no sense to suggest, as Larzelere now does, that the jury should be given explicit instructions concerning the admissibility of a "co-conspirator's" statement, but be left to wonder what a

---

[4] Larzelere confuses conspiracy with principal liability -- it is disingenuous to ask for a partial instruction (as Larzelere did), and then complain when the trial judge gave a complete instruction that was not confusing.

[5] *State v. Dene*, 533 So. 2d 265, 266 (Fla. 1988), discusses the evolution of accomplice liability law in Florida.

[6] The instructions did not allow Larzelere to be convicted of conspiracy. The jury was "correctly and intelligently instructed." *See, Petition*, at 30.

[7] The mere use of the word "conspiracy" does not transform the prosecution into one for an inchoate crime. *See, Brooks v. State*, 918 So. 2d 181 (Fla. 2005); *Gamble v. State*, 659 So. 2d 242, 245 (Fla. 1995); *Gordon v. State*, 704 So. 2d 107, 117-18 (Fla. 1997).

"conspiracy" is in the first place.[8] When stripped of its pretensions, Larzelere's strained argument has no basis in the law, and is not a basis for relief.

To the extent that further discussion is necessary, *State v. Roby*, 246 So. 2d 566, 571 (Fla. 1971), establishes that this claim is meritless. The law is clear that the indictment for premeditated murder included liability as a principal -- Larzelere's efforts to construct an error, while creative, have no basis in law, and are not a basis for reversal. The denial of guilt stage relief should be affirmed.

Because the jury was properly instructed, and because there was no "constructive amendment" or "fatal variance," appellate counsel's performance was not deficient. Because there was no error, Larzelere suffered no *Strickland* prejudice, and there is no basis for relief. The petition should be denied.

II. THE "CUMULATIVE ERROR" CLAIM

On pages 32-33 of the petition, Larzelere argues that "cumulative error" entitles her to relief. However, none of those claimed errors are identified other than by reference to the direct appeal and post-conviction litigation. Of course, habeas is not a substitute for a direct appeal, nor is habeas a mechanism for the defendant to present duplicative claims that

[8] The *Standard Jury Instruction* on accomplice liability in effect at the time of the 1992 trial when the "active participant was hired by defendant" made use of the word "co-conspirator."

are properly litigated in a *Florida Rule of Criminal Procedure* 3.851 motion. *Morris v. State/McDonough*, 31 Fla. L. Weekly S250, 255 n.14 (Fla. Apr. 20, 2006); *Smith v. State/McDonough*, 31 Fla. L. Weekly S159, 163 (Fla. Mar. 9, 2006); *Knight v. State/Crosby*, 923 So. 2d 387, 395 (Fla. 2005). The "cumulative error" claim does not comply with the procedural requirements of Florida law, and should be denied on those grounds alone.

Alternatively and secondarily, the "cumulative error" claim is insufficiently briefed to present a claim for this Court's consideration. The law is settled that a bare assertion of error that is unsupported by citation to any authority is not sufficient to present an issue for review. *Simmons v. State*, 2006 Fla. LEXIS 813 n.13 (Fla., May 11, 2006) ("The State correctly points out in its brief that Simmons' counsel adopts arguments made in the court below in her initial brief to this Court. This practice does not preserve an issue for review by an appellate court. *See Duest*, 555 So. 2d at 852 (stating that claims are deemed waived if a party merely makes reference to arguments made in a lower court).)"; *Lawrence v. State/Moore*, 831 So. 2d 121, 133 (Fla. 2002); *Duest v Dugger*, 555 So. 2d 849, 852 (Fla. 1990)("the purpose of an appellate brief is to present arguments in support of the points on appeal"). This "claim"

presents no issue for consideration, and should be denied on that basis.[9]

Finally, while specific claims of error cannot be identified, it appears that there are no errors which can be aggregated to supply a basis for reversal.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court deny habeas corpus relief.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **David Hendry,** CCRC – Middle**,** **Richard Kiley,** CCRC – Middle, and **April Kiley,** CCRC – Middle, Capital Collateral Regional Counsel – Middle 3801 Corporex Park

[9] As written, this claim seems to attack Larzelere's death sentence as well as her conviction. That makes no sense, since the death sentence was set aside.

Dr., Suite 210, Tampa, Florida 33619, on this ____ day of May, 2006.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL