IN THE SUPREME COURT OF FLORIDA

KENNETH HARTLEY,

Appellant,

v. CASE NO. SC04-1387

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

BILL MCCOLLUM
ATTORNEY GENERAL

MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
Tallahassee, Florida
(850) 414-3300, Ext. 3583
(850) 487-0997 (Fax)

COUNSEL FOR APPELLEE

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I. PRELIMINARY STATEMENT

Appellant, KENNETH HARTLEY raises three issues in this appeal from the denial of his amended motion for post-conviction relief. References to the appellant will be to "Hartley" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The seventeen-volume record on appeal will be referenced as "PCR" followed by the appropriate volume and page number. The seventy-two volume record of trial proceedings will be referenced as "TR" followed by the appropriate volume number and page number. References to Hartley's initial brief will be to "IB" followed by the appropriate page number.

II. STATEMENT OF THE CASE AND FACTS

In April 1991, Kenneth Hartley, along with Ronnie Ferrell and Sylvester Johnson, murdered seventeen-year-old Gino Mayhew. The three men were tried separately. All three were convicted of first-degree murder, robbery, and kidnapping. Hartley and Ferrell were sentenced to death while Johnson was sentenced to life in prison. At trial, Hartley was represented by attorney Robert Stuart Willis. Mr. Willis was admitted to the bar in 1972, is board certified in criminal law, and is AV rated by Martindale-Hubbell.

The relevant facts concerning Gino Mayhew's murder are recited in the Florida Supreme Court's opinion on direct appeal:

> …Sidney Jones worked for the victim in the victim's crack cocaine business. He testified to the following information. On April 22, 1991, the victim was selling crack from his Chevrolet Blazer at an apartment complex. On that date, Jones saw the three codefendants together near the Blazer. He saw Hartley holding a gun to the victim's head and saw him force the victim into the driver's seat. Hartley climbed into the back seat behind the victim. Ferrell climbed into the front, passenger seat. Johnson was outside the Blazer talking to Hartley. After Hartley, Ferrell, and the victim entered the Blazer, Jones saw it leave the apartment complex at a high speed and heard Ferrell shout out of the Blazer that the victim would "be back." Johnson followed soon afterward in a truck. Another witness confirmed that the victim, Ferrell, and another individual, whom the witness was unable to positively identify, left the apartment complex together in the victim's Blazer at a high rate of speed.

On April 23, police found the victim's Blazer parked in a field behind an elementary school. The victim's body was slumped over in the driver's side seat of the Blazer. The victim had died as a result of bullet wounds to the head (he had been shot five times: one shot into his forehead, three shots into the back of his head, and one shot into his shoulder).

Several weeks after the victim was found, Jones told police what he had seen on April 22, and Ferrell, Hartley, and Johnson were arrested for the victim's murder. Hartley told police that he did not know the victim but told several other witnesses that he had robbed the victim two days before the murder. Specifically, he told one witness that "the only reason they [are] saying that [I killed the victim] is because I robbed him two days before he was killed." Hartley later told the witness (who at the time of the second statement was Hartley's cellmate) that the plan was Sylvester Johnson's; that they originally planned to rob some "dreads" but then decided to "get [the victim]," i.e., rob and murder the victim; that they forced the victim to drive to the elementary school; that Johnson drove the getaway vehicle; that "I left my trade mark, left no witnesses"; and that his trademark was to "shoot the person in the head leaving no witnesses." He also told the witness that Ferrell and Johnson acted so nervous that he considered shooting them and that he would "get off" because everyone was too scared to testify. A number of the details provided by this witness were never released to the public.

Additionally, Hartley told another cellmate that he was not involved in the murder but that he had robbed the victim a few days before the murder. He later admitted to the cellmate that he had robbed and murdered the victim and provided numerous details of the crime very similar to those provided by the previous witness. Another witness testified that he heard Hartley state: "I think I really fucked up this time by doing this with that motherfucker Ferrell. I think he's going to turn on me and testify against me when he's just as guilty in doing this as I am."

Hartley v. State, 686 So.2d 1316 (Fla. 1996).

Hartley presented no witnesses at the guilt phase of the trial. After the defense rested its case, the court inquired of Mr. Hartley about his right to testify as well as his desire to present witnesses on his behalf. The following colloquy ensued:

> ***COURT***: Mr. Hartley, your attorney, Mr. Willis, has announced that he's rested his case in chief and that he will put on no evidence or testimony and of course I assume he's told you that you have the right to testify and that some of the questions would be asked of you, if you do testify and that if you do testify some of the questions the State would ask you if you've ever been convicted of a felony, if so how many times and so on. And he having made that announcement is that your desire to close your case in chief at this time.
>
> ***HARTLEY***: Yes, Sir.
>
> ***COURT***: And put on no further testimony, either witnesses or yourself.
>
> ***HARTLEY***: Yes, Sir.

(TR. Vol. LXIX 2285).

At the penalty phase, Hartley put on two witnesses to testify on his behalf. Just after Hartley presented the testimony of his last witness, trial counsel announced he had no further witnesses to present. The prosecutor asked the trial judge to inquire as to the defense's failure to present any psychiatric testimony during the penalty phase. Trial

counsel informed the court that he and Hartley had discussed the matter on several occasions and had decided, with "deliberate exercised judgment" not to put on mental mitigation evidence. (TR. Vol. LXX 2554-2555).

After hearing the evidence, arguments of counsel, and the trial court's instructions, the jury returned a recommended sentence of death by a vote of nine-to-three. The trial judge found six aggravating circumstances: (1) Hartley had previously been convicted of a prior violent felony, specifically a 1986 manslaughter conviction for killing a fifteen year-old girl with a shotgun, and two separate 1991 convictions for armed robbery; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed to prevent a lawful arrest; (4) the murder was committed for pecuniary gain; (5) the murder was particularly heinous, atrocious, or cruel (HAC), and (6) the murder was cold, calculated, and premeditated (CCP). The court found minimal mitigation. The trial judge followed the jury's recommendation and sentenced Hartley to death for the first degree murder of Gino Mayhew. The trial judge also sentenced Hartley to consecutive sentences for robbery and kidnapping (fifteen years and life in prison, respectively). Hartley, at 1319.

On direct appeal, Hartley raised eleven issues. Among them was an allegation that the trial judge erroneously found the murder to be especially heinous, atrocious, or cruel (HAC). This Court agreed with Hartley and ruled it was error for the trial judge to find Mayhew's "execution style killing" was HAC. Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1996). This Court found the error to be harmless beyond a reasonable doubt in light of the remaining five valid aggravators and the minimal mitigation. This Court unanimously affirmed Hartley's convictions and sentence to death. Hartley v. State, 686 So.2d at 1324. Hartley next filed a Petition for Writ of Certiorari to the United States Supreme Court. In Hartley v. Florida, 522 U.S. 825 (1997), the United States Supreme Court denied review.

On September 16, 1998, Capital Collateral Regional Counsel-North filed, on Hartley's behalf, a shell 3.850 motion for post-conviction relief raising thirty-three (33) claims. (PCR Vol. I 1-42). On or about September 18, 1998, Mr. Jefferson Morrow undertook to represent Hartley in his post-conviction proceedings.

On October 1, 1998, Mr. Morrow filed another shell motion, on Hartley's behalf, raising one claim of ineffective assistance of counsel at both phases of Hartley's capital

trial. (PCR Vol. I 43-48). No reference was made to the shell motion filed just two weeks before and Hartley made no specific allegations of deficient performance against trial counsel. Instead, Hartley simply claimed he was denied effective assistance of counsel at both phases of his capital trial when trial counsel failed to "insure an adversarial testing and a reliable outcome." The second shell motion was not sworn to in accord with Rule 3.850(c), Florida Rules of Criminal Procedure. A second, apparently identical copy of the motion was filed on November 9, 1998. (PCR Vol. I 49-54). This motion contained the requisite oath. (PCR Vol. I 55).

On April 15, 2000, Hartley filed a motion for appointment of a psychologist, Dr. Harry Krop, to evaluate Hartley during the post-conviction proceedings. (PCR Vol. I 71). Hartley never called the motion up for a hearing or requested a ruling on the motion.

Almost two years later, on February 2, 2002, Mr. Morrow filed, on Mr. Hartley's behalf, an amended Rule 3.851 motion for post-conviction relief raising thirty claims. (PCR Vol. I 87-176).[1] The State filed a response to this motion on April 8, 2002. (PCR Vol. I 178).[2] A case management conference was

[1] A duplicate copy of this motion was filed on April 11, 2002. (PCR Vol. I 179 to PCR Vol. II 201-270).

[2] For some reason, the pages of the State's response were

held on April 11, 2002. During the April 11, 2002 hearing, there were some preliminary discussions on the necessity for an evidentiary hearing on each of Hartley's claims. (PCR Vol. XIV 2452-2471).

Particularly at issue were Claims V and XI of Hartley's amended motion for post-conviction relief. The State averred the claims were insufficiently pled. Mr. Morrow agreed the claims were not sufficiently pled. Mr. Morrow explained this was the case because, at the time he filed the motion, he had not yet received some of the transcripts required to present a legally sufficient claim. (PCR Vol. XIV 2462). Mr. Morrow requested, without objection from the State, that he be granted an additional two weeks to file an addendum to those two claims. (PCR Vol. XIV 2462).

On April 29, 2002, Hartley filed an addendum to Claims V and XI. In the addendum, Hartley claimed trial counsel was ineffective for failing to investigate and then present evidence regarding the allegedly improper use of informants, including Sidney Jones. Hartley also alleged that trial counsel was ineffective in his investigation and presentation of evidence regarding the testimony of certain jailhouse informants. (PCR Vol. II 272-273). As to Claim XI, Hartley

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not numbered sequentially in the record but are listed in Volume I of the post-conviction record as page 178 through 178

claimed trial counsel was ineffective for failing to call Hartley's brother, football star Shawn Jefferson, during the penalty phase of Hartley's capital trial. (PCR Vol. II 273-274).

Finally, Hartley requested additional time to "develop the reputation of George Bateh in obtaining jail house confessions in order to bolster a murder case." (PCR Vol. II 274). Hartley alleged that "if" his reputation was "substantial", trial counsel was ineffective for failing to exploit this evidence at trial.

On May 14, 2002, Hartley filed "additional allegations regarding Issue Five and Jailhouse confessions." In his motion, Hartley alleged it is improper to use jailhouse informants at trial.[3] (PCR Vol. II 399-401). On May 15, 2002, the Court denied this motion. (PCR Vol. III 399).

On May 17, 2002, the court entered an order granting an evidentiary hearing on three of Hartley's claims, specifically: (1) trial counsel was ineffective for failing to call the "star witnesses" during the penalty phase of the trial (Claim XI); (2) counsel was ineffective for failing to prepare for the penalty phase of the trial and subpoena

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AA.

[3] Two additional hearings on May 7, 2002, and May 15, 2002, were held in which the final issues for evidentiary hearing were resolved. (PCR Vol. XIV 2472-2489).

"crucial penalty phase" witnesses (Claim XXI); and (3) trial counsel was ineffective for failing to "adequately employ the services of an available mental health expert." (Claim XXII). The court reserved ruling on Hartley's remaining claims. (PCR Vol. III 404-405).

On July 17, 2002, Hartley filed a motion to declare Florida's capital sentencing procedure unconstitutional in light of the United States Supreme Court's decision in Ring v. Arizona. (PCR Vol. III 414. On July 26, 2002, the State filed a response to Hartley's Ring claim. (PCR Vol. III 426-438).

On September 27, 2002, an evidentiary hearing was conducted on Hartley's amended motion. On October 1, 2002, Hartley filed an unsworn emergency motion titled "Emergency Motion Alleging Additional Grounds and Additional Witnesses for 3.851." (PCR Vol. V 961). In the motion, Hartley alleged that an unnamed witness had surfaced who was prepared to testify that unidentified State witnesses admitted to him that they presented perjured testimony at trial and actually did not even know Kenneth Hartley. (PCR Vol. V 961). The witness was later identified as James Patrick Johnson. (PCR Vol. XVII 2729). Hartley never formally amended his motion for post-conviction relief to add a legally sufficient claim of newly discovered evidence.

On November 25, 2002, a status hearing was held in this case. Mr. Morrow advised the collateral court it could now rule on Hartley's amended motion for post-conviction relief. Mr. Morrow told the court that Mr. Johnson refused to talk with him and that, as such, the defense would not call him at the evidentiary hearing. Mr. Morrow reiterated he did not intend to call him as a witness and would not subpoena him to attend the evidentiary hearing. Upon inquiry from the collateral court judge, Mr. Morrow noted he had not had a chance to talk with Mr. Hartley about Mr. Johnson's refusal to cooperate. The collateral court requested Mr. Morrow obtain a waiver from his client as to that witness. (PCR Vol. XVII 2731). The case was passed till January 17, 2003. (PCR Vol. XVII 2733).

Subsequently, on January 17, 2003, the court reconvened the evidentiary hearing. Mr. Morrow announced that one witness, James Johnson, would be called to testify. The court inquired whether there would be any additional witnesses called. Mr. Morrow replied he had no other witnesses for the hearing. (PCR Vol. XVII 2740). Mr. Johnson testified on Hartley's behalf. Once again, Hartley did not move to supplement his amended motion for post-conviction relief to add a claim of newly discovered evidence to conform to the

testimony presented by Mr. Johnson. Likewise, Hartley did not move to add a claim the State committed a Giglio violation in presenting the testimony of State witnesses Ronald Bronner and Eric Brooks.

At the conclusion of the hearing on January 17, 2003, collateral counsel asked that Mr. Hartley be allowed to address the court. Counsel told the court that Mr. Hartley wanted to call more witnesses. The collateral court informed Hartley if he had more witnesses he wanted to bring forward, he could do that. (PCR Vol. XII 2198).

Mr. Morrow advised the collateral court his client wanted him to bring additional witnesses to support a claim that Ronald Bronner and Eric Brooks testified falsely at Hartley's trial. Mr. Morrow told the court these witnesses included Bronner and Brooks and their unidentified family members who could testify as to their knowledge of the perjury. (PCR Vol. XII 2199). Mr. Morrow told the court he was in the process of attempting to locate Bronner and Brooks in order to present their testimony. (PCR Vol. XVII 2797). Mr. Morrow requested additional time to locate the witnesses. (PCR Vol. XVII 2797).

Hartley told the court he also wanted a witness by the name of "Stag" called. Collateral counsel did not know who

"Stag" was and Hartley never identified him. (PCR Vol. XII 2199).

Hartley also told the court that, in addition to Bronner and Brooks, he wanted even more witnesses called. (PCR Vol. XVII 2798). When the collateral court pressed Hartley to reveal the names of the witnesses he wanted collateral counsel to present, Hartley informed the court he did not know any of these witnesses' proper names. Hartley claimed he only knew them by their "nickname." (PCR Vol. XIII 2201).

Eventually, Hartley identified these witnesses as "Tina, Bruce, and Rock. Hartley said he wanted Tina called because "I was not there." (PCR Vol. XIII 2203). Hartley claimed that at the time of the murder, he was with "Brucie" and "Tightman" and they went over to Tina's house and he was with a girl named "Sookie." (PCR Vol. XIII 2203). The trial court continued the evidentiary hearing until February 7, 2003, to allow collateral counsel to investigate and present any additional witnesses. (PCR Vol. XIII 2208).

However, on January 22, 2003, Mr. Morrow moved to withdraw from Hartley's case, citing to an unidentified conflict of interest. (PCR Vol. V 979). A hearing was held on the motion on February 14, 2003. The State opposed the motion and urged the court not to allow Mr. Morrow to withdraw so

late in the proceedings. (PCR Vol. XVII 2816). Hartley told the court that if he permitted Mr. Morrow to withdraw, he wanted another attorney appointed to represent him. Hartley told the court he did not have the funds to hire counsel. (PCR Vol. XVII 2821).

On February 21, 2003, the Chief Judge of the Fourth Judicial Circuit held an *in camera* hearing on Mr. Morrow's motion to withdraw. The defendant and Mr. Morrow were present. The State was not present. Hartley told the court he wanted Mr. Morrow off the case. (PCR Vol. XVII 2857). On April 3, 2003, the Chief Judge granted Mr. Morrow's motion to withdraw. (PCR Vol. V 990).

On April 23, 2003, the collateral court appointed Mr. Dale Westling to represent Hartley. (PCR Vol. V 992). Hartley objected to Mr. Westling's appointment, citing to, among other things, the fact that Mr. Westling, upon assuming the case, discussed Mr. Hartley's case with Mr. Morrow. Hartley alleged, in strong terms, that such conduct was improper. (PCR Vol. VI 1007-1009).

On July 1, 2003, Mr. Kenneth Malnik, on behalf of Mr. Hartley, requested he be permitted to represent Hartley in this case. (PCR Vol. XIII 2213). On July 21, 2003, a hearing

was held on Mr. Malnik's motion. Hartley was present. (PCR Vol. XVII 2830).

At that hearing, Hartley informed the collateral court he wanted Mr. Malnik to represent him. Mr. Malnik agreed to represent Hartley. (PCR Vol. XVII 2834).

Mr. Malnik requested an opportunity to file an amended motion. The State objected to any amendment on the grounds that Hartley's motion for post-conviction relief had been amended many times and the evidentiary hearing had already been conducted to completion. (PCR Vol. XVII 2832, 2834). Over the State's objection, the court granted Mr. Malnik an opportunity to file a claim for "any issue he thinks should be filed." (PCR Vol. XVII 2835). The Court gave Mr. Malnik thirty days in which to file any new claim. (PCR Vol. XVII 2836).

On October 20, 2003, Mr. Malnik filed a motion entitled "Motion for Amended Claim." No amended claim was presented, however. Instead, Mr. Malnik averred that Hartley had not been evaluated by a psychologist during post-conviction proceedings. He requested appointment of a psychologist to evaluate Hartley. As grounds for the motion, counsel alleged only that "Mr. Hartley was physically assaulted as a teenager

and appeared to be traumatized from the incident." (PCR Vol. XIII 2223).

On November 21, 2003, Hartley, through counsel Kenneth Malnik, filed a supplement to the amended Rule 3.850 motion. (PCR Vol. XIII 2227-2228). In this motion, Hartley alleged that trial counsel was ineffective for failing to investigate an alibi. Hartley also alleged trial counsel was ineffective for failing to present evidence that Hartley, while awaiting trial, stopped an unnamed fellow inmate from hanging himself and performed CPR on the inmate. (PCR Vol. XIII 2227). Finally, Hartley alleged he had been unable to obtain necessary records from predecessor collateral counsel. (PCR Vol. XIII 2227-2228). Once again, Hartley did not add either a legally sufficient claim of newly discovered evidence or a Giglio claim based on Johnson's testimony. (PCR Vol. XIII 2226-2229).

On December 5, 2003, the State filed a response to Hartley's new claims and on December 16, 2003, filed a supplemental response. (PCR Vol. XIII 2230-2235). The Court did not grant an evidentiary hearing on the supplemental claims.

With a view toward issuing an order on Hartley's amended and supplemented motion for post-conviction relief, the

collateral court granted each side an opportunity to submit written closing arguments. In his written closing argument, Hartley argued that newly discovered evidence, in the guise of James Johnson's testimony, entitled him to a new trial.[4] The State filed a reply to Hartley's closing argument. (PCR Vol. XIII 2321-2328).

After the written arguments were submitted, the collateral court granted the parties an opportunity to present oral closing arguments. Mr. Hartley requested, and was permitted, to address the court as part of the closing arguments.[5] For the most part, Hartley simply complained about previous collateral counsel's investigation and presentation of evidence at the evidentiary hearing. (PCR Vol. XIII 2368-2393).

On June 10, 2004, the collateral court denied Hartley's amended motion for post-conviction relief. (PCR Vol. VIII 1495 *et. Seq*.). In its order, the collateral court made no

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[4] Hartley did not include his closing argument in the record on appeal.

[5] In his initial brief, and without any citation to the record, Hartley alleges that the court struck Mr. Hartley's closing arguments. However, there is nothing in the record to support an assertion that the collateral court "struck" Hartley's closing argument. Rather, it appears the court considered it as part of the closing arguments of the parties. Hartley never asked to put on additional evidence at the closing argument hearing and he, like counsel for both sides, was not sworn.

ruling on Hartley's purported claim of newly discovered evidence. The court did rule on each of Hartley's other claims, including the three supplemental claims raised by Mr. Malnik and Mr. Malnik's motion for appointment of a psychologist. (PCR Vol. VIII 1517-1520).

Hartley filed a motion for rehearing on June 25, 2004. (PCR Vol. XIII 2331-2338). Hartley did not complain that the collateral court judge had not ruled on his "newly discovered evidence claim." (PCR Vol. XIII 2331-2338). Likewise, Hartley did not seek a ruling on this purported claim.

On October 4, 2004, the collateral court entered an amended order denying Hartley's amended motion for post-conviction relief. The collateral court made no mention of the purported newly discovered evidence claim in his amended order. (PCR Vol. XI 1853-1880). Hartley, once again, did not seek a ruling. This appeal follows.

III. SUMMARY OF THE ARGUMENT

Claim I: In this penalty phase claim, Hartley alleges trial counsel was ineffective for failing to call his brother, Shawn Jefferson, to testify about Hartley's character. Hartley also alleges trial counsel was ineffective for failing to present the testimony of several other witnesses, including a high school teacher, several friends and his sister and

mother, all of whom testified at the evidentiary hearing. Finally, Hartley implies counsel was ineffective for failing to seek a mental health expert's opinion to establish statutory mitigation and to present his testimony at the evidentiary hearing.[6]

The collateral court concluded that Mr. Jefferson was not available at the time of trial. This finding is supported by both the testimony of trial counsel, whom the collateral court found credible and persuasive, and the testimony of Shawn Jefferson. Trial counsel is not deficient for failing to call an unavailable witness.

Even if trial counsel should have called Mr. Jefferson, Hartley cannot show his failure to do so undermined confidence in the outcome of the penalty phase proceedings. Mr. Jefferson testified only that Hartley was a good big brother, who pushed him to do his best and encouraged him to pursue his talent in the National Football League (NFL). Even though Mr. Jefferson found some good in his older brother who had set him a very

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[6] On page 40 of his initial brief, Hartley avers he is not appealing the collateral court's ruling on Claim XXII. In Claim XXII, Hartley alleged trial counsel was ineffective for failing to adequately employ the services of an available mental health expert and to present evidence of brain damage to the jury. (PCR Vol. II 240). The collateral court denied the claim. (PCR Vol. XI 1872). Notwithstanding Hartley's assertion he is not appealing the denial of this claim, Hartley raises this as an issue in Claim I, which asserts claims of ineffective assistance of counsel at the penalty

poor example, this evidence pales in comparison to the aggravation introduced at trial, including a prior manslaughter conviction, two armed robberies, and the fact that the trial court found the murder to be cold, calculated, and premeditated (CCP).

Additionally, calling Mr. Jefferson would have presented the jury with a young man who grew up in the same household and who had the same opportunities as Hartley did, yet refrained from leading a life of violence and crime, instead taking a path of success, charity, and responsibility. Hartley failed to show that had trial counsel called Mr. Jefferson, there is a reasonable possibility the jury would have recommended a life sentence.

Hartley also cannot show that trial counsel was ineffective for failing to call additional mitigation witnesses at the penalty phase of his capital trial. None of the witnesses who testified at the evidentiary added much "character evidence" except that Hartley was mannerable, "jokeable" and kind to elderly people.[7] Even Hartley's sister and mother added little character evidence.

Most of the witnesses knew nothing about Hartley's

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phase.

[7] As the victims who died at Hartley's hands were both teenagers, it is unlikely his kindness to elderly people would have persuaded the jury to recommend a life sentence.

extensive criminal history and none offered any evidence supporting the notion that Hartley's judgment or ability to conform his conduct to the requirements of law was impaired by alcoholism, drug abuse, brain damage or dysfunction, impulsivity, low IQ, learning disability, or mental illness. Trial counsel is not ineffective for failing to call witnesses who had little personal knowledge about the defendant and whose testimony could be undermined by the fact they knew little to nothing about Hartley's violent criminal past.

Finally, Hartley failed to show trial counsel was ineffective for failing to consult with a mental health expert. Though granted an evidentiary hearing on this claim, Hartley put on no evidence that either of the statutory mental mitigators applied or that he suffers from any brain damage or dysfunction, low IQ, impulsivity, learning disability, or mental illness. Moreover, the record shows that Hartley affirmatively waived his right to consult with a mental health expert at trial and Hartley put on nothing at the evidentiary hearing to demonstrate his waiver was anything but knowing and voluntary.

Hartley has failed to show trial counsel's failure to call any of the witnesses that Hartley presented during the

evidentiary hearing constituted deficient performance. Likewise, Hartley failed to show the additional mitigation presented at the evidentiary hearing undermines confidence in Hartley's sentence to death.

Claim II: Hartley alleges the collateral court erred in denying his claim that newly discovered evidence in the guise of the evidentiary hearing testimony of James Johnson, establishes the state presented the false or misleading testimony of Ronald Bronner and Eric Brooks. This claim may be denied for three reasons. First, Hartley never properly presented this claim to the collateral court. Second, apparently believing that Hartley never amended his motion for post-conviction relief, the collateral court did not rule on any Giglio or newly discovered evidence claim stemming from the testimony of James Johnson. Hartley did not seek a ruling on this purported claim and as such, has not preserved this issue for appeal.

Finally, Johnson's testimony did nothing to establish that the State knowingly put on false evidence. Nor did his testimony undermine the testimony of eyewitness Sidney Jones or state witness, Anthony Parkin, who testified that Hartley twice admitted he killed Gino Mayhew. This Court should deny this claim.

Claim III: In this claim, Hartley raises a claim of ineffective assistance of collateral counsel. Such a claim is not cognizable in post-conviction proceedings and should be denied.

IV. ARGUMENT

ISSUE ONE

I. WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF HARTLEY'S CAPITAL TRIAL

In his first claim before this Court, Hartley alleges trial counsel was ineffective for failing to investigate and present available mitigation evidence during the penalty phase of Hartley's capital trial. Hartley faults counsel for failing to call Hartley's brother, Shawn Jefferson, to the witness stand. Hartley also alleges trial counsel was ineffective for failing to call several other witnesses, all of whom testified at the evidentiary hearing.

Finally, Hartley faults trial counsel for failing to seek the opinion of a mental health expert in preparation for trial. (IB 53). Hartley does not allege that such an expert, if retained, would have established any statutory mental mitigation. Instead, Hartley complains only that trial counsel failed to offer an explanation at the evidentiary hearing for not seeking the opinion of a mental health expert to establish statutory mitigation. (IB 53).

To establish a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney's performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. Id. at 688. A court reviewing a claim of ineffective assistance of counsel "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

Second, the defendant must show that counsel's deficiency prejudiced the defendant. Prejudice is proven only when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. When a defendant alleges that trial counsel was ineffective for failing to present mitigating evidence, the defendant has the burden of showing that any deficiency in counsel's performance "deprived the defendant of a reliable penalty phase proceeding." Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998).

Under Strickland, whether counsel was ineffective and whether there was prejudice are mixed questions of law and fact. The legal issues are subject to a *de novo* standard of review, and the trial court's determination of facts are given deference as long as they are supported by competent, substantial evidence. Sochor v. State, 883 So.2d 766, 771-72 (Fla. 2004).

A. Shawn Jefferson

At the evidentiary hearing, trial counsel, Robert Willis, testified he was admitted to the bar in 1972 and had handled a number of murder cases during his practice. (PCR Vol. XV 2507). In 1988, he received his certification in criminal law from the Florida Bar. (PCR Vol. XV 2535). At the time of trial, Mr. Willis had prosecuted death cases and tried one other as a defense lawyer. That case resulted in a life sentence. (PCR Vol. XV 2536).

Collateral counsel questioned Mr. Willis about his failure to call Shawn Jefferson as a witness during the penalty phase of Hartley's capital trial. Mr. Willis recalled he had talked with Shawn Jefferson at some point prior to trial. He could not recall specifically speaking with him about testifying at the penalty phase. (PCR Vol. XV 2532).

Mr. Willis told the collateral court that from his

conversation with Mr. Jefferson, he understood that Mr. Jefferson did not want to have anything to do with the case and, as such, was unavailable as a witness. (PCR Vol. XV 2532). According to Mr. Willis, Mr. Jefferson told him that, while he loved his brother, he had a good thing going and could not afford to be associated with this [the murder trial]. (PCR Vol. XV 2524, 2532). Mr. Willis told the collateral court Mr. Jefferson wanted him to do everything he could for Hartley and even hired and paid him to defend his older brother but did not want to be publicly linked with him. (PCR Vol. XV 2533).

Mr. Willis testified that, in his view, Mr. Jefferson would have been an excellent witness to put a human face on his client. (PCR Vol. XV 2542). Mr. Willis told the court he would have called Mr. Jefferson during the penalty phase of the trial if he would have been willing to testify. (PCR Vol. XV 2530). He would not, however, want to put on an unwilling witness at a murder trial. (PCR Vol. XV 2542). Mr. Willis told the court that Hartley did not request that he call Mr. Jefferson at the penalty phase and that Mr. Jefferson never informed him he would be willing to testify on Hartley's behalf. (PCR Vol. XV 1861).

Mr. Jefferson also testified at the evidentiary hearing.

Mr. Jefferson is Hartley's younger brother. Mr. Jefferson told the collateral court he did not recall telling Mr. Willis he did not want to be associated with the murder trial because he was an NFL player. (PCR Vol. XI 2550). He told the collateral court he would have testified if needed. (PCR Vol. XV 2555).

Mr. Jefferson averred that if called to testify at trial, he would have told the jury his brother was not the person the prosecutor depicted him to be. Mr. Jefferson told the collateral court that Hartley was a caring person. Hartley and Jefferson sang in the church choir together even though Hartley was an awful singer. They played sports together and Hartley encouraged his younger brother to always do his best. (PCR Vol. XV 2554). When things got tough, Mr. Jefferson heard his brother's voice of encouragement. (PCR Vol. XV 2555).

Mr. Jefferson testified both he and his brother had the same opportunities in life. They grew up in the same household, had the same mother and father, played sports together and went to the same school and church. (PCR Vol. XV 2560). The year Mr. Jefferson went off to college, Hartley went to prison for manslaughter. Mr. Jefferson was not aware of the details of Hartley's manslaughter conviction.

Mr. Jefferson told the collateral court that he was no saint but that he tries to live an exemplary life. (PCR Vol.

XV 2587). Mr. Jefferson testified that he always tries to do the right thing. (PCR Vol. XV 2587). Mr. Jefferson told the collateral court that as result of his success in the NFL he was the breadwinner of his family. He allocated a significant amount of his salary to help his extended family. (PCR Vol. XV 2572-2573). Mr. Jefferson testified that during the course of his career he donated his time and his money to the United Way and the Boys and Girls Clubs of America. He was even the United Way spokesman when he was with the Atlanta Falcons. (PCR Vol. XV 2564-2565).

Mr. Jefferson told the collateral court he did not attend his brother's trial. Mr. Jefferson testified he did not do so because his family thought it was best for him to go to training camp. (PCR Vol. XV 2575). At the time of trial, he was still trying to make it in the NFL. (PCR Vol. XV 2575). At the time of Hartley's trial, Mr. Jefferson was in the third year of his career. He had been drafted in 1991 in the ninth round. (PCR Vol. XV 2562).

Mr. Jefferson told the collateral court that while he felt he should be at the trial, his family felt he should stay where he was because he was competing for his job. (PCR Vol. XV 2577). He told the court it was decided it was more important for Mr. Jefferson to make the team.

Mr. Jefferson testified that he and his family, including his sister Cheryl Daniels, discussed the fact he needed to focus on making the team. (PCR Vol. XV 2598). Family members reassured him that the rest of the family would be Hartley's moral support. (PCR Vol. XV 2596). Mr. Jefferson told the court that while it was a tough decision, he decided he would try to make the team and his family would watch how the trial was progressing. (PCR Vol. XV 2596). Mr. Jefferson told the collateral court his family told him, whenever he inquired about the trial, not to worry and to concentrate on the game. (PCR Vol. XV 2597).

Based on both the testimony of Shawn Jefferson and trial counsel Willis, the collateral court denied Hartley's claim. The court found Mr. Willis' testimony, that Mr. Jefferson was unwilling and therefore unavailable to testify, to be credible. (PCR Vol. XI 1861). The court, citing to this Court's decision in Nelson v. State, 875 So.2d 579 (Fla. 2004), concluded that trial counsel is not ineffective for failing to call an unavailable witness. (PCR Vol. XI 1861).

This Court may deny this claim for two reasons. First, the collateral court found that Shawn Jefferson was unavailable to testify during the penalty phase of Hartley's capital trial. This Court has determined that trial counsel

cannot be ineffective for failing to call a witness if the witness is unavailable at the time of trial. In Nelson v. State, 875 So.2d 579 (Fla. 2004), this Court noted that proof a witness would have been available to testify at trial is integral to the prejudice prong of a claim of ineffective assistance of counsel for failing to call a particular witness at trial. This Court concluded that "if a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness. Nelson v. State, 875 So.2d at 583.

In the case at bar, the collateral court's conclusion that Shawn Jefferson was not available at the time of trial is supported by the testimony of both trial counsel and Shawn Jefferson himself. Porter v. State, 788 So.2d 917, 923 (Fla. 2001) (noting that as long as its decision is supported by competent, substantial evidence, the Florida Supreme Court will not substitute its judgment for that of the trial court on questions of fact). In accord with this Court's decision in Nelson, trial counsel cannot be ineffective for failing to call Shawn Jefferson to testify at Hartley's trial.

Even if Mr. Jefferson would have been willing and

available to testify, there is no reasonable probability the introduction of his testimony would have resulted in a life sentence. First, Mr. Jefferson, though apparently sincere in his views, added little to mitigate this murder. Much in the same vein as Reverend Williams, who did testify at Hartley's capital trial, Mr. Jefferson testified that Hartley was a caring person who was an untalented, but willing, church choir member. Jefferson's testimony added little more than his opinion that Hartley had been a good big brother. When viewed against the nature of the cold, calculated and premeditated murder of Gino Mayhew, a prior manslaughter conviction involving the shotgun death of a 15 year old girl, and two armed robberies committed within less than

three months after Hartley's release from prison, this evidence was of minimal value.

Too, while Mr. Willis did not testify his failure to call Mr. Jefferson was a tactical decision, calling Mr. Jefferson would have been like playing with the proverbial double edged sword. In this case, however, the sword's sharper edge cut against Hartley's plea for a life sentence.

Mr. Jefferson would have presented to the jury a young man who grew up in the same household as Hartley, attended the

same schools and church, lived in the same community, and, unlike Hartley, grew to be a fine upstanding and law abiding young man. Generous with his money and time to charities such as The United Way, supportive of family, and successful in the National Football League, Shawn Jefferson was a success story, and as different from his brother as night and day.

Had trial counsel called Mr. Jefferson during the penalty phase, the prosecutor could have exploited Mr. Jefferson's success to Hartley's detriment. Certainly, the prosecutor would have pointed out to the jury that Mr. Jefferson's desire to "always do the right thing" was in stark contrast to his brother.

Mr. Jefferson's appearance for the defense would have presented the prosecution with an opportunity to point out that Mr. Jefferson and Mr. Hartley were raised in the same environment and given the same opportunities and that while Mr. Jefferson went the right way, Hartley willfully and consciously took a path toward violence and ultimately toward murder.

Hartley set a very poor example for his little brother yet Mr. Jefferson's strength of character led him to take a completely different path than his older brother. It is reasonable to conclude the minimal good character evidence

offered by Mr. Jefferson would have been greatly overshadowed by this stark contrast between these two brothers. This court should deny this claim.

B*. *Other family and friends

At the evidentiary hearing, Hartley called several other witnesses he alleged trial counsel should have called during the penalty phase. The first witness to testify at the evidentiary hearing on Hartley's behalf was Coach Freddie Stevens.

Coach Stevens told the collateral court that Hartley was a mannerable and cooperative boy. (PCR Vol. XVI 2607). Coach Stevens knew Hartley about a year and a half but did not actually coach him in football. (PCR Vol. XVI 2609). He taught him in physical education and saw him around school. (PCR Vol. XVI 2608). Coach Stevens testified he was not contacted to testify but would have been happy to testify that Hartley was mannerable. (PCR Vol. XVI 2608). Coach Stevens was not aware that Hartley had previously been convicted of two robberies but was aware of the manslaughter conviction. (PCR Vol. XVI 2610-2612). Coach Stevens had not seen Hartley since Hartley was 17 years old. (PCR Vol. XVI 2610). He believed that Hartley had been in prison since he last saw him. (PCR Vol. XVI 2612).

Hartley next called his sister, Cheryl Daniels to the stand. Ms. Daniels testified that she spoke with trial counsel, Bob Willis, about her brother's case. (PCR Vol. XVI 2614). She did not know she could testify on her brother's behalf at the penalty phase. (PCR Vol. XVI 2615). She would have if asked to do so.

Ms. Daniels told the collateral court that if she would have been called to testify, she would have told the jury that Hartley was a good brother and a caring person when it came to elders. (PCR Vol. XVI 2616). He was a jokeable person and a sweet person. (PCR Vol. XVI 2616). He loved everyone. (PCR Vol. XVI 2616). According to Ms. Daniels, "there wasn't no particular person that he did not love." (PCR Vol. XVI 2616). She testified that she gave trial counsel some names that he could call as witnesses who could testify about Hartley's good points. (PCR Vol. XVI 2616).

She grew up in the same household as Shawn Jefferson and Hartley. She left home at age 18. She could not recall how old her brothers were when she left home. (PCR Vol. XVI 2618).

Ms. Daniels did not volunteer to be a witness. (PCR Vol. XVI 2625-2526). Ms. Daniels had no actual knowledge of the manslaughter conviction but knew it happened. She was also

not aware of Hartley's two robbery convictions until they got to trial in 1993. (PCR Vol. XVI 2626).

The next witness called on Hartley's behalf was Jean Daniels. She knew none of the facts of the murder case. (PCR Vol. XVI 2629). She knew about Hartley's convictions for robbery and manslaughter but did not know any of the facts underlying the convictions. (PCR Vol. XVI 2630, 2636). She testified that if she had been called at trial, she would have testified that Hartley was raised in the church, had a curfew and was a good boy. (PCR Vol. XVI 2632). Hartley sang in the choir, was an usher, and was good to elderly folks. (PCR Vol. XVI 2632).

Ms. Daniels testified that she lived on welfare but she raised good children. She raised her children with discipline and that school, church, and rules were a must in her house. She provided her sons, Shawn Jefferson and Kenneth Hartley, the same love and opportunity. (PCR Vol. XVI 2634). According to his Mom, Hartley knew right from wrong. (PCR Vol. XVI 2645). She said that Hartley told her not to come to the trial. (PCR Vol. XVI 2637-2638).

Roanie Groomes testified next. She was a life-long friend of Kenneth Hartley and a school teacher. Ms. Groomes told the collateral court that, had she been called, she would

have testified he was mannerable and was raised in a good home with ethical values. She also would have testified Hartley was active in the church and in sports. (PCR Vol. XVI 2650). Ms. Groomes knew about Hartley's manslaughter conviction. She testified the victim, Angel McCormick, was a very fine young lady and there was no reason for Hartley to have killed her. (PCR Vol. XVI 2653). She did not know about his robbery convictions. (PCR Vol. XVI 2654).

Ms. Groomes told the collateral court she talked to Hartley when he was in jail. Hartley never asked her to come down for the trial. (PCR Vol. XVI 2657). She was afraid to come down and did not want to deal with it. (PCR Vol. XVI 2657). Nonetheless, she would have, if asked, testified at the penalty phase. (PCR Vol. XVI 2658).

Next, Hartley called Tanya Hawk. She was unemployed at the time of the hearing. (PCR Vol. XVI 2659). She had not worked since 1991. (PCR Vol. XVI 2665). She blew a kiss to Hartley as she came forward to the witness stand. (PCR Vol. XVI 2675). Ms. Hawk testified she had loved Hartley since the third grade. (PCR Vol. XVI 2661). She always wanted to be Hartley's girlfriend. (PCR Vol. XVI 2664).

Hartley always helped her out. (PCR Vol. XVI 2662). She told the court Hartley was helpful to elderly people and to

others as well. (PCR Vol. XVI 2662). She had heard about his prior criminal record. (PCR Vol. XVI 2666). Mr. Willis did talk with her before trial. (PCR Vol. XVI 2668). She told him she was willing to be a character witness. (PCR Vol. XVI 2669). She could have come to the trial but chose not to. (PCR Vol. XVI 2668).

Finally, Hartley called Ms. Dorothy Cherry to testify at the evidentiary hearing. Ms. Cherry testified that Hartley was a friend of the family. (PCR Vol. XVI 2680). She told the collateral court that Hartley was a great guy always. (PCR Vol. XVI 2682). She described him as upright and wonderful. (PCR Vol. XVI 2682). She testified she does not know anything bad about him. (PCR Vol. XVI 2682). Ms. Cherry told the collateral court she did not know he had been convicted of two robberies. She knows the shooting that resulted in Hartley's manslaughter conviction just had to be an accident. She was told it was an accident. (PCR Vol. XVI 2683, 2686). She knew, however, that Hartley pled guilty to shooting Angel McCormick. She had heard that Ms. McCormick was a fine young woman. (PCR Vol. XVI 2685).

Ms. Cherry told the court that she did not want to get involved with the case because there was so much going on in her life. At the time of trial, she was in Atlanta taking

care of her mother. (PCR Vol. XVI 2684). Her problems pretty much required her full attention. (PCR Vol. XVI 2692).

This Court may deny Hartley's claim as to these witnesses for two reasons. First, some of these witnesses were unavailable to testify. Hartley's mother testified that Hartley told her not to come to trial. (PCR Vol. XVI 2637-2638). Ms. Cherry was in Atlanta taking care of her mother at the time of trial and she testified at the evidentiary hearing that she did not want to get involved in the case because there was so much going on in her life. (PCR Vol. XVI 2684, 2692). Tanya Hawk testified that she could have come to the trial but chose not to. (PCR Vol. XVI 2668).

Moreover, Mr. Willis' testimony at the evidentiary hearing established that neither Cheryl Daniels nor Jean Daniels were available. Mr. Willis testified he attempted to get family members to testify but Hartley's family members were uncooperative and unwilling to testify. (PCR Vol. XI 1926). Mr. Willis testified that Cheryl Daniels was his liaison with Hartley's family and she told him that none of the family members were willing to testify. The collateral court found Mr. Willis' testimony to be credible. (PCR Vol. XI 1871). Trial counsel is not ineffective for failing to call witnesses who are unavailable to testify at trial. Nelson v.

State, 875 So.2d 579, 583 (Fla. 2004).

Even if all the witnesses would have been available and willing to testify, none of the witnesses presented at the evidentiary hearing provided any weighty mitigation. The fact Hartley was mannerable, considerate, and helpful to elderly people pales in comparison to his three prior violent felonies, one of which involved the manslaughter of fifteen-year-old Angel McCormick, a person who one of Hartley's own witnesses described as a very fine young lady.

Unlike many defendants who can point to a troubled or deprived childhood and claim it contributed, or simply added some context, to their own violent acts, the evidence elicited from Hartley's character witnesses demonstrated Hartley's childhood was both stable and nurturing. Testimony at the evidentiary hearing refuted any notion that Hartley grew up in a home marred by drug addiction, violence, sexual abuse, or neglect. Moreover, none of the witnesses who testified at the evidentiary hearing, or even at trial, presented any testimony to establish that Hartley was in any way impaired by the long term effects of alcohol or drug addiction, suffered from a low IQ, was impulsive, or had any sort of mental impairment, learning disability, or brain injury. Indeed, Hartley's mother, Jean Daniels, painted a picture of a son who was

taught right from wrong and who grew up in a cohesive, loving, church-going family; a son who was perfectly capable of choosing to do the right thing but consistently chose the wrong thing.

Additionally, all of the testimony presented at the evidentiary hearing revealed Hartley's "character witnesses" knew little about the character of Kenneth Hartley. For the most part, the witnesses had little knowledge of the facts surrounding the death of Angel McCormick and no knowledge at all of the two robberies that Hartley committed in the days before and after he executed Gino Mayhew by shooting him five times in the head. Because Hartley did not demonstrate at the evidentiary hearing that but for counsel's failure to call these witnesses at trial, he probably would have received a life sentence, the trial judge properly denied Hartley's claim.[8]

C. Failure to retain a mental health expert

On page 40 of his initial brief, Hartley asserts that he does not intend to appeal the collateral court's denial of his claim that trial counsel was ineffective for failing to adequately employ a mental health expert and to present evidence of brain damage. (IB 40). Nonetheless, in his first

[8]Trial counsel testified at the evidentiary hearing that Hartley never asked him to call any particular witness to

claim, Hartley faults trial counsel for failing to seek a mental health expert's opinion to establish statutory mitigation. Should this Court determine that Hartley is actually presenting some sort of claim before this Court, instead of merely venting frustration at trial counsel's failure to offer an explanation for his decision, this Court may deny this claim because the record shows Hartley affirmatively waived his right to consult with a mental health expert and/or present evidence of mental mitigation during the penalty phase of his capital trial.

Prior to trial, Hartley moved for an order to transport Hartley for evaluation by a mental health expert. The Court granted the motion. (TR. Vol LXX 2554-2555). Hartley did not, however, call any mental health expert to testify on his behalf at the penalty phase.

Instead, Hartley presented two other witnesses during the penalty phase of his capital trial. Hartley, first, presented the testimony of seasoned criminal defense attorney, Alan Chipperfield, to provide some assurance that if the jury recommended a life sentence, Hartley would indeed spend his life in prison. Trial counsel testified at the evidentiary hearing that he called Mr. Chipperfield because studies into the death penalty strongly suggested that persons are less

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testify at the penalty phase. (PCR Vol. XII 2112).

likely to recommend death if they are secure in the belief that life means life. (PCR Vol. XII 2128-2129).

Next, Hartley called his pastor, Reverend Coley Williams. Reverend Williams testified he had known Hartley since 1980. According to Reverend Williams, Hartley had a quiet and peaceful spirit, attended church off and on, was remorseful about killing Angel McCormick, came from a good family, and was intelligent. (TR Vol. LXX 2525-2535). Reverend Williams told the jury that Hartley was not deprived as a child and was raised in a loving home. He was not abused and his childhood environment was wholesome and stable. (TR Vol. LXX 2540). Reverend Williams thought Hartley was a mature individual. (TR Vol. LXX 2541).

Just after Reverend Williams testified, trial counsel announced he had no further witnesses to present. The prosecutor asked the trial judge to inquire as to the defense's failure to present any psychiatric testimony during the penalty phase. The following exchange took place after the prosecutor made his request:

> **TRIAL COUNSEL**: Your Honor, let me say--I don't mean this sarcastically--this is an odd time for Mr. Bateh to be worrying about the record. But the fact of the matter is I have told Mr. Bateh this before and I will repeat it for the purposes of the record although I do not think it is required, Mr. Hartley and I have discussed this on several different occasions over a matter of months with deliberate exercised judgment that we do not intend to do that.

> We do not wish to do that. Certainly we are aware that the Court entered an order transporting him for that [to obtain psychiatric evaluation] purpose if we wanted it to be done. We did not request it to be done. I don't know that we need to do any official waiver or formal waivers in as much counsel acknowledges those things are not required, they are not done in other situations.
>
> **COURT**: I don't know anything else we need to do.
>
> **PROSECUTOR**: That is probably sufficient....

(TR. Vol LXX 2554-2555).

This Court has recognized that a competent defendant may waive or limit his right to present mitigating evidence. Boyd v. State, 910 So.2d 167, 189 (Fla. 2005). Hartley does not allege this waiver was not knowing or voluntary and there is no real issue about Hartley's competence.[9] Hartley did not testify at the evidentiary hearing this decision was not, as trial counsel explained on the record to the trial judge, the result of his own deliberate exercised judgment in consultation with trial counsel. In fact, Hartley presented no evidence at all to support the notion his waiver at trial of his right to present mental mitigation was anything but knowing and voluntary. Given counsel's experience and Hartley's failure to present any evidence that his waiver of

[9] Hartley did not raise a claim on direct appeal that his waiver of mental mitigation evidence was not knowing and voluntary or that any inquiry about the waiver was insufficient. Hartley v. State, 686 So.2d 1316 (Fla. 1996).

mental mitigation was not knowing and voluntary, this Court should deny this claim.

Additionally, this Court may deny this claim because Hartley has failed to show that trial counsel's failure to consult with a qualified mental health expert undermines confidence in his sentence to death. In presenting this claim to the collateral court, Hartley made no allegation he was insane at the time of the murder or was incompetent to stand trial. Hartley did not allege he suffers from any major mental illness or a low IQ. Hartley also made no allegation that at the time of the murder he was under the influence of an extreme mental or emotional disturbance or that at the time of the murder he was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (PCR Vol. I 148-149, Vol. II 234).[10]

Before this Court, Hartley, likewise, makes no claim that either statutory mitigator applied at the time of the murder

[10] While Hartley did allege, in a conclusory fashion, in Claim XXI of his amended motion for post-conviction relief, that he previously had psychological problems, suffered severe child abuse, had a chronic alcohol problem, and suffered brain damage, Hartley put on no evidence at the evidentiary hearing to support this claim. (PCR Vol. II 234). In fact, at both trial and at the evidentiary hearing, Hartley's witnesses provided no support at all for the notion that Hartley had a history of psychological problems, alcohol abuse or suffered from brain damage. They also specifically refuted any notion that Hartley suffered "severe child abuse."

or that he suffers from a major mental illness, low IQ, or brain damage. Instead, Hartley faults counsel only for failing to "offer any explanation for the fact he did not seek a mental-health expert's opinion to establish statutory mitigation…".[11] (IB 53).

Hartley put on no evidence at the evidentiary hearing to support his claim that trial counsel was ineffective for failing to consult with a mental health expert in preparing for trial. As noted by the collateral court in denying Hartley's claim, Hartley presented no evidence he suffered any brain damage or that either statutory mental mitigator was present at the time of the murder. (PCR Vol. XI 1872). Neither Hartley's siblings nor his mother provided any testimony to support the notion that, as a child or teenager, Hartley suffered from mental health problems, low intelligence, low self-esteem, substance abuse, brain damage, impulse control, or childhood head injuries. (PCR Vol. XI 1872). Likewise, none reported that Hartley suffered any sexual or physical abuse that might contribute to his mental or emotional condition at the time of the murder. Though granted an evidentiary hearing on this claim, Hartley failed to produce any evidence to support his claim that trial

[11] Perhaps this is so because Hartley never asked him.

counsel was ineffective for failing to present the testimony of a qualified mental health expert to the jury. This Court should deny this claim.[12]

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[12] Hartley complained, in his motion for rehearing from the denial of his amended motion for post-conviction relief, that the collateral court judge had precluded him from presenting evidence at the evidentiary hearing to support his claim because the court denied his motion for the appointment of a mental health expert. (PCR Vol. XIII 2337). He has not raised a specific claim that the collateral court erred in failing to grant Mr. Malnik's eleventh hour request for the appointment of a mental health expert.

However, nothing in Rule 3.851 or in Florida law required appointed collateral counsel to seek leave of court to consult with a mental health expert in post-conviction proceedings as part of the investigation into whether trial counsel was ineffective for failing to investigate mental mitigation or present the testimony of a qualified mental health expert. Section 27.711(6), Florida Statutes provides reimbursement for collateral counsel for up to $15,000 for miscellaneous expenses including payment of expert witness fees.

Mr. Malnik's request for appointment of a mental health expert came well after the evidentiary hearing was concluded and years after Hartley filed his initial motion for post-conviction relief. Even so, when he finally did seek to retain a mental health expert, his only grounds were that Hartley had been physically assaulted as a child and appeared to be traumatized. (PCR Vol. XIII 2223-2224).

This request was not sufficient to trigger a duty on the part of the collateral court judge, to appoint a mental health expert, especially so late in the proceeding. In his motion, Hartley pointed to no nexus between the murder and this alleged assault, which occurred years before the murder. In his motion, Hartley made no claim he suffered from any brain damage or even had a history of brain damage as a result of this injury or from any other specific trauma or injury. Further, none of the evidentiary hearing witnesses testified about any mental problems, low intelligence, substance abuse, brain damage, childhood injuries, sexual or mental abuse, or any other factor relating to available mental mitigation.

II. WHETHER THE COLLATERAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE STATE PRESENTED FALSE TESTIMONY IN VIOLATION OF BRADY v. MARYLAND AND GIGLIO v. UNITED STATES

In his second claim on appeal, Hartley blends a newly discovered evidence claim with an allegation of a Giglio violation. Hartley claims that newly discovered evidence demonstrates the prosecutor knowingly put on false testimony.[13]

Though certainly not clear from the initial brief, it appears Hartley is actually attempting to present this Court with two separate claims, the first, a claim of newly discovered evidence in the form of recantation evidence. The second, a Giglio violation based on the testimony of James Johnson that State witnesses, Ronald Bronner and Eric Brooks, reported that the prosecutor told them what to say. Hartley notes that "[i]t is difficult to imagine a clearer Giglio violation if Ronald [sic] Johnson is credible. (IB 67).

Without even looking to the merits of this claim, this Court may deny this "hybrid" claim on procedural grounds for

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Given these considerations and the fact Hartley waited years after he first filed his motion for post-conviction relief to pursue appointment of a mental health expert, the collateral court judge did not abuse his discretion in denying Hartley's motion for appointment of a mental health expert.

[13] A claim that newly discovered evidence shows the prosecutor put on false testimony is not really a claim of newly discovered evidence. This so called "newly discovered" evidence is not evidence relevant to guilt and therefore cannot be of a nature likely to produce an acquittal upon

two reasons. First, this claim was never properly presented to the collateral court below.

While Hartley filed an emergency motion to add additional witnesses and additional grounds for 3.851 relief on October 1, 2002, Hartley never amended his motion for post-conviction relief to add a legally sufficient and sworn Giglio claim. Nor did he ever amend to add a claim of newly discovered evidence.

In his October 1, 2002 motion, Hartley alleged only that an unidentified person was willing to testify that unidentified State witnesses admitted they committed perjury at trial. (PCR Vol. V 961-962). Such vague and conclusory allegations do not constitute a legally sufficient claim of newly discovered evidence. Sims v. State, 750 So.2d 622, 624-625 (Fla. 1999) (in order to present a legally sufficient claim of newly discovered evidence the defendant must allege that the asserted facts were unknown to the trial court, the party, or counsel by the time of trial, it must appear that the defendant or his counsel could not have known them by the use of diligence, and the evidence must be of such nature that it would probably produce an acquittal on retrial).

On October 2, 2002, during the second day of Hartley's evidentiary hearing, collateral counsel indicated he had just

learned of a "new witness." He identified the witness as Jimmy Johnson. Collateral counsel provided no other details except that the witness allegedly had information that a "Mr. Bonner" lied about a jailhouse confession. (PCR Vol. XII 2132). Mr. Morrow told the collateral court he needed time to talk to the witness to see if that was true and then would "file a supplemental" with his name and address along with what he has to say. (PCR Vol. XII 2132).

However, no sworn "supplemental" claim was ever presented. The fact the trial judge allowed Hartley great leeway at the evidentiary hearing and afforded Hartley multiple opportunities to find and call witnesses to testify on his behalf did not relieve Hartley of his obligation to present a legally sufficient claim to the trial court. Because neither a legally sufficient claim of newly discovered evidence nor a legally sufficient Giglio claim was properly and timely presented to the lower court, the claim is not cognizable on appeal. Cave v. State, 899 So.2d 1042, 1052 (Fla. 2005).

This Court may also deny this claim because it was not preserved for appeal. Perhaps because Hartley never actually supplemented his amended motion for post-conviction relief with this new claim, the collateral court never ruled on the

issue and Hartley never sought to obtain a ruling. While in his initial brief, Hartley claims the collateral court erred in denying his claim of newly discovered evidence, the collateral court never actually ruled on the claim. (PCR Vol. VIII 1494-1520, Vol. XI-1853-1880). A defendant who fails to obtain a ruling on a motion

also fails to preserve the issue for appeal. Farina v. State, 937 So.2d 612,629 (Fla. 2006).

In this case, the collateral court judge issued an order denying Hartley's motion for post-conviction relief. Hartley filed a motion for rehearing yet Hartley never asserted, or even pointed out, that the collateral court failed to address his purported claim of newly discovered evidence. (PCR Vol. XIII 2331-2338). In response to the motion for rehearing, the collateral court issued an amended order denying Hartley's motion for rehearing. (PCR Vol. X 1853). Once again, the collateral court did not address the claim, and once again Hartley remained silent about the collateral judge's failure to rule on what Hartley claims, now, are claims of newly discovered evidence and a Giglio violation. Hartley's failure to request a ruling on this claim precludes him from raising them now on appeal. Farina v. State, 937 So.2d at 629.

Should this court consider this claim on the merits,

Hartley is still not entitled to relief. To establish a Giglio violation, Hartley must demonstrate (1) a witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. See Robinson v. State, 707 So.2d 688, 693 (Fla. 1998); Routly v. State, 590 So.2d 397, 400 (Fla. 1991). The State bears the burden of proof on the third prong. If the defendant makes a threshold showing satisfying the first two prongs of a Giglio violation, the burden shifts to the State to prove that the presentation of the false testimony was harmless beyond a reasonable doubt. To meet the harmless error standard, the State must establish that there is no reasonable possibility that the error contributed to the conviction. Guzman v. State, 941 So.2d 1045, 1050 (Fla. 2006)

Hartley's argument the State committed a Giglio violation seems to turn on the notion that Johnson's testimony, that Brooks told him the State was "rehearsing" his testimony, establishes a Giglio violation. (IB 66). Such a vague hearsay statement cannot establish a Giglio violation. No Giglio violation occurs if a prosecutor reviews the testimony of a witness before trial.[14]

[14] Hartley also points to Johnson's statement that Bronner told him that "he told the prosecutor that they told him they didn't know nothing [about the murder]." (PCR Vol. XVII 2747). This statement is completely incoherent and cannot

Likewise, Hartley failed to show that Johnson's testimony entitles him to a new trial on the basis of newly discovered evidence. To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Newly discovered evidence satisfies the second prong of the Jones test if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability. Diaz v. State, 945 So.2d 1136 (Fla. 2006).

Mr. Johnson's testimony would not likely produce an acquittal on retrial nor does his testimony give rise to reasonable doubt about Hartley's guilt. During his testimony at the evidentiary hearing, Mr. Johnson provided no detail about Bronner and Brook's alleged recantation. In fact, for the most part, his testimony was incoherent.

Johnson was unable to identify even a single "lie" that Eric Brooks and Ronald Bronner admitted telling in order to

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support a finding the State intentionally presented false or misleading evidence to the jury.

convict Mr. Hartley of murder. When asked on cross-examination what "lie" Eric Brooks admitted he told at Hartley's trial, Johnson testified "[h]e didn't say what the lie was." (PCR Vol. XVII 2765. When asked what lie Bronner confessed to, Johnson said Bronner did not say. (PCR Vol. XVII 2771).

In addition to the dearth of detail, Johnson's testimony did not time-track. For instance, Johnson testified that Bronner and Brooks admitted they had lied on Hartley sometime before May or June 1993 when Johnson was released from jail. (PCR Vol. XVII 2768, 2770, 2787, 2794). Johnson testified during cross examination he was 95% certain he had gotten out of jail in June 1993 and that Brooks and Bronner had made these revelations before June 1993. (PCR Vol. XVII 2772).

On re-direct, in response to defense counsel's leading questions, Johnson backtracked and reported he could not really remember the months of the year this occurred. (PCR Vol. XVII 2780)). Minutes later, Johnson testified that he was certain he had gotten out before July 4th, 2003. (PCR Vol. XVII 2784). This would have made it impossible for Bronner and Brooks to have reported to Johnson they testified falsely at Hartley's trial because Hartley's trial did not begin until August 1993.

Finally, Johnson's testimony had no impact on the trial testimony of Anthony Parkin (Snake) who testified he heard Hartley tell some other person in Hartley's cell; "I really fucked up this time by doing this with that mother fucker Ferrell. I think he's going to turn on me and testify against me when he's just as guilty in doing this as I am." (TR. Vol. LXVII 2187). Parkin also testified that Hartley told him directly, while they shared a cigarette, that "the only thing that worries me in this case is that after we killed the guy, Ferrell started getting real nervous..." (TR. Vol. LXVII 2190). Parkin testified he reported what he heard immediately and gave a sworn statement to that effect in June 1991. (TR. Vol. LXVII 2190). As Hartley admitted on two occasions he killed Gino Mahew within earshot of, or directly to, Anthony Parkin, the impeachment of Brooks and Bronner would not likely have resulted in an acquittal at trial.

Finally, the evidence supporting the jury's finding was, even without Bronner and Brooks' testimony, competent and substantial. Sidney Jones' and Juan Brown's testimony established that Hartley and Ferrell abducted Gino Mayhew at gunpoint and forced him to drive away in his own Blazer to the kill spot, with Ferrell riding shotgun and Hartley in the back seat behind the captive driver. The medical examiner's

testimony established the fatal shots were fired from the backseat of the Blazer where Hartley was seated. Johnson's testimony does not compel this court to grant Hartley a new trial. This Court should deny this claim.

III. WHETHER HARTLEY'S CLAIM OF INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL IS COGNIZABLE IN THESE PROCEEDINGS

In this claim, Hartley does not raise an allegation of ineffective assistance of trial counsel. Instead, Hartley claims that collateral counsel was ineffective during post-conviction proceedings. In support of this claim, Hartley makes numerous allegations against collateral counsel but points to nothing in the record to support his claims of malfeasance.

This Court has concluded, on numerous occasions, that claims of ineffective assistance of post-conviction counsel do not present a valid basis for relief. Lambrix v. State, 698 So.2d 247, 248 (Fla. 1996) (Claims of ineffective assistance of post-conviction counsel are not cognizable). *See also* Zack v. State, 911 So.2d 1190, 1203 (Fla. 2005); Kokal v. State, 901 So.2d 766, 777 (Fla. 2005); Foster v. State, 810 So.2d 910, 917 (Fla. 2002); King v. State, 808 So.2d 1237, 1245 (Fla. 2002); Waterhouse v. State, 792 So.2d 1176, 1193 (Fla. 2001). Hartley has presented no compelling reason to

reconsider this Court's well-established jurisprudence on this issue. This Court should deny this claim.

CONCLUSION

Based upon the foregoing, the State requests respectfully requests this Court affirm the collateral court's order denying Hartley's amended motion for post-conviction relief.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

_____
MEREDITH CHARBULA
Assistant Attorney General
Florida Bar No. 0708399
Department of Legal Affairs
The Capitol
(850) 414-3583 Phone
(850) 487-0997 Fax
Attorney for the Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Harry Brody, Brody and Hazen, P.A., P.O. Box 16515, Tallahassee, Florida 32317 this 5th day of March 2007.

_____
MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
MEREDITH CHARBULA
Assistant Attorney General