IN THE SUPREME COURT OF FLORIDA

RONALD WAYNE CLARK, JR.,

Appellant,

v. CASE NO. SC07-2318

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

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PRELIMINARY STATEMENT

Appellant, RONALD WAYNE CLARK raises two issues in this appeal from the denial of his motion for post-conviction relief.

References to the appellant will be to "Clark" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The six volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume number and page number. The three volume supplemental record will be referred to as "PCR Supp" followed by the appropriate volume and page number.

References to the eleven volume record from Clark's direct appeal will be referred to as "TR" followed by the appropriate volume and page number. References to Clark's initial brief will be to "IB" followed by the appropriate page number.

Clark has been convicted of two murders, both of which will be referred to in this appeal. Clark was first convicted of murder in Nassau County for the first degree murder of Charles Carter. Clark's Nassau County jury recommended Clark be sentenced to death, however this Court struck three of the four aggravators found to exist and reduced Clark's sentence to life. This case will be referred to as the "Nassau County case". The jury from that case will be referred to as the "Nassau County jury".

The instant appeal is a case from Duval County. Clark murdered Ronald Willis in Duval County, was convicted, and sentenced to death. The instant case will be referred to as the "Duval County case." The jury in the instant case will be referred to as the "Duval County jury."

STATEMENT OF THE CASE AND FACTS

Ronald Clark, born April 20, 1968 was 21 years and 10 months old when murdered Ronald Willis on January 13, 1990. The relevant facts surrounding Mr. Willis' murder are set forth in this Court's opinion on direct appeal as follows:

> …On the afternoon of January 13, 1990 two teenagers walking down a dirt road in rural Dual County found a crowbar, some broken false teeth, a bloody shirt, and some blank checks, with the name Ronald Willis printed on them, that also had blood on them. One of the boys returned home and told his mother what they had found, and she called the sheriff's office. Also on the 13th Willis' mother called his ex-wife to see if she knew of Willis' whereabouts. The ex-wife did not, and she and her sister began driving around looking for him. They found Willis' truck at a motel, parked near it, and started calling his name. A small child was in the truck, and a man identifying himself as the child's father removed the child and pointed out Ronald Clark and John Hatch as the people who had been driving the truck. The ex-wife took the keys and locked the truck while her sister went to telephone the police. Clark approached the ex-wife, grabbed her, and tried to take the keys. When she kicked him, he ran away. The sister ran after Clark and noticed that he was wearing Willis' cowboy boots. Clark and Hatch ran off before the police arrived. They had been identified, however, and the police arrested Hatch in Nassau County on January 20, 1990.
>
> Hatch described the events of January 12 to 13 as follows. When he arrived home after work on January 12, Clark was at his house. They decided to hitchhike to Jacksonville to shoot pool. Along the way they shot at signs and beer bottles with a pistol Hatch had stolen from a house he had been remodeling. Willis stopped to give them a ride, and, during the ride, Clark whispered to Hatch that he was going to steal the truck. When Hatch asked Willis to stop the truck, both he and Clark got out of the truck, and Clark, who had the stolen pistol, shot Willis seven or eight times. Clark shoved Willis' body to the center of the

> seat, Hatch got in the passenger's seat, and Clark drove to a more secluded area. Clark pulled Willis' body from the truck, during which Willis' shirt came off. Clark then took Willis' wallet and boots and pushed his body into a ditch.
>
> Clark and Hatch went to a restaurant and to Hatch's ex-wife's apartment complex, but later returned to where they had left the body. Taking the body with them, they went to Clark's father's house and got a rope and several cinder blocks. They then drove to the Nassau County Sound Bridge, tied the blocks to the body, and dumped it into the water. After driving around some more, they went to an acquaintance's house to buy drugs. The acquaintance went with them to the motel where Willis' ex-wife and her sister found the truck. Hatch and Clark left the state, eventually winding up in South Carolina. Hatch returned to Nassau County, where he was arrested. South Carolina authorities arrested Clark on February 7, 1990 and returned him to Florida.

Clark v. State, 613 So.2d 412 (Fla. 1992).

The State indicted Clark for first-degree murder and armed robbery and tried him on those charges in January 1991. Henry Davis represented Clark at trial.

Clark's co-defendant, John David Hatch, testified against Clark in return for a twenty-five year sentence. Clark testified on his own behalf that Hatch killed Willis. The jury convicted Clark of armed robbery and felony murder.

During the penalty phase, Clark refused to allow his trial attorney to present any mitigating evidence. Trial counsel told the court that Clark had been examined by three mental health experts who could testify for him. Counsel also informed the trial judge that Clark knew that he could testify on his own

behalf, but that Clark wanted nothing more done. The trial judge conducted an extensive colloquy with Clark concerning his decision to waive mitigation. Clark told the trial court that: "I don't want the jury to know nothing." Clark v. State, 613 So.2d 412, 413-414 (Fla. 1992).

The record shows that Clark understood the consequences of his decision and that he voluntarily and knowingly waived the presentation of mitigating evidence. Id. Indeed, Clark was well aware of the mitigation evidence that was available to him.

This is so because trial counsel presented what this Court deemed to be "strong non-statutory mitigation" at Clark's earlier first degree murder trial in Nassau County, Florida. In November 1990, just two months before he was tried for the murder of Ronald Willis in Duval County, Clark was tried and convicted in Nassau County for the murder of Charles Carter. Clark v. State, 609 So.2d 513 (Fla. 1992).[1]

[1] In the Nassau County case, Clark was convicted of the October 29, 1989 murder of Charles Carter. Clark murdered Mr. Clark less than two months before he murdered Ronald Willis. During the penalty phase in the Nassau county case, Clark presented evidence of his alcohol abuse and emotional disturbance, as well as his abused childhood. Nonetheless, the jury recommended Clark be sentenced to death by a vote of 10-2 and the trial judge sentenced Clark to death. Clark v. State, 609 So.2d 513 (Fla. 1992).

On appeal, this Court reduced Clark's sentence to life after striking three of the four aggravators found by the trial court. In directing that Clark be sentenced to life without the possibility of parole for 25 years, this Court noted that the mitigation evidence that trial counsel presented to the Nassau

Clark's Duval County jury recommended that Clark be sentenced to death by a vote of 11-1. On February 20, 1991, the trial court conducted a Spencer hearing during which both sides argued their views on sentencing. Id.

Defense counsel placed reports of three mental health experts into evidence and argued that Clark should be sentenced to life imprisonment rather than death. The trial court, however, followed the jury recommendation and sentenced Clark to death.

In aggravation, the trial court found: (1) Clark had previously been convicted of a violent felony [first degree murder in Nassau County]; (2) the murder was committed in the course of a robbery; and (3) the murder was committed for pecuniary gain. The trial court found no statutory and no non-statutory mitigation had been established. Clark v. State, 613 So.2d 412 (Fla. 1992); (PCR Vol. V 827).[2]

County jury, most of which was uncontroverted, constituted "strong non-statutory mitigation." Clark v. State, 609 So.2d at 516. This Court's opinion in the Nassau murder case was issued well after Clark's Duval County murder trial had been concluded.

[2] This Court found the felony murder and pecuniary gain aggravators to be merged into one aggravator. This Court also observed that given the fact the trial judge instructed the jury that these two aggravators were to be merged, if found to exist, it is unlikely the trial court weighed them separately when sentencing Clark to death. Clark v. State, 613 So.2d 412, 414 (Fla. 1992).

On appeal, Clark raised no challenge to the guilt phase of his trial. In accord with its practice, however, this Court reviewed the sufficiency of the evidence to support the jury's verdicts. This Court found the record contained competent, substantial evidence to support Clark's convictions. Clark v. State, 613 So.2d 412, 413 (Fla. 1992).

Clark did, however, raise four issues as to the penalty phase. Clark alleged: (1) the trial judge erred in allowing him to waive presentation of mitigating evidence, (2) the trial judge erred in finding felony murder and pecuniary gain as separate aggravators, (3) the trial judge erred in failing to consider the mitigating evidence properly and to find that several mitigators had been established and (4) Clark's sentence was disproportionate. Clark v. State, 613 So.2d 412, 414 (Fla. 1992).

The Florida Supreme Court rejected each of Clark's claims. As to Clark's claim the trial judge erred in allowing him to waive presentation of mitigating evidence, this Court found that Clark had voluntarily and knowingly waived the presentation of mitigating evidence. Clark v. State, 613 So.2d 412, 414 (Fla. 1992). On December 24, 1992, this Court affirmed Clark's convictions and sentence to death. Id. at 415.

On May 26, 1993, Clark filed a petition for a writ of certiorari in the United States Supreme Court. On October 4,

1993, the United States Supreme Court denied review. Clark v. Florida, 510 U.S. 836 (1993).

On November 16, 1994, Clark filed an initial motion for post-conviction relief. On November 1, 1995, Clark filed his first amended motion for post-conviction relief. (PCR Vol. I 49-202).

Subsequently, on June 20, 2003, Clark filed a supplement to his first amended motion and the State filed a response. (PCR Vol. V 828). On January 31, 2006, Clark filed his second amended motion.

In his second amended motion, Clark raised twenty-one (21) claims. On May 22, 2006, after a Huff hearing/case management conference, the collateral court granted Clark an evidentiary hearing on his first three claims. (PCR Vol. III 445-446).

In his first three claims, (Claims I-III), Clark alleged: (1) the State violated the dictates of Brady v. Maryland, 373 U.S. 83, 87 (1963) when it withheld material exculpatory or impeachment evidence and the dictates of Giglio v. United States, 405 U.S. 150 (1972) when it presented false and misleading testimony to Clark's Duval County jury; (2) trial counsel was ineffective during the penalty phase of Clark's capital trial; and (3) trial counsel was ineffective during the guilt phase of Clark's capital trial. (PCR Vol. III 445-446). The evidentiary hearing was held on February 26, 2007.

Clark presented one witness in support of the claims for which an evidentiary hearing was granted. Over the objection of the State, Clark was permitted to call Michael Thompson; a witness Clark averred supported a newly discovered evidence claim. However, Clark had never presented this newly discovered evidence claim in a sworn motion for post-conviction relief. Likewise, Clark had not been granted an evidentiary hearing on any such claim.

The State presented two witnesses at the evidentiary hearing. Neuropsychologist Tannahill Glen testified as to the results of her psychological evaluation of Ronald Clark. Co-defendant, John David Hatch, also testified in rebuttal of Clark's newly discovered evidence "claim."

After the evidentiary hearing, the Court permitted both sides to submit written closing arguments. On September 17, 2007, the collateral court denied Clark's amended motion for post-conviction relief, in its entirety. (PCR Vol. V, 826-859).

Clark appealed. On September 16, 2008, Clark filed his initial brief. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

Claim I: In this claim, Clark raises one guilt phase claim and one penalty phase claim. Clark's guilt phase claim may be denied because Clark put on no evidence at the evidentiary hearing to support his claim.

Clark's penalty phase claim may be denied because Clark failed to present sufficient evidence to pierce his on-the-record waiver, at trial, of his right to put on mitigation evidence. Clark's penalty phase claim must also fail because, even if this Court were to permit Clark to go behind his waiver, Clark can show no deficient performance. Trial counsel is not deficient when he refrains from presenting evidence that may do more harm than good.

Finally, Clark's penalty phase claim must fail because Clark can show no prejudice. Much of the evidence Clark claims should have been presented was harmful, including evidence that Clark is a sociopath who enjoys hurting others. Such evidence would not likely persuade a jury to recommend life in prison especially since Clark had previously been convicted of a murder just months before Clark's Duval County trial.

Claim II: This claim may be denied because Clark never raised this newly discovered evidence claim in his sworn motion for post-conviction relief. Additionally, the claim is time barred because Clark discovered this evidence two years before he

raised it as a claim before the collateral court. Finally, this claim should be denied because the "newly discovered" evidence would not likely result in an acquittal at retrial.

ARGUMENT

ISSUE I

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE AND PENALTY PHASE OF CLARK'S CAPITAL TRIAL.

A. Standard of review

An ineffective assistance of counsel claim presents a mixed question of law and fact subject to plenary review. This Court applies the test outlined in Strickland v. Washington, 466 U.S. 668, 687, (1984) to review claims of ineffective assistance of counsel. State v. Pearce, 994 So.2d 1094, 1099 (Fla. 2008); Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This standard of review requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. If the trial court's findings are supported by competent substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact, the credibility of the witnesses, and the weight to be given to the evidence by the trial court. Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997) (quoting Demps v. State, 462 So.2d 1074, 1075 (Fla. 1984)).

B. Applicable Law

To establish a claim of ineffective assistance of counsel, two elements must be proven. First, the defendant must show that trial counsel's performance was deficient. This requires a

showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Kimbrough v. State, 886 So.2d 965, 978 (Fla. 2004).

In order to meet this first element, a convicted defendant must first identify, with specificity, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Pietri v. State, 885 So.2d 245 (Fla. 2004).

In reviewing counsel's performance, the court must indulge a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. It is the defendant's burden to overcome this presumption. Mungin v. State, 932 So.2d 986, 996 (Fla. 2006). In this case, the presumption that trial counsel's conduct fell within the wide range of professional assistance includes, within it, the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Asay v. State, 769 So.2d 974, 984 (Fla. 2000) (ruling the defendant bears the burden of proving that counsel's representation was unreasonable

under prevailing professional standards and was not a matter of sound trial strategy).

If the defendant successfully demonstrates trial counsel's performance was deficient, the defendant must then show this deficient performance prejudiced the defense.[3] In order to demonstrate prejudice, the defendant must show 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. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

Where Clark alleges his counsel was ineffective during the penalty phase for failing to adequately investigate and present evidence in mitigation, Clark must show that, but for trial counsel's alleged errors, there is a reasonable probability he would have received a life sentence. Gaskin v. State, 822 So.2d 1243 (Fla. 2002). Unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

[3] If a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong. Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

Strickland v. Washington, 466 U.S. 668, 687 (1984); Gorby v. State, 819 So.2d 664, 674 (Fla. 2002).

In addition to the ordinary scrutiny this Court conducts under the dictates of Strickland, this case also presents an issue of waiver. Clark waived his right to present mitigation evidence to his penalty phase jury. On direct appeal, this Court found Clark's waiver was knowing and voluntary. Clark v. State, 613 So.2d 412, 414 (Fla. 1992).

It is well-established that defendants have the right to waive presentation of mitigating evidence. Grim v. State, 971 So.2d 85 (Fla. 2007). A defendant has the right to choose what evidence, if any, the defense will present during the penalty phase. Grim v. State, 841 So.2d 455, 461 (Fla. 2003). After doing so, a defendant should not be allowed, as a rule, to complain that counsel was ineffective for allowing him to exercise that right.

This Court has recognized, however, that a defendant's waiver of his right to put on mitigation evidence will not always defeat a claim of ineffective assistance of counsel.[4] This Court has held that a defendant may still show deficient performance if counsel fails to conduct an adequate

[4] The United States Supreme Court has never imposed an informed or knowing requirement upon a defendant's decision not to introduce evidence. Schiro v. Landrigan, 550 U.S. 465 (2007).

investigation and advise the defendant so that he reasonably understands what is being waived and its ramifications. State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002).

C. Merits

This claim should be denied for two reasons. First, Clark can show no deficient performance in either the guilt phase or penalty phase. Second, Clark cannot show trial counsel's actions or alleged inaction undermines confidence in the outcome of Clark's capital trial.

GUILT PHASE

In his lone claim of ineffectiveness at the guilt phase, Clark asserts trial counsel was ineffective for failing to investigate and present evidence that Mr. Hatch, and not Mr. Clark, was the shooter. (IB 25). Clark raised this claim in his amended motion for post-conviction relief. An evidentiary hearing was held on the claim.

Before this Court, Clark alleges the record on appeal is replete with evidence that Hatch was the shooter. Clark cites to page 981-982 of the post-conviction record in support of his claim. (IB 31).

However, the pages to which Clark cites contain trial counsel's testimony about his views of the case. (PCR Vol. VI 981-982). Trial counsel's opinion of who was, and was not, the

shooter does not constitute substantive evidence that Hatch was actually the shooter.[5]

Clark presented no evidence, at the evidentiary hearing, to support his claim that trial counsel was ineffective for failing to investigate and then present persuasive evidence that Hatch was the shooter.[6] This is so because Clark failed to present any evidence at the evidentiary hearing, in existence at the time of trial, that Hatch was the shooter. Trial counsel cannot be ineffective for failing to present evidence that did not exist at the time of trial. Pooler v. State, 980 So.2d 460, 465 (Fla. 2008) (counsel not ineffective for failing to present a defense where there is no evidence to support a defense); Bell v. State, 965 So.2d 48, 64 (Fla. 2007)(counsel not ineffective for failing to present a credible defense when there is no evidence to

[5] The collateral court found that trial counsel's testimony at the evidentiary hearing, that he would have developed evidence that Hatch was the shooter if such evidence existed, to be credible and more persuasive than Clark's allegations. (PCR Vol. V 838).

[6] Clark did present testimony from Michael Thompson in the guise of newly discovered evidence. The collateral court found that Thompson had "credibility issues." Even so, by its nature, newly discovered evidence cannot be evidence to support an ineffective assistance of counsel claim. This is so because in order to be newly discovered, the defendant must show that both he and his counsel were not aware of the evidence at the time of trial and could not have been aware of it with due diligence. Counsel cannot be ineffective for failing to discover newly discovered evidence.

support a credible defense).[7] Clark's guilt phase claim should be denied.[8]

PENALTY PHASE

In his lone penalty phase claim, Clark alleges counsel was ineffective for failing to present the same mitigation that trial counsel presented in Clark's earlier murder trial in Nassau County. At his trial in Duval County, Clark waived his right to present mitigation evidence. The record of trial demonstrates what occurred:

> **Trial Counsel**: (at sidebar) Judge, I would like to make record of the fact that Mr. Clark has decided not to put any evidence on. He was examined by two psychiatrists and Dr. Maculuci, but he's decided that he doesn't want any evidence adduced at this hearing and that he does not wish to testify.
>
> *(Jury is excused).*
>
> **Trial Counsel**: All right, your Honor, I just wanted to advise the court that Mr. Clark has decided not to exercise his right to testify or to present other evidence in mitigation. As this Court may recall, Mr. Clark was seen by two psychiatrists, Dr. Miller and Dr. Bernard, and he

[7] Trial counsel did present evidence at trial that Hatch was the shooter. Clark testified Hatch the shooter. The fact the jury did not believe Clark does not prove that counsel was ineffective. In order to prevail on his claim of ineffective assistance of counsel, Clark would have had to present evidence, at the evidentiary hearing, that was not presented at trial, to show Hatch was the shooter. Clark introduced no such evidence.

[8] Clark also complains that trial counsel failed to hire an investigator. (IB 33). However, counsel can only be ineffective if the failure to hire an investigator resulted in a failure to discover critical evidence. Clark presented no evidence at the evidentiary hearing that trial counsel failed to uncover because he did not hire an investigator.

was seen by Dr. Maculuci out of Tallahassee. They all submitted reports and he knows he can testify but he would not like to present that to the jury.

The Court: All right. Mr. Clark, will you please stand, sir. Mr. Clark, you understand, sir that this is as much your hearing as it is their (the State's) hearing, do you understand?

Mr. Clark: Yes, sir.

The Court: And do you understand what happened, what Mr. Davis said, is that correct, is that your position in the case?

Mr. Clark: Yes, sir.

The Court: Okay. And have you had time to think about this and reflect on it and is this your desire not to call or present any testimony that Mr. Davis alluded to?

Mr. Clark: Yes, sir.

The Court: In regarding to your own testimony, did you wish to testify in this matter and tell the jurors anything about yourself or your past or your background, or where you are planning to go from here. Is there anything that you want to tell them?

Mr. Clark: No.

The Court: You understand I would give you full opportunity to have your say if you want to have your say, that I will give you full opportunity to say whatever you want to say at this time. I want to make it as clear to you as I can that this is as much your hearing as it is the State of Florida's hearing.

Mr. Clark: Yes, sir.

The Court: Do you understand that?

Mr. Clark: Yes, sir.

The Court: Okay. And are you feeling all right today.

Mr. Clark: Yes, Sir.

The Court: Are you having any trouble thinking or is your reasoning good today.

Mr. Clark: Yes, sir.

The Court: Okay. Are you under the influence of any drugs or alcohol, or anything like that?

Mr. Clark: No, I didn't take none today.

The Court: Okay. And you don't want any of this testimony presented, and you, yourself, do not want to testify or speak to the jury.

Mr. Clark: I don't want the jury to know nothing. I want Mr. Willis to know that I did not kill Ronald Willis. That's all I've got to say.

The Court: Okay. Well, you understand Mr. Clark, that we are in a little different proceeding at this time than that.

Mr. Clark: Yes, sir.

The Court: But this is your one and only opportunity and I wanted to afford you every opportunity that I could to say anything that you wanted to say to these 12 people that are going to make a recommendation to me and you do seem very coherent and you seem to have a good frame of mind in my discussions with you this morning, but I wanted to afford you every opportunity that I could to speak to these people if you so wanted to.

Mr. Clark: I don't want to.

The Court: Okay. Well that is your decision and I'm certainly not going to force you or make you do something that you do not want to do. I guess this is something that you have thought about, you and Mr. Davis. So, I just wanted to make sure and satisfy myself that you understood this proceeding that we are having here today and that this is much your proceeding as it was the State's and I would afford you to state anything or whatever you wanted to state if you so desire.

Mr. Clark: I don't have anything to say.

The Court: Okay. Mr. Davis, then based upon my conversation with Mr. Clark and I guess the conversation that you had with Mr. Clark, there won't be any further testimony to present.

Trial Counsel: That is correct judge.

(TR Vol. XI 786-791).

Although, trial counsel did not present mitigation to the jury, at his client's direction, trial counsel did present mitigation evidence to the trial court at the Spencer hearing. Trial counsel requested the court to consider the reports from all three examining mental health experts. The trial court agreed to consider the reports. (TR Vol. XI 830-831).

Mr. Clark was given an opportunity to address the court. Clark demurred. Clark told the trial judge "I ain't got nothing to say." (TR Vol. XI 837).

Notwithstanding his waiver of mitigation at trial, Clark alleged, in his motion for post-conviction relief, that trial counsel was ineffective for failing to present mitigation evidence during the penalty phase of his capital trial. An evidentiary hearing was held on the claim.

Clark presented no mitigation evidence at the evidentiary hearing. Instead, Clark claimed only that trial counsel was ineffective for failing to present the same mitigation to his

Duval County jury that trial counsel presented in Clark's Nassau County murder trial.

At the evidentiary hearing, Clark put the transcripts from Clark's Nassau County trial into evidence. Additionally, trial counsel, Henry Davis, testified about Clark's decision to waive mitigation.

Before going into detail about his representation of Mr. Clark, Mr. Davis told the collateral court about his previous experience. Mr. Davis was a trial attorney for the Justice Department from 1976-1980. In 1980, he started a private practice. (PCR Vol. VI 965). Criminal defense work constituted about 50% of his private practice. Clark's murder trials, in Nassau and then Duval County, were the first capital cases he had tried. (PCR Vol. VI 965). He had tried other murder cases, however. (PCR Vol. VI 965).[9]

Trial counsel investigated in preparation for the penalty phase. Several mental health experts examined Clark. Trial

[9] Trial counsel was unable to review his trial file before the evidentiary hearing because almost all of it was missing. Trial counsel testified that there were boxes and boxes of files in Clark's two cases and the only thing intact was some of his notes he made from one of the trials. (PCR Vol. VI 969). It is not uncommon for trial counsel not to retain an entire copy of his trial file when he surrenders it to collateral counsel and for much, or all of it to be missing, by the time the evidentiary hearing is conducted. This makes it often difficult for trial counsel to recall what he did and did not do and why. Trial counsel testified that he surrendered his file to his collateral counsel with the understanding they would copy it and return it to him. He never got it back. (PCR Vol. VI 970).

counsel met with Clark's father. They had several conversations. (PCR Vol. VI 973). Trial counsel also spoke to Clark's stepmother and people who know Clark and John Hatch and the people with whom they associated. (PCR Vol. VI 973).

Mr. Davis learned that both of Clark's parents had very, very significant psychiatric problems. Trial counsel believed that Clark inherited those problems. The doctors who examined Clark confirmed that this was the case. In the course of his investigation, trial counsel also learned about things that Clark did as a child and as he was growing up continuing up until the time he was arrested in the case. (PCR Vol. VI 973).

Clark's parents told trial counsel that Clark would kill and torture animals just for the sport of it. Clark threw cats against the wall just to kill them. Clark would also super-glue cats' eyes shut just to do it. Trial counsel told the collateral court that the "the list went on and on." (PCR Vol. VI 974).

Clark had a very difficult childhood. It was, in trial counsel's experience, the most traumatic painful life that he had ever heard. Clark had no parental guidance and from birth never received normal parenting. (PCR Vol. VI 975). He never developed a sense of right and wrong. (PCR Vol. VI 975). Clark acted out constantly.

In Mr. Davis' opinion, Clark was a bright fellow. He educated himself and spent hours telling trial counsel about the things he had accomplished.

Trial counsel told the collateral court that Clark is a totally different person from the person he was before this arrest. Trial counsel attributed this change to medication he received at the jail. In his opinion, Clark is not the same person who was in Nassau County out there on the road killing people. (PCR Vol. VI 976).

Mr. Davis did not present the same mitigation in Duval County that he did in Nassau County for two reasons. First, Mr. Clark did not want him to do that. It was Clark's decision to waive mitigation. (PCR Vol. VI 1012).

Trial counsel had several discussions with Mr. Clark about the mitigation case. Ronald Clark told him that he did not want to present the mitigation presented in the Nassau County case. (PCR Vol. VI 972). Clark understood what he was doing and freely and voluntarily made the decision to waive mitigation. (PCR Vol. VI 1011).

Clark was intelligent, competent, and capable of making the decision. (PCR Vol. VI 1012). Even though trial counsel thought the mitigation presented to the Nassau County jury cut both ways, he would have put it before the jury if Clark wanted him to. In trial counsel's mind, it was not so clear cut that

he would have not presented it, if Clark wanted him to. (PCR Vol. VI 975).

The second reason trial counsel did not present the same mitigation he did in Nassau County was that the evidence, in his view, would have been at least as prejudicial as it would have been helpful. (PCR Vol. VI 1009). After presenting the mitigation evidence and getting the recommendation for death in Nassau County, trial counsel was concerned that presenting the same mitigation evidence might cast Clark in a worst light than he already was. (PCR Vol. VI 1010).

Trial counsel told the court that it was a judgment call. If he were faced with the same situation today, he might present it because there is nothing to lose. At the time, trial counsel felt it was not helpful to present that evidence, especially since it had been rejected just a few months or weeks ago in Nassau County. (PCR Vol. VI 1010).

The collateral court denied the claim. The collateral court found that trial counsel made a tactical decision not to present the same mitigation evidence that he presented in the Nassau County trial because the mitigation evidence cut both ways. The court pointed to evidence that Clark tortured animals for sport. The collateral court noted that Mr. Davis was aware, from the jury's reaction in Nassau County, that the mitigation evidence presented had the opposite effect of its intended

purpose. The collateral court found that trial counsel's tactical decision not to present the same mitigation evidence, as he did in Nassau County, did not constitute deficient performance. (PCR Vol. XI 837-838).

This Court should affirm for three reasons. First, Clark failed to present any evidence sufficient to allow him to go behind his waiver of mitigation at trial.

Clark did not testify at the evidentiary hearing. Clark did not testify he was unaware of the mitigation that could have been presented. Clark did not testify that, if only counsel would have explained it better or investigated more thoroughly, he would have made a different decision.[10]

This Court has held that a defendant may go behind his waiver if he shows that counsel failed to conduct an adequate investigation and advise the defendant so that he reasonably understands what is being waived and its ramifications. State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002). Clark did not do that.

[10] In his initial brief, Clark avers that "nothing in the record indicates that Judge Davis advised Appellant of the quality and quantity of the mitigation available." (IB 39). Clark undoubtedly already knew of the quality and quantity of the available evidence because he had sat through his Nassau County trial and heard all the evidence. Even so, Clark's argument presumes the State bears the burden to show Clark's waiver was voluntary. This is not the case. Instead, it is Clark's burden to show it was involuntary. In post-conviction, the defendant bears the burden to show trial counsel's performance was deficient.

Indeed, Clark implicitly recognizes that trial counsel did investigate and discover available mitigation.[11] This is so because Clark's entire claim is based on the notion that trial counsel should have put on the same mitigation evidence he investigated, discovered, and then presented to the Nassau County jury.

Given Clark's claim, the only way Clark could have demonstrated counsel failed to conduct an inadequate investigation was to present, at the evidentiary hearing, significant additional mitigation not discovered or presented to Clark's Nassau County jury. Clark did not do so.

Clark did not put on any additional mitigation evidence at the evidentiary hearing that Clark claims counsel should have, but did not investigate and present. Clark did not present any evidence that trial counsel failed to consult with him or that he did not understand what was being waived and its ramifications. This Court should not permit Clark to go behind his waiver to assert a claim of ineffective assistance of counsel when Clark failed to put on any evidence that counsel conducted an inadequate investigation or failed to advise him so

[11] Trial counsel had Clark evaluated by three mental health experts, including an addictionologist, and presented the testimony of these experts at Clark's Nassau county murder trial. Additionally, trial counsel procured the testimony of Clark's step-mother, Frances Clark, who testified before a Nassau county jury about Clark's social history and childhood traumas.

he reasonably understood what was being waived. Henry v. State, 937 So.2d 563 (Fla. 2006)(finding no deficient performance when trial counsel investigated and prepared for the penalty phase and Henry knowingly and voluntarily waived his right to present mitigation evidence).

Even if this Court were to discount Clark's waiver, Clark failed to show counsel's performance was deficient. This Court has recognized, on many occasions, that counsel is not ineffective for failing to present evidence that might do more harm than good. Hamilton v. State, 875 So.2d 586, 593 (Fla. 2004); Van Poyck v. State, 694 So.2d 686, 689-92 (Fla. 1997) (finding no ineffectiveness of counsel where counsel made a tactical decision not to present a mental health expert whose findings would not be helpful).

Counsel testified at the evidentiary hearing that he presented the mitigation evidence to the Nassau County jury that Clark avers should have been presented in the instant case. He could tell from the reaction of the jurors that they were not seeing it as mitigation. (PCR Vol. VI 974). The Nassau county jury recommended death.

Trial counsel believed the evidence was at least as prejudicial as it was helpful. Trial counsel learned much information, during the scope of his investigation, which was not favorable to Clark, including that Clark had a fondness for

torturing small animals. A review of the evidence from the Nassau County case, as well as a report from at least one of the mental health experts who evaluated Clark, illustrates some of trial counsel's concerns.

In a June 12, 1990 report, Dr. Ernest Miller wrote that Clark last worked in 1988. Since that time, Clark has been involved in dealing drugs. (TR Vol. I 55). Dr. Miller notes that Clark admitted that he physically and mental abused his wife. (TR Vol. I 56). Among Dr. Miller's conclusions was that Clark had a passive/aggressive/sociopathic personality disorder.

Francis Clark testified during Clark's Nassau County trial. She is Clark's stepmother. (PCR Supp. Vol. I 3).[12]

Ms. Clark told the jury that alcohol made Clark mean. He got kicked out of school because drugs and alcohol made him hostile in school. Ms. Clark told the jury that Clark would steal his father's anti-depressants. He would take his father's medication if he felt like he wanted to hurt someone. She has seen Clark with a sawed-off shotgun. (PCR Supp Vol. I 8, 11).

Dr. Manuel Chaknis testified. Dr. Chaknis testified that Clark told him that, after his parents divorced, he bounced back and forth between this father's house and his mother's house. Dr. Chaknis suspected that Clark bounced in and out of these

[12] Some of Clark's mitigation evidence was actually presented during the guilt phase in support of a voluntary intoxication, diminished capacity type defense.

homes because of his inability to manage his behavior, although he did not know that for sure. (PCR Supp Vol. I 17). Clark told Dr. Chaknis that he would "love" to kill the woman who molested him as a child. (PCR Supp Vol. I 19). Clark constantly fought in school and quit school to avoid being expelled. (PCR Supp Vol. I 20). Dr. Chaknis told the Nassau County jury that Clark tried to attack a classmate and a vice-principal with a 2X4. (PCR Supp Vol. I 20). Clark told Dr. Chaknis that he overdosed deliberately on a number of occasions because "life is a dud." (PCR Supp Vol. I 21).

Clark told Dr. Chaknis that he had sexual intercourse with near peer age females who had passed out. Dr. Chaknis told the jury that he described this [in his report] as "rape-like" behavior. Clark also told Dr. Chaknis that a man attempted to seduce him and that someday he "hoped to disembowel him." (PCR Supp Vol. I 21). Clark did manage to sabotage some of this man's property.

Clark told Dr. Chaknis that he fought extensively in school and had been suspended on several occasions for misconduct. (PCR Supp. Vol. I 22). Clark told Dr. Chaknis that he "derived extreme enjoyment from hurting other people and watching blood splatter." (PCR Supp Vol. I 22).

According to Dr. Chaknis, Clark is immature and preoccupied with aggressive and destructive thoughts and impulses. (PCR

Supp Vol. I 25-26). Clark reported one incident where he armed himself with several weapons to severely injure a child in Oklahoma. (PCR Supp Vol. I 22).

The record supports that much of the evidence presented to Clark's Nassau County jury reflected extremely poorly on Clark. Certainly, the mitigation evidence did not persuade the Nassau County jury to recommend Clark be sentenced to life in prison. Counsel is not deficient for making a tactical decision not to present evidence that his client is a sociopath who has engaged in violent and rape-like behavior, desires to kill or disembowel those he perceives have harmed him, and enjoys seeing others hurt. Looney v. State, 941 So. 2d 1017, 1029 (Fla. 2006) (Counsel not ineffective for failing to call mental health expert, Dr. Gutman, who diagnosed Looney as anti-social personality disorder); Hamilton v. State, 875 So.2d 586, 593 (Fla. 2004) (counsel not ineffective for not presenting the testimony of defense expert, Dr. Mhatre, who would opine that Hamilton had anti-social personality disorder); Reed v. State, 875 So.2d 415, 437 (Fla. 2004) ("[T]his Court has acknowledged in the past that antisocial personality disorder is 'a trait most jurors tend to look disfavorably upon'") (quoting Freeman v. State, 852 So.2d 216, 224 (Fla. 2003)).

Finally, this claim should be denied because Clark can show no prejudice. Clark did not present any additional mitigation

at the evidentiary hearing. Accordingly, in order to show prejudice for failing to present the same mitigation as was presented to Clark's Nassau County jury, Clark must show there is a reasonable probability that, if trial counsel would have presented this same evidence, he probably would have received a life sentence in his Duval County case. This he cannot do.

In claiming that Clark was prejudiced by trial counsel's failure to present the same mitigation presented to Clark's Nassau County jury, Clark points to the fact that the evidence, while not weighty enough to convince Clark's Nassau County jury and trial judge that a life sentence was appropriate, was sufficient to convince the Florida Supreme Court to reduce Clark's death sentence to life in prison. (IB 31). In presenting this argument, Clark presumes that trial counsel's ineffectiveness may be proven by the subsequent actions this Court took on appeal. Clark is mistaken.

This Court in Carratelli v. State, 961 So.2d 312 (Fla. 2007) rejected such a notion. In order for a collateral defendant to show trial counsel was ineffective, he must show there is a reasonable probability of a different outcome at trial, not on appeal. Id. at 323. Accordingly, the fact this Court ultimately reduced Clark's Nassau County sentence to life does not prove Clark suffered prejudice in his Duval County case.

Even if this Court's decision in Clark's Nassau County case were relevant to this Court's consideration of Clark's claim now, this Court did not reduce Clark's Nassau County death sentence to life because of overwhelming mitigation evidence. Instead, Clark's death sentence was reduced to life, for the most part, because this Court found insufficient evidence to support three of the four aggravators found to exist by the trial court (HAC, CCP, and in the course of a robbery). Left with only one aggravator (pecuniary gain) and what the Court characterized as strong non-statutory mitigation, this Court reduced Clark's sentence to life. Clark v. State, 609 So.2d 513 (Fla. 1992).

This case, however, was in a completely different posture than was the Nassau County case. In the case at bar, the trial court found, and this Court upheld, that two aggravators existed, including a conviction for a prior murder: (1) Clark had previously been convicted of a violent felony, the Nassau County murder and (2) the murder was committed in the course of a robbery/pecuniary gain (which were merged into one aggravator).

The presence of a prior murder conviction under similar circumstances was, without doubt, a weighty aggravator. Because the instant case is in a completely different posture than was the Nassau County case, the fact this Court reduced Clark's

sentence to life in prison, in the Nassau County case, does not satisfy Strickland's prejudice prong in the instant case.

Putting on this same evidence would have also opened the door to the State calling an expert, such as Dr. Tannahill Glen, who testified at the evidentiary hearing on behalf of the State. Dr. Glen testified that Clark is malingering and has anti-social personality disorder. Persons with anti-social personality disorder manifest behaviors such as a lack of remorse for maladaptive or hurtful behaviors, lying in order to cover up one's culpability for wrongdoing, irresponsibility, inability to hold a job, and a pervasive disregard for one's own or other people's safety. (PCR Vol. VI 1044). It is common for a person with anti-social personality disorder to engage in criminal behavior. (PCR Vol. VI 1044).

According to Dr. Glen, a person with anti-social personality disorder knows right from wrong and can choose to conform his conduct to the law. He simply chooses not to. (PCR Vol. VI 1046). A person with an anti-social personality disorder makes active choices to behave in a certain manner regardless of the effect on other people. (PCR Vol. VI 1045).

Clark, however, is more than anti-social. Dr. Glen testified that Clark is a sociopath and narcissistic. In addition to the typical traits of an anti-social personality

disorder, a sociopath is someone who has a sadistic streak and has no remorse for hurting others. (PCR Vol. VI 1049).[13]

Lastly, Clark can show no prejudice because presenting the same mitigation witnesses presented to Clark's Nassau County jury would have allowed the Duval County jury to hear testimony that Clark is a violent sociopath who tried to attack a high school class mate and vice-principal with a two-by-four, had engaged in "rape-like behavior" with numerous young women, was a drug dealer, had fought often in school, was suspended on several occasions for misconduct, and derived extreme enjoyment from hurting other people and watching blood splatter.

Given the nature of much of the "mitigating" evidence presented to Clark's Nassau County jury, Clark cannot show there is a reasonable probability that, had the Nassau County mitigation been presented in the instant case, the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death. Willacy v. State, 967 So.2d 131, 144 (Fla. 2007) (no prejudice shown because presenting mental mitigation that may include a diagnosis that Willacy was a sociopath would likely have been more harmful than helpful); Evans v. State, 946 So.2d 1, 13 (Fla. 2006)(Evans has

[13] Dr. Glen testified that Clark is bright and does not suffer from any emotional disturbance. Clark's capacity to appreciate the criminality of his conduct is not impaired. (PCR Vol. VI 1053).

failed to establish prejudice because the mitigation evidence he presented at the evidentiary hearing would likely have been more harmful than helpful); Johnson v. State, 921 So.2d 490, 501 (Fla. 2005); Freeman v. State, 852 So.2d 216, 224 (Fla. 2003)(anti-social personality disorder is a trait most jurors look disfavorably upon). Clark's claim should be denied.

ISSUE II

WHETHER NEWLY DISCOVERED EVIDENCE WARRANTS A NEW TRIAL.

In Clark's second claim before this Court, Clark avers that newly discovered evidence warrants a new trial. Clark alleges that the testimony of Michael Thompson constitutes newly discovered evidence. Mr. Thompson testified that Clark's co-defendant, John Hatch told him he shot Mr. Willis. (IB 42-48).

A. Standard of Review

When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, this Court reviews the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence. Melendez v. State, 718 So.2d 746, 747-48 (Fla. 1998); Blanco v. State, 702 So.2d 1250, 1251 (Fla. 1997). This Court then reviews the trial court's application of the law to the facts *de novo*. Preston v. State, 970 So.2d 789, 798 (Fla. 2007).

B. Applicable Law

The test to be applied to claims of newly discovered evidence was first enunciated in Jones v. State, 709 So.2d 512 (Fla. 1998). 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. Jones v. State, 709 So.2d at 521.

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." Jones, 709 So.2d at 526 (quoting Jones v. State, 678 So.2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See* Jones v. State, 591 So.2d 911, 915 (Fla. 1991).

In determining whether the evidence compels a new trial, the collateral court must "consider all newly discovered evidence which would be admissible" and must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916. This determination includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence.

The collateral court should also determine whether the evidence is cumulative to other evidence in the case. The collateral court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly

discovered evidence. Jones, 709 So.2d at 521 (citations omitted).

C. The collateral court's ruling

The collateral court denied this claim on three independent grounds. First, the collateral court found the claim was untimely because Clark failed to file this new claim within one year of the time he discovered it. The collateral court pointed to Rule 3.851(d)(2)(A) in ruling the claim was untimely. (PCR Vol. V 857).

The collateral court also denied the claim because the court concluded that Clark failed to establish the evidence would have been admissible at Clark's trial. (PCR Vol. V 857). Finally, the collateral court denied the claim because he found, in light of Thompson's credibility problems; the newly discovered evidence would not likely produce an acquittal at trial. (PCR Vol. V 857).

D. Merits

This Court should affirm the trial court's order for three reasons. First, the claim was never properly before the collateral court. Rule 3.851 (d) and (e), Florida Rules of Criminal Procedure, requires a defendant, under oath, to set forth his claims for post-conviction relief. Clark does not dispute he failed to raise this claim of newly discovered evidence in his amended motion for post-conviction relief.

A defendant who discovers he has omitted a timely claim from his motion for post-conviction relief is not without remedy. Rule 3.851(f)(4) does provide a mechanism for amending a motion before the evidentiary hearing. In accord with the rule, a trial judge may permit a defendant to amend his motion at any time up to 30 days prior to the evidentiary hearing upon motion and good cause shown. A trial judge may grant a motion to amend, in his discretion, provided the motion sets forth the reason the claim was not raised earlier and the defendant attaches a copy of the claim sought to be added. *Rule 3.851(f)(4), Florida Rules of Criminal Procedure*.[14]

Clark did not file a motion to amend his pending post-conviction motion to add a claim of newly discovered evidence. Instead, Clark surprised the state and the collateral court by calling a witness whose testimony was completely unrelated to the claims for which an evidentiary hearing was granted. Indeed, at the evidentiary hearing, Clark initially denied that he was calling Mr. Thompson to support a new claim of newly discovered evidence. Instead, he claimed that Mr. Thompson's testimony was relevant to mitigation. (PCR Vol. VI 940).

Clark subsequently admitted that Mr. Thompson was called to support a newly discovered evidence claim. Clark requested he be

[14] The State preserved this objection before the collateral court. (PCR Vol. VI 29-30).

allowed to amend his motion to conform to the evidence. He never did, however. (PCR Vol. VI 961-962). This Court should find this claim was not properly before the collateral court because Clark never raised this claim in a sworn motion for post-conviction relief.[15]

If this Court were to consider this claim a *de facto* supplemental motion, this claim should still be rejected because it was not timely filed. Rule 3.851(d), Florida Rules of Criminal Procedure, provides that no motion shall be considered unless it is brought within one year from the time a defendant's conviction becomes final.

An exception to this one year requirement is made when the defendant alleges there exists newly discovered evidence that could not have been discovered during that one year period with due diligence. *Rule 3.851(d)(2)(A), Florida Rules of Criminal Procedure.* A defendant does not, however, have unlimited time to bring a claim of newly discovered evidence. Rather, a defendant must bring a claim of newly discovered evidence within one year of the time he discovered the evidence or with due diligence could have discovered it. Glock v. Moore, 776 So.2d

[15] If this court allows this practice to be followed, it will open to door to defendants intentionally and routinely failing to include a claim in a sworn motion, then attempting to surprise the State and the collateral court on the day of the evidentiary hearing with new unsworn claims that the State has had no opportunity to answer or prepare for.

243, 251 (Fla. 2001)(“Any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence.”).

Michael Thompson testified he told Clark about his conversation with John David Hatch in the early part of 2005 about two years before the February 26, 2007 evidentiary hearing. (PCR Vol. VI 950-953). Accordingly, Clark had till the end of February 2006, to file a supplemental motion or to amend his pending motion. Clark did not do so. Instead, Clark waited till the day of his evidentiary hearing to raise this claim.

Clark acknowledges that the claim is untimely. Clark seeks to excuse his failure to raise the claim earlier on three bases. First, collateral counsel was not able to talk to or have access to Thompson until shortly before the hearing. (IB 44). However, there is no evidence in the record to support that assertion.

Next, Clark also claims he was “ill” much of the intervening year. Clark offers no details and offers no explanation how his illness prevented him from communicating his conversation with Thompson, to counsel, until “shortly before the hearing.” (IB 44). Finally, Clark claims that he could not

raise this claim before because current counsel was not appointed till March 2006.

None of Clark's excuses has legal merit. Clark, himself, knew of the claim in the early part of 2005. Accordingly, Clark discovered this evidence some two years before the evidentiary hearing. In accord with Rule 3.851(d)(2), Clark's supplemental claim was "filed" one year too late. The collateral court's finding that Clark's claim is untimely should be affirmed.

Finally, this claim may be denied because Clark failed to show that Mr. Thompson's testimony, when considered along with all the other evidence introduced at trial, would likely produce an acquittal upon re-trial or even a lighter sentence. At the evidentiary hearing, Thompson testified that John David Hatch cried when he told him that he had to testify against his co-defendant to save his life. According to Thompson, Hatch told him that he was in the car with this guy and the guy got shot in a drug deal gone bad. (PCR Vol. VI 947).

Thompson told the collateral court that Hatch reported, in 1992, that what happened is that "one of them owed the other one some money and the dude pulled a gun on him and he pulled a gun and shot him and killed him. (PCR Vol. VI 947). Thompson testified that Hatch did not say a whole lot but did say that he threw the guy over some kind of bridge into a canal or something and that the body had washed out to sea. Thompson told Hatch

they hadn't found the body. Thompson told the collateral court that Hatch did not go into a lot of detail. (PCR Vol. VI 948). Thompson testified that Hatch did say the incident happened in a car but that Hatch did not tell him what happened to the car or the dead man's clothing. (PCR Vol. VI 955).

Thompson testified that he had about twenty felony convictions and had been sentenced to nine consecutive life sentences for sexual battery. (PCR Vol. VI 948-949). Thompson told the collateral court that Clark had asked him to look at some paperwork about his case. It was in that paperwork that Thompson learned of Clark's connection with John Hatch. Thompson claimed he did not read all of it. (PCR Vol. VI 951).

Thompson did not testify that Hatch told him when the murder happened, what kind of gun was used, how many times "the guy" was shot, what kind of vehicle the dead man had, how they came into contact with the victim on the day of the murder, or what they did with the dead man's gun. Thompson provided no information on where the murder occurred or even the victim's name.

The State called John David Hatch in rebuttal. Hatch testified at the evidentiary hearing that he did not make these statements to Thompson and that his trial testimony was true. (PCR Vol. VI 1085).

The collateral court, in denying the claim on the merits, noted that Thompson had "credibility issues." (PCR Vol. V 857). The collateral court's finding that Thompson had credibility issues and that his testimony would not likely result in an acquittal upon retrial is supported by competent, substantial evidence.

First, Thompson testified that he had been convicted of a felony some twenty times. Second, Thompson's description of the crime, in at least two material ways, was not consistent with Clark's own version of events. Third, Clark admitted to William Brown, a family acquaintance, that he shot and killed Mr. Willis.

At the evidentiary hearing, trial counsel testified the victim was a model citizen. (PCR Vol. VI 1005). Clark never told him that Mr. Willis was a drug dealer or user. (PCR Vol. VI 1005). Clark did, however, tell trial counsel he was present at the murder. Trial counsel testified, at the evidentiary hearing, that Clark had a very clear recollection of the events both before and after the murder. (PCR Vol. VI 1006).

Moreover, while Clark gave a statement to the police, Clark never claimed he or Hatch shot Mr. Willis in self defense in a drug deal gone bad. Nor did Clark tell the police that he or Hatch owed Mr. Willis money or Mr. Willis owed him or Hatch any money.

At trial, Detective Sergeant Jerry Jesonek read Clark's post-arrest statement to the jury. (TR Vol. X 582-586). Clark told the police it was Hatch who shot and killed Mr. Willis and that he did not know what was happening until he heard the gunshots. Clark made no claim that Mr. Willis had a gun or that this was a drug deal gone bad. Nor did Clark claim that Hatch killed Mr. Willis in self-defense because Mr. Willis pulled a gun first. (TR Vol. X 582-586).

Instead, Clark told the police that Mr. Willis picked them up as he and Hatch were walking on U.S. highway 17. Clark told the police that Mr. Willis stopped to give them a ride because he thought, albeit mistakenly, that he knew them from somewhere. (TR Vol. X 583). Clark also told the police it was Hatch who planned, before they even got into Mr. Willis' truck, that he was going to "take" the first person who stopped. (TR Vol. X 583). According to Clark, this truly was a random murder.

At trial, Clark testified on his own behalf. Clark testified the statement he gave to the police was true. (TR Vol. X 647-664). Clark made no claim before the jury that the murder was "self-defense" or a drug deal gone bad. It is logical to conclude, that, if the murder was the result of a drug deal gone bad or if Mr. Willis had a gun, Clark would have been the first to point a finger toward the victim and claim that it was not really his or even Hatch's fault.

In addition to testimony and statements from both trial counsel and Clark, himself, that belies any notion Mr. Willis' murder was a result of a drug deal gone bad, Thompson testified that Hatch told him the murder happened in a car. However, Mr. Willis stopped and picked up Clark and Hatch in his truck. (TR X 583). No car was involved.

Finally, at trial, the State presented the testimony of William Brown. Brown testified that he knew Clark. He had known Clark for six years. He got to know Clark and his father when they would come into his service center, where Mr. Brown was the manager. (TR Vol. X 614).

At the time of the murder, however, Mr. Brown was employed with the Nassau County Sheriff's Office. On November 2, 1990, he transported Clark to the county jail. Clark started talking to him. Clark was afraid that Mr. Willis' father would kill him. Clark told Mr. Brown that after he shot Mr. Willis, he realized that Mr. Willis was his father's best friend and a good friend to his girl friend's mother. Clark said it didn't matter because "I done killed him." (TR Vol. X 617). Clark realized the man was Ronald Willis after seeing his photograph.

Clark told Mr. Brown that Mr. Willis worked for UPS. Brown knew that Ronald Willis worked for UPS because he had seen him in his uniform several times. (TR Vol. X 619).

Given that Thompson is a twenty year convicted felon, Thompson did not come forward with any of this information for more than 13 years, Thompson's version of events, as supposedly described by Hatch, varied in two material ways from the actual evidence presented at trial, the dearth of detail in Thompson's testimony, and Clark's admission to a family acquaintance that he shot and killed Ronald Willis, the collateral court committed no error in denying Clark's newly discovered evidence claim. The order should be affirmed.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Clark's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Harry Brody and Jeff Hazen, P.O. Box 16515, Tallahassee, Florida 32317, this 16th day of February, 2009.

_____
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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.

_____

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