IN THE SUPREME COURT OF FLORIDA

RONALD WAYNE CLARK,
Appellant,

v.

STATE OF FLORIDA
Appellee.

_____/

Lt. Case #: 160-1990-CF010067-AXXX-MA
Appeal No. SC-072318

INITIAL BRIEF OF APPELLANT

Harry Brody
Jeff Hazen
Brody & Hazen, P.A.
P.O. Box 16515
Tallahassee, FL 32317
850.942.0005
Attorneys for Appellant

STATEMENT OF CITATIONS

Citations follow the record from the state court appellate proceedings. Thus, citations to the appellate record of the trial are designated (R. _____) and citations to the appellate record of post-conviction proceedings are designated (PC-R. _____).

REQUEST FOR ORAL ARGUMENT

Appellant requests that he be granted an evidentiary hearing on the issues raised and argued in his Initial Brief. The State has sought and Appellant has been sentenced to Florida's most serious and singularly irreversible sanction, Death, and Appellant considers an oral argument of his claims and contentions essential to the exercising of his rights under the State and Federal Constitutions. Although granting oral argument is discretionary with this Court, Appellant anticipates that oral argument will assist this Court's understanding of the case and of the errors which he contends infect his Judgment of Conviction and Sentence of Death.

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Reeves v. State, 826 So. 2d (Fla. 2002)

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PROCEDURAL HISTORY

Ronald Willis was shot and killed on January 13, 1990. Clark v. State, 613 So. 2d 412, 413 (Fla. 1992) His body was found in rural Duval County on that same day. Id. Ultimately, Appellant and John Hatch were arrested for Mr. Willis's murder. Hatch quickly affixed Mr. Clark with primary culpability for the killing and robbery of Mr. Willis. Id.

The state indicted Mr. Clark for first-degree murder and armed robbery, and, in January 1991, tried him on these charges. (PC-R. 0900) Mr. Hatch testified against Mr. Clark in exchange for receiving a 25-year sentence for his participation in the crime. Id. [By the time of the evidentiary hearing, on February 26, 2007, Mr. Hatch was free and testified for the state again. (PC-R. 1084)] At trial, Appellant testified that Mr. Hatch killed Mr. Willis. (PC-R. 0384) Nevertheless, the jury convicted Appellant of armed robbery and murder. Id.

In the penalty-phase of the trial, no mitigating evidence was introduced, and the jury, by an 11-1 vote rendered after 14 minutes of deliberation, recommended to the court that Appellant be sentenced to death. Id.

A Spencer hearing was held on February 20, 1991, wherein counsel argued that a life sentence was

appropriate, but the judge ultimately followed the jury's recommendation and sentenced Appellant to death. Id.

Mr. Clark appealed the conviction and sentence, but the Florida Supreme Court found the evidence sufficient to convict Mr. Clark and affirmed the conviction and the death sentence. Clark v. State, 613 So. 2d 412 (Fla. 1992) Subsequently, the United States Supreme Court denied review.

Appellant timely filed a motion for post-conviction relief, which was amended twice. (PC-R. 385) Finally, an evidentiary hearing was held on February 26, 2007 and, thereafter, Judge Wiggins entered an Order denying Appellant's claims for relief. (PC-R. 826-859)

Mr. Clark hereby appeals the denial of his post-conviction motion for vacation of his judgment of conviction and sentence of death. (PC-R. 881-900)

STATEMENT OF THE FACTS AND SUMMARY OF EVIDENTIARY HEARING TESTIMONY

At the evidentiary hearing, Mr. Michael Thompson testified that he is an inmate at Union Correctional Institution ("UCI"), where he's been incarcerated since 2003. (PC-R. 945) He met Appellant in the library for Death Row at UCI, where Mr. Thompson worked as a librarian. Id. Mr. Thompson made some copies for Mr. Clark and proofed some documents for him. (PC-R. 946)

While looking over Appellant's paperwork, Mr. Thompson saw and recognized the name "John Hatch," with whom Mr. Thompson had "done time" at another prison. Id. In fact, Mr. Thompson and Mr. Hatch had done ten years together at Baker Correctional Institution, and were "good friends." Id.

Mr. Thompson testified that, one particular night, Mr. Hatch was upset and started crying. Id. Mr. Hatch told Mr. Thompson how he, Mr. Hatch, had had to testify against Mr. Clark to save his own life. Id. Hatch explained that he either had to testify or he would have ended up on Death Row. Id. According to Mr. Hatch, he and Mr. Clark were in a car with a guy during a drug deal when the guy pulled a gun, so Mr. Hatch pulled his gun and shot the guy dead. (PC-R. 947) Thus, Mr. Hatch told Mr. Thompson that Mr.

Hatch was the shooter and admitted that he testified untruthfully against Mr. Clark at Clark's trial. Id. After he killed the guy, Mr. Hatch dumped the body off a bridge into a canal. (PC-R. 948)

Finally, Mr. Thompson testified that he didn't know Mr. Clark until some time in 2005, when he met Mr. Clark in the library and recognized who he was. (PC-R. 955) Thompson also expressed to Mr. Clark fear of becoming involved while he worked in the Death Row library because "the system" would retaliate against him if he helped Mr. Clark. Id.

Appellant's trial attorney, Henry Davis (hereafter "Judge Davis"), is now a Circuit Judge in Duval County. (PC-R. 964) Judge Davis testified that he represented Mr. Clark in two murder cases, one case in Nassau County and the instant case in Duval County. (PC-R. 1114)

Judge Davis testified that Mr. Clark was 21 or 22 years old when they met and that Mr. Clark was one of the nicest clients that he ever had. (PC-R. 0968) Further, although the cases originated in different counties, both cases were related in many ways. (PC-R. 971) Thus, he intended to introduce the penalty-phase material and substantial mitigation he'd found or developed in both cases. (PC-R. 972) Ultimately, however, he did not present

any mitigation in the Duval County case, primarily because Mr. Clark told him that he did not want to spend the rest of his life in prison. Id. Thus, since he had received the death penalty in Nassau County, Mr. Clark did not want to present the mitigation in Duval if he was convicted. (PC-R. 972)

Judge Davis also testified that he felt that the mitigation he had found and presented in the Nassau case "cut both ways" because of its disturbing nature and impact on the jurors. (PC-R. 973-974) In fact, according to Judge Davis, Mr. Clark's was "the most traumatic, painful life that I had ever heard [of.]" (PC-R. 975)

Mr. Clark did not receive "normal parenting" from birth. (PC-R. 975-976) No one taught him right from wrong, testified Judge Davis. Still, Mr. Clark was, and is, bright, intelligent, and articulate, having educated himself as best he could. Id. In jail, Mr. Clark had apparently examined his life, and Judge Davis testified that he and Mr. Clark had long discussions about Mr. Clark's life, and about his accomplishments and regrets, and the person Judge Davis met in jail was not the person who'd been subjected to and done such terrible things as Judge Davis described as comprising Mr. Clark's life from

birth or conception until his arrest for the shooting. (PC-R. 975)

In jail, he was put on medication and, once Mr. Clark got away from the street drugs, alcohol, and running the streets, Mr. Clark seemed to Judge Davis like a different person. (PC-R. 976) As Judge Davis remarked, "The person who is seated here is not the person who in Nassau County was out in the road killing people as the jury said." (PC-R. 976)

In Nassau County, Judge Davis's strategy was to present all of the mitigation he had found. (PC-R. 376) However, according to Judge Davis, Duval was a different situation because, in Nassau, the State had two very credible witnesses. On the other hand, in Duval, an examination of the facts leading up to the shooting indicates that a strong inference could be made that Mr. Hatch was, as he eventually confessed to Mr. Thompson, the shooter. (PC-R. 977) Appellant denied then, as he does now, that he shot Mr. Willis. Id. However, as Judge Davis explained, he didn't know of any evidence which confirmed that. (PC-R. 978) Thus, Judge Davis calculated that, if the jury concluded Hatch was the shooter, then Mr. Clark would not get the death penalty. Id.

Judge Davis did recall that, shortly before trial, two Nassau County deputies claimed that they overheard Mr. Clark make allegedly incriminating statements. Id. Judge Davis suspects this may have tilted things; however, with the close guilt question, he didn't want to present the mitigation that included Mr. Clark's history of violence. Id. Further, Judge Davis realized that the jury merely makes a recommendation, but the trial judge is not required to follow it. Id. It is, Judge Davis testified, "the judge's call." Id.

In sum, Judge Davis thought that there was sufficient psychiatric and personal history in the psychiatric reports prepared for the case to convince "anybody" that Ronald Clark was "seriously disturbed at the time all this was going on." (PC-R. 979) Thus, beyond showing that Ronald Clark was "not a normal person to say the least" at the time he was convicted, Judge Davis didn't think that presenting the mitigation which was used in Nassau would have been particularly beneficial. Id. Certainly, as all of the witnesses save one were local, and all of them were cooperative and available, the mitigation could easily have been presented. Id.

Judge Davis also testified that, in his judgment, most of what Mr. Clark and Mr. Hatch were doing was Mr. Hatch's

idea. (PC-R. 981) Mr. Hatch stole the gun and the ammunition and loaded the gun. Id. Mr. Hatch left Nassau County with the gun and brought it into Duval County. Id. Mr. Hatch and Mr. Clark were drunk and doing drugs and it seemed, to Judge Davis, "farfetched" to believe that, at the last moment, Mr. Hatch, not knowing what Mr. Clark would do, would hand the loaded weapon to Mr. Clark. (PC-R. 982)

In fact, Judge Davis testified that, in Nassau County, the defense presented all of the mitigation it had developed, including the evidence of sexual abuse inflicted on Mr. Clark and other "hard" mitigation to listen to. (PC-R. 983-984) This was the evidence in the record that the Florida Supreme Court received before it over-turned the death sentence in the Nassau County case. (PC-R. 984)

Regarding the Duval case, Judge Davis re-iterated that he thought the best outcome would occur if he could convince the jury that Mr. Hatch was the shooter. Judge Davis did not recall there being a "significant difference" in the sizes of Mr. Clark and Mr. Hatch, as Mr. Clark was 75-100 pounds lighter then, but frail. (PC-R. 0987) Both Mr. Clark and Mr. hatch were thin, but Mr. Clark was the taller of the two. Id.

As the Nassau County case was stronger, the state tried the Nassau case first so it could use a conviction as a prior-violent-felony aggravator, and the existence of that weighty aggravator was a substantial difference between the Nassau and the Duval cases. Id.

Prior to trial, Judge Davis and Mr. Clark met regularly to prepare the case. (PC-R. 988) Appellant was always open, amenable, and pleasant. Id. They would talk and discuss options. Id. The family was also helpful. Id.

Judge Davis did not hire or retain a private investigator, nor did he "really want a private investigator on the case." Id. He didn't see any need for an investigator to look further into the facts, and he was also concerned with someone looking into some of the unsavory rumors he'd heard about Mr. Hatch and Mr. Clark, apparently for fear of what an investigator might turn up. At that time, he didn't use an investigator to develop mitigation and doesn't know if mitigation experts were even around. (PC-R. 989) Instead, Judge Davis developed the mitigation himself in consultation with doctors who had seen Mr. Clark in the past. (PC-R. 990) (Occasionally, when he did use an investigator, Walter Wright, to locate possible witnesses, Mr. Wright would just locate people, not develop mitigation or do interviews. Id.) Judge Davis

did posit, however, that, if an investigation could have found witnesses who would have helped him prove Hatch was the shooter, he would have wanted to do that. (PC-R. 990)

Finally, Judge Davis testified that, in his opinion, the homicide in this case "could not be distinguished from the murder cases that are tried every week here in Duval County." (PC-R. 999) "They are all bad," he added. Id.

Dr. Elizabeth Tannahill Glen, a clinical neuropsychologist testified for the state that she studies the brain and behavior, how the brain functions, and how these things effect thinking, mood, and behavior. (PC-R. 1025)

Dr. Glen testified that she had been unable to document brain dysfunction or damage in Mr. Clark. (PC-R. 1031) She concluded that Mr. Clark suffers from anti-social personality disorder. (PC-R. 1043) She further opined that he is a "sociopath," while acknowledging that "sociopath" is not a technical, diagnostic term. (PC-R. 1050-1051) According to Dr. Glen, Mr. Clark manifests a "narcissistic" tendency toward grandiosity. (PC-R. 1051-1052)

Regarding her background, Dr. Glen acknowledged that she had worked for the Atlanta Police Department in its Victim Witness Association or assistance program. (PC-R.

1055) Also, although this was only the second time that she'd testified in a criminal case, she has always been hired by the State. (PC-R. 1056)

Regarding the scope of her expertese, Dr. Glen acknowledged that she would defer to a medical doctor or to a psychiatrist concerning the prescribing of drugs or the effect of those drugs on patients. (PC-R. 1058)

Dr. Glen also admitted that, if Mr. Clark were remorseful, such remorse would be inconsistent with her diagnosis of anti-social personality disorder, although she strongly cautioned that remorse, superficially expressed, would not necessarily be inconsistent. (PC-R. 1058-1059) She did feel comfortable with her diagnosis, although she only saw Mr. Clark once for seven hours sixteen or seventeen years after the shootings and the trial. (PC-R. 1061)

Regarding her diagnosis of alleged malingering by Mr. Clark, Dr. Glen acknowledged that she did not know what specific motivation Mr. Clark might have for malingering. (PC-R. 1062-1064) She also admitted that she is more familiar with malingering in the context of a civil, personal-injury lawsuit, where the obvious motivation is monetary. (PC-R. 1063)

Finally, Dr. Glen acknowledged that, in her examination of Mr. Clark and her testimony in the case, she explicitly “stayed away from” and did not discuss “the crime itself and the circumstances around that.” (PC-R. 1065) She was not asked to address the specifics of either shooting. (PC-R. 1067) She also denied being able to testify as a neurologist about brain function or brain damage. (PC-R. 1066-1067) Still, she insisted that she could diagnose brain damage. (PC-R. 1067)

To conclude the testimony taken at the evidentiary hearing, John David Hatch testified that he did know Michael Thompson in prison, but Mr. Hatch denied that he told Mr. Thompson that he shot and killed Mr. Willis. (PC-R. 1085)

THE HEARING COURT'S ORDER

On September 17, 2007, the hearing court issued an "Order Denying Defendant's Motions For Post-Conviction Relief." (PC-R. 826-859)

The hearing court first reviewed the "Procedural History" of the case, noting inter alia, that the sentencing court had found no mitigation, either statutory or non-statutory. (PC-R. 0827)

Addressing Claim One of the Second Amended Motion, the court first noted that the Claim consists of two sub-claims. (PC-R. 832) The first is a Brady claim alleging that three exculpatory statements were not disclosed to the defense. (PC-R. 832) See, also Brady v. Maryland, 373 U.S. (1963)

The three statements, as the court writes, were, in fact, disclosed. (PC-R. 833) Thus, Brady is inappropriate and the court denied this part of the claim. Id.

Regarding the second part of Claim One, Appellant alleged that the state knowingly presented false, material evidence. See, Giglio v. U.S., 405 U.S. 150 (1972); U.S. v. Agurs, 427 U.S. 97 (1976); and Guzman v. State, 868 So. 2d 498 (Fla. 2003)

Claim One alleged that Mr. Hatch's mother and his sister-in-law falsely testified that Appellant had

possession of the gun on the day of the shooting and that Mr. Hatch testified that his statement to the jury and on the day of his arrest were the same.

At the hearing, Mr. Hatch denied Mr. Thompson's allegations that Mr. Hatch was the shooter. He also testified that he testified truthfully at the trial. With no evidence to the contrary, the court denied this claim.

Addressing Claim Two, ineffective assistance of counsel for failing to investigate and to present mitigating evidence, the hearing court held that the claim is procedurally barred on the ground that it was raised on direct appeal. (PC-R. 863) [Mr. Clark contended that the trial court erred in allowing him to waive the presentation of mitigation. Clark v. State, 613 So. 2d 412 (Fla. 1992)] The hearing court also noted that the trial court's waiver inquiry was adequate. (PC-R. 836) Nevertheless, the hearing court also addressed the ineffective assistance claim. Id. The court found that counsel's performance was not deficient based on Judge Davis's testimony that the evidence "cut both ways" and that Mr. Clark didn't want mitigation presented. (PC-R. 837)

The hearing court also addressed the allegation that an investigator wasn't hired. Id. The court relied on Judge Davis's testimony that the investigators "aren't out

there" and that he didn't think it necessary to hire one. Id. The court agreed with Judge Davis that there was no need for a blood spatter expert. Id. The court notes Judge Davis's testimony that, if he knew of evidence to show that Mr. Hatch was the shooter, he would have developed it. (PC-R. 838)

Finally, the court relies on Judge Davis's testimony that Mr. Clark's clear memory of events eliminated any voluntary intoxication defense. Id. Similarly, Judge Davis's testimony that, with Appellant's consent, the introduction of the medical reports, which, again, "cut both ways," was preferable to calling the doctors to testify. (PC-R. 838) The court agreed, and, in general, found Judge Davis's testimony more credible and more persuasive than the allegations. See, Laramore v. State, 699 So. 2d 846 (Fla. 4th DCA 1997) Thus, the court held that counsel's performance was not deficient, citing Songer v. State, 419 So. 2d 1044 (Fla. 1982); and Gonzalez v. State, 579 So. 2d 145 (Fla. 3rd DCA 1991) (Tactical decisions of counsel do not constitute IAC.) Appellant contends that the hearing court erred in denying this claim.

Claim Three, ineffective assistance in guilt-phase for failing to present a voluntary intoxication defense, was

denied on the strength of Judge Davis's testimony that Mr. Clark's clear recollection belied the defense. (PC-R. 839)

Further, the court holds that Mr. Clark presented no evidence of his claim that trial counsel failed to present evidence of Mr. Clark's long-standing substance abuse and mental health problems and cites Dr. Glen's testimony he suffered no extreme emotional or mental disturbance. Id. Thus, the court denies this IAC guilt-phase claim.

The allegation that various experts should have been called is denied as facially insufficient. Id. Judge Davis testified that he didn't see the need to hire a blood spatter expert, that he didn't know who was wearing what clothes when the crimes occurred, and that Mr. Clark was wearing the victim's boots when he was arrested.

In sum, the hearing court denied the IAC guilt-phase claim, citing Gore v. State, 846 So. 2d 461, 469-70 (Fla. 2000) and Cunningham v. State, 748 So. 2d 328 (Fla. 4th DCA 1999) (Burden on movement to present supporting witnesses.) Appellant contends that Judge Davis should have utilized any evidence indicating Mr. Hatch as the shooter.

Claim Four, that counsel failed to use all preemptory challenges, was denied as facially insufficient and, in any case, fails to satisfy the requirements of Strickland. (PC-

R. 841) See, Johnson v. State, 921 So. 2d 490 (Fla. 2005) and Reaves v. State, 826 So. 2d 932 (Fla. 2002) dd. (Speculation and conjecture insufficient basis for claim.) Also, Judge Davis testified he wouldn't have left three challenges if he weren't satisfied with jury. (PC-R. 841) Appellant does not appeal this holding.

Claim Five, alleging a violation of Ake v. Oklahoma, 470 U.S. 68 (1985), was procedurally barred. Id. No appeal is taken.

Claim Six, alleging that a reliable competency hearing was not held, was denied on its merits. (PC-R. 842) Appellant was found competent by Dr. Barnard and Dr. Miller, who were appointed by the court to evaluate him. (PC-R. 842) No appeal is taken.

Claim Seven, alleging incompetence to stand trial, was denied on its merits. (See Claim Six, supra.) (PC-R. 842) No appeal is taken.

Claim Eight, alleging improper waiver of penalty-phase, was procedurally barred as it was on direct appeal. (PC-R. 843) Appellant contends waiver was not knowing.

Claim Nine, alleging Mr. Hatch's perjury rendered death sentence unreliable, was denied on same grounds as Claim One. (PC-R. 843) Appellant contends that Mr. Hatch was shooter on the basis of Newly Discovered Evidence and

IAC where counsel didn't cite evidentiary support for contention that Mr. Hatch was the shooter.

Claim Ten, alleging a Caldwell violation (diminution of jury responsibility for "recommendation"), was procedurally barred. (PC-R. 844) No appeal is taken.

Claims Eleven, Twelve, Thirteen, Fourteen, Fifteen, Eighteen, Nineteen, Twenty were denied as procedurally barred. (PC-R. 844-854) No appeal is taken.

Claim Sixteen, alleging admission of illegally obtained statements, was facially insufficient. (PC-R. 850) No appeal is taken.

Claim Seventeen, improper jury argument, was facially insufficient. (PC-R. 850) Appeal is not taken.

Claim Nineteen, alleging a Crawford violation, was denied because Crawford is not retroactive. (PC-R. 853) Appeal is not taken.

Claim Twenty, alleging an incomplete record on appeal, was denied as procedurally barred and on the merits. (PC-R. 853-854) Appeal is not taken.

Claim Twenty-one, the cumulative error claim, was denied on the basis that IAC has not been found. (PC-R. 854) Appeal is not taken.

Claim Thirty, alleging Ring and Apprendi error, was denied on the ground that neither case is retroactive. (PC-R. 855-856) Appeal is not taken.

Finally, the Newly Discovered Evidence claim, alleging that Michael Thompson's testimony constitutes newly discovered evidence of innocence, was denied as untimely, on the ground that it would not have been admissible at trial, and, finally, on the ground that it would probably not produce an acquittal or retrial, especially in light of credibility issues. (PC-R. 857-858) Hearing court erred in denying this claim.

SUMMARY OF ARGUMENTS

1. In Argument One, Appellant contends that the lower court erred in ruling on Appellant's Claim One, alleging ineffective assistance of counsel in the guilt and penalty-phase of the trial.

The hearing court failed to consider Appellant's evidence that trial counsel that counsel failed to present to the jury the plethora of plentiful and persuasive mitigation which had been presented in the Nassau County case and which was readily available.

The lower court's reliance on the trial attorney's testimony is not convincing as a tactical or strategic explanation for the failure to present any mitigation.

This mitigation, available but not presented, includes the testimony of experts regarding Appellant's long history of drug and alcohol abuse and the history of life story told to mental-health professionals. The court erred in writing that such evidence had not been propounded.

Had trial counsel presented the mitigation that was used in Nassau County, Appellant would not have been sentenced to death.

Further, trial counsel failed to investigate and present evidence that Mr. Hatch was the shooter. This

deficiency prejudiced both the guilt and penalty phases of the trial.

2. In Argument Two, Appellant contends that Michael Thompson's testimony constitutes newly discovered evidence that probably would secure both an acquittal to first-degree murder and a lesser sentence than death.

Mr. Thompson testified, convincingly, that Mr. Hatch confessed to him that he, Mr. Hatch, was the shooter and that Mr. Hatch badly lied on the stand to save him own life.

The hearing court erred in finding this testimony barred and not credible.

ARGUMENT ONE:
APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCEOF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDEMENTS TO THE U.S. CONSTITUTIONAND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

1. The Standard of Review

The Constitutional argument advanced in this argument presents mixed questions of law and fact. Thus, this Court is required to give deference to the factual conclusions of the lower court, while the legal conclusions of the lower court are to be reviewed de novo or independently. See, Ornelas v. U.S., 517 U.S. 690 (1996) and Stephens v. State, 748 So. 2d 1028 (Fla. 1999)

2. The Lower Court's Order

In its Order, the court holds that Appellant's claim regarding the decision to waive mitigation is procedurally barred because the waiver was raised on direct appeal. (PC-R. 836) Clark v. State, 613 So. 2d 412 (Fla. 1992) Although this court found the waiver voluntarily and knowingly made, it did not have before it the scope of counsel's investigation and the propriety of the advice which counsel gave to Mr. Clark on the foolishness of waiver of mitigation.

3. Judge Davis's Testimony

Judge Davis testified that he represented Mr. Clark in two murder cases, one case in Nassau County and the instant case in Duval County. (PC-R. 1114) Although the cases originated in different counties, both cases were related in many ways. (PC-R. 971) Thus, Judge Davis intended to use the penalty-phase material and mitigation in both cases. (PC-R. 972)

The primary reason Judge Davis testified that he did not present mitigation in the Duval County case was because Mr. Clark told him that he did not want to spend the rest of his life in prison. Id. Mr. Clark had already received the death penalty in Nassau County, and, apparently, he didn't want to risk getting life in Duval. Thus, Mr. Clark did not want to present the mitigation in Duval if he was convicted. (PC-R. 972) This does not really constitute a legal strategy, nor does the client's predictable "Give me freedom or give me Death!" hyperbole bombast.

Judge Davis also testified that he felt that the mitigation he had found and presented in the Nassau case "cut both ways" because of its disturbing nature and impact on the jurors. (PC-R. 973-974) In fact, according to Judge

Davis, Mr. Clark's was "the most traumatic, painful life that I had ever heard [of.]" (PC-R. 975) This is actually a description of good mitigation. Mr. Clark was young, and, in many ways, had even failed as a child. This doesn't weaken the power of the mitigation.

Mr. Clark did not receive "normal parenting." (PC-R. 975-976) No one taught him right from wrong. dd. Still, Mr. Clark was, and is, bright, intelligent, and articulate, having educated himself as best he could. Id.

In jail, Mr. Clark had apparently examined his life, and Judge Davis testified that he and Mr. Clark had long discussions about Mr. Clark's life, both his accomplishments and his regrets. Id. Thus, the person Judge Davis met in jail was not the person who'd been subjected to and done the terrible things Judge Davis was concerned might "cut both ways." The power of mitigation had on Judge Davis ("a different person!") would have had the same impact on a fair juror.

In jail, Mr. Clark was put on medication and, once Mr. Clark was trusted and was taken off street drugs and alcohol, he was "like a different person." (PC-R. 976) As Judge Davis testified, "The person who is seated here is not the person who in Nassau County was out in the road killing people." (PC-R. 976)

In Nassau County, Judge Davis's strategy was to present all of the mitigation he had found. (PC-R. 376) Ultimately, it worked. This court found death disproportionate. However, according to Judge Davis, Duval was a different. In Nassau, the State had two very credible witnesses. On the other hand, in Duval, an examination of the facts leading up to the shooting indicates that strong inference could be made that Hatch was, as he told Mr. Thompson, the shooter. (PC-R. 977) Appellant denied then, as he does now, that he shot Mr. Willis. Id. As Judge Davis explained, he didn't know of any evidence which confirmed that. (PC-R. 978) Thus, Judge Davis calculated that, if the jury concluded Hatch was the shooter, then Mr. Clark would not get the death penalty. Id. Thus, the mitigation would have been *more* effective under these facts, especially if counsel could support the contention that Mr. Hatch was the shooter.

In sum, Judge Davis thought that there was sufficient psychiatric and personal history in the psychiatric reports prepared for the case to convince "anybody" that Ronald Clark was "seriously disturbed at the time all this was going on." (PC-R. 979) Thus, beyond showing that Ronald Clark was "not a normal person to say the least" at the time he was convicted, Judge Davis was wrong to suggest

that presenting the mitigation which was used in Nassau would have been particularly beneficial. Id. Certainly, as all of the witnesses save one were local, and all of them were cooperative and available, the mitigation could easily have been presented. Id. (This testimony also refutes the hearing court's finding that no expert testimony was available.)

The record is replete with evidence that Mr. Hatch was the shooter and leader: most of what Mr. Clark and Mr. Hatch were doing was Mr. Hatch's idea (PC-R. 981); Mr. Hatch stole the gun and the ammunition and loaded the gun Id.; and Mr. Hatch left Nassau County with the gun and brought it into Duval County. Id. Mr. Hatch and Mr. Clark were drunk and doing drugs and it seems "farfetched" to believe that, at the last moment, Mr. Hatch, not knowing what Mr. Clark would do, would hand the loaded weapon to Mr. Clark. (PC-R. 982)

In Nassau County, where the defense presented all of the mitigation it had developed, including the evidence of sexual abuse inflicted on Mr. Clark and other "hard" mitigation to listen to (PC-R. 983-984), the evidence in the record actually caused the Florida Supreme Court to over-turn the death sentence. (PC-R. 984) Counsel's

assessment that the mitigation was “hardly beneficial” is extremely suspect.

Judge Davis re-iterated that he thought the best outcome would be that he could convince the jury that Mr. Hatch was the shooter. However, Judge Davis did not recall there being a “significant difference” in the sizes of Mr. Clark and Mr. Hatch, as Mr. Clark was 75-100 pounds lighter then, but frail. (PC-R. 0987) Both were thin but Mr. Clark was taller. Id. Had he used the clothing evidence to show the blood in the smaller clothes, this argument would have been strengthened. Further, the hearing court didn’t note the significant size difference the jury would have seen.

Finally, the state tried the Nassau case first so it could use a conviction as prior-violent-felony aggravator and the existence of that aggravator is a difference between the Nassau case and the Duval cases. Id. However, if Mr. Hatch is the shooter or if the full mitigation was presented, Mr. Clark could not have received a death sentence.

Judge Davis and Mr. Clark met regularly in preparation for trial. (PC-R. 988) Appellant was always open, amenable, and pleasant. Id. They would talk and discuss options. Id. The family was also helpful. Id. Clearly, had Judge Davis retained sufficient “fight” after the

Nassau sentence, he would not have permitted Mr. Clark's dark mood to have enveloped him. Although this is pure speculation, it seems from this vantage, that, after losing in Nassau, both counsel and client were down to the point of concession when the Duval case was called to trial. To agree to a complete waiver of mitigation where one has powerful evidence simply because the client says he prefers death to life in prison does not serve the client effectively.

Judge Davis did not hire or retain a private investigator, nor did he "really want a private investigator on the case." Id. He didn't see any need for an investigator to look further into the facts, and he was also concerned with someone looking into some of the unsavory rumors he'd heard about Mr. Hatch and Mr. Clark, apparently for fear of what an investigator might find. At that time, he didn't use an investigator to develop mitigation and doesn't know if mitigation experts were even around. (PC-R. 989) Instead, Judge Davis developed the mitigation himself in consultation with doctors who had seen Mr. Clark in the past. (PC-R. 990) However if he could have found witnesses who would have helped him prove Hatch was the shooter, he would have wanted to do that. (PC-R. 990) Clearly, the two strands of counsel's

deficient performance were the failure to present the abundant, available mitigation and the failure to find and fully present evidence that Mr. Hatch was the shooter, and, hence, a liar.

4. The Nassau Record

Transcripts from the Nassau County case were introduced as evidence in the instant case. Nassau County Case No. 45-1990-CF-186-AXXX-MA; Clark v. State, 609 So. 2d 513 (Fla. 1992) (PC-R. 829; 1018-1023)

This court cogently summarized the extensive mitigation presented to the jury in Nassau County:

> 'In mitigation, Mr. Clark presented evidence of his alcohol abuse and emotional disturbance, as well as his abused childhood. Much of this evidence was uncontroverted. The trial court rejected the statutory mitigating circumstances concerning mental impairments, finding that Mr. Clark did not suffer from extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or ***516** to confirm his conduct to the requirements of the law was not substantially impaired. However, the court did acknowledge that the evidence showed that Mr. Clark was a disturbed person, that his judgment may have been impaired to some extent, that he drank an excessive amount of alcohol on the day of the murder, and that he was abused as a child.
>
> Although there was some variation in testimony as to the specific amount of alcohol consumed by Mr. Clark on the day of the crime, all witnesses agreed that the amount was substantial. Mr. Clark began drinking early that day and continued drinking throughout the day.

In addition, Mr. Clark testified that he smoked crack cocaine that day and took several of the father's antipsychotic prescription pills, although this testimony was not corroborated.

Apparently, spending the entire day drinking was typical for Mr. Clark, as he presented evidence of an extensive history of substance abuse. Lay and expert witnesses testified that Mr. Clark began using alcohol at the age of six and was drinking regularly by the age of eleven of twelve. Mr. Clark also frequently used LSD, PCP, cocaine, and various other drugs. As a result of his alcohol and drug abuse, Mr. Clark dropped out of high school to avoid being expelled.

Mr. Clark was emotionally and sexually abused as a child. His parents were alcoholics who separated when Mr. Clark was five or six. Mr. Clark was sent back and fourth from one parent to another. He witnesses physical abuse and violence between his parents, and he was sexually abused by his mother's lesbian lover. In 1984, Mr. Clark was evaluated by a psychologist, who noted that Clark was very disturbed and needed intense treatment to prevent him from acting in a more brutal and violent way. All experts who evaluated Mr. Clark prior to trial found him to be chemically dependent.

While we find no error in the trial court's rejection of this evidence as statutory mitigation, especially in light of the defense expert's own testimony that the statutory mitigating circumstances were inapplicable here, this evidence does constitute strong nonstatutory mitigation. The death penalty is reserved for "the most aggravated and unmitigated of most serious crimes." Dixon, 283 So. 2d at 7. Having found that only one valid aggravating circumstance exists, and having considered the mitigation established by the record, we find that this is not such a crime. The sentence of death in this case is disproportionate when compared with other capital cases where this Court has vacated the death sentence and imposed life imprisonment. See, e.g., McKinney v. State, 579 So. 2d 80, 85 (Fla. 1991); Caruthers v.

State, 465 So. 2d 496, 499 (Fla. 1985); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984).'

All of this evidence could have been presented, as well as indications, if not absolutely dispositive evidence, that Mr. Hatch was the shooter, and counsel's failure to convince Mr. Clark that he *had* to use this evidence, in both phases of the case, constitutes prejudicial ineffective assistance of counsel.

5. Applicable Law

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Unites States Supreme Court had held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination

of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also, Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to **investigate** and **prepare** available mitigating evidence for the sentencer's consideration. See, Phillips v. State, 608 So. 2d 778 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 1984). See also, Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989; Middleton v. Dugger, 849 F. 2d 491 (11th Cir. 1988); Blake v. Kemp, 758 F. 2d 523 (11th Cir. 1985); Tyler v. Kemp, 755 F. 2d 741 (11th Cir. 1985).

Counsel here did not meet rudimentary constitutional standards. As explained in Tyler v. Kemp, 755 F. 2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicated the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individual manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision. Id. at 743 (citations omitted).

Counsel's highest duty is the duty to investigate and prepare. In Wiggins v. Smith, 123 S. Ct. 2527 (2003), the United States Supreme Court expanded on the duties on counsel to conduct a "reasonable investigation." Wiggins involved a decision by trial counsel to limit the scope of investigation. Id. at 2533. In rejecting counsel's decision in Wiggins not to present significant evidence, the Court, citing its opinion in Williams v. Taylor, 529 U.S. 362 (2000), held that, before counsel may limit the presentation of evidence, counsel must fulfill the obligation to *conduct a thorough investigation*. Id. at 2535. Wiggins further held that a limitation on the scope of investigation must be reasonable in order to be considered legitimately strategic. Id. at 2536.

Subsequent to Wiggins the court held that:

> 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the

> case and to explore all avenues leading to facts relevant to the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).'

Rompilla v. Beard, 125 S. Ct. 2456, 2466 (2005).

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, See, Brewer v. Aiken, 935 F. 2d 850(7th Cir. 1991), or on the failure to properly investigate or prepare. See, Kenley v. Armontrout, 937 F. 2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986).

6. Analysis

Nothing in the record indicates that Judge Davis advised Appellant of the quality and quantity of mitigation available. Apparently, both Judge Davis and Appellant believe that the presentation of the mitigation in Nassau County had been fruitless. They would be, understandably, disappointed after that loss, temporary as it turned out. Under such circumstances, counsel should be careful when assessing or condoning a waiver of mitigation.

Furthermore, a careful review of the totality of Judge Davis's testimony and the facts found by the court to deny the IAC-penalty-phase claims suggests that there was no strategic or tactical benefit or rationale for the waiver of mitigation beyond Appellant's commonly stated, but seldom followed up on, preference for execution over life imprisonment. In this case, there is no evidence of a viable strategic or tactical decision being reached.

Finally, counsel readily admits his main strategy was to show that Mr. Hatch was the shooter. That would both take death off the table and result in a lesser conviction or acquittal. Therefore, counsel offers no reason not to use available evidence to indict Mr. Hatch. Failure to do so is close to prejudice per al.

7. Conclusion

The lower court erred when it denied Appellant's claim that he received ineffective assistance of counsel in the guilt and penalty-phases of his trial. Counsel did not adequately explain to Appellant what he would waive if he did not present mitigation. Neither courts nor counsel have an interest in helping a depressed inmate facilitate his execution, and, accordingly, counsel must fully advise a client in the Appellant's position, particularly one who

has such plentiful, persuasive mitigation in hand, to present that mitigation to the jury.

The “cuts both ways” explanation is common but commonly not compelling because the jury has already been convinced beyond a reasonable doubt that the defendant has committed terrible acts of violence. Counsel should not be encouraged to create a tactic or a strategy out of the inevitable exposure of the occasionally gruesome details of the typically abnormal childhood and upbringing of the capital defendant. Concern about shocking the jury seems superfluous and, in fact, a jury must expect to be leveled with regarding the deviations from normalcy which made or created the defendant. Terrible acts with no exlanation are for more terrifying than the senseless acts of a child who has gone unloved and brutalized. Lockett calls for the jury to *know* the person whose life is in its hands.

ARGUMENT TWO:
NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. HATCH'S CONVICTION AND SENTENCE WERE IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS AND THE LOWER COURT ERRED IN DENYING APPELLAT RELIEF ON THIS BASIS

1. The Standard of Review

The same standard of review as that used for Claim One applies to Newly Discovered Evidence. Thus, this Court's review grants the lower court deference for question of fact, and legal conclusions are reviewed independently. See, Ornelas v. U.S., 517 U.S. 690 (1996); Stephen v. State, 748 So. 2d 1028 (Fla. 1999).

2. Order of Hearing Court

At the evidentiary hearing, the Defendant submitted a claim of newly discovered evidence in the form of Michael Thompson's testimony. (P.C. Vol. II at 29-31.) The State objected to the claim, both procedurally and on the merits. (P.C. Vol. II at 29-30.) To be considered newly discovered evidence, it must meet the standard set forth in Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994). The evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it "must appear that the defendant or his counsel could not have

known [of it] by the use of diligence." Jones v. State, 700 So. 2d 512(Fla. 1998) (quoting Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (1994.)) In Jones, the Florida Supreme Court stated that "newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State 591 So. 2d 911, 915 (Fla. 1992). To reach this conclusion the trial court is required to "consider all newly discovered evidence and the evidence which was introduced at the trial." Id. at 916. In revisiting the issue of newly discovered evidence, the Florida Supreme Court stated that:

> 'The trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. See Johnson v. Singletary, 647 So. 2d 106, 110-11 (Fla. 1994); Bain v. State, 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether it constitutes impeachment evidence. See Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence goes to the merits of the case or whether the evidence is cumulative to other evidence in the case. See, State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997); Williamson, 651 So. 2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.'

Jones, 709 So. 2d at 521-22.

At the evidentiary hearing, the defendant presented the testimony of Michael Thompson, an inmate and law clerk

who helped the Defendant with his post-conviction "paperwork." (P.C. Vol. II at 15-17.)

Thompson testified that before meeting the Defendant, Thompson had been housed at a different correctional facility with co-Defendant Hatch. (Id.) A year after he became friends with Hatch, Hatch admitted that he was the one that shot the victim, Ronald Willis. (Id.) However, it was not until thirteen year later, in 2005, when Thompson was housed in the same correctional facility as Appellant and started helping him with his case, that Thompson realized who Appellant was *vis-a-vis* Mr. Hatch. Id.

The Court notes that the Defendant's claim is untimely in that the Defendant failed to raise this newly discovered claim within one year of learning of its existence. Glock v. Monroe, 776 So. 2d 243, 251 (Fla. 2001); see, Fla. R. Crim. P. 3.851(d)(2)(A). However, counsel was not able to talk to or access Thompson until shortly before the hearing. Mr. Clark was ill much of the intervening year and counsel didn't represent him until March, 2006.

The Court contends that Appellant has also failed to establish that this evidence would have been admissible at the Defendant's trial. Jones, 591 So. 2d at 916. This does not apply, however, because the evidence did not exist. Thompson's testimony was, in fact, of such nature that it

would probably produce an acquittal for the Appellant on retrial. The lower court does not consider Thompson's credibility fairly. He has much to lose by coming forward. Like Mr. Hatch, he has convictions. The testimony itself, however, is completely consistent.

3. The Testimony of Michael Thompson:

'At the evidentiary hearing, Mr. Michael Thompson testified that he is an inmate at Union Correctional Institution ("UCI"), where he's been incarcerated since 2003. (PC-R. 945) He met Appellant in the library for Death Row at UCI, where Mr. Thompson worked. Id. Mr. Thompson made some copies for Mr. Clark and proofed some documents for him. (PC-R. 946) While looking over Appellant's paperwork, Mr. Thompson saw and recognized the name "John Hatch," with whom Mr. Thompson had "done time" at another prison. Id. In fact, Mr. Thompson and Mr. Hatch had done ten years together at Baker Correctional Institution, and were "good friends." Id.

Mr. Thompson testified that, one particular night, Mr. Hatch was upset and started crying. Id. Mr. Hatch told Mr. Thompson how he, Mr. Hatch, had to testify against Mr. Clark to save his own life. Id. Hatch explained that he either had to testify or he would have ended up on Death

Row. He and Mr. Clark were in a car with a guy during a drug deal that went bad when the guy pulled a gun, so Mr. Hatch pulled his gun and shot the guy dead. (PC-R. 947) Thus, Mr. Thompson testified that Mr. Hatch told Mr. Thompson that Mr. Hatch was the shooter and that Mr. Hatch admitted that he testified untruthfully against Mr. Clark. Id. After he killed the guy, Mr. Hatch dumped the body off a bridge into a canal. (PC-R. 948)

Finally, Mr. Thompson testified that he didn't know Mr. Clark until some time in 2005, when he met Mr. Clark in the library and recognized who he was. (PC-R. 955) Thompson also expressed to Mr. Clark fear of becoming involved while he worked in the Death Row library because "the system" would retaliate against him if he helped Mr. Clark.' Id.

4. Analysis

There is nothing is this statement that seems fabricated. The State raised no challenge to any of the details, and the state has not provided a motive for Mr. Thompson to lie. Mr. Thompson has no reason to help Appellant, and risks angering "the System" in which he lives. The statement has every indication of truthfulness.

Mr. Hatch, on the other hand, faces a possible trip back to the joint for perjuring himself in a capital case, a felony. He has always made his deal, and so he owes continued allegiance to the state. He has much to lose.

The hearing court did not consider the whole record in casually dismissing Mr. Thompson's testimony, unless the word of a convict is assumed to be a lie. But, if so, Mr. Hatch's word would be similarly suspect.

Examining the text, however, supports Mr. Thompson's credibility. His statement, set out above, is simple, unadorned, and rings true. A lie would be more elaborate, more damning. This statement has the washed out concrete complexion of convict skin, the quality of a couple cans kicking it to kill the time that's killing them, the one a little drunk on some well-stewed hooch, the other, as always, just listening. Story. Tears. Justification. Then back to the Big Nothing. Some years down the drain. Thus, Mr. Thompson bumps into Mr. Clark, recognizes the story. Mr. Clark, the guy Mr. Hatch snitch on "to save my life."

Mr. Thompson's testimony is consistent. The court pointed out no problems with it, no facts contradicting any part of it.

Mr. Thompson risks reprisal. Mr. Hatch made his deal and has to stick to the story. Those facts make the testimony more likely true, but it has been 13 years and Thompson is a convict. But, if he was making up a story, maybe he wouldn’t have left those problem facts in it.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, Mr. Clark respectfully urges this Court to reverse the lower court's order and to grant him relief on the arguments herein as this Court deems proper, including vacating his conviction and sentence.

Respectfully submitted,

_____

Harry Brody
Bar #0977860

Jeff Hazen
Bar #0153060

Attorneys for Appellant

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Brody and Hazen, P.A.
P.O. Box 16515
Tallahassee, Fl 32317
850-942-0005

_____

Harry Brody
Bar #0977860
Jeff Hazen
Bar #0153060
Attorneys for Apellant