IN THE SUPREME COURT OF FLORIDA

CASE NO. 90, 976

CLARENCE JONES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

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I.

MR. JONES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL MURDER TRIAL

The State's answer brief essentially makes two points. First, the post-conviction proceeding did not add any more evidence to what was presented at the initial penalty phase proceeding. Second, the evidence that was presented at the hearing was not persuasive enough to establish prejudice.

There is no question that the trial attorney, Cliff Davis, held himself out to be an experienced criminal defense lawyer who had handled penalty phase litigation. Therefore, this trial lawyer should be held to a high standard in the investigation, preparation and presentation of this aspect of a death penalty case. Mr. Davis knew right from the start of his representation that the State would have a strong case in aggravation, premised primarily on the status of the person killed. Ponce de Leon was the first Tallahassee police officer killed in the line of duty. The case engendered tremendous publicity and consequent pressure on the prosecution to obtain a death sentence.

The record in the case established that Mr. Davis did three things to create a life sentence defense. First, he got some records from the Department of Corrections in

Maryland. He was unsure if the State had provided them in discovery or he had independently secured them. The record demonstrates that the State provided them as part of a discovery response.

Second, he called family members of Mr. Jones. This point was substantially in dispute. Time records are the life blood of a court-appointed attorney. There is not one reference to talking to any member of Mr. Jones family in these records. Although Mr. Davis asked for and received assistance from an investigator to gather information for the guilt-innocence phase, no such effort was made for penalty. At best, Mr. Davis' efforts were insignificant and surely produced the result of no family involvement during the trial. Mr. Davis never sought to visit the family on their home turf. The 3.850 record shows substantial interest on behalf of Mr. Jones family; he would not have had to been a stranger in a strange land.

Finally, Mr. Davis hired a psychologist on the eve of the penalty phase portion of the trial. This is completely wrong to bring in a mental health professional the weekend before penalty phase begins. The State wants to characterize Dr. Annis' testimony as adequate. This could not be further from the truth. To understand why is to travel back to the death sentence imposed by Judge Padovano. The sentencing order recognized the testimony of Dr. Annis.

> Dr. Annis, . . ., testified that the defendant Jones had a

> troubled family life, that he had been a drug abuser for many years, and that he was generally, the product of an unfortunate environment. Dr. Annis did not testify, however, that the defendant Jones suffered from any form of mental or emotional illness at any time during his life, much less at the time of the commission of the capital felony in this case. (emphasis suppled)

This theme was repeated throughout the sentencing order. In addressing the other statutory mitigating factors, Judge Padovano made clear that there was no evidence of any casual connection between Jones' life history and the commission of the crime.* The evidence adduced at the hearing on the 3.850 motion says otherwise.

In addition, the State effectively cross-examined Dr. Annis not just on the substance of his testimony but also on the process of how it was obtained. In preparing his report, Dr. Annis admitted "I used a lot of statements that Mr. Jones stated. I was advised by the defendant." Dr. Annis also agreed he never talked to anyone from Mr. Jones' family. In response to a question by the prosecutor, Dr. Annis stated "I never met [Clarence Jones] until Friday." This was of course the weekend before the penalty phase began.

Any meaningful explanation for capital murder must begin with an examination of the structure of the lives of those who commit it. While there are few absolutes in

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*Judge Padovano used this same rationale in rejecting the presence of any nonstatutory mitigation.

capital penalty phase litigation, one is that you cannot hire a mental health expert to do a competent job the Friday before the penalty phase begins on Monday. This is especially true when no one else has done anything to gather information about the client. It is no coincidence that capital sentencing law requires that the sentencer must consider the background and character of the defendant. The social history of the defendant has become the primary vehicle to inform the sentencer about these matters. The overriding purpose of this information is to help explain what the defendant has done and explain it in a way that has some relevance to the decision the sentencer must make about life or death. Lawyers who represent defendants charged with capital murder know that uncovering the intimate information necessary to do a complete social history is an arduous and complex task.

The sentencer of Mr. Jones did not have the opportunity to learn the truth about his life. This failure can be directly attributed to Mr. Jones' lawyer, Cliff Davis. In Smith v. Stewart, 140 F. 3d 1263 (9th Cir. 1998), Bernard Smith shot and killed a store clerk during a robbery. Smith had recently been paroled from prison in California and had committed three armed robberies of convenience stores before he killed the store clerk. Smith was tried and convicted of murder and ultimately sentenced to death.

At the trial, Smith's lawyer presented no mitigating evidence and gave little reason to spare Smith's life. Cliff Davis presented minimal mitigating evidence. As

in Smith, "counsel did not perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface." As in Smith, the lawyer testified that "he had spoken with Smith, and Smith's mother, but that he received no information." This is comparable to Cliff Davis' lack of effort. Although Davis secured the services of an investigator for the guilt portion of the trial, no such effort was made in the equally or more important penalty phase. Cliff Davis failed to discover and present readily available mitigating evidence. This deficient performance resulted in an unreliable death sentence.

As supplemental authority, the State cites, Kokal v. Dugger, ____ So. 2d ____ (Fla. 1998) However, this Court's opinion starkly demonstrates the difference between Kokal's trial lawyer's effort and that of Cliff Davis. As this Court noted in footnote 6, Kokal's lawyer "began thinking about penalty phase strategy the moment he was retained." Davis gave no such consideration to penalty even though he was well aware Jones was very death penalty eligible. Kokal's lawyer hired a psychiatrist right away to assist him. While the psychiatrist ultimately had little to offer, it showed the lawyer had a mind set to investigate. In spite of this, the trial court found that "the defense lawyer's over-all preparation for the penalty phase of the trial may have fallen below that expected of reasonable competent counsel. The lawyer did little more than simply think about the penalty phase until after the guilt phase was completed." It is clear Cliff

Davis really did not even think about the penalty phase until the verdict of guilty of first-degree murder was returned.

The other cases cited by the State also miss the mark. In Rose v. State, 617 So. 2d 291 (Fla. 1993), the defense presented two mental health experts at the post-conviction hearing. As this Court noted, the experts rendered conflicting conclusions about the applicability of the statutory mental health mitigators. In Mr. Jones case, the mental health expert were consistent about the presence of the mental health mitigators. Rose also required that his attorney not pursue defenses of insanity or intoxication, even during the penalty phase. Clarence Jones imposed no such limits on his lawyer Cliff Davis.

The lawyer representing Rose had to overcome substantial hurdles imposed by his client. In spite of this, the lawyer hired a psychologist and discussed a variety of issues prior to the penalty phase. The psychologist "ruled out the possibility of organic brain syndrome because of the results of testing and because of Rose's recall of the events on the night of the murder." Given this information, Rose's lawyer made some decisions about how to present evidence during the penalty phase. In contrast, Cliff Davis made no independent investigation of Clarence Jones life and thus could not make professional decisions about the penalty phase.

In Mills v. State, 603 So. 2d 482, 483-486 (Fla. 1992) the lawyers did not even

request mental health expertise to assist them because nothing in their representation suggested "that any kind of mental impairment existed." Cliff Davis hired a clinical psychologist for some reason; the motion itself identified competency although Davis testified this was not the real reason. The lawyer representing Mills presented three lay witnesses and made such an effective argument that the jury recommended a life sentence. Compare Stevens v. State, 552 So. 2d 1082, 1085-1086 (Fla. 1989). "The record shows that substantial mitigation evidence would have been discovered had trial counsel conducted ro arranged for a reasonable investigation into Steven's background." Like Stevens, Clarence Jones had no local ties to the community where the crime occurred. Like Stevens, Cliff Davis did not reach out to the Jones' family community.

In Correll v. Dugger, 558 So. 2d 422 (Fla. 1990)*, Correll challenged his lawyer's effectiveness at the penalty phase. Unlike Clarence Jones case, Correll's lawyer hired a psychiatrist who examined Correll prior to trial. The psychiatrist concluded, based on available data, that Correll did not suffer from brain damage and that the statutory mental health mitigators were not applicable. Subsequent mental health evaluators found that Correll suffered from "serious mental defects or brain

*The States citation of 588 So. 2d is incorrect.

damage as a result of his excessive use of drugs."

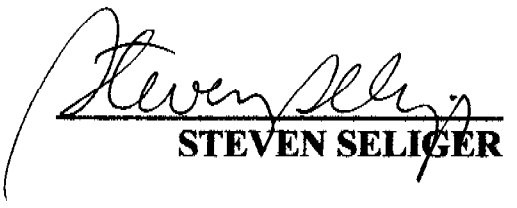
Unlike Cliff Davis, Correll's attorney knew about the excessive alcohol and drug use of his client and told the psychiatrist about it. The psychiatrist then had the opportunity to talk about it with Correll. This is the difference between doing an independent investigation so that professional judgments can be made and what Cliff Davis failed to do. Mr. Jones psychologist was basically on his own because the lawyer had little information. This conduct was professional deficient.

CONCLUSION

For the reasons argued in this reply brief, Mr. Jones requests this Court to reverse the lower court's denial of the motion for post-conviction relief and remand with instructions to order a new penalty phase proceeding, including empaneling a new jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail this _____ day of September, 1998 to **Richard Martell**, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050.



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