IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-941
L.T. No. CRC 99-05593

JAMES DELANO WINKLES
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE 6TH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,
STATE OF FLORIDA

REPLY TO ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This pleading addresses Issue II of Mr. Winkles's initial brief. As to all other claims, Mr. Winkles relies on the Initial Brief. Reference to the trial transcript will be: (FSC ROA Vol.___p.#). The post-conviction record shall be referenced as: (PCR Vol. ___p.#).

ISSUE II

WHETHER MR. WINKLES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BASED ON AN ALLEGED FAILURE TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE.

Appellee is incorrect in suggesting that Mr. Winkles's trial attorneys did not perform deficiently with regard to the investigation and presentation of mitigating evidence at the penalty phase. Appellee is also incorrect in suggesting that the trial court properly denied the claim of deficient performance at the penalty phase. The record reflects that trial counsel did not conduct a reasonable investigation for mitigation and did not make a strategic decision regarding what evidence to present. Furthermore, Mr. Winkles made a showing of prejudice resulting from trial counsel's deficient performance.

Mr. Winkles's trial attorneys failed to conduct a reasonable investigation in preparation of the penalty phase. The trial attorneys should have located and

presented as a penalty phase witness Mr. Winkles's uncle, J.C. Winkles. Failing to present J.C. Winkles as a witness was deficient performance caused by inadequate investigation by Mr. Winkles's trial attorneys.

Appellee asserts that the trial attorneys employed a mitigation specialist to investigate Mr. Winkles's background, and the mitigation specialist used up all of the court approved funds. That the trial attorneys hired a mitigation specialist who depleted the allocated funds before locating even one mitigation witness does not absolve the trial attorneys of deficient performance.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984); see also Ragsdale v. State, 798 So.2d 713, 716 (Fla. 2001) ("[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." (Quoting State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000)). A reasonable investigation is a crucial prerequisite to the presentation of mitigating evidence. See State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002) (stating that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated - this is an integral part of a capital case.") The focus should be "whether the investigation supporting counsel's decision not to introduce mitigating

evidence of [the defendant's] background was itself reasonable." Wiggins v. Smith , 539 U.S. 510, 523, 123 S.Ct. 2527 (2003).

Trial counsel failed to conduct a reasonable investigation. It is unreasonable that the trial attorneys, with the assistance of the hired mitigation specialist, did not locate Mr. Winkles's uncle, J.C. Winkles, a retired attorney living in Tennessee. Routine questioning of Mr. Winkles and basic investigative techniques would reveal the location and whereabouts of J.C. Winkles. Such investigation by collateral counsel did reveal the location of J.C. Winkles who was able to testify at the evidentiary hearing and who could have testified at a penalty phase trial.

Appellee is also incorrect in asserting that Mr. Winkles was not prejudiced by the failure of trial counsel to locate and present J.C. Winkles at the penalty phase. J.C. Winkles did have new and significant mitigation to offer.

J.C. Winkles would have been instrumental as a crucial corroborative witness in the penalty phase . J.C. Winkles would have described his mother as "not a good mother." (PCR Vol. IV p. 432). This testimony standing alone would not be of great impact, however, in conjunction with the testimony of Mr. Winkles, J.C. Winkles's testimony would corroborate the shocking and deviant upbringing Mr. Winkles suffered.

Appellee is incorrect in asserting that J.C. Winkles, as a penalty phase

witness, did not have any new or significant mitigation to offer. Although J.C. Winkles had no direct knowledge of incestuous acts between his mother and Mr. Winkles, his testimony that his mother was not good, was promiscuous, and that sexual morals were not known in the house would have corroborated Mr. Winkles's testimony of incest with his grandmother and his aunt. Appellee, noting that J.C. Winkles had no direct knowledge of the incest, fails to recognize that incest is not something that lends itself to many witnesses. Actually, that J.C. Winkles would describe his own mother as he did at the evidentiary hearing lends pure credibility to the testimony. People do not say such things about their own mothers unless those things are painfully true.

There could be no denying the veracity of Mr. Winkles's description of incest in the household when he was growing up. There could be no denying that Mr. Winkles was teased by his grandmother about the size of his penis, that he was indoctrinated into sex by his grandmother when he was very young, or that his grandmother taught him to perform cunnilingus upon her at her request. There could be no denying that Mr. Winkles was called upon to service his grandmother and aunts at their whim. J.C. Winkles's truthful description of his own mother's promiscuity corroborates Mr. Winkles's description of the abusive incest.

The importance of corroborating Mr. Winkles's testimony is clear.

Regarding presentation of the incestuous abuse, Mr. Winkles testified that his attorneys told him that there were no witnesses and that it couldn't be proved, that it would be a pointless exercise. (PCR. Vol. V p. 629-30). First, the attorneys could have presented the uncorroborated testimony of Mr. Winkles. They did not. The decision not to present the testimony of Mr. Winkles because it could not be corroborated cannot be deemed a tactical decision because a tactical decision must be an informed decision. ("Strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable.") Strickland, 466 U.S. at 690-91. The decision not to present Mr. Winkles's testimony was not informed, it was based on ignorance. Second, had the trial attorneys conducted an investigation, they would have discovered J.C. Winkles, who would have corroborated Mr. Winkles's testimony. Had the trial attorneys conducted a thorough and adequate investigation they could have made an informed decision to present Mr. Winkles's testimony about the abuse.

The trial attorneys also should have presented mitigation obtained through a mental health professional. Appellee is incorrect in asserting that the failure to call Dr. Maher in the penalty phase cannot form the basis for relief. Appellee suggests that Dr. Maher would not have been available at trial because Dr. Maher did not have the added background information from J.C. Winkles and thus did not have the

confidence to rely on Mr. Winkles's self-report of abuse. While it is true that Dr. Maher did not have the additional background information from J.C. Winkles, that was because the trial attorney's investigation was deficient. The background information corroborating Mr. Winkles's self report of sexual abuse was not available because the trial attorneys failed to adequately investigate and retrieve the information. Had the attorneys done a proper investigation, the background material would have been available to Dr. Maher and he would then be confident to rely on the self-report of incestuous sexual abuse.

Appellee is also incorrect in suggesting that the mental health evidence offered in postconviction was not compelling. Appellee points out that both Dr. Dee and Dr. Maher agreed that there was no statutory mitigation that could have been presented. However, both mental experts would have presented substantial and significant non-statutory mitigation which would have explained why the crime happened. A penalty phase jury would have learned of the bizarre and shocking indoctrination to incestuous sex suffered by Mr. Winkles as a child. The jury would have understood why Mr. Winkles had such a distorted and misogynistic view of women. They would have understood why Mr. Winkles had the capacity to commit the crimes that he did.

Finally, the non-statutory mitigation and explanation presented by Dr. Dee

and Dr. Maher combined with the other mitigation found, including that this was a cold case unsolved for over 19 years, would have had great impact on a penalty phase jury. Such mitigation and explanation combined with Mr. Winkles's acceptance of responsibility would provide the jury with reason to vote for a life sentence over a sentence of death.

CONCLUSION

Wherefore, in light of the facts and arguments presented in this Reply and the facts and arguments presented in Appellants Initial Brief, Mr. Winkles hereby moves this Honorable Court to:

1. Vacate the judgments and sentences in particular, the sentence of death.

2. Order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO ANSWER BRIEF OF APPELLEE** has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 19, 2009.

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I HEREBY CERTIFY that a true copy of the foregoing **Reply to Answer Brief of Appellee,** was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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