IN THE SUPREME COURT OF FLORIDA

KENNETH LOUIS DESSAURE,

Appellant,

Case No. SC09-393
L.T. No. CRC99-15522 CFANO

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

APPELLANT'S REPLY TO APPELLEE'S ANSWER BRIEF

ERIC C. PINKARD, ESQ.
Florida Bar No. 651443
Robbins Equitas
2639 Dr. MLK Jr. Street N.
St. Petersburg, Florida 33704
(727) 822-8696
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The record on direct appeal will be cited throughout this document as "DAR" with the appropriate volume and page number (DAR v#:page#); the postconviction record will be cited as "PCR" with the appropriate volume and page number (PCR V#:page#).

APPELLEE IS INCORRECT IN ASSERTING THAT THE TRIAL COURT PROPERLY REJECTED MR. DESSAURE'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FIALING TO MOVE FOR A COMPETENCY HEARING WHEN MR. DESSAURE SIGNED THE WAIVER OF HIS RIGHT TO PRESENT MITIGATING CIRCUMSTANCES AND IN FAILING TO PRESENT MENTAL HEALTH MITIGATING CIRCUMSTANCES AT THE *SPENCER* HEARING

The Appellee asserts that Mr. Dessaure executed a proper "waiver of mitigating circumstances" and, therefore, counsel was not ineffective for failing to obtain a competency evaluation. However, the term "waiver" is an incomplete description of the forms which Mr. Dessaure signed. Two extraordinary documents were presented by Mr. Dessaure's counsel concerning his waiver of the penalty phase. In one, dated September 6, 2001, it states "I, Kenneth Dessaure, the defendant herein, wish to retain my counsel, and understand that society has a **significant interest in determining whether a convicted murderer deserves to die**, and to preserve the ability for a meaningful appellate review, I direct counsel to challenge the State's case and present mitigation on my behalf to the Court, in summary form, without calling witnesses". (PC-ROA Vol. V 72, *emphasis added*). The second, dated September 11, 2001, states "The defendant, Kenneth Dessaure, hereby waives argument by counsel in favor of a life sentence in this cause. Further, **I join the state in seeking a death sentence**" (PC-ROA VOl.V – 73, *emphasis added*).

The forms signed by Mr. Dessaure are not mere "waivers" but rather statements that he wished to join the State in seeking the death sentence. Although Mr. Dessaure had previously discussed waiver of mitigation, joining the state in seeking his execution is an entirely different matter. Dr. Maher, Dr. Dee, Barry Cobb, and Rita Bruno, all with extensive experience in Capital Cases, all said they had never seen such a form.

The facts in the case are uncontroverted that Dr. Maher was not informed of the forms that Mr. Dessaure signed, nor asked to evaluate Mr. Dessaure for competency on the basis of his signing the forms. Dr. Maher said he had never seen a waiver form like the one prepared by counsel and submitted to the court, where the defendant sought his own execution. (PC-ROA VOL VIII 120). Dr. Maher specifically stated that, had he ever been informed by Mr. Dessaure's defense counsel of the signing of the form, he would have strongly recommended an evaluation for competency. (PC-ROA VOL VIII 120). Dr. Maher was clear in his testimony that no one ever told him about Mr. Dessaure signing the form until several months after the trial. (PC-ROA VOL VIII 119).

Furthermore, the other mental health expert in the case, Dr. Henry Dee, testified that this action on the part of Mr. Dessaure, given the evidence of his numerous suicide attempts in the past, required that a competency evaluation take place. Dr. Dee specifically stated that, even if Mr. Dessaure had been evaluated months before, that would not have been a substitute for a formal competency evaluation at the time he signed the form. (PC ROA VOL VII 26). Dr. Dee also testified that Mr. Dessaure's signing of the waiver indicated he was not competent to proceed at that time. (PC-ROA VOL VII 38). He felt that due to the severe depression, Mr. Dessaure met the criteria for an involuntary commitment at the time he signed the waiver form. (PC-ROA VOL VII. 46). Counsel Watts also admitted during his testimony that he never informed Dr. Maher about the forms Mr. Dessaure signed:

> Q. Did you ever tell Dr. Maher that not only does Mr. Dessaure want to waive the presentation of mitigation, but he wants to join the State in seeking his death sentence?
>
> A. No, sir, I didn't tell that to Dr. Maher.

> Q. So, you didn't get any input from Dr. Maher as to what he thought about that vis-à-vis his competence?
>
> A. No sir. (PC ROA VOL VIII 200-204)

Contrary to the assertions of the Appellee, there was an inadequate investigation into Mr. Dessaure's suicidal tendencies. Dr. Heidi Hanlon testified at the evidenciary hearing concerning the frequency and details of the suicide attempts. Specifically, she stated that Mr. Dessaure had (1) drank bleach when at age 15; (2) cut himself at age 16, after his brother was killed; (3) held a gun to his head at age 16; (4) ingested some pills on two different occasions at age 19; and (4) tried to strangle himself with shoelaces at age 20 (after a fight with his girlfriend) (PC-ROA VOL VII 61-62). Also, she testified as to Mr. Dessaure's polysubstance dependence and drug history with Xanax, LSD, and hallucinogenic mushrooms. (PC-ROA VOL VII 60).

The Appellee improperly relies upon Ocha v. State, 826 So.2d 956 (Fla. 1996); Farr v. State, 621 So.2d 1368 (Fla. 1993); Robinson v. State , 684 So.2d 175 (Fla. 1996); and Hamblin V. State , 527 So.2d 800 (Fla. 1988). However, those cases are distinguishable from the case at bar. In all of those cases there were complete competency evaluations by multiple mental health professionals, who had been informed of the clients desire to be executed, and found the Defendant competent. In the case of Mr. Dessaure, his counsel did not seek a competency evaluation after Mr. Dessaure signed the form stating that he wanted to join the state in seeking his own execution. Thus, any competency opinion by Dr. Maher was not based upon the essential information that Mr. Dessaure wanted to join the state in ending his own life.

Furthermore, in *Farr* the Court found that even if the Defednant wishes to be executed, the sentencing court must consider all the mitigating evidence. In this case the mental health findings of Dr. Maher, that Mr. Dessaure suffered from post-traumatic stress disorder, were never considered, although they were proffered.

Appellee also incorrectly argued that there is evidence that Mr. Dessaure waived the presentation of Mental Health mitigation through Dr. Maher at the *Spencer* hearing. In this case Dr. Maher was ready, willing and able to present testimony concerning his findings at the *Spencer* hearing. Counsel Watts could not state why he did not present the testimony of Dr. Maher at the *Spencer* hearing. Dr. Maher did explicitly testify that he was not contacted by attorney Watts to testify at the *Spencer* hearing. Due to this failure, the Lower Court never heard the testimony from Dr. Maher that Mr. Dessaure suffered from Post Traumatic Stress Disorder, rising to the level of extreme emotional disturbance and a statutory mental health mitigator. Inexplicably, counsel proferred to the court that Dr. Maher was prepared to offer evidence as to the statutory mitigator, but then failed to present this evidence at the *Spencer* hearing. At the time of the *Spencer* hearing, Mr. Dessaure had changed his mind about presentation of mitigating circumstances, yet counsel failed to bring forth the most compelling mitigation – the existence of statutory mental health mitigators. (ROA VOL 24 4446-4454). Thus there was no waiver by Mr. Dessaure of Dr. Maher's testimony and findings.

Because of this failure, the Lower Court found only minimal mitigating circumstances that (1) the defendant was 21 years old; (2) the defendant had the capacity to be a loving parent; (3) the defendants family life was dysfunctional while he was growing up, his parents abandoned him to be raised by his Grandmother, and his older

brother died in a traffic accident; (4) the defendant has the capacity to form personal relationships; (5) the defendant was well behaved in court. (ROA VOL 24 4362-4364)

Contrary to the assertions of the Appellee, had counsel presented the compelling mental mitigation evidence by calling Dr. Maher, there is a reasonable probability that the outcome would have been different as a life sentence would have been imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail this 25th day of January, 2010 to:

Stephen D. Ake, Assistant Attorney General
Office of the Attorney General
Conourse Center 4
3507 E. Frontage road, Suite 200
Tampa, Florida 33607
Fax: 813-287-7910
Email: Stephen.ake@myfloridalegal.com

_____
ERIC PINKARD, ESQ.
Florida Bar No.: 651443