IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-1463
Lower Tribunal No. 88-12996

Terance Valentine
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE 13TH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY,
STATE OF FLORIDA

REPLY TO ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This pleading addresses issues I and III of Mr. Valentine's initial brief. As to all other claims, Mr. Valentine relies on the Initial Brief and Petition for writ of Habeas Corpus. Reference to the trial transcript will be: (FSC ROA Vol.___p.#). The post-conviction record shall be referenced as: (PCR Vol. ___p.#).

ARGUMENT I

Mr. Valentine was denied the effective assistance of counsel at the guilt and senten cing phase of his capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution. Trial counsel failed to object or to move in limine to prevent the prosecutor from engaging in repeated misstatement of facts at issue in the case.

In this case, prosecutor Karen Cox engaged in continuous prosecutorial misconduct, and was simply "warming up", so to speak, for her later activities in U.S. v. Sterba, 22 F.Supp.2d 1333, (M.D. Fla. 1998), of which she was disciplined for. Karen Cox was well aware that the appellant and his ex-wife were still legally married, or should have been. On page 22, of the State's Answer, they mention how Karen Cox was acquiescing to Livia Valentine's desire to not be referred to as Valentine, and how she considered herself to be married to Mr. Porche. The

desires of the victim should in no way supercede the role of the advocate to avoid putting forth misleading and inaccurate information in a court proceeding.

Most importantly, considering how this is an ineffective assistance of counsel claim, trial counsel, Simson Unterberger was well aware that Livia and Terance Valentine were still legally married; as he testified to. (PCR Vol. 20 p. 437). My failing to object to the misnaming of Livia, or moving in limine to make sure that the victim was referred to a Livia Valentine, trial counsel allowed Karen Cox to mislead the jury about the status of the relationship. Regarding prejudice, Mr.Valentine would not have been convicted of 1rst Degree murder, had trial counsel made sure that he was portrayed as the cheated on, distraught and devastated husband that he happened to be, at the time of the murder.

ARGUMENT III

The lower court erred in holding that Mr. Valentine was not denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution. Trial counsel failed to adequately challenge the State's case in the mistaken belief that the case would never go to penalty phase. As a result of trial counsel's deficient performance, investigative leads were ignored, a proper mental evaluation was not done and important statutory and non-statutory mitigation was not established.

On page 29 of the State's Answer, they argue: "In denying the claim below, the court specifically found that counsel performed reasonably, but even if the mental mitigation found by Dr. Dee should have been presented, it would not have made any difference to the outcome." However, this type of post-hoc rationalization analysis is specifically prohibited by Wiggins v. Smith, 539 U.S. 510, 526-527 (2003).

Moreover, in Porter v. McCollum,558 U.S. ----, 130 S.Ct. 447, 449 (2009) 175 L.Ed.2d 398 (2009), the facts and legal reasoning of the United States Supreme Court fall squarely on point with the facts of Mr. Valentine's case. Similar to Porter, Mr. Valentine was sentenced by a jury who knew little about

him, besides the facts of the crime itself. Id. at 449. Walter Lopez, who handled the penalty phase at trial, did very little preparation and knew little if anything about statutory mitigation.

At the evidentiary hearing, Walter Lopez was asked the following questions and gave the following answers:

> Q. When the jury came back guilty is it safe to assume that the jury did not believe he was where he said he was?
> A. That's correct.
> Q. So upon seeing that this man is convicted of first degree murder, did you make any attempts to establish a statutory mitigator?
> A. We had whatever mitigators there were already on the record, already on the record and we brought the witnesses up from Costa Rica to establish the other mitigation circumstances. It was difficult for me, it was difficult for me for a number of days to be part of a team that was arguing that Mr. Valentine was in Costa Rica when this occurred and then have to get up and argue, he was in Costa Rica but if he wasn't there he was here and if he was here he was incompetent.
> Q. Well, sir –
> A. That is the dilemma that I had for myself. Whether the presentation of those mitigating factors was adequate the record will tell us.
> Q. Yes, sir, however, you say incompetent – what do you mean by incompetent?
> A. Incompetent or meeting some of the statutory mitigating circumstances.
> Q. Like which one, which statutory mitigator?
> A. I don't know, Mr. Kiley.

THE COURT: I am not following your question, Counsel, to be honest with you.
BY MR. KILEY:
Q. Are you aware that there are two statutory mental mitigators?
A. Yes.
Q. Do you know what the first one is?
A. Mr. Kiley –
Q. Do you know what the first one is?
A. No I do not.
Q. Are you aware that the first one is that the defendant was operating under severe mental or emotional disturbance at the time of the offense?
A. Yes.
Q. Now, does the fact of the defendant being under a severe mental or emotional disturbance have anything to do with the standard of competency?
A. No.
Q. Now, are you aware of the second mental mitigator, sir?
A. Yes.
Q. Are you aware of that?
A. Yes.
Q. But you just told me you weren't aware of that.
A. I was going to let you recite them, Mr. Kiley.
Q. You were certified in this capital stuff, weren't you?
A. Yes, I was.
Q. In mitigation?
A. Yes, I took it.
Q. Now, going back to Dr. Gamache it is safe to assume , sir, that Dr. Gamache was not going to bill you for something he didn't do, right?
A. No.
Q. Nor was he going to do anything for free?
A. That's correct.
Q. Now this psych exam at Orient Road with William Fuente you were not present there, were you?

A. I was not.
Q. And this review of records they were prison records; were they not, sir?
A. I don't know what records he reviewed.
Q. Well, did you supply Dr. Gamache as per the –
A. I supplied him with some records, yes.
Q. Of his previous incarceration?
A. That's correct.
Q. And that was your attempt to establish a non-statutory mitigator; was it not, sir?
A. Yes.
Q. Now, do you know again whether or not Dr. Gamache ever talked to the mitigation witnesses which you provided at trial?
A. He did not.
Q. And, sir, are you aware of the standard or the burden of proof required of you as a certified capital attorney to prove a statutory or a non-statutory mitigator?
A. It is my burden.
Q. What is the standard you're getting at, Mr. Kiley.
THE COURT: Do you mean clear and convincing?
BY MR. KILEY:
Q. Is it beyond a reasonable doubt?
A. No.
Q. Could it possibly be a preponderance of the evidence?
A. Yes.
MR. KILEY: One moment, sir, Your Honor.
THE COURT: Yes.
BY MR. KILEY:
Q. Sir, you just testified you really had nothing to do with the guilt phase.
A. Well, I had nothing to do in terms of presenting the evidence at the Court. I had a lot to do with the guilt phase because I did confer with Mr. Unterberger throughout the trial.
Q. Regarding the penalty phase, have you ever in your career argued an inconsistent defense?

A. Yes.
Q. And attempting to prove a statutory mitigator would have been inconsistent with the defense of alibi in the guilt phase?
A. Yes.
Q. But this was a separate proceeding; was it not?
A. Yes, it was.
Q. Yet, you did not attempt to establish any statutory mitigation?
A. Well, in order to answer that question I would really need to review what in fact I did argue and present to Judge Allen. Now, did I present psychological or psychiatric evidence, I did not. I did not.
Q. Okay. Well, if the record reflects at the penalty phase colloquy that you did not attempt to establish a statutory mental mitigation through the testimony of Dr. Gamache or any lay witness nor did you argue statutory mental mitigation, would you have any reason to dispute the trial record?
A. I have no reason to dispute the trial record. (PCR Vol. XVII p. 181-187).

The above cited testimony of penalty phase counsel clearly establishes several important points regarding counsel's ineffectiveness. Mr. Lopez had focused on the standard of competency rather than the statutory mitigation he could have investigated and presented but, as his testimony above revealed; he did not know what the statutory mitigators were. A major concern regarding the ineffectiveness of Mr. Lopez, lies in the fact that he never expected this case to go to a penalty phase. (PCR Vol. XVII p. 180). That's despite the fact that there was a live witness naming his client as the shooter, and several phone calls where his

client called the live victim/witness to further intimidate her. Trial counsel should have been well aware that this case was likely proceeding to penalty phase, yet he failed to properly prepare.

Had trial counsel acted properly in preparing mitigation and inquiring about the relevant statutory mitigators, the issues found by Dr. Henry Dee would have been discovered. Dr. Dee opined that Mr. Valentine was suffering from extreme mental or emotional disturbance at the time of the crime. (PCR Vol. XVII p. 203-204). Dr. Dee also opined that Mr. Valentine's sense of self worth and his sense of importance was exaggerated. Dr. Dee further opined that Valentine eluded constantly that things will happen almost like magic and that because he believes something should happen, it will happen. It was Dr. Dee's opinion that even a casual reading of the trial transcripts and the depositions would prompt a mental health professional to conclude that this man may be suffering from some disease or defect of the mind. (PCR Vol. XVII p. 215).

Dr. Dee also gave Mr. Valentine a battery of neuropsychological tests including the Wechsler Adult Intelligent Scale. Dr. Dee explained how the tests worked and ultimately opined that Mr. Valentine, although he is a very intelligent man, has suffered brain damage due to instances in childhood where he fell and/or dropped and lost consciousness and had to be hospitalized. (PCR Vol. XVII p.

216-222). Dr. Dee opined that the testing revealed that Mr. Valentine suffers from frontal lobe damage. (PCR Vol. XVII p. 225). As a result, people who have frontal lobe damage "don't plan well". (PCR Vol. XVII p. 225). Dr. Dee also opined that people with this type of brain damage are a good deal more impulsive and a good deal more irritable that the normal person. (PCR Vol. XVII p. 226).

In addition to the mania, Dr. Dee opined that the frontal lobe damage in and of itself, indicates that Mr. Valentine was operating under extreme mental or emotional disturbance at the time of the crime. (PCR Vol. XVII p. 227). Dr. Dee also opined that the results of the tests coincide with the examples of his behavior during his childhood and the information gleaned from Mr. Valentine in the clinical interview.

It was apparent to Dr. Dee that this man had these problems all of his life. (PCR Vol. XVII p. 228-229). Dr. Dee also opined that Mr. Valentine had mood disturbance for most of his life. Dr. Dee testified that mood disturbance is a presentation of abnormally intense and often inappropriate mood states. (PCR Vol. XVII p. 229-230). Dr. Dee ultimately opined that Mr. Valentine was operating under extreme mental or emotional disturbance at the time of the offense. (PCR Vol. XVII p. 231).

Dr. Dee testified about the evaluation done by Dr. Gamache, and opined from a reading of Dr. Gamache's material; there was no indication that Gamache had read any of the trial transcripts, (unlike Dr. Dee). Nor does it indicate that Dr. Gamache interviewed any penalty phase witnesses. Nor does it indicate that Dr. Gamache had an extensive clinical interview with Mr. Valentine, (again unlike Dr. Dee). (PCR Vol. XVII p. 258-259). Based upon Dr. Gamache's billing records, Dr. Dee testified that Gamache could not have given Valentine the neuropsychological battery and interview Valentine because there wasn't enough time billed for doing all that. Gamache billed for three hours, and Dr. Dee's evaluation took at least 16 hours. (PCR Vol. XVII p. 260).

Clearly Dr. Gamache wasn't properly prepped to conduct a thorough and well-researched mental health examination. That's likely because trial counsel was unfamiliar with mental health mitigators, and did not anticipate the trial proceeding to penalty phase. His actions demonstrated his ineffectiveness under Strickland v. Washington, 466 U.S. 668, (1984).

CONCLUSION

Wherefore, in light of the facts and arguments presented in this Reply and the facts and arguments presented in Appellants Initial Brief, Mr. Valentine 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

HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 29th, day of July, 2011.

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CERTIFICATE OF COMPLIANCE

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

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