IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NO.: SC10-318
L.T. NO.: 2000-CF-1549

LUTHER DOUGLAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

FRANK TASSONE, ESQUIRE
Fla. Bar No.: 165611
1833 Atlantic Blvd.
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

ARGUMENT I IN REPLY

WHERE TRIAL COUNSEL WAS UNAWARE OF SUBSTANTIAL MITIGATION AS THE RESULT OF HIS FAILURE TO INVESTIGATE AND PROVIDE HIS EXPERTS WITH DOCUMENTATION DEMONSTRATING THAT DOUGLAS WAS UNDER "EXTREME EMOTIONAL DISTRESS," HAD CHRONIC DEPRESSION, BORDERLINE INTELLECTUAL FUNCTIONING, AND FRONTAL LOBE DAMAGE, IT WAS NOT A STRATEGIC DECISION TO OMIT THE PRESENTATION OF SAME IN THE PENALTY PHASE. THIS MITIGATION, IF PRESENTED, HAD A REASONABLE PROBABILITY OF UNDERMINING CONFIDENCE IN THE OUTCOME OF THE PENALTY PHASE AS TWO AGGRAVATING FACTORS WERE FOUND COMPAIRED TO ONE STATUTORY MITIGATING FACTOR. (restated)

The state, in its answer contends that this court may deny Douglas' claim because A) "Douglas cannot show prejudice from trial counsels' failure to call Dr. Krop or Dr. Miller, to the witness stand, during the penalty phase of Douglas's capital trial;" and B) "this claim may be denied because the decision to portray Douglas in the best light possible was a sound strategic decision made after investigation by two very experienced trial attorneys." (AB 43.)

Contrary to the state's position, Douglas was prejudiced by his counsel's failure to properly investigate and present mitigation at his penalty phase, and counsel's decision to pursue a mitigation strategy that presented Douglas in the "best light possible" cannot be considered "strategic" where counsel failed to adequately investigate Douglas' mitigation and to provide the fruits of such investigation to the appointed mental health expert. Furthermore, counsel opened

the door to tremendous damaging evidence in its attempt to portray Douglas in the "best light possible" and the jury was never given a valid explanation for why Douglas may have committed the instant crime.

A. Douglas was prejudiced by his counsels' deficiencies in the penalty phase

In its answer brief the state announced, "as a whole, both Dr. Krop and Dr. Miller's testimony was much more harmful, than helpful. Because their testimony would have allowed evidence to come in that was manifestly unfavorable, Douglas has failed to present proof sufficient to undermine the confidence in the outcome of his penalty phase proceedings and sentence to death." (AB 43.) In reaching this abrupt conclusion the state failed to address the startling school records which had not been discovered by trial counsel, but were gathered by post-conviction counsel, presented to the mental health experts to assist in their evaluations, and presented to the court as evidence at the evidentiary hearing. The state skipped over trial counsels' ignorance of Douglas' borderline IQ; the failure of trial counsel to properly investigate mitigation in the case; and follow up with Dr. Krop and provide him documentation and contact information.

The very premise of the state's rationale is flawed under a recent United States Supreme Court case, Sears v. Upton, 130 S. Ct. 3259 (2010). During the post-conviction proceedings for Demarcus Ali Sears, it was determined that Sears functions in the bottom first percentile in cognitive functioning and reasoning; the

cause of the abnormality was significant frontal lobe brain damage suffered as a child as well as drug and alcohol abuse; Sears' cognitive impairments and childhood difficulties were not brought to light at the time he was sentenced to death. Id. at 3261. Despite the evidence presented at post-conviction evidentiary hearing, the trial court denied Sears' ineffective assistance of counsel claim and the Supreme Court of Georgia summarily denied review. The USSC granted Sears' subsequent petition for writ of certiorari, vacated the judgment, and remanded for further proceedings. The USSC found that where the evidence presented in post-conviction also showed some adverse information, this did not mean that Sears was not prejudiced by counsel's failure to find and present the mitigation at trial:

> [T]he fact that Sears' brother is a convicted drug dealer and use, and introduced Sears to a life of crime…actually would have been consistent with a mitigation theory portraying Sears as an individual with diminished judgment and reasoning skills, who may have desired to follow in the footsteps of an older brother…
>
> [T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising…given that counsel's initial mitigation investigation was constitutionally inadequate. **Competent counsel should have been able to turn some of the adverse evidence into a positive -- perhaps in support of a cognitive deficiency mitigation theor**y. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking…[and] "profound personality disorder…" **This evidence may not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts - - especially in light of his purportedly stable upbringing.**

Id. at 3263-64 (emphasis added). Sears is directly on point with the instant situation. Like Sears, Douglas is significantly cognitively disabled and suffers from frontal lobe damage and alcohol and drug abuse. Like Sears, these issues were not discovered or presented during the penalty phase of Douglas' trial.

The state in Douglas attempts to discount the mental and cognitive mitigating evidence which was presented at evidentiary hearing: statutory mitigation that Douglas was suffering from an "extreme mental or emotional disturbance" at the time of the crime (3 R 401-2) (3 Supp 456); compelling non-statutory mental mitigation which would have explained Douglas' behavior; evidence that that Douglas has an IQ of 75 (which is in the bottom 6.7% of the population in terms of intelligence and cognitive functioning) (1 Supp 2-5) (3 R 12); that Douglas has frontal lobe impairment likely caused by organic brain damage (3 R 389); that Douglas has struggled with pronounced cognitive and emotional disabilities since childhood (1 Supp 2-3, 6); that he flunked the third and fourth grades once each and the seventh grade three time despite nearly perfect attendance (1 Supp 6, 9); was literally unable to complete middle school due to his disabilities (1 Supp 7-9); that Douglas suffers from chronic depression (7 R 1149); Douglas had "profound" problem drugs and alcohol (3 Supp 455); and that his frontal lobe impairments were exacerbated by significant drug and alcohol abuse. (3 Supp 455).

The state suggests that Douglas was not prejudiced by his counsel's failure to conduct an investigation into mental mitigation and present the aforementioned mitigation to the jury merely because Dr. Krop and Dr. Miller may have found that Douglas suffered with anti-social personality disorder (although neither Dr. Krop or Dr. Miller ever diagnosed Douglas with anti-social personality disorder (3 R 384-411, 445-477) and because Douglas was involved in a series of criminal issues for which he was not convicted.

As stated by the USSC in Sears, competent counsel would have turned even negative information brought to light by mental health experts into positive, mitigating information by tying the information to the facts of the crime and by explaining the correlation between Douglas' criminal behavior and evidence of significant cognitive and emotional impairment. This evidence might not have made Douglas any more likable by the jury, but it might well have helped the jury understand him and his horrendous acts. This approach would have been far more effective than explaining to the jury that Douglas was a great, likeable guy who randomly, and uncharacteristically committed a brutal crime. While the state proclaims that the testimony of Drs. Krop and Miller would have taught the jury that "Douglas' conduct on the night of the murder was simply the culmination of a life of lawlessness, indifference to the needs and rights of others, illegal drugs, and violence toward women," (AB 45) the jury would have actually learned that

Douglas was born with an abnormality of the frontal lobe which resulted in a severe cognitive disability (3 R 389) (3 Supp 456); Douglas' mental disability resulted in the inability to perform to the level of his siblings and other children his age (1 Supp. 1-9); Douglas' inability to perform as other children resulted in feelings of self-doubt, anxiety, and insecurity (1 Supp. 1-3); these internal issues were compounded by the violence, drug use, and sexual abuse which were occurring in Douglas' home. (3 Supp 435, 446; 1 Supp 2.)

Because Douglas' cognitive and emotional disabilities were not properly addressed with counseling as a child, Douglas turned to drugs and alcohol at a very young age after being introduced to the street lifestyle by an older mentor. (3 Supp 446, 455-56.) Given his low cognitive and emotional functionality, lack of treatment, and violent upbringing, Douglas overreacted to everyday situations and responded to even minute negative stimuli with violence (3 R 448.) The pattern of criminal behavior and ultimately this crime were the result of Douglas' disabilities and chaotic upbringing and were not, as trial counsel would have the jury believe, a random, inexplicable act of Douglas, "the nice guy." Nor was Douglas' crime simply the end of his chosen path, as argued by the state. (16 R 1297.)

Importantly, if trial counsel's strategy was to keep Douglas' undesirable criminal conduct out of the sentencing decision, as contended by the state, this "strategy" failed; the court knew that Douglas had a criminal history but that he

had never been convicted—this is why the court assigned only "little weight" to the statutory mitigator of "no significant criminal history." (AB 8.) Counsels' admissions that they did not know the extent of Douglas' cognitive deficiencies and statements that they were "shocked" to discover that he has and IQ of 75 proves Douglas' trial attorneys failed to conduct the requisite mitigation investigation prior to deciding how to approach the penalty phase of Douglas' trial.

This court should not ignore the prejudice suffered by Douglas as a result of his counsel's deficient performance simply because the trial court discredited the information presented in post-conviction. The trial court focused primarily on the negative information that arguably may have been presented regarding Douglas' criminal behaviors if mental mitigation had been addressed. (AB 39) (5 R 819, 822-39.) The court cast off the fact that an "extreme mental or emotional disturbance" was present at the time of the crime by stating it was worthy of little weight. (AB 40) (5 R 819, 822-39.) The court did not address any of the non-statutory mitigating evidence that was uncovered in post-conviction. (5 R 822-39.) The court did not even mention the school records which were introduced into evidence at the evidentiary hearing which document Douglas' IQ of 75, his cognitive and emotional difficulties, and his struggle in completing middle school. (5 R 819, 822-39.) In Porter v. McCollum, 130 S. Ct. 447 (2009), the USSC found

that the Florida Supreme Court cannot simply defer to the decision of the trial court in assessing claims of alleged ineffective assistance of counsel:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - - or even cursory - - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing…Yet neither the postconviction trial court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

Id. at 454-55. Based on the USSC's determination in Porter, and based on the trial court's failure to thoroughly address the substantial mitigation which was presented in post-conviction, it is imperative that this court properly address all of the mitigation which was available to the trial attorney's which was not utilized at trial in determining the likelihood of prejudice in Douglas' case.

B. Counsels' deficiencies in the penalty phase of Douglas' trial cannot be excused as strategic

In response to the state's second assertion that defense counsel's performance in Douglas' penalty phase was the result of an informed, strategic decision, and that the testimony of a mental health expert "would have been devastating to trial counsels' attempt to portray Douglas in the best light possible," Douglas respectfully disagrees. The evidence proves that trial counsel did not

conduct a constitutionally sufficient mitigation investigation upon which to make an informed, strategic decision.

Trial counsel for Douglas did not know whether the testimony of a mental health expert at penalty phase would have been helpful or appropriate because counsel did not follow up with Dr. Krop after Dr. Krop conducted an initial assessment of Douglas for the purpose of determining competency to stand trial. Counsel did not provide Dr. Krop with school records and contact information for Douglas' friends and family which was specifically requested by Dr. Krop. (3 R 385-86.) Because counsel was completely unaware of whether or not a mental health expert would have been useful at trial, it cannot be said that counsel's "decision" to present Douglas in the best light possible was reasonable or strategic.

The state cannot point to **any** evidence to show that trial counsel properly investigated this case for mental mitigation. As conceded by the state in its answer, "[Trial counsel] Mr. Eler's recollection of his contact with Dr. Krop in relation to the Douglas case was not particularly good." (AB 31.) Though the state refers to Douglas' trial counsel as "very experienced trial counsel[ors]," it concedes that, prior to Douglas' case, **the attorney appointed for the specific purpose of preparing for penalty phase** and representing Douglas during the sentencing portion of his trial **had never tried a murder case**, much less a capital murder case involving investigation into mitigation. (AB 34, 43-44.)

Neither lead nor second chair trial counsel found or investigated Douglas' school records. Because this critical, easily discoverable, and basic penalty phase tool was not discovered, both lead and second chair counsel considered Douglas an "intelligent" man, despite the fact that he has an IQ of 75, well within the borderline range of intelligence. (6 R 970)

While both lead and penalty phase counsel testified that they do not think that Dr. Krop could have been helpful at trial, and thus did not use him as a witness, this was not an informed choice; neither counsel had not followed up with Dr. Krop's request for additional documentation, contact information, and additional testing and assessment of Douglas and thus neither counsel had any idea what Dr. Krop could or would offer by way of mitigation in the penalty phase.

Just because trial counsel presented a mitigation theory for the penalty phase of trial, does not mean that counsel's performance was constitutionally sufficient. The United States Supreme Court in Sears v. Upton, 130 S. Ct. 3259 (2010), has flatly rejected the notion that prejudice can only be found in cases where no mitigation was presented:

> We have never limited the prejudice inquiry under Strickland to cases in which there was only "little or no mitigation evidence" presented… True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decision maker…But we have found deficiency and prejudice in other cases in which counsel presented what could have been

> described as a superficially reasonable mitigation theory during the penalty phase.
> …
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the Strickland inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.

Id. at 3266. This court in Rose v. State, 675 So. 2d 567 (Fla. 1996), discussed the necessity of choosing a penalty phase theory only after a thorough investigation of options:

> Without ever investigating his options, counsel latched onto a strategy which even he believed to be ill-conceived. Here, there was no investigation of options or meaningful choice. See Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)("Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."), cert. denied, 503 U.S. 952 (1992).

Id. at 572-73. Like penalty phase counsel in Rose, Douglas' trial team latched onto an ill-conceived strategy based upon a cursory mitigation investigation of Douglas' friends and family members.

While the state point at the presentation of Douglas' friends and family at penalty phase and argues that this was enough—that this was "strategy" on the part of defense counsel—this argument cannot stand. Even if counsel had conducted an adequate investigation of the mitigation in this case (which they did not—neither counsel was even aware that Douglas had a borderline IQ), the "strategy"

employed by counsel was poorly conceived, and in some instances patently untrue: e.g. “Douglas is a smart person, although he dropped out of high school due to reading problems.” (AB 8.) Defense could not even follow through with its chosen “strategy” as nearly one half of the proposed mitigating factors were not proven or substantiated. (3 R 411-12.)

Most importantly, the “strategy” to present Douglas as a nice person who by all accounts was cared for and loved by his family and friends and had a carefree life after his abusive father left the house, backfired on the defendant and opened the door to the state’s damaging portrayal of Douglas: that Douglas was not a victim of his upbringing or disabilities but, “a man standing at the end of his chosen path.” (3 R 425.) The trial court clung to the state’s interpretation of Douglas’ penalty phase and found “nothing in the Defendant’s background is compelling mitigation as he is not the product of depravation, the victim of circumstance, or a result of the system.” (3 R 425.)

Counsel did not conduct a proper investigation of the mitigation in Douglas’ case; counsel did not properly utilize its mental health expert to show the jury that Douglas has borderline intelligence, frontal lobe damage resultant from organic brain damage exacerbated by excessive drug and alcohol abuse, that Douglas should have received treatment as a child to address the abuse of his father as well as his cognitive and emotional disabilities, that Douglas suffered from “extreme

emotional or mental disturbance" at the time of the crime; counsels' unreasonable mitigation presentation backfired on Douglas and laid the foundation for the state's penalty phase theme that Douglas "was a man standing at the end of his chosen path"; and counsel failed to present sufficient evidence at penalty phase to support its chosen penalty phase theory.

There can be no choice, and hence, no strategy where a decision is made without proper thought and research. Id. citing Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)("Our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") Rather than hiding-the-ball from the jurors by trying to convince them that Douglas was a good person, counsel should have thoroughly investigated the case and approached the jury with honest, well-reasoned mitigation.

CONCLUSION

Based upon the contents of Douglas' Initial Brief and the argument contained herein, Douglas respectfully requests that this court find that trial counsel was deficient in failing to adequately investigate, prepare, and present mental mitigation in the penalty phase of Douglas trial, that Douglas was prejudiced by the deficiencies of his counsel, and that Douglas' death sentence be reversed and remanded for a new penalty phase.

RESPECTFULLY SUBMITTED,

TASSONE, SICHTA, & DREICER, LLC

FRANK TASSONE, ESQUIRE
Fla. Bar No.: 165611
RICK SICHTA, ESQUIRE
Fla. Bar No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

_____

A T T O R N E Y

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to Assistant Attorney General, Meredith Charbula, Esq. at PL-01, The Capitol, Tallahassee FL 32399 on this _____ day of December, 2010.

_____

A T T O R N E Y