

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-450
Lower Tribunal No.: 05-1992-CF-17795**

JOHNNY HOSKINS aka JAMILE ALLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Johnny Hoskins aka Jamile Alle (hereinafter referred to as “Mr. Hoskins”) relies on his Initial Brief for all purposes, and offers the following replies to the Answer Brief of Appellee dated January 4, 2011, regarding Arguments II/III as listed by the Appellee.

The post-conviction record on appeal will be referred to as "(PCROA ____)" followed by the appropriate Roman numeral volume number and then page number(s).

All other references will be self-explanatory or otherwise explained.

ARGUMENT

Mr. Hoskins argues that the post-conviction Court improperly denied post-conviction relief because his trial counsel failed to investigate and to present mitigating evidence during his penalty phase proceedings, specifically that Mr. Hoskins suffered from Intermittent Explosive Disorder (hereinafter referred to as “I.E.D.”) and that Mr. Hoskins suffered from substance abuse. Moreover, Mr. Hoskins suffered from a mental and emotional disturbance of an extreme nature due to his brain damage and thus he lacked the ability to conform his conduct to the requirements of the law pursuant to Fla. Stat. §921.141(6)(b) and he had a genetic predisposition to substance abuse.

As recited in the Initial Brief of the Appellant on page 61, the post-conviction Court misapprehended the significance of the testimony regarding brain damage and its significance when exacerbated by the mental illness, I.E.D, as laid out in its Order Denying Defendant’s Motion for Post-Conviction Relief. (PCROA Vol. 7, pp.1204-1207). The Appellee incorrectly states on page 24 of his Answer Brief that Mr. Hoskins “presented nothing that was not before the jury at his resentencing proceeding.” At the post-conviction hearing, Dr. Alexander Morton (hereinafter referred to as “Mr. Morton”) and Dr. Hyman Eisenstein (hereinafter referred to as “Dr. Eisenstein”) presented evidence of Mr. Hoskins’ drug abuse and of his Axis I mental illness diagnosis of I.E.D. that trial counsel Ernest Chang

(hereinafter referred to as “trial counsel Chang”) failed to investigate or present as discussed in Mr. Hoskins’ Initial Brief and also below.

It is clear that trial counsel Chang for five years made no additional efforts to further investigate or prepare the mitigation evidence in the resentencing proceeding. The United States Supreme Court has stated that trial counsel has an “obligation to conduct a thorough investigation of the defendant’s background.” *Porter v. McCollum*, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) *citing Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495 (2000). Trial counsel Chang just relied on what was already done by prior counsel, Randall Moore (hereinafter referred to as “trial counsel Moore”) and did not abide by his obligation. As stated in the Initial Brief of the Appellant, trial counsel Chang admitted that his philosophy was to do everything that trial counsel Moore had done in the previous two penalty phase proceedings, plus anything else he could think of. (PCROA Vol.3, p.386). Trial counsel Chang did not conduct a thorough investigation of Mr. Hoskins’ background and just relied on what was done before. This is an unreasonable strategy by trial counsel Chang, especially when the first two penalty phases resulted in a jury recommendation for death and specifically by a unanimous vote in the second penalty phase. *See Hoskins v. State*, 702 So.2d 202 (Fla. 1997).

At the post-conviction hearing, Mr. Hoskins demonstrated through the testimony of Shirley Furtick (hereinafter referred to as “Ms. Furtick”), the

mitigation expert, that there was an in-depth family history that was not investigated by trial counsel Chang. Ms. Furtick divulged that Mr. Hoskins and his family suffered from a history of substance abuse and of mental illness. (PCROA Vol.2, pp.224-226). Mr. Furtick even identified the possibility of I.E.D. as a potential issue. (PCROA Vol.2, p.226). Once again, trial counsel Chang just relied on what was done in the first two penalty phases unsuccessfully by trial counsel Moore. Even though trial counsel Chang met with various members of Mr. Hoskins' family, he failed to make an independent effort or to retain an investigator to aid him in investigating Mr. Hoskins and his family's history. (PCROA Vol.3, pp.387-388).

Trial counsel Chang just put on all the witnesses that had testified in prior penalty phases proceedings and did not conduct his own mitigation investigation on behalf of Mr. Hoskins. (PCROA Vol.3, p.388). The prejudice suffered by Mr. Hoskins is that his trial counsel failed to present available mitigating evidence, such as his drug abuse and his diagnosis of I.E.D., to the jury because he relied on what was done unsuccessfully in the first two penalty phase proceedings.

Furthermore, as discussed in the Initial Brief of the Appellant, and recognized by the post-conviction Court in its Order Denying Defendant's Motion for Post-Conviction Relief, trial counsel Chang did not properly prepare Dr. Harry Krop (hereinafter referred to as "Dr. Krop") to testify. Trial counsel Chang had

phone conversations with Dr. Krop where he discussed generally what Dr. Krop's testimony would be at the penalty phase proceedings. (PCROA Vol.3, pp.387 & p.413). Trial attorney Chang's first face-to-face meeting with Dr. Krop was either the night before or on the morning of the penalty phase proceedings. (PCROA Vol.3, p.387). Trial counsel testified that on the date of the penalty phase proceedings, he had not reviewed the tests done by Dr. Krop and that he expected Dr. Krop would orally report his findings. (PCROA Vol.3, pp.409-410). Trial counsel Chang just relied on what was done by trial counsel Moore and his conduct in failing to discuss and prepare Dr. Krop is ineffective assistance of counsel, as he did not look into the drug abuse and potential mental illness that Mr. Hoskins suffered. Trial counsel's testimony as laid out in the Initial Brief of the Appellant indicates clearly that he was not going to do anything additional mitigation investigation on behalf of Mr. Hoskins.

The Answer Brief of the Appellee on page 31 cites to volume 2 and page 238 to 239 of the record to state that "(t)he only 'mitigation' that Hoskins has identified as not having been presented at sentencing is substance abuse information, which the trial expert had found no evidence of." This reference is in the midst of Dr. Morton's testimony during the post-conviction proceedings and does not support the Appellee's assertion. Pages 238 and 289 of volume 2 of the post-conviction proceedings record encompass testimony about entering Dr.

Morton's slides into evidence, a lunch recess, and judicial notice regarding Ms. Furtick. Regardless of the citation error, if the reference is to Mr. Hoskins' expert Dr. Morton, then this assertion is incorrect. Dr. Morton, a board certified expert in the field of psychopharmacology, testified that there was evidence of substance abuse in the deposition of Carrie Jacobs and in Mr. Hoskins' arrest records for drugs in 1998 and in a pre-sentencing assessment. (PCROA Vol.2, p.155). The Initial Brief of the Appellant on pages 16 to 18 describes the evidence of substance abuse uncovered by Dr. Morton with the aid of Ms. Furtick and Dr. Eisenstein. (PCROA Vol.2, pp.157-163).

If the above reference is to trial counsel Chang's expert, Dr. Krop, this assertion highlights the failure by trial counsel Chang as effective counsel to Mr. Hoskins during the penalty phase proceedings. Trial attorney Chang testified during the post-conviction hearing that he might have come across some information that Mr. Hoskins had snorted cocaine. (PCROA Vol.3, p.389). Yet, he does not recall discussing substance abuse with to Dr. Krop or even Mr. Hoskins. (PCROA Vol.3, pp.389-399). Trial counsel Chang correctly acknowledges that substance abuse is relevant information to pass along to a mental health expert. (PCROA Vol.3, p.389). Moreover, trial counsel Moore also failed to provide Dr. Krop or any expert information he had about Mr. Hoskins' drug abuse. Trial

counsel Chang did not do everything necessary in this case. (PCROA Vol.3, p.390).

Trial counsel Moore testified that Mr. Hoskins conveyed to him that Mr. Hoskins had a cocaine problem at the time of the homicide and that Mr. Hoskins' girlfriend conveyed to him that Mr. Hoskins abused drugs. (PCROA Vol.3, p.373). Yet, trial counsel Moore could not recall substance abuse discussions with Dr. Krop. (PCROA Vol.3, p.376). Furthermore, the attachment to the letter dated September 23, 1994, from Dr. Krop to trial counsel Moore, shows a reference to cocaine and alcohol abuse by Mr. Hoskins. (PCROA Vol.3, p.380). Yet another key piece of evidence of substance abuse was missed by both trial counsels. Mr. Hoskins is prejudiced because despite evidence of substance abuse by Mr. Hoskins, no mitigating evidence of his substance abuse history was ever investigated or presented to his jury to show his prevalent abuse and effect on his mental illness. Dr. Morton, Dr. Eisenstein, and Ms. Furtick were presented at post-conviction proceedings to show the amount of evidence of substance abuse present in Mr. Hoskins' life. On page 33 of the Answer Brief, the Appellee is correct that the facts of the case are horrific, but it is up to a jury at penalty phase to determine the weighing of the aggravating evidence versus the mitigating evidence in coming to their recommendation. There is prejudice as trial counsel failed to investigate and present valid mitigating evidence of substance abuse and evidence of mental

illness suffered by Mr. Hoskins throughout his life and at the time of the homicide.

Furthermore, it should be noted that Dr. Eisenstein testified that it is possible to use drugs and alcohol and still be diagnosed with I.E.D. (PCROA Vol.3, pp.344-345). It is the level of addiction that determines whether it would be ruled in or ruled out. (PCROA Vol.3, p.344). A co-morbid diagnosis permits an Axis I diagnosis of I.E.D. and a diagnosis of substance abuse as a secondary element in a case. (PCROA Vol.3, p.345). Mr. Hoskins' substance abuse does not rule out a diagnosis of I.E.D. (PCROA Vol.3, p.345).

With regard to the I.E.D. diagnosis, the Answer Brief of the Appellee on pages 17 refers to how Dr. Harry McClaren (hereinafter referred to as "Dr. McClaren") did not find a significant number of disciplinary reports in reviewing Mr. Hoskins Department of Corrections records. The Appellee argues that this suggests that Mr. Hoskins has "good control of himself" and no severe problems with impulse control. (PCROA Vol.3, p.428). As discussed in Mr. Hoskins' Initial Brief, Dr. Eisenstein found that Mr. Hoskins met the criteria for I.E.D. (PCROA Vol. 2, pp.301-302 & p.308). In a report from the Department of Corrections dated June 25, 2009, Mr. Hoskins' last reported disciplinary action was on or about December 13, 2005, in a less than four year span. (PCROA Vol.3, p.204). However, as stated in the Answer Brief of the Appellee on page 11, Dr. Eisenstein testified that Mr. Hoskins received approximately one disciplinary report a year

over 15 years. (PCROA Vol.2, p.311). These disciplinary reports included aggressive incidents where Mr. Hoskins jumped an inmate, where he threatened officers, and used foul language in responses. (PCROA Vol.2, pp.311-312). Furthermore, Dr. Krop in his findings under his heading of impulse control, history of impulse control, listed three similar incidents that were similar to those found in the Florida Department of Corrections records. (PCROA Vol.2, p.311). Dr. Krop reported an incident of a fight regarding a racial comment in 1988, in a Georgia Department of Corrections record and he reported two separate incidents involving racial comments on the streets. (PCROA Vol.2, p.311). Dr. Eisenstein also testified about another aggressive incident where Theresa Kovatch told him about the attack committed by Mr. Hoskins on his former girlfriend, Katrina. (PCROA Vol.2, pp.291-291 & pp.313-314). Mr. Hoskins has a lengthy and prominent history of loss of impulse control as demonstrated by Dr. Eisenstein, with the aid of Ms. Furtick and Dr. Morton. This again highlights trial counsel Chang's failure to follow-up on his own expert as trial counsel had not reviewed the tests done by Dr. Krop and he expected Dr. Krop would orally report his findings. (PCROA Vol.3, pp.409-410). This led to the detriment of Mr. Hoskins' mental illness diagnosis, whereby the jury was not told the extreme nature of Mr. Hoskins' mental and emotional disturbance due to his brain damage. Thus he lacks the ability to conform his conduct to the requirements of the law pursuant to Fla. Stat.

§921.141(6)(b). Therefore, the post-conviction Court improperly denied post-conviction relief because his trial counsel failed to investigate and present mitigation evidence of Mr. Hoskins' I.E.D., during his penalty phase proceedings.

CONCLUSION

Once again, the post-conviction Court failed to follow the clearly established precedent of the United States Supreme Court when it failed to evaluate the totality of available mitigation evidence that was adduced at trial and at the post-conviction evidentiary hearing in reweighing it against the evidence in aggravation. *See Clemons v. Mississippi*, 494 U.S. 738, 751-752, 110 S.Ct. 1441 (1990); *see also Williams v. Taylor*, 529 U.S. 362, 397. The post-conviction Court improperly denied post-conviction relief to Mr. Hoskins.

Based on the foregoing and the Initial Brief of the Appellant, Mr. Hoskins respectfully request that this Honorable Court vacate Mr. Hoskins' sentence of death and grant him relief that this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail to Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118, to Thomas Brown, Assistant State Attorney, Office of the State Attorney, 2725 Judge Fran Jamison Way, Viera, Florida 32940, and to Johnny Hoskins a/k/a Jamile Alle, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 1st day of March, 2011.

I HEREBY CERTIFY that, in compliance with this Honorable Court's Administrative Order *In Re: Mandatory Submission of Electronic Copies of Documents*, AOSC04-84, dated September 13, 2004, a copy of the Microsoft Word document of the foregoing brief has been transmitted in an electronic format to this Court's electronic mail at e-file@flcourts.org on this 1st day of March, 2011.

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I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

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