IN THE SUPREME COURT OF FLORIDA

Case No. SC11-1016
Lower Court Case No. 95-2284CFA

BRANDY BAIN JENNINGS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR COLLIER COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO ARGUMENT I

MR. JENNINGS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

a. Deficient performance

The State claims that Mr. Osteen "was an experienced capital litigator, and very familiar with the ideas and general framework of presenting a case in mitigation; he had attended continuing legal education course on the subject and was exposed to a lot of training with regard to capital issues" (Answer at 36). This overstates Mr. Osteen's testimony.

The passage to which the State cites refers specifically to Mr. Osteen's familiarity with the ABA Guidelines for the Appointment and Performance of Counsel in Capital Cases, and whether he would have looked to the ABA Guidelines for guidance on how to proceed in Mr. Jennings's case. (PCRT. 2888-2889). Mr. Osteen testified that he was "exposed to a lot of that" but, although he was "probably" aware of ABA Guidelines, he would have had the "general framework" of how to handle a case. In any event, in Mr. Jennings's case it appears that Mr. Osteen did not exercise whatever knowledge he might have had. The record demonstrates that Mr. Osteen's investigation deficient, his

understanding of mental health mitigation was limited and he failed to fulfill some of the most rudimentary duties of counsel in death penalty cases.

The ABA Guidelines advise counsel to "[c]ollect information relevant to the sentencing phase of trial including, but not limited to: *medical history*, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); *educational history* (achievement, performance and behavior) *special educational needs* including cognitive limitations and learning disabilities)...." ABA Guideline 11.4.1(D)(2)(C). Just like trial counsel conducted no out-of-state investigation, he obtained no out-of-state records, despite the fact that Mr. Jennings was raised outside Florida until he was in his teens. Counsel's failure to investigate Mr. Jennings's childhood was deficient performance. The State complains that Mr. Jennings's criticism of counsel for making "no effort" to obtain background records is "directly refuted by the record." (Answer at 38) Contrary to the State's accusation, Mr. Osteen's testimony was unequivocal:

> Q: Did you make any effort to obtain any school records regarding Mr. Jennings?
>
> A: No, I did not.
>
> Q: Did you make any effort to obtain any medical records regarding Mr. Jennings?
>
> A: No, I did not.

(PCR. 2892). Thus, it is not Mr. Jennings's who misstates the record on this point.

Moreover, the State's complaint that "Jennings has not identified any critical records which should have been discovered or could potentially affect the case" (Answer at 42) is not supported by the record. The State relies on the trial experts' reports to show counsel made effort to obtain records and that "Jennings has not identified any pertinent information that was unknown to counsel due to any purported failure to obtain records" and that "the mental health reports indicate that the defense experts reviewed school, jail, and medical records" (Answer at 38). This assertions is not entirely accurate. Dr. Masterson's report (PCR. 3760-3771) reveals that he relied solely on Mr. Jennings's self-report and testing, and makes no mention of any records provided to, obtain by, or reviewed by him. Dr. Wald's report (PCR. 3772-37781) does indicate that he reviewed Lee County school records and Collier County Jail medical records (PCR. 3778), however the fact remains that neither trial counsel nor the trial experts ever obtained or reviewed Mr. Jennings's childhood medical or school records -- those which contained the most valuable information. Had trial counsel obtained these records, he would have realized that Mr. Jennings, contrary to his mother's belief and testimony, was not a "straight-A student." Moreover, the records would have demonstrated the chaotic circumstances in which Mr. Jennings grew up -- he had attended fourteen schools

by the sixth grade. It cannot be said that such records are not "pertinent to the case."

In defending trial counsel's performance, the State contends that Mr. Jennings "offered no evidence to suggest that Ed Neary, the public defender investigator that had worked with Osteen on nearly all of the numerous capital cases Osteen had handled, had any less experience or did any less thorough a job investigating Jennings' background than a mitigation specialist might have done." (Answer at 43). This contention is puzzling given the wealth of information uncovered in postconviction and presented at the evidentiary hearing. Trial counsel recalled that Mr. Neary "went around and tried to find evidence and interviewed the witnesses and interviewed the defendant." (PCR. 2896-7). The record reflects that Mr. Neary did less than the very minimum that would be considered a reasonable mitigation investigation. He did not investigate outside the Southwest Florida area despite the fact that Mr. Jennings grew up in several states and did not come to Florida until he was in his teens. He did not obtain any school records from out of state. He did not interview any witnesses out of state, even though he was aware that witnesses were available and had written to at least one of them. In contrast, Dr. Sultan in postconviction worked up the case and conducted exhaustive investigation that is expected of a mitigation specialist. Dr. Sultan

testified that she conducted an extensive social history investigation, reviewed Mr. Jennings's school records, employment records, a petition of independency, and sex offence legal documents concerning Mr. Jennings family. In addition, Dr. Sultan travelled to meet with Mr. Jennings's mother and conducted telephonic interviews with several family members, including Alice Clark (Tawny's older sister), Sherman Jennings (Tawny's older brother), Lois Lara (Brandy's first cousin), Patricia Scudder, and friend Tasha Van Brocklin. (PCR. 3078-3081).
As a result, she learned of the valuable mitigation evidence testified to at the evidentiary hearing.

ABA Guideline § 11.4.1 from 1989—reflecting prevailing professional norms years prior to Mr. Jennings's trial—provides that counsel's penalty phase investigation "should comprise efforts to discover all reasonably available mitigating evidence" ABA Guideline § 11.4.1(C) . Here, trial counsel conducted limited family interviews and sent a letters to a possible character witnesses. Counsel did not collect readily available basic background materials such as childhood school and medical records from out-of-state. No competent counsel in a death penalty case would have failed to collect and review such information.

Nor would competent counsel have simply accepted his client's mother's claims that he was a "straight-A" student, or that he was not abused or neglected.

Indeed, it is not surprising that "nothing was ever brought to his attention relating to this type of mitigation." (Answer 44) That is why attorneys and former police officers with no training in mental health issues are no substitute for mitigation specialists with the necessary education, training, and experience which would enable them to elicit such information. Given that Mr. Neary and Mr. Osteen lacked such experience, it is no surprise that neither Mr. Jennings, Tawny, or anyone else ever provided counsel with any information which needed to be developed further on this point.

The State points out that Osteen "relied primarily on Jennings and his mother to assist with the development of family background and character mitigation, and was assisted by his co-counsel and the public defender's chief investigator in locating and interviewing potential witnesses." (Answer at 42) However, the State ignores the fact that counsel failed to identify and adequately interview collateral witnesses – especially witnesses with knowledge of Mr. Jennings's chaotic and troublesome childhood. See ABA Guideline 11.4.1(D)(3)(B) (counsel should interview "witnesses familiar with aspects of the client's life history that might affect the . . . possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death"). In fact, counsel made only limited efforts to interview those

who knew Mr. Jennings as an adult. When he learned of Heather Johnson, he made no effort to interview her. In stead, his investigator only sent a letter asking for positive character information (Defense Exhibit 12), without explanation of what information would be helpful. (PCRT. 2831) Worse still, when Ms. Johnson responded, he *still* did not make any effort to interview her, even if only by telephone.

Despite these failings and trial counsel's deficient investigation, the State excuses trial counsel's failure to investigate and present Heather Johnson -- and additional available witnesses -- suggesting that "It was a reasonable trial tactic to focus on positive information rather than negative information such as extreme drug use." (Answer at 35) Although counsel's decision to focus on good character evidence might be "reasonable, in the abstract, [it] does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced" the defendant. *Sears v. Upton*, 130 S. Ct. 3259, 3265 (2010). Under *Strickland*, the issue is "not whether counsel should have presented" mitigating evidence, but rather "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable." *Wiggins v. Smith*, 123 S. Ct.. 2527, 2536 (2003)(emphasis omitted). Here, trial counsel could not have made a

reasonable strategic decision to forgo presentation of mitigating evidence because he had not conducted a reasonable investigation.

b. Prejudice

In making the prejudice determination, this court "must consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter v. McCollum,* 130 S. Ct.. 447, 453-4 (2009) (quotation marks omitted). The *Strickland* inquiry requires a "probing and fact-specific analysis" in evaluating the totality of the available evidence. *Sears v. Upton,* 130 S. Ct. at 3266.

The State argues that prejudice cannot be shown because "This case involves a senseless triple murder and Jennings' death sentences are supported by multiple, substantial aggravating factors." (Answer at 48) The State further asserts that "Any possible deficiency with regard to the investigation and presentation of non-statutory mitigation related to Jennings' family background could not have made a difference in this case." (Answer at 48) This argument ignores what *Porter* and *Sears* require.

Rather than addressing the cumulative effect of counsel's deficiencies, the State chooses to diminish the import of each of them in turn to assert that each would not have made any difference. For example, with regard to Patricia and

Lloyd Scudder, the State asserts that "inconsistencies" in their testimony would have rendered them incredible. However, while there may be minor inconsistencies in their recollection of time-frames and dates, their stories of Mr. Jennings's chaotic and traumatic childhood were entirely consistent. And while the State suggests that "No one testified that Tawny was abusive" (Answer at 50), this is simply not true. The conditions described by the Scudders certainly would be considered abuse and neglect. Mr. Jennings grew up in poverty and squalor. Contrary to the state's understanding, the testimony at the evidentiary hearing did not demonstrate that Tawny was "too loving." (Answer at 50) Indeed, his mother introduced him to drugs, exposed him to her sexual activity when he was a small child, did not feed him properly, and left him in the care of men she knew to be child molesters.

The State similarly discounts to irrelevance the testimony of Heather Johnson and Kevin McBride as "similar to that which was presented to the jury at the penalty phase. . ." (Answer at 52) This oversimplification of the testimony completely misconstrues the evidence presented and ignores the relevant additional information offered by these witnesses. Each testified not only to Mr. Jennings's character traits, but also to his drug use, to Tawny's limitations as a mother and to the dysfunctional relationship she had with Mr. Jennings. Heather Johnson

described Tawny as hard, cold, demanding and tough. She observed that Mr. Jennings's relationship with his mother was contentious, but he still always wanted to please his mom. (PCR. 2829). Kevin McBride recalled that Tawny knew about her young son's drinking but did nothing to stop it. In fact, Mr. Jennings and his mother drank together and were always moving among different motels. Tawny was "unstable", "rough around the edges", and "wanted to have her own fun."

The State also discounts to irrelevance Mr. McBride's and Bruce Martin's testimony regarding the extent of Mr. Jennings's drug use and dependence which was not explored at trial. The State contends that the introduction of such evidence would "reduce if not eliminate the statutory factor of no significant criminal history." (Answer at 52) This argument ignores the fact that this mitigator, while found by the trial court, was given only "some" weight. Moreover, the argument ignores the fact that much of this testimony related to drug use in Mr. Jennings's youth, which would greatly reduce any negative effects of evidence. As the Eleventh Circuit has recognized:

> [E]vidence of alcoholism and drug abuse is often a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing. However, we credit [defendant's] evidence of alcohol abuse beginning at age 11 as mitigation, as it was used as a way to escape his horrible background.

Cooper v. Sect'y, Dep't of Corr., 646 F.3d 1328, 1355 (11th Cir. 2011) (quotation marks and citations omitted). Having convicted Mr. Jennings of a brutal triple murder, it seems unlikely that the jury would have judged Mr. Jennings's drug use more harshly, especially considering the horrendous upbringing which led to it.

The State similarly discounts the mental health testimony presented at the evidentiary hearing. The State claims that the "postconviction experts were not consistent with their opinions and the relied on testing and information which was not available to the trial experts." (Answer at 53) This argument is puzzling. While Dr. Eisenstein found statutory mitigation and Dr. Sultan did not, Dr. Eisenstein's testimony was based on his neuropsychological testing, and Dr. Sultan's on her extensive interview and investigation. Dr. Hyde did not form any opinion with regard to statutory mitigation. The experts' conclusions were inconsistent only to the extent that each applied their different discipline in their respective field. In fact, their opinions are quite complimentary.

Moreover, the State's claim that the experts relied on information or testing that was unavailable at the time of Mr. Jennings's trial is simply incorrect. While Dr. Eisenstein performed an updated versions of the WAIS intelligence test which was not in use at the time of Mr. Jennings's trial, the WAIS has existed for decades. Had Dr. Eisenstein performed the same battery of tests in 1995, he would

have used the version of the WAIS that was then current. There was no data available to the postconviction experts that was not available to the experts at trial, had trial counsel sought and obtained it.

To further defend trial counsel's failings, the State also complains that "new experts would not have been an option for trial counsel." (Answer at 53) This is hardly the issue. Whether or not "new" experts would have been approved by the court or complained about by the county, trial counsel's duty was to obtain competent experts to perform adequate evaluations. The fact remains that the trial experts did not conduct adequate evaluations for the purposes of investigating mitigation and were not provided the necessary information, records and access to witnesses to do so.

Similarly, the State's complaints that Mr. Jennings does "not present any evidence as to what information could and would have been presented to the jury through Dr. Wald and Dr. Masterson" is irrelevant to this Court's prejudice analysis. Mr. Jennings need not show that the additional information presented in postconviction needed be presented through the trial experts. More significantly, however, the expert testimony presented at the evidentiary hearing was far above and beyond the limited information learned by the trial experts. In addition to interviews and testing of the defendant, the postconviction experts interviewed

family and friends who provided a wealth of valuable insight into Mr. Jennings's background. Dr. Sultan's testimony was especially compelling in this regard.

Lastly, but of significance, the State's contention that Mr. Jennings "did not offer any relevant material as potential prejudice even if Mr. Osteen's decision against presenting this testimony could be deemed reasonable" (Answer at 54) misconstrues what *Strickland* requires. "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Wiggins*, 123 S. Ct. at 2538. Here, trial counsel's understanding and appreciation of Mr. Jennings background was cursory, at best. Having failed to conduct a reasonable investigation, trial counsel could not have made a reasonable decision to forgo the presentation of evidence.

The wealth of compelling mitigation offered in postconviction demonstrates that Mr. Jennings's was prejudiced by trial counsel's failure to investigate. Relief is warranted.

REPLY TO ARGUMENT II

MR. JENNINGS'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY IMPEACH THE PREJUDICIAL TESTIMONY OF ANGELA CHANEY

While the State now claims that Ms. Cheney was "not a critical witness"

(Answer at 68), obviously they did not call her to testify at Mr. Jennings's trial for no reason. The State offered Ms. Cheney's guilt-phase testimony to establish Mr. Jennings's guilt, and to establish aggravating factors as to penalty. The circuit court relied on Ms. Cheney's highly prejudicial testimony at sentencing, as did this Court when affirming Mr. Jennings's sentence. Indeed, the State continues to rely on Ms. Cheney's trial testimony argue that Dr. Eisenstein's postconviction testimony is not credible. Any assertion that Ms. Cheney was "not a critical witness" is belied by the State's and Courts' consistent reliance on her testimony to pursue Mr. Jennings's sentence of death.

Trial counsel's failure to adequately cross-examine this highly prejudicial witness was constitutionally deficient. It is apparent that Mr. Osteen had no strategic reason for failing to impeach Ms. Cheney on cross-examination at trial. While Mr. Osteen may have been "aware of the substance of her testimony" (Answer at 64), he had no recollection of how he became aware of it. Mr. Osteen "did not conduct background investigation of Cheney because he did not have any reason to do so" (Answer at 64). Regardless of how he learned of the substance of Ms. Cheney's testimony, Mr. Osteen would have learned that Ms. Cheney had been married to the co-defendant's brother and had dated Mr. Jennings from the materials provided to him in pre-trial discovery. This information was available to

him regardless of whether he believed a background investigation of Ms. Cheney was necessary. For the same reasons, Mr. Jennings cannot be faulted because he "never indicated that he provided this information to counsel or gave counsel any reason to believe that Cheney's testimony was subject to impeachment on any of these bases" (Answer at 74). It is clear that counsel should have learned this information from Ms. Cheney's statements and police reports which were provided in pre-trial discovery.

The State, like the lower court, believes that prejudice cannot be shown because "Cheney indicated that she testified truthfully at trial and was not influenced by her relationships with Jennings and Graves." (Answer at 65-66) This belief ignores the facts presented at the evidentiary hearing and the effect that these facts would have had on the jury. In the context of the prejudice analysis under *Strickland*, the jury's appraisal of credibility must be considered. *Kyles v. Whitley*, 115 S. Ct. 1555 (1995). The fact that Ms. Cheney was married to the co-defendant's brother, maintained a relationship with the co-defendant, helped him, and advocated on his behalf all demonstrate bias in favor of Mr. Jennings's co-defendant and hostility toward Mr. Jennings, neither of which the jury had any knowledge.

The fact that "Cheney testified she did not think her talking to law

enforcement helped Graves" (Answer at 66) is of little import. The issue is not whether Ms. Cheney thinks in hindsight that she helped Graves. The issue is whether her offers of comfort and assistance to him were evidence of bias that the jury should have heard. Ms. Cheney admitted that she was present "at a meeting with the lawyers" at Attorney Mark Gustavson's home, when the family was trying to hire him to represent Graves (PCRT. 2860), she provided moral support, spoke with Graves 30 to 40 times by phone while he was at the jail, and even took her daughter to visit him there. (PCRT. 2862)

While Ms. Cheney's belief that she did not help Graves is irrelevant, the State's contention that she did not help Graves is simply untrue. Ms. Cheney's testified that she contacted Graves in jail not only because she believed it was "the right thing to do," as the State suggests (Answer at 66), but also because she wanted to help him:

> MS. CHENEY: "I wanted to make sure to do the right thing and report what he told me."
>
> Q: And this was for his benefit?
>
> A: For him and my own. It cleared my conscience as well.

(PCRT. 2864). Ms. Cheney clearly had Mr. Grave's interests at heart and sought to help him by cooperating with the police on his behalf.

Similarly, Ms. Cheney's testimony that "she was either divorced or seeking a divorce from Graves' brother at the time of trial" (Answer at 67) does nothing to refute the fact that she had a close familial relationship with Graves. Indeed, she maintained that relationship after Graves was arrested and went to great lengths out of concern for Graves. Whether "the jury did in fact hear that Cheney was friends with Graves" (Answer at 67) is of little significance when the true nature of their relationship is considered, as it should have been by the jury.

Lastly, Mr. Jennings disputes the State's claim that Mr. Jennings has argued "additional facts" that are "procedurally barred because they were not offered in his initial motion." (Answer at 68) In furtherance of this assertion, the State claims:

> [p]ursuant to Florida Rule of Criminal Procedure 3.851(f)(4) any amendment to Jennings' claim had to have been filed prior to the evidentiary hearing, so the new allegations that counsel should have established that the statement could not have been made as described and that illegal drugs may have been consumed at the time of the statement are not properly before the Court and should not be considered.

(Answer at 63, n.4). This assertion misapprehends the rule. Rule 3.851(f)(4) addresses amending a pending rule 3.851 motion with additional claims, not facts. The rule requires the "claim sought to be added" be attached to a motion to amend, and requires that a motion to amend "sets forth the reason the claim was not raised earlier." In the immediate case, Mr. Jennings pled and was granted a hearing on a

claim that trial "counsel failed to impeach several other key witnesses" including Angela Cheney. Impeachment would include eliciting facts challenging Ms. Cheney's credibility due to prior inconsistent statements, bias (such as kinship or hostility to a party), Ms. Cheney's character, or any defect in the capacity of Ms. Cheney to observe or recall the matters she testified to. *See* Fla. Stat. § 90.608. The State was or should have been aware that Mr. Jennings would elicit any available impeachment information at the evidentiary hearing.

The State similarly, but incorrectly, complains that "[f]ollowing the evidentiary hearing, Jennings expanded his argument to allege that counsel also should have established that the statement 'could not have taken place' as testified to and that Jennings and Cheney may have been using illegal drugs around the time the statement was made." (Answer at 63). The State's complaint overlooks the fact that, having been granted an evidentiary hearing on the claim that trial counsel failed to adequately impeach the State's witness, Mr. Jennings is entitled to present relevant facts to prove the claim. Having sufficiently plead claim his claim that trial counsel failed to impeach Ms. Cheney, Mr. Jennings was entitled to present and argue relevant facts to prove that claim, which he did here.

Furthermore, the State's assertion now that Mr. Jennings "precluded the parties from developing the relevant information at the evidentiary hearing"

(Answer at 68-69) is inconsistent with the record and without merit. The State made no contemporaneous objection to Ms. Cheney's testimony on these matters which would have been appropriate if such testimony did not relate to claims for which Mr. Jennings had been granted an evidentiary hearing. Moreover, the State had ample opportunity to cross-examine Ms. Cheney or call her as their own witness had they wished to do so. Similarly, the State's complaints that they were unable to question Mr. Osteen about whether he might have "strategically avoided" impeaching Ms. Cheney based on her drug use is inconsistent with the record. Here again, the State had ample opportunity to cross-examine Mr. Osteen, and/or call him to testify as their witness, had they wished to. Indeed, it was the State who subpoenaed Mr. Osteen for the evidentiary hearing, and the State who declined to release him from their subpoena until the hearing was concluded. The fact remains that Mr. Osteen expressed no strategic reason for his failure to impeach Cheney.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Jennings respectfully urges this Court to reverse the lower court, grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

Respectfully Submitted,

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I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Carol Dittmar, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, this 4th day of May, 2012.

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