Electronically Filed 09/04/2013 11:43:29 AM ET

RECEIVED, 9/4/2013 11:48:31, Thomas D. Hall, Clerk, Supreme Court

IN THE

SUPREME COURT OF FLORIDA

JESSE GUARDADO Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO.: SC 12-1040 Lower Case No.: 04-CF-903

REPLY BRIEF OF APPELLANT

CLYDE M. TAYLOR, JR.
FL Bar No. 0129747
ct@taylor-taylor-law.com
CLYDE M. TAYLOR III
FL Bar No. 0454140
bc@taylor-taylor-law.com
Taylor & Taylor, PA
2303 N. Ponce de Leon Blvd., Ste. L
St. Augustine, FL 32084
Telephone: (904) 687-1630
Facsimile: (904) 342-6296

Counsel for Appellant GUARDADO

TABLE OF CONTENTS

Table of Citations ii

Argument and Citations of Authority

I. IAC-Penalty phase for failure to investigate and present mitigation 1

II. IAC-Failure to strike biased jurors voir dire 8

Certificate of Service 9

Certificate of Compliance 10

TABLE OF CITATIONS

Cases — Page

Bloom v. Calderon, 132 F.3d 1267 (9th Cir. Cal. 1997) 3

Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. Ariz. 1995) 3

Cooper v. Sec'y, Dep't of Corrs., 646 F.3d 1328 (11th Cir. 2011) 7, 8

Davis v. Georgia, 429 U.S. 122 (1976) 8

Dufour v. State, 905 So. 2d 42 (Fla. 2005) 5

Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230 (11th Cir. Ga. 2012) 8

Porter v. McCollum, 558 U.S. 30 (2009) 4

Shellito v. State, 2013 Fla. LEXIS 1378 (Fla. July 3, 2013) 4

Other Authorities

A.B.A. Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) 1, 4, 5

ARGUMENT AND CITATIONS OF AUTHORITY

I. IAC-Penalty phase failure to investigate and present mitigation.

The State contends that penalty-phase counsel was not ineffective because they presented Dr. Larson as an expert witness and his testimony did not differ from the post-conviction expert testimony.[1] (Answer Brief, pg. 47) In essence, the State advocates the "check the box" strategy adopted by Guardado's penalty-phase counsel, and proposes that this Court approve an investigation so long as the "retain mental health expert" box was checked. This approach offends the Florida and U.S. Constitution, and ignores the prevailing professional norms.

The State wants this Court to consider this an "ineffective assistance of expert" claim. (Answer Brief, pg. 53) This is not an "ineffective assistance of expert" claim. It is focused squarely on the inaction of the attorneys and their poor use of expert assistance to help them do their job. The State's argument emphasizes that an expert was hired and asks this Court to look no further. (Answer Brief, pg. 57)

[1] The State's Answer Brief does not address the other alleged deficiencies with the investigation (counsel's failure to interview witnesses and obtain prison records) or the deficient presentation (which included damaging testimony from Dr. Larson, but failed to include character witnesses and Guardado's mother). Accordingly, this reply argument is limited to counsel's failure to present evidence of his drug delirium.

The State oversimplifies penalty-phase counsel's duty to investigate mitigation. The A.B.A. Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) provide a comprehensive view of this duty. It requires that counsel "has a duty to hire, assign or have appointed competent team members; to investigate the background, training and skills of team members to determine that they are competent; and to *supervise and direct* the work of all team members." *Id*. at 4.1.B (*Emphasis* added).

The State's Answer defends counsel's decision to retain Dr. Larson and suggest that they were "entitled to rely on his mental health expert's experience and expertise." (Answer Brief, pg. 56) The decision to retain Dr. Larson is not the issue. Indeed, seeking the assistance of a forensic psychologist like Dr. Larson was a good place to begin a mitigation investigation. The problem is that they did not give him sufficient information, provide the proper direction, or question his conclusions regarding Guardado's drug problem. The second problem with Dr. Larson was that he was not qualified to conduct the detailed substance abuse evaluation that Guardado needed. The drug abuse issue was so central to this case, to bring on an expert not even qualified to address that issue was inexcusable. As a result, Dr. Larson's testimony ignored the best mitigation available.

Furthermore, when counsel retained Dr. Larson, it did not relieve them from their obligation to conduct a reasonable investigation. Supplemental Guideline 10.4 reinforces this notion and states:

> A. Counsel *bears ultimate responsibility* for the performance of the defense team and for decisions affecting the client and the case. It is *the duty of counsel to lead the team* in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and *obtain all relevant records and documents* that enable the defense to develop and implement an effective defense strategy.
>
> B. Counsel *guides the defense team* and, based on consultation with team members and experts, *conducts ongoing reviews* of the evidence, assessments of potential witnesses, and analyses of the most effective manner in which to convey the mitigating information. Counsel decides how mitigation evidence will be presented. Id. (*Emphasis* added).

Counsel needed to equip Dr. Larson with "all relevant records and documents" so that he could render a well-informed opinion. See also, Clabourne v. Lewis, 64 F.3d 1373, 1385 (9th Cir. Ariz. 1995) (finding numerous errors with the penalty phase investigation, including the failure to provide experts with adequate materials needed to develop an accurate mental health profile); and Bloom v. Calderon, 132 F.3d 1267, 1278 (9th Cir. Cal. 1997) (recognizing a duty to provide mitigation expert with information that is readily available). When counsel failed to provide Dr. Larson with all of the arrest reports from Guardado's prior convictions, they failed to uphold their responsibility. Consequently, Dr. Larson could not opine whether Guardado's criminal history was related to

substance abuse. (Answer Brief, pg. 10) Likewise, counsel failed to guide Dr. Larson with any directions other than to search for any mitigating circumstances. (Vol. V, pgs. 877-878) This self-imposed restraint resulted in a disservice to Guardado.

Once counsel learned that Dr. Larson did not specifically address the extent of Guardado's drug binge, they should have requested a more extensive evaluation of their client's drug problem.[2] In Shellito v. State, 2013 Fla. LEXIS 1378, 17 (Fla. July 3, 2013), this Court recently reminded capital litigants that "counsel must not ignore pertinent avenues for investigation of which he or she should have been aware." *Id*. at 17. (citing Porter v. McCollum, 558 U.S. 30, 40 (2009)). The most obvious "avenue for investigation" was to find a way to explain why Guardado murdered the person that took care of him "like a mother." (R 309)

Furthermore, Supplementary Guideline 5.1 calls attention to the duty to recognize and identify mental health and substance abuse issues. "At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness…[and] effects of substance abuse." *Id*. The obvious avenue for investigation was to find the link in the chain of events that led

[2] If Dr. Larson was not qualified to render such an opinion then they should have sought another expert to fill the void. Either way, counsel carried the burden and Dr. Larson did not help him shoulder the load.

to the murder. Dr. Larson's test results did not provide the necessary link in the chain. In failing recognize the shortcomings of Dr. Larson's report, counsel ignored the importance of the drug abuse mitigation and breached the duty described in Shellito and Porter.

The State contends that counsel was entitled to rely on Dr. Larson and not obligated to consult a second expert. (Answer Brief, pg. 57) The State's reliance on Dufour v. State, 905 So. 2d 42 (Fla. 2005), is misplaced. In Dufour, this Court stated, "[a]lthough counsel did not seek a second opinion, the record clearly reflects that counsel attempted to secure a mental health expert, *had no reason to doubt that expert's negative conclusions*, and made an informed decision not to present a mental health expert." *Id*. at 56. (*Emphasis* added). Thus, this Court concluded that the attorney had no reason to doubt the expert's conclusions. The same conclusion cannot be drawn in this case.

Here, counsel had a reason to doubt Dr. Larson's conclusion that minimized and overlooked his drug problem for several reasons. First, counsel never asked Dr. Larson to evaluate the effects of Guardado's drug binge on his behavior. Second, it was clear that Dr. Larson did not focus on his drug use because he administered a litany of tests that had nothing to do with his drug use. Unlike the expert in Dufour, counsel did not make an informed strategy decision based upon

Dr. Larson's report because it lacked an explanation for how his drug use controlled his behavior.

Furthermore, Supplementary Guideline 10.11 contemplates scenarios where multiple experts are necessary to conduct a meaningful investigation. It requires a defense team to prepare "[m]edical doctors, psychologists, toxicologists, pharmacologists, social workers and persons with specialized knowledge of medical conditions, mental illnesses and impairments; substance abuse, physical, emotional and sexual maltreatment, trauma and the effects of such factors on the client's development and functioning." *Id*. Clearly, the circumstances of the case should dictate which experts are needed.

As to prejudice, the State argues that the evidence presented during the evidentiary hearing was cumulative to Dr. Larson's testimony. (Answer Brief, pg. 59) In support, the State argues the following: 1) the label of "statutory vs. non-statutory" for mitigation is irrelevant; 2) the court considered evidence of Guardado's drug addiction before imposing the death sentence; and 3) the post-conviction testimony describing the effects of the drugs on Guardado's behavior does not outweigh the aggravation.

If statutory mitigation and non-statutory mitigation were merely a label, then the State would be correct. However, it is not the label, but the degree of culpability attached to the label that is significant. The State whitewashes the post-

conviction testimony describing Guardado's "drug delirium" and suggests that trial testimony that he "was on drugs" and "addicted" carries the same meaning. It is true that both imply that Guardado was intoxicated at the time of the offense, but only the post-conviction testimony explained how the crack controlled Guardado's behavior. Furthermore, the post-conviction testimony established that his drug use rendered him incapable of conforming his conduct to the requirements of the law. (Vol. V, pgs. 822, 838)

Acknowledging that Guardado "murdered the victim because of his addiction to cocaine" falls well short of recognizing that the crack controlled him on the night of the murder. A person can be high on drugs and be able to conform his conduct within the confines of the law, but Guardado's body was so dependent on the drug that it rendered his "moral brakes" inoperable. (Vol. V, pg. 825) In summary, the totality of the post-conviction testimony establishes prejudice.

The State's failure to appreciate the post-conviction testimony is also the foundation for the argument that the new evidence would not have overcome the aggravating circumstances. To the contrary, the evidence that should have been presented (his drug delirium deprived him of an ability to conform his conduct within the law) explained his actions, which is exactly what the jury wanted to know. Having heard that the victim was generous and supported Guardado, the

jury needed to hear why he murdered her. Defense counsel failed to provide that explanation.

Finally, the State argues that Cooper v. Sec'y, Dep't of Corrs., 646 F.3d 1328 (11th Cir. 2011), does not apply to this case. However, Cooper is still illustrative and factually very similar. Subsequent cases merely question the Cooper's inference that an "unreasonable determination of the facts" analysis includes determinations of historical facts. See Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1259 (11th Cir. Ga. 2012). The undersigned is unaware of any subsequent decision that limits the holding that "Cooper's attorneys did not conduct an adequate background investigation and unreasonably decided to end the background investigation after only talking to Cooper, Cooper's mother and Dr. Merin." Cooper, 646 F.3d at 1351.

II. IAC-Failure to strike biased jurors voir dire.

The State has argued that Guardado is procedurally barred from challenging trial counsel's inaction when jurors Tucker and Hebert were excused. (Answer Brief, pg. 75) The State argued that Guardado was attempting to evade the procedural bar by invoking the principal of "fundamental error." (Answer Brief, pg. 76) To clarify, the undersigned is not invoking "fundamental error" to sidestep any procedural hurdles, and maintains that this Court may consider the claims related to Tucker and Hebert based upon Davis v. Georgia, 429 U.S. 122 (1976).

The State has argued that the remaining jurors (Pennington, Cornelius, and Earl) were impartial and not actually biased. (Answer Brief, pgs. 79, 82) Furthermore, the State suggests it would have been impossible to strike all 3 because defense counsel only had 1 peremptory strike available and two of the jurors were good for the defense. (Answer Brief, pgs. 80-81) Appellant relies on the argument presented in the Initial Brief that demonstrate the actual bias of each of the jurors.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been electronically furnished to the Office of the Attorney General, Criminal Appeals Division, PL-01, The Capitol, Tallahassee, Florida, 32399-1050 and Jesse Guardado-DC# 324342, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida, 32026-4000 via U.S. Postal Service; and Assistant Attorney General Charmaine Millsaps, via electronic delivery Charmaine.Millsaps@myfloridalegal.com this 4th day of September 2013.

Respectfully submitted,

/s/ Clyde M. Taylor, Jr.
CLYDE M. TAYLOR, JR.
FL Bar No. 0129747
ct@taylor-taylor-law.com

CLYDE M. TAYLOR III
FL Bar No. 0454140
bc@taylor-taylor-law.com

TAYLOR & TAYLOR, PA
2303 N. Ponce de Leon Blvd., Ste. L
St. Augustine, FL 32084
Telephone: (904) 687-1630
Facsimile: (904) 342-6296

Counsel for Appellant GUARDADO

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Reply Brief of the Appellant complies with the type-font limitation.

/s/ Clyde M. Taylor, Jr.
CLYDE M. TAYLOR, JR.
FL Bar No. 0129747
ct@taylor-taylor-law.com

CLYDE M. TAYLOR III
FL Bar No. 0454140
bc@taylor-taylor-law.com

TAYLOR & TAYLOR, PA
2303 N. Ponce de Leon Blvd., Ste. L
St. Augustine, FL 32084
Telephone: (904) 687-1630
Facsimile: (904) 342-6296