Filing # 17993143 Electronically Filed 09/09/2014 09:52:38 AM

RECEIVED, 9/9/2014 09:53:44, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-2170

ANDREW R. ALLRED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF EIGHTEENTH JUDICIAL CIRCUIT FOR SEMINOLE COUNTY, STATE OF FLORIDA
Lower Tribunal No. 2007-CF-4890A

REPLY BRIEF OF APPELLANT

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ARGUMENT

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. ALLRED'S CLAIM THAT HE RECEIVED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL WHEN TRIAL COUNSEL FAILED TO ENSURE A REASONABLY COMPETENT MENTAL HEALTH EVALUATION.

Trial Counsel's Misinterpretation of Dr. Day's Mental Health Conclusions

Trial counsel provided prejudicial ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) by failing to adequately investigate and present mitigation at the penalty phase of Mr. Allred's trial. Subsection one of Appellant's claim asserts that trial counsel provided ineffective assistance of counsel for trial counsel's misinterpretation of Dr. Day's mental health diagnosis and opinions of Mr. Allred. The Appellee argues that Attorney Caudill did not misinterpret Dr. Day's diagnosis or opinions and that Attorney Caudill believed Dr. Day's opinions to be that "Allred had demonstrated antisocial personality disorder traits (though not a full diagnosis),

and that her testimony may do more harm than good." Answer Brief, Page 72 (citing V13, R206-212).

However, the Appellee wrongly summarizes Attorney Caudill's testimony at the evidentiary hearing regarding trial counsel's understanding of Dr. Day's mental health conclusions. The following dialogue occurred between Attorney Caudill and post-conviction counsel during the evidentiary hearing:

> Q. I'm referring to the second paragraph in two sentences that read as follows, Dr. Day has concluded that Mr. Allred is a sociopath or psychopath, although the Court is permitted to view any antisocial personality disorder as a mitigating factor is a decision based on the facts of each case. Now, the first part of that is Dr. Day has concluded Mr. Allred is a sociopath or a psychopath. Is that a true reflection of the understanding you and the defense team at the time that this memo was prepared?
>
> A. *Yes*.
>
> Q. Are the terms "sociopath," "psychopath", and "antisocial personality disorder" interchangeable?
>
> A. No
>
> Q. Okay. What is the difference as you understand them?
>
> A. There are people who can suffer from antisocial personality disorder who are in fact neither a sociopath, psychopath. There are features that are unique to each.
>
> Q. Was it your understanding that Dr. Day had diagnosed Mr. Allred with antisocial personality disorder at the time this memo was prepared?

> A. *It was my understanding that she had come to a conclusion that if she were to offer a diagnosis in court, that would be the diagnosis, the only diagnosis that she could offer.*
>
> Q. Sounds like a lightly qualified, yes.
>
> A. Well, that was the conversation. One of them was in the parking lot at the jail.
>
> Q. Okay. I was going to ask you about that anyway. It sounds rather dramatic. Describe what happened.
>
> A. Well, we had more than one conversation leading up the penalty phase because we listed Dr. Day as a witness, ultimately we withdrew her . . . And so we had a conversation, we're walking into the jail . . . Dr. Day said was, I don't think so Tim. I really don't think I can help you at all in this case. *If I had to testify to a diagnosis, I would have to say that he's a – suffers from antisocial personality disorder, or worse, that he's a psychopath or sociopath . . . .*

PC13/208-10 (emphasis added).

At the evidentiary hearing, Dr. Day testified that Mr. Allred only has "features" of anti-social personality disorder and she could not actually diagnosis Mr. Allred with ASPD. PC13/347. Attorney Caudill wrongly misinterpreted Dr. Day's mental health conclusions regarding Mr. Allred. Trial counsel not only testified to this misinterpretation during the evidentiary hearing, evidence was shown that the misinterpretation was also memorialized at the time of the penalty phase. An internal defense memorandum states that Dr. Day found Mr. Allred is a

"sociopath or psychopath" and therefore the failure to call Dr. Day as a witness "is not, per se, acting ineffectively." PC11/1843 (Defense Exhibit 5).

Attorney Caudill testified that he needed mental health expert testimony to be successful during the penalty phase as his trial strategy relied heavily on mental health evidence. PC12/189-90. Thus, the evidence presented at penalty phase was lacking because there was no mental health expert testimony. The "strategic" decision to not use this expert testimony was not sound as it based upon Attorney Caudill's own misinterpretation of Dr. Day's opinions.

Double-Edge Sword Argument

The initial argument in the Appellee's Answer Brief regarding the legal standard applicable to all *Strickland* claims of ineffective assistance of counsel contains a reference to what is commonly called the "double-edged sword." Answer Brief, Page 66 (citing *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009) and *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004)). The Supreme Court has acknowledged that potentially mitigating evidence might not have been uniformly favorable to the defendant, but nevertheless held that counsel's failure to investigate and develop that evidence fell below the standards expected of a reasonable capital defense attorney. *See, e.g., Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 177 L.Ed. 2d 1025 (2010) (*per curiam*) at 3264; *Porter v. McCollum*,

558 U.S. 30, 1305 S.Ct. 447, 175 L.Ed. 2d 398 (2009); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000).

This Court has said categorically: "An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword." *Reed v. State*, 875 So. 2d 415, 437 (Fla. 2004); *see also*, e.g., *Johnston v. State*, 63 So. 3d 730, 741 (Fla. 2011); *Winkles v. State*, 21 So. 3d 19, 26 (Fla. 2009). The reality, however is that "the availability and admissibility of practically any evidence is a two-edged sword." *St. Pierre v. Walls*, 297 F.3d 617, 632 (7th Cir. 2002). A court can evaluate the relative sharpness of each edge, and the reasonableness of counsel's decision not to develop and present the evidence, only by considering all the circumstances of the particular case.

The Appellee argues that presenting Dr. Day's testimony at the penalty phase trial would have "revealed a sinister side of Allred that Attorney Caudill did not want to expose." Answer Brief, Page 79. Even if post-conviction counsel uncovered some apparently adverse evidence, it would be unsurprising, "given that [trial] counsel's initial mitigation investigation was constitutionally inadequate." *See Sears v. Upton*, 130 S.Ct. at 3264 (2010). Competent counsel would have been able to turn most, if not all, of this evidence into a positive. *Id.*; *See also*, *Porter v. McCollum*, 558 U.S. 30 (holding that evidence that defendant was AWOL was

consistent with defendant's theory of mitigation and did not diminish the evidence of his military service). Further, any harmful information that could have been presented (i.e. Mr. Allred's supposed lack of remorse as seen through his recorded police interview and letters written to the Barwick family subsequent to the murders), was already known to the State. PC13/253. Attorney Caudill agrees that the harmful information were facts already known to the State and presented at trial to support the cold, calculated, and premeditated (CCP) aggravator. PC13/220-22. Further, the risk at presenting such harmful evidence is blunted since Mr. Allred waived a jury for the penalty phase trial; essentially turning his penalty phase into one long *Spencer*[1] hearing.

Attorney Caudill testified that he needed a mental health expert to be successful during the penalty phase. PC12/189-90. While the court previously heard testimony during the penalty phase regarding Mr. Allred's social ineptness and unhappy childhood, Attorney Caudill needed an expert who could tie together the testimony from lay witnesses to his overall penalty phase strategy. This was apparent since despite presenting evidence of an early psychiatric referral, possible sexual abuse, and family domestic violence, Judge Eaton's sentencing order still found Mr. Allred to have had a normal, happy childhood. PC12/191-94. The

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993)

testimony of Dr. Caddy and Dr. Geffken would have helped provide the court with an understanding, not an excuse, for why someone like Mr. Allred could commit a crime like this one. Specifically, the experts presented in post-conviction helped explain the dissociative state Mr. Allred went into at the time of the murders and why, unlike peers his own age, Mr. Allred was unable to deal with the stress and devastating emotions after his very public and humiliating break-up with Tiffany Barwick.

Dr. Geffken's Expert Testimony

The Appellee argues that "Dr. Geffken found autism in Allred even without all of the criteria. As the trial court found, Allred criticized the discussion about antisocial personality disorder because he did not meet all the criteria for antisocial personality disorder yet he put an expert on the stand to opine that he suffers from autism spectrum disorder despite the expert acknowledging that Allred does not demonstrate all the criteria for Autism Spectrum." Answer Brief, Page 78. At the evidentiary hearing, Dr. Geffken discussed both autism spectrum disorder *and* pervasive developmental disorder as the following:

> Autism spectrum disorder is sometimes also called pervasive developmental disorders through – and that would include autism, Asperger's, Rett's Disorder, childhood disintegrative disorder, and they talk about pervasive developmental disorder as opposed to an overarching classification which is generally

> individuals – which are individuals who don't meet all the criteria through any of the specific categories.

PC12/119. Dr. Geffken further explained the difference between autism spectrum disorder and pervasive developmental disorder and stated:

> Q. And when they have pervasive development disorder, is there an onset of language delay?
>
> A. Well, I think with a – if we're using that as one of the five specific diagnoses, there's could – or there might be, or there might not be because it's called pervasive disorder, not otherwise specified. And in the psychiatric manual what it means when they use depression not otherwise specified, anxiety disorder, not otherwise specified, it could be autism spectrum disorder, not otherwise specified, it means you meet some of the criteria, but not all of the criteria. So the delay in the onset of language might or might not be there with BED.

PC12/152-53.

When Dr. Geffken was asked for his expert opinion after his clinical evaluation of Mr. Allred, he testified that: "[Mr. Allred] falls in that broad class. Autism spectrum disorder being a group of conditions, and *you would at the very least have pervasive development disorder*, if not Asperger's disorder, or high-functioning autism." PC12/126 (emphasis added). Specifically, Mr. Allred's emotional and social development is extremely delayed compared to other peers his age. PC12/126-27. Dr. Geffken testified that after the traumatic experiences of his girlfriend breaking up with him and learning his best friend had sex with her,

"[Allred] was just at a loss, and had no ability to cope after." PC12/128. Someone like Mr. Allred who has a pervasive developmental disorder "is more at a loss than your average individual who would have more social skills and more emotional skills from, and have learned from their prior experience . . . he had this intense attachment and just had no way to cope with it." PC12/128. It is not uncommon for individuals with a pervasive developmental disorder to have an intense attachment to specific individuals. PC12/129-30. Mr. Allred's social and emotional deficits did give a plausible explanation for why he reacted the way he did in this case.

Thus, even as the Appellee asserts that Mr. Allred does not meet all the criteria of autism spectrum disorder, Dr. Geffken would still place Mr. Allred into the broader category of pervasive developmental disorder.

CONCLUSION

Based on the foregoing Reply Brief and the Initial Brief of Appellant, the circuit court improperly denied Mr. Allred relief on his 3.851 motion. Mr. Allred respectfully requests that this Honorable Court reverse the circuit court's order denying relief, vacate his conviction and sentence of death, and grant him a new trial; or grant such other relief as this Honorable Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF APPELLANT has been emailed to Mitchell Bishop, Assistant Attorney General, at capapp@myfloridalegal.com and Mitchell.Bishop@myfloridalegal.com, and mailed via United States Postal Service to Andrew Allred, DOC # 130930, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this 9th day of September, 2014.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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