IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1823

LOWER COURT CASE NO. 08-2244-CFMA

MATTHEW L. CAYLOR

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT

OF THE FOURTEENTH JUDICIAL CIRCUIT,

IN AND FOR BAY COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ISSUE I

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF THE TRIAL BY FAILING TO INVESTIGATE AND PRESENT SUBSTANTIAL MITIGATION IN VIOLATION OF CAYLOR'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS?

INVESTIGATION

At page 16 of Appellee's brief, Appellee takes a loose license with its description of the facts: "Moreover, Dr. Crown conceded that almost all doctors that evaluated appellant specifically ruled out bipolar disorder." In reality, the question and answer relating to Appellee's statement appears at PCR V22, p247, which was as follows:

> Q. Yes, I see that. But every time these other doctors, other than Dr. Herendeen and Dr. Cadgil – we will get to that in a minute – all of these other diagnoses – in fact, they specifically – and will get to those – where they rule out bipolar disorder later on in here, don't they, sir?
>
> A. Yes.

Not only was that question extremely confusing, but the questions and answers for the next few pages (PCR V22 1274-1279) clearly indicate that the doctors did not "rule out" the diagnosis (PCR V22 1276), but indicated "not clear at this time" (PCR V22 1274), or the diagnosis of bipolar was made at the time of admission (PCR V22 1276). True, some doctors did not diagnose bipolar and some doctors did. However, it should be noted that Appellant was diagnosed by DOC with major mental disorders and

was receiving lithium in prison for bipolar disorder (PCR V22 1237-1238).

At page 33 of Appellee's brief, it is stated:

> Second, trial counsel's decision to limit the mental health investigation and forgo expert mental health testimony at the penalty phase cannot amount to deficient performance under *Strickland* because trial counsel made a reasonable strategic decision to use a penalty phase strategy that would render mental health mitigation counterproductive.

For whatever reason, Appellee lumps together "investigation" and "presentation" of mitigation conjunctively as if they were not mutually exclusive. Notwithstanding, whether counsel ultimately utilized mental health mitigation in the penalty phase, he is not relieved from thorough investigation of it. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Supreme Court acknowledged what the trial court and appellate court found regarding the same conclusion made by Appellee in this case.

> "…when the decision not to investigate…is a matter of trial tactics, there is no ineffective assistance of counsel." (Citations omitted).
>
> The Maryland Court of Appeals affirmed the denial of relief, concluding that trial counsel had made "a deliberate, tactical decision to concentrate their effort at convincing the jury" that appellant was not directly responsible for the murder. *Wiggins* v. *State,* 352 Md., at 608, 724 A. 2d, at 15. The court observed that counsel knew of Wiggins' unfortunate childhood. They had available to them both the presentence investigation (PSI) report prepared by the Division of Parole and Probation, as required by Maryland law, Md. Ann. Code, Art. 41, § 4-609(d) (1988), as well as "more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic

> mother, placements in foster care, and borderline retardation." 352 Md., at 608-609, 724 A. 2d, at 15. The court acknowledged that this evidence was neither as detailed nor as graphic as the history elaborated in the Selvog report but emphasized that "counsel *did* investigate and *were* aware of appellant's background." Id. at 518.

The Court in *Wiggins* found counsel's investigation unreasonable even though his counsel had records and obtained the use of a mental health expert to examine Wiggins for mitigation. Appellant's counsel did not hire any mental health expert for mitigation, nor did he obtain any records.

The record is undisputed that trial counsel, with all of his experience, did not obtain any records prior to trial (PC V24 1513-1514), failed to hire a mental health expert for mitigation (PC V24 1556; PC V24 1562), and counsel's investigation did not begin to take notes until approximately three months before trial(EX V8 1453-1470). This court in *Rimmer v. State*, 59 So.3d 763, 781 (Fla. 2011) found counsel's performance deficient for failing to do what counsel in the instant case failed to do.

At page 37 of the answer brief, Appellee relies upon *Dufour v. State*, 905 So.2d 42 (Fla. 2005) to support their argument that counsel is not required to pursue additional mental health experts after receiving an unfavorable report. *Dufour* is

distinguishable from the instant case. This Court in *Dufour* pointed out the following:

> Dvorak testified at the evidentiary hearing that Dr. Gutman was retained to examine Dufour with regard to competency for trial and at the time of the offense, as well as for mitigating information relating to Dufour's background. Dr. Gutman's report indicated that he not only evaluated whether Dufour was competent but also fully evaluated Dufour's mental health status. Dr. Gutman found that Dufour had antisocial behavior, showed little signs of a conscience, and had average intelligence. Dr. Gutman concluded Dufour was competent at the time of the offense and for trial. Dr. Gutman could not provide any psychiatric dynamic or reason behind the killing and he did not indicate that Dufour was in any way unaware of what he was doing. Id. at 55.

The same circumstance did not happen in the instant case. Appellant's counsel acknowledged that Dr. Rowan only evaluated Appellant for competency; she did not write a report nor perform an evaluation concerning Appellant's history or mitigation.

PREJUDICE

Appellee argues at page 40 of its brief that prejudice cannot be shown in this case because:

> Appellant cannot show prejudice with one expert's diagnosis of bipolar that is contradicted by the state's expert at evidentiary hearing and by multiple experts' reports in appellant's medical history—especially when combined with the harmful information that would come in with this testimony.

Again, Appellee likes to be loose in its interpretation of the facts. Appellee continues to contend that only Dr. Crown found Appellant was bipolar when, in fact, a number of doctors'

reports found the same diagnosis, including the Department of Corrections. In addition, Appellee contends that Dr. McClaren contradicted the bipolar diagnosis at the evidentiary hearing. That statement is entirely inaccurate.

Although Dr. McClaren would not confirm bipolar disorder, he could not rule it out. Dr. McClaren acknowledged that years ago other mental health experts had diagnosed Caylor with bipolar disorder and he was prescribed medication for that diagnoses even in prison (PC V24 1630-1631).

At page 47 of the answer brief, it is argued that: However, the only thing appellant appears to have shown at the evidentiary hearing was that it was physically possible to get some other witnesses in to testify under subpoena, even though their testimony added little, if anything.

However, at page 32 of the court’s order (PC V4 619) the court acknowledged that much of the additional testimony strengthened the mitigation:

> At the evidentiary hearing, the Defendant first presented the testimony of his parents, Kimberly Caylor and Kerry Caylor. Kimberly Caylor testified that no one from the Public Defender's Office contacted her in person in Georgia. (EH. 164). Smith spoke with her for less than a half hour before trial. (EH. 165). Smith did not ask questions about her son, the Defendant, but only told her about the questions he would ask. (EH. 165). Kimberly Caylor then testified with respect to what the Defendant characterizes as additional information that was not elicited during the penalty phase at trial. She was diagnosed as bipolar. (EH. 167). As a child, she was sexually abused by her stepfather. (EH. 167). Her brother

was an alcoholic and a schizophrenic. (EH. 167). She and her husband had used meth for seven years. (EH. 168). The Defendant suffered several head injuries when he was a child. (EH. 172). When the Defendant was an infant, she observed her husband Kerry hold the baby’s mouth and nose closed until he passed out in order to stop him from crying. (EH. 173). She witnessed Kerry verbally and physically abuse the Defendant. (EH. 173). She once witnessed Kerry physically abuse the Defendant for soiling his underwear and subsequently hiding the soiled garment. (EH. 174). When the Defendant was 17, he was thrown out of the house, and he later got married. The Defendant and his then-wife often had to resort to eating out of dumpsters. (EH. 176). The Defendant was 12 when he first started using drugs with his father. (EH. 178). Chris, her younger son, was never verbally or physically abused by her or her husband. (EH. 180). She indicated that she had waived a "little bit more” information at the evidentiary hearing than she had during the penalty phase, but when she was asked if she agreed that her testimony at the evidentiary hearing was "substantially more broad" than what she had provided at the penalty phase, she replied, "Um, no." (EH. 180). On cross-examination, she acknowledged that Smith had specifically told her just to answer his questions and not elaborate on her answers because he was trying to keep out bad information about the Defendant. (EH. 181-82). Also on cross-examination, she acknowledged that the Defendant had affairs with his uncle's wife, and with Jean Shelton, the mother of his ex-girlfriend. (EH. 189-90).

The Defendant's father, Kerry Caylor, also testified with respect to what the Defendant characterizes as additional information that was not elicited during the penalty phase at trial. Kerry stated that no one from the Public Defender's Office came in person to Georgia to speak with him or his wife. (EH. 202). He met Mr. Smith, the Defendant's trial counsel,in person for the first time at trial. Smith spent a total of 30 to 40 minutes preparing him and his wife for trial. (EH. 203). According to Kerry, Smith allegedly stated that he "didn't understand why people want to come to Florida to kill people or commit murders." (EH. 204). According to Kerry, Smith was one of the rudest people he had ever met. (EH. 204). Kerry and his wife noticed that neither Smith nor Ernest Jordan, Smith's investigator, checked into the Defendant's background

as thoroughly as the postconviction investigator Daniel Ashton. (EH. 205-206). Smith told Kerry that he could not find any records. (ER 206).

Kerry's first stepfather was verbally and physically abusive to him. (EH. 207). Kerry's mother was verbally and physically abusive as well. (EH. 211). When the Defendant was an infant, Kerry admitted that he smothered the Defendant to stop him from crying, using his hands to cover the Defendant's mouth and nose until the Defendant passed out. (ER 211-12). When the Defendant disobeyed, Kerry verbally abused him by using foul language. (EH. 212-13). Kerry often abused his wife in front of the Defendant. (EH. 213). Drugs made Kerry violent. (EH. 210). After the Defendant turned six, he started defecating in his pants daily, so Kerry spanked him; and when the Defendant then started hiding his soiled underwear, Kerry spanked him for that as well. (EH. 214-15). One time, during the Christmas holidays, the Defendant cursed at his mother; Kerry punched him in the jaw, which left a goose egg under his eye. (EH. 214). As the Defendant got older, the beatings got worse, and instead of using just his fists, Kerry often kicked his son. (EH. 216). Kerry recounted the family's dire financial circumstances when he was unemployed for two years. (EH. 217). There was no money for electric bills or food, and the Defendant and his brother Chris were so hungry they ate toothpaste. (EH. 217). Kerry also recounted the incident when the Defendant was sexually molested by a police officer who was living with them at the time. (ER 218-20). After the Defendant left home and got married, he and his wife often had to resort to eating out of garbage cans. (EH. 221). When the Defendant was on crack, he frothed at the mouth and had trouble speaking. (ER 222). The Defendant was sexually abused by Kerry's stepsister. (EH. 223). The Defendant tried to commit suicide "a lot of times." (EH. 224). Kerry and Kimberly knew the Defendant had mental health issues, but they could not afford treatment. (EH. 225).

Keisha Bulger testified at the evidentiary hearing, but not during the penalty phase at trial. Before the instant offenses took place, Bulger arranged the acquisition of the Defendant's drug supply. (EH 130). The police later questioned Bulger about her relationship with the Defendant.(ER 130). Her recorded statement was received by Mr. Smith, the Defendant's trial counsel, during discovery. She

testified that right before the time of the instant offenses, the Defendant was spending anywhere from $200 to $1,000 a day for drugs. (EH. 131). She also testified that, according to the police, the Defendant's phone number appeared on her phone on three occasions; these calls were placed just before the offenses took place. (EH. 131). She stated that he called to ask her to get him crack cocaine. (EH. 132). The Public Defender's Office never contacted her. (EH. 133). On cross-examination she acknowledged that the Defendant had admitted to her that he was sexually frustrated, and he had asked her to find him a woman so he could have sex. (EH. 135-36).

Stephanie Putnam testified at the evidentiary hearing, but not during the penalty phase at trial. Putnam knew the Defendant because her ex-husband was friends with him (EH. 138). She knew the Defendant from 1998 to 1999, and last saw him in 2003. (EH. 138-39). She, her ex-husband, the Defendant's wife, and the Defendant did drugs together, generally meth and cocaine. During their drug binges, the two couples rarely slept for three to seven days at a time. (EH. 140). They used drugs all day long for several consecutive days in a row. (EH. 141). When Putnam spoke to the Defendant, he complained about his unhappy life and said that using drugs made him feel normal. (EH. 141). She testified that the Defendant's mood would change very quickly, and his behavior was erratic. (EH. 142-143). He was extremely upset about being convicted of the sexual charge because he did not think he was guilty. (EH. 143). Putnam had no recollection of anyone contacting her from the Public Defender's Office. (ER 144). Putnam testified that she would have appeared at trial if she had been asked. (EH. 146).

Connie Rushman, the Defendant's aunt, testified at the evidentiary hearing, but not during the penalty phase at trial. Kimberly Caylor (the Defendant's mother) is her sister. (EH 154). Rushman's father was an alcoholic, and he beat her and her siblings. (EH. 155-56). Rushman was also sexually abused by her father. (EH. 157). Rushman is a recovering heroin addict. (EH. 157). After her father left the family, her mother's boyfriend sexually and emotionally abused Kimberly Caylor. (EH. 157). Rushman confirmed that Kimberly Caylor was addicted to meth. (EH. 157). The Public Defender's Office did not contact Rushman,

but she would have testified at trial if she had been asked to do so. (EH. 161).

Chris Caylor, the Defendant's brother, testified at the evidentiary hearing, but not at the penalty phase at trial. The Public Defender's Office did not request him to testify during the penalty phase, but he acknowledged that he would not have testified, even if he had been asked to do so. (EH. 249). Chris is 32 years old and has lived with his parents for his entire life. (EH. 242-43). Chris observed his parents physically and verbally abuse the Defendant. (EH. 243). His parents did not treat him the same way they treated the Defendant. (EH. 243). Chris also observed his father physically abuse his mother and saw both parents using drugs. (EH. 244-45). Chris also observed the Defendant doing drugs with his parents. (EH. 246). Chris observed on many occasions the Defendant's severe mood swings and impulsiveness. (EH. 247).

The testimony of Jack Jarrett, the Defendant's step-grandfather, was perpetuated in a deposition taken on April 2, 2014, and the parties stipulated to the admission of his deposition at the evidentiary hearing. (EH. 195). Jarrett stated that he did not remember being contacted by the defense in 2009, but did remember them talking to his wife, Jean Jarrett. (D. at 15). He admitted that he was "not really sure" that he would have come down to Florida to testify at the penalty phase, stating, "I kind of have a fear of flying." (D. 16). According to Jarrett, the Defendant's mother, Kimberly Caylor, wanted to abort the Defendant and resented him from birth. (D. 6-7). The Defendant's parents stated that they were not going to treat their son Chris the same as they did the Defendant, and indicated that they would treat Chris better. (D. 7). Jarrett knew about Kerry Caylor's temper. (D. 14). One Christmas, when the Defendant was about nine or ten, Kerry got angry and hit him in the face, leaving a goose egg. (D. 8). The Defendant revealed he once contemplated suicide during the holidays. (D. 21). When Jarrett admonished the Defendant's parents that marijuana would lead to hard drugs, they scoffed at the suggestion. (D. 9). When Kerry Caylor was on drugs, he did not care if he worked or not. (D. 10). It was Jarrett's understanding that Kerry gave the Defendant his first marijuana cigarette when he was 12 years old. (D. 12). When the Defendant attended a youth program, he prayed that his parents would have something to eat and that the

> electricity would be turned on. (D. 13). The Defendant believed he turned out the way he did because of the way his parents had raised him, and Jarrett agreed. (D. 14-15).

When viewed in the light of the substantial additional information that was available and the lack of investigation, Appellant must be entitled to a new penalty phase trial. There can be no confidence in the outcome of this case given the lack of effort.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO ENSURE THAT CAYLOR RECEIVED A REASONABLY COMPETENT MENTAL HEALTH EVALUATION FOR MITIGATION WHICH WAS IN VIOLATION OF MR. CAYLOR'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS?

At page 54 and 57 of Appellee’s brief, it is argued that counsel is not responsible to obtain mental health records from a third-party hospital to use like an expert. That is ludicrous.

Recently, the United States Supreme Court again stated: “It is unquestioned that under the prevailing professional norms at the time of Porter’s trial, counsel had ‘an obligation to conduct a thorough investigation of the defendant’s background.’” *Porter v. McCollum*, 130 S.Ct. 447, 452 (2009), *quoting Williams v. Taylor*, 529 U.S. 362, 396 (2000); see also

Wiggins v. Smith, 539 U.S. 510, 524 (2003)("[I]nvestigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'")(emphasis in original)(citations omitted).

Likewise, this Court has also repeatedly stated that in reviewing the deficient performance prong of an ineffective assistance of counsel claim: "[w]e begin with the premise that 'an attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case.'" *Hurst v. State*, 18 So.3d 975 (Fla. 2009), *quoting State v. Pearce*, 994 So.2d 1094, 1102 (Fla. 2008); *Parker v. State*, 3 So.2d 974 (Fla. 2009); *State v. Riechmann*, 777 So.2d 342, 350 (Fla. 2000). Thus, it was not the mental health expert's responsibility to discover mitigating evidence—it was trial counsel's.

ISSUE III

WHETHER TRIAL COURT ERRED IN SUMMARILY DENYING CAYLOR'S CLAIM THAT COUNSEL WAS INEFFECTIVE BY FAILING TO CHALLENGE JUROR WEAVER BECAUSE SHE WAS NOT IMPARTIAL BEYOND A REASONABLE DOUBT IN VIOLATION OF CAYLOR'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTSS?

In as much as the answer brief provides no additional perspective on this issue, Appellant will rely upon his initial brief. Appellant is entitled to an evidentiary hearing on this issue.

ISSUE IV

WHETHER TRIAL COURT ERRED IN SUMMARILY DENING AN EVIDENTIARY HEARING BASED ON CAYOR'S CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO INQUIRE OF JURORS' FEELINGS AND OPINIONS CONCERNING THE DEATH PENALTY AND MITIGATING FACTORS IN VIOLATION OF CAYLOR'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS?

In as much as the answer brief fails to provide any additional perspective to this issue, Appellant would rely upon his initial brief, except to reiterate *Thompson v. State*, 796 So.2d 511, 517 (Fla. 2001):

> With respect to defense counsel's performance during voir dire, Thompson alleges that counsel failed to (1) inquire about possible racial prejudices despite the fact that Thompson was an African American who was accused of murdering a white man and woman; (2) question jurors about their beliefs regarding the credibility of police officers; (3) adequately question the panel about their views on the death penalty; (4) question jurors about their opinions concerning mental health experts and mental health mitigation as it related to the guilt and penalty phases; (5) excuse a juror who indicated that she would have difficulty believing that a defendant who remained silent was innocent.
>
> Because we find that these claims are not conclusively refuted by the record, we remand for an evidentiary hearing.

In addition, Appellant contends that Appellee totally missed the point: It is impossible to show actual bias because

certain questions were not asked; the response to those questions might have resulted in a prejudiced outcome, but the actual outcome is just mere speculation. Appellant should be permitted an evidentiary hearing on this issue.

ISSUE V

WHETHER TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS?

Appellant will rely upon the initial brief to support this argument.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authorities, the Appellant respectfully asks this Court to reverse the judgment and death sentence.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant Attorney Robert Morris at Robert.morris@myfloridalegal.com, and mailed to Matthew Caylor, Q23494, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-1000, this 22nd day of July, 2016.

_/s/Michael P. Reiter_____
Michael P. Reiter

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Courier New 12-point font.

__/s/Michael P. Reiter_____
Michael P. Reiter