

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

FELONY DIVISION 14
CASE NO: 2014-CF-014049-AO

STATE OF FLORIDA,
Plaintiff,

vs.

JUAN ROSARIO,
Defendant.

ORDER GRANTING IN PART AND DENYING
IN PART MOTION FOR NEW TRIAL

THIS CAUSE came before the Court without an evidentiary hearing on the Motion for New Trial filed by Defendant, Juan Rosario ("Defendant"), on October 25, 2018. The Court reviewed the Motion and the entire file, including the trial and penalty phase transcripts. The Court also observed the performance of counsel in this case, including at the guilt phase, the penalty phase, and the *Spencer* hearing. Finally, the Court conducted extensive colloquies with Defendant during the course of this proceeding. The Court is fully advised on the premises, and for the reasons stated in this Order, Defendant's Motion is granted in part and denied in part. Due to trial counsel's ineffectiveness during the penalty phase of Defendant's trial, he is entitled to a new penalty phase. The Court finds:

1. During the trial and penalty phases of this proceeding, Roger Weeden and Luis Davila represented Defendant. During the *Spencer* hearing, Marc Burnham and Ted Marrero represented Defendant. At issue is the quality of Mr. Weeden and Mr. Davila's representation at the trial and penalty phases, and whether their performance was so deficient as to warrant new proceedings.

2. The Court appointed Mr. Weeden as lead trial counsel in this matter. Eventually, the Court appointed Mr. Davila to assist him. Mr. Davila's primary responsibility was to develop the mitigation evidence in this matter.

3. Unbeknownst to the Court, Mr. Weeden did not meet the qualifications for lead trial counsel in a death penalty case. See Fla. R. Crim. P. 3.112 (f)(3). His failure to meet these qualifications, standing alone, does not constitute grounds for relief from a conviction or sentence. See *Ferrell v. State*, 653 So.2d 367 (Fla. 1995). It is, however, one of the factors that the Court may consider in deciding whether trial and guilty phase counsel met the *Strickland* standard for ineffective assistance of counsel.

4. The evidence against Defendant at the guilt phase was substantial. The witness the defense hoped would testify on Defendant's behalf invoked her Fifth Amendment rights and declined to participate. Mr. Weeden and Mr. Marrero had no control over the witness's personal

invocation of her constitutional rights, and her decision not to testify evidences no deficiency on their part. The Court concludes Mr. Weeden and Mr. Davila provided Defendant with effective representation at the guilt phase. Even if their performance was deficient, Defendant suffered no prejudice due to the substantial evidence presented against him.

5. By contrast, Mr. Weeden and Mr. Davila did not provide effective assistance in Defendant's penalty phase. Even though Mr. Weeden had represented Defendant since January 2015, he and Mr. Davila were patently unprepared for the trial's penalty phase. They failed to conduct even a basic mitigation investigation, such as retaining a doctor to examine Defendant. They requested no education records and retained no mitigation expert, even though the Court authorized this action more than a year before trial. Mr. Davila expressed his mistaken belief that the Defendant's *investigator* was a mitigation expert. This situation caused the Court to delay the trial's penalty phase for six weeks.

6. At the penalty phase, defense counsel presented minimal and unsatisfactory mitigation. Dr. Earl Taitt testified that Defendant suffered from post-traumatic stress disorder because someone murdered his mother when he was 19 years old. Some family members testified to events in the defendant's background indicating a less-than-ideal childhood. The defense provided little details or supporting records, though. They neither retained nor called an early childhood trauma expert. This is common practice. Their overall presentation was disjointed, disorganized, and ineffective.

7. The Court is very familiar with penalty phase mitigation and the quality of representation appropriate to this phase. Mr. Weeden and Mr. Davila failed to demonstrate the proficiency and quality expected of attorneys in a penalty phase. Defendant has therefore met the first prong of the *Strickland* standard.

8. The Court must next decide whether Defendant has met *Strickland's* second prong by determining whether counsel's deficient performance prejudiced him. The Court concludes that Defendant has met this standard, in no small part because of the performance by his new lawyers at the *Spencer* hearing.

9. Defendant's new attorneys requested additional time to prepare mitigation. They immediately requested the appointment of a mitigation specialist. The Court granted his request, and it would have granted a similar request from Mr. Weeden or Mr. Davila. *Spencer* counsel also filed prompt motions for the appointment of experts and otherwise conducted the type of investigation that the Court expects from effective defense counsel in the penalty phase.

10. At the *Spencer* hearing, Defendant's new lawyers presented a PET scan and expert to discuss the forensic evidence that Defendant's early childhood had resulted in permanent changes to his brain. Significantly, the expert testified that those changes would affect his responses and could explain – although not justify – Defendant's murder of Elena Ortega. If a jury found this evidence credible, it would constitute substantial mitigation.

11. Defendant's new lawyers also indicated they had not been able to complete their investigation in the time allotted, and that given sufficient time, they could offer additional evidence of Mr. Rosario's intellectual and emotional limitations.

12. Based on the totality of the circumstances, the Court concludes Mr. Weeden and Mr. Davila either failed to present, or insufficiently presented, substantive evidence of Defendant's emotional and intellectual disabilities to the jury. A real possibility exists that this testimony could convince at least one juror that life in prison is Defendant's appropriate sentence. Defendant suffered clear prejudice due to his lawyers' deficient penalty phase performance.

13. In making this determination, the Court is mindful that Florida's death penalty sentencing scheme is designed for a jury, and not a judge, to determine whether life or death is the appropriate sentence. The Court's role is a more limited one: to ensure that a death recommendation is appropriate. *Spencer* counsel's eventual presentation of additional and critical evidence to the Court neither excuses nor substitutes for the critical role of a jury in a Florida capital murder case.

14. The State argues Defendant waived any ineffective assistance of counsel claims. While a defendant may waive claims of deficient performances in penalty phase, such a waiver is only knowing and voluntary if counsel conducted a satisfactory mitigation investigation. *Brooks v. State*, 175 So.3d 204 (Fla.S.Ct. 2015). That did not occur in this case, and even if Defendant tried to waive his rights, the Court concludes from repeated interactions with Defendant that he had no idea what rights he was waiving.

15. The State urges the Court to deny this Motion and proceed to sentencing, and the Court understands that it has this option. Based on the Court's extensive review of appellate case law illustrates the painful reality, however, that the Florida Supreme Court will – at the very least – order a new penalty phase of this trial. The Court cannot disregard this binding precedent.

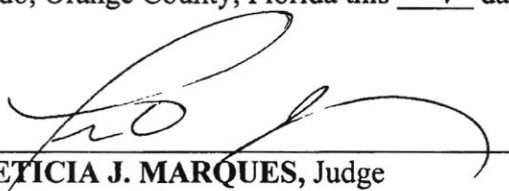
16. Finally, while the focus of the Court's Order has necessarily been Defendant's right to effective counsel, the Court also notes the significant collateral effects that would occur if it ignored Mr. Weeden and Mr. Davila's ineffectiveness and immediately proceeded to sentencing. The years preceding an inevitable retrial of Defendant's penalty phase would result in an even greater emotional toll on the victim's family, additional costs to Florida's taxpayers and the risk of witnesses unavailability due to the passage of time.

THEREFORE it is ORDERED:

1. Defendant's Motion for a New Trial as to the guilt phase is **DENIED**.

2. Defendant's Motion for a New Trial as to the penalty phase is **GRANTED**.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 29 day of November, 2018.



LETICIA J. MARQUES, Judge

Copies furnished via electronic service to:

Assistant State Attorney, Bradley King
Assistant State Attorney, Matthew Ryan Williams
Assistant State Attorney Kenneth Nunnelley
Assistant State Attorney, Deborah Barra
Marc Burnham, Esq.
Ted Marrero, Esq.

Tc Bt
11/29/18