IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,754

MANUEL ADRIANO VALLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

TODD G. SCHER
Litigation Director
Florida Bar No. 0899641

SUZANNE D. MYERS
Staff Attorney
Florida Bar No. 0150177

Office of the Capital Collateral Regional Counsel
101 N.E. 3rd Ave.
Suite 400
Ft. Lauderdale, FL 33301
(954)713-1284

COUNSEL FOR APPELLANT

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CERTIFICATE OF FONT

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ARGUMENT I

MR. VALLE'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE LOWER COURT'S ADOPTION OF THE PROPOSED ORDER WRITTEN BY THE STATE DENYING RELIEF TO MR. VALLE.

The State asserts that Mr. Valle's due process argument is procedurally barred because Mr. Valle had prior notice of and agreed to the presentation of proposed orders to the court. The State further argues that Mr. Valle had an opportunity to review the State's proposed order and to file objections thereto, thereby negating any due process violation. The State's assertions are inaccurate. In fact, Mr. Valle made repeated objections to the use of proposed orders, not only in open court, but also in writing. The State seems to believe that the defense was objecting on "the grounds that a) he should have sufficient time to [compose the order]; and, b) that while he should be allowed to submit a proposed order, the State should be precluded from doing so" (State's Answer Brief at 39). This characterization is in no way accurate. Counsel for Mr. Valle specifically stated:

> MR STRAND: No, I object to Ms. Brill being allowed to give any order, but not me.

(PC-R3. 443). In essence, counsel was objecting to a situation in which the State was being asked to propose an order, but the defense would not be permitted to do so.

After the court agreed that Mr. Valle would have sufficient opportunity to draft a proposed order and an opportunity to

respond to the State's proposed order, contrary to the State's argument, Mr. Valle **did** renew his objection to the entire process of submitting proposed orders:

> THE COURT: How about maybe not a proposed final order, how about a proposed initial draft, would that be all right?
>
> MR. STRAND: Yes, Judge, I would object to the whole thing, and here's what I would ask the Court to do, I think that the Court should listen to the evidence and make the consideration based on the arguments and if the Court wants a memo then the Court should write his own order using its own considered judgment for the language and so forth, and if the Court decides that it wants to have proposed orders I still object based on --

(PC-R3. 444) (emphasis added). Mr. Valle further objected in writing, after the proposed orders were submitted, to the judge's use of the State's proposed order in part or whole because in so doing he would be abrogating his duty as the ultimate fact finder to be fair and impartial (PC-R. 276-277). Thus, the State's argument that Mr. Valle "did not renew his prior objections" (Answer Brief at 39), is false.

The State argues that Mr. Valle agreed to the submission of proposed orders. However, after making his objections clear on the record, Mr. Valle was simply following the dictates of the trial court in filing his proposed order. Mr. Valle cannot be deemed to have "agreed" to the procedure or "waived" any right to raise the issue on appeal when he was simply complying with the

court's procedures after duly objecting.

The State next asserts that the "vast bulk" of its proposed order "contained an accurate summary of the testimony presented at the evidentiary hearing, an accurate summary of the prior proceedings in this case, and case law precedent from this State" (Answer Brief at 44). The State further asserts that Mr. Valle did not challenge below and on appeal the accuracy of the facts or law presented in the State's order adopted by the lower court (Id.). These assertions are again flatly false. Following his written objections to the State's order on the grounds that it, *inter alia*, was "completely biased toward the State," did not "fairly analyze the evidence" (PC-R. 278), in his motion for rehearing filed below, Mr. Valle asserted that the court overlooked evidence presented by Mr. Valle, see, e.g. PC-R. 294, 296, and "overlooked the proper standard for determining whether the Defendant was prejudiced by counsel's ineffective assistance" (PC-R. 296). In his Initial Brief, Mr. Valle continued to make these arguments. See, e.g. Initial Brief at 28 ("it is in fact the lower court's order that is not supported by any record evidence whatsoever"), 32 ("Because the State's proposed order contained the facts that it wanted the lower court to find, the lower court necessarily and clearly failed to review to actual testimony itself on this point"); 32 ("none of Mr. Scherker's testimony in which he explains the motivations for filing the motion in limine are discussed in the State's proposed order

adopted by the trial court"); 35 ("the lower court's order, drafted largely by the State, does not set forth a proper test for assessing prejudice in the Sixth Amendment ineffective assistance of counsel context") 37 ("the trial court exceeds the scope of Strickland); 37 ("[t]he trial court merely looked at the similarities of the traditional mitigation presented in 1981 and 1988 without ever discussing the effet that the harmful evidence had on the jury's 8-4 recommendation of death").

The State further argues that reliance on Patterson v. State, 513 So. 2d 1257 (Fla. 1987), is improper because Patterson only addresses sentencing orders, not orders denying post-conviction relief. However, the circumstances involved in making a determination on a defendant's Rule 3.850 motion are no less weighty. Here, it is the trial court's responsibility to decide whether Mr. Valle has established the factual basis for his claims that will determine whether he receives a new sentencing proceeding and possibly receives a life sentence, or whether his death sentence stands and he is executed. If the judge is required to make an independent weighing of the circumstances to determine whether a defendant is sentenced to die, then the judge must be required to make an independent weighing of the circumstances presented in postconviction to determine whether that death sentence will stand. While there may be "no error" when a sentencer "makes verbal findings, after notice to both parties, and then requests the State to prepare an order based on

those findings" (Answer Brief at 45), this is not what occurred here. The judge did not make verbal findings and then ask the State to reduce them to writing.

Although the trial court repeatedly stated that it would prepare its own order and not sign off on a proposed order (PC-R. 245, 530), that is exactly what the trial court did. The State's attempt to distinguish the trial court's final order from the proposed order submitted by the State by pointing out that the number of pages and font size are different, fails.[1] A reading of the final order and the proposed order makes it clear that the trial court conducted no independent analysis of the evidence or the law and simply cut and paste almost the entirety of the State's proposed order which was submitted on diskette. The only exception between the State's proposed order and the judge's final order is a recitation of the testimony and the evidence from the 1981 sentencing. The "facts" and "conclusions" relied on by the State in addressing the merits of Mr. Valle's claim are all gleaned from the State's proposed order.

In light of the concern recently expressed by several members of this court regarding the practice of trial courts adopting orders written by an adversarial party, LeCroy v. Dugger, 727 So. 2d 236 (Fla. 1998)(Anstead, J., concurring in

[1]The State does not acknowledge that the State's proposed order was accompanied by a computer diskette for the judge (PC-R. 278).

part and dissenting in part), the lower court's order should be reversed with directions to conduct a new evidentiary hearing before another judge in a manner consistent with due process.

ARGUMENT II

MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS DUE TO TRIAL COUNSEL'S UNREASONABLE PRESENTATION OF MODEL PRISONER EVIDENCE.

A. STANDARD OF REVIEW.

The State asserts that this Court must affirm the lower court's denial of relief because (1) the evidence "supports the post-conviction court's ruling" (Answer Brief at 46); (2) the "lower court's findings were amply supported by the evidence" (Answer Brief at 47); (3) "the post conviction court's conclusion that no deficiency was demonstrated is amply supported by the record" (Answer Brief at 53); and (4) "[t]he lower court's conclusion [as to prejudice] is amply supported by the records of this cause" (Answer Brief at 54). These are incorrect statements of law.

This Court recently clarified that a claim under Strickland v. Washington, 466 U.S. 668 (1984), "is a mixed question of law and fact, subject to plenary review." Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999). While a reviewing court applies the "competent and substantial evidence" standard to a trial court's factual findings and credibility determinations,[2] the ultimate

[2]Mr. Valle asserts, however, that here, where the trial court's order was merely an adoption of the State's proposed order, no deference whatsoever should be afforded to any findings or conclusions. See Argument I, supra.

legal determination of both deficient performance and prejudice are mixed questions and the appellate court owes no deference to lower court rulings and must perform *de novo* review. Further, in assessing the deference afforded to factual findings, review of the entire record is also required. See Way v. State, No. SC78640 (Fla. April 20, 2000) (concluding that lower court's finding that Brady evidence had been disclosed to trial counsel was not supported by competent and substantial evidence). It is clear that under the appropriate standard of review, ignored by the Appellee, that Mr. Valle must prevail on his Strickland claim.

B. DEFICIENT PERFORMANCE.

Aside from not analyzing Mr. Valle's claim under the proper standard of review, the Appellee also ignores the precise countours of this Court's mandate in its opinion remanding for the evidentiary hearing. As to deficient performance, the Court remanded for evidence on the issue on "whether Valle's lawyers introduced Skipper evidence at Valle's resentencing only because they believed this was required." Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997). Under the plenary review that is required, Mr. Valle has clearly established his entitlement to relief.

The State asserts that Mr. Valle has ignored the record evidence relied upon by the trial court which support's the trial

court's ruling. The State, however, ignores the fact that all of the witnesses unequivocally testified that Mr. Scherker was laboring under the mistaken belief that the Skipper evidence had to be presented during Mr. Valle's resentencing. During the evidentiary hearing the State offered no witnesses, nor any substantial evidence to refute this testimony, and the trial court made no finding that the witnesses were not credible. Instead, the State pointed to several choppy portions of the record, without explaining the context in which the record assertions were made. These portions of the record do not conclusively rebut the ultimate conclusion that Mr. Valle's counsel were operating under the mistaken belief that presentation of the Skipper evidence was required.

The State specifically points to the colloquy in court in which the resentencing court is asking Mr. Valle if he understood the ramifications of Mr. Zelman's departure from the case. The State specifies, "Mr. Zelman at the time had expressly told the resentencing court that he had discussed with the Defendant the `pros and cons' of his views for `what I would consider to be a sufficient [length of time]' (3R. 2334-38)" (Answer Brief at 49). Indeed, another one of the sentencing counsel represented that they had, `had hours of discussions about this' Id." (State's Answer Brief at 49). Upon a reading of the entire colloquy (Record on Appeal in Florida Supreme Court Case No. 72,328 at 2334-38), however, it is clear that the only matter being

discussed was that Mr. Zelman was departing and Mr. Valle understood he would not be able to receive the benefits of Mr. Zelman's representation. Mr. Valle stated agreement with Mr. Zelman's departure, because, as was testified to at the evidentiary hearing, Mr. Valle had "simply [chosen] Mr. Scherker as his lawyer, and he no longer saw [Mr. Zelman] as his lawyer" (PC-R. 223-24). Mr. Zelman repeatedly emphasized that Mr. Valle was not making a choice between options or strategies, but a choice between lawyers (Id.). Therefore, contrary to the State's assertion, Mr. Zelman did not withdraw because he disagreed with the presentation of Skipper evidence, rather he withdrew because Mr. Valle was not given the opportunity to make an intelligent decision to pursue the strategy of presenting Skipper evidence (PC-R. 229).

Likewise, Mr. Scherker made it clear that his belief that he was required to present the model prisoner evidence was a legal conclusion. As a result, he made no risk-reward analysis or weighing of the pros and cons of whether or not to present the damaging evidence. As it was a legal conclusion, he never presented any options to Mr. Valle because the decision was his own, not Mr. Valle's (PC-R. 474).

As to Mr. Scherker, the State also argues that "his testimony that he felt compelled to present Skipper evidence, was expressly contradicted and belied by his written motions and verbal arguments during the resentencing" (Answer Brief at 50-

51). Initially, Mr. Valle submits that this statement was contained in the lower court's order which was cut-and-pasted from the State's proposed order, and thus is meaningless in terms of assisting this Court in its review of this argument. More importantly, the State's assertion ignores the record. Mr. Scherker explicitly explained that he filed the motion *in limine* as a means of "damage control" and an "attempt to present the best possible case that I could once I was to go forward in front of a jury" (PC-R. 512-13). Mr. Scherker was not changing his position that he was required to present the evidence for which the remand was granted, regardless of the form or name attached to the evidence, as he explained fully to the State during cross-examination below:

> We were going forward regardless because I believed we absolutely had to. All that I was attempting to do was, because, for lack of a better way to put it, prevent damage control, and keep it from being a free for all for you while preserving at least some of the elements and getting my expert witnesses on the stand. I'm sorry, but I don't see it as a change in position or as an amendment of anything.

(PC-R. 513). Of course, none of Mr. Scherker's testimony in which he explains the motivations for filing the motion in limine are discussed in the State's proposed order adopted by the trial court. According this claim the plenary review that is required, however, it is clear that the State's arguments are without merit.

As the State has cited, in State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987), this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses of action have been considered and rejected" (State's Answer Brief at 54). The testimony and evidence presented at the evidentiary hearing conclusively demonstrate that no alternatives to presenting the Skipper evidence were pursued. In fact, the State concedes this in its brief:

> The State recognizes that Zelman also testified that one of the other defense lawyers, Scherker, felt that the Skipper evidence had to be presented, or else this Court's remand would be recalled, or the prior 1981 sentence would become valid. **However, the unequivocal and undisputed testimony herein also establishes that no such "legal" compulsion or analysis was ever communicated to the Defendant before, during, or after the meeting where the attorneys discussed the strategy decision of whether to present Skipper evidence with the Defendant.**

(Answer Brief at 50) (emphasis added). Thus, the State acknowledges and concedes that Mr. Valle did not make a choice between options or strategies after a reasoned and intelligent decision making process. Mr. Valle has proven deficient performance. Strickland v. Washington, 466 U.S. 668 (1984).

C. PREJUDICE.

Under Strickland v. Washington, 466 U.S. 668 (1984), in determining a claim for ineffective assistance of counsel, the court must consider the totality of the circumstances before the judge and jury and must focus its inquiry on the proceeding whose

result is being challenged. The State's argument that Mr. Valle asserts "that prejudice must be determined in a vacuum solely focused on the `closeness' of the jury vote during the 1988 resentencing" (Answer Brief at 5), is, frankly, false. Mr. Valle argued that the proper focus of the prejudice analysis is the affect that the Skipper evidence had on the jury.[3] One of the factors in that determination is the closeness of an 8-4 jury vote. See Rose v. State, 657 So. 2d 567 (Fla. 1996); Phillips v. State, 608 So. 2d 778 (Fla. 1992); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Mr. Valle in no way claims that the closeness of a jury recommendation is the sole focus of a prejudice determination.

Mr. Valle has argued that the State and the trial court exceed the scope of Strickland by including the evidence and witness testimony from the 1981 sentencing in its analysis of prejudice as it pertains to the present issues. This is evident in the lower court's order, in which a comparison is made between the 1981 and 1988 resentencing proceedings. Mr. Valle also argued that the court must consider the witnesses' testimony at

[3]While the State prefers to use a prejudice analysis from Robinson v. State, 707 So. 2d 688, 695 (Fla. 1998) (Answer Brief at 55), Mr. Valle prefers to follow the precise contours of this Court's opinion in his case, wherein the Court indicated that prejudice would be established if there was "a reasonable probability that in the absence of the State's rebuttal evidence, Valle would not have been sentenced to death." Valle v. State, 705 So. 2d 1331, 1334 (Fla. 1997).

the evidentiary hearing. Each witness repeatedly testified that the State's rebuttal to the Skipper evidence was a major hurdle, which in fact overshadowed the traditional mitigation presented at the resentencing. The State used the prison conduct evidence to show that Mr. Valle was a liar (R. 5881); to attack the credibility of the experts (R. 5893); and during closing arguments to refer to Mr. Valle's defense as a fantasy or dream (R. 5894).[4] Moreover, the jury may not have placed as much weight on the aggravators had they not heard the devastating rebuttal to the Skipper evidence. As Mr. Valle pointed out in his initial brief, the aggravating circumstances were very "hotly disputed by the defense" (Appellant's Initial Brief at 46). The jury very well could have given less weight to the aggravators had they not been subjected to the prejudicial bad conduct evidence. Certainly, in light of the prejudicial nature of the evidence presented by the State, there is at least a reasonable probability that the jury would have recommended a life sentence.

The State argues that the "three very powerful aggravating circumstances" establishes the lack of prejudice (Answer Brief at 56). This argument completely overlooks the State's use of the Skipper evidence to show that the aggravating circumstances should be afforded **additional** weight when compared to the

[4]Thus, the "same" case was not presented at the 1981 proceeding as was presented during the 1988 resentencing (Answer Brief at 55).

mitigation:

> You know how to weigh a cold, calculated, premeditated murder and try to somehow balance that against the fact that somebody thinks that he's been a pretty good prisoner in jail since then. I mean there is more than just logic on balancing that. Your heart tells you what the right answer is on that. The cold, calculated, premeditated murder has to be more important than whether or not one person thinks he's been a good prisoner. The other one thinks he's been a bad prisoner, whether he was really trying to escape or he wasn't trying to escape. How can that somehow balance against the crime that he had committed?

(R. 5874) (emphasis added). See also R. 5900 ("We are somehow going to ask you jurors, the defense is anyway, to balance somebody who is not a safe bet, to consider that as something in mitigation and to weigh that against a cold, calculated, premeditated assassination, make believe that they somehow balance"). The State also fails to acknowledge its use of the prison conduct evidence to argue that Mr. Valle's experts were not credible, that Mr. Valle is a dangerous violent man, and that the defense case was a fantasy. See Initial Brief at 43-45. It is highly disingenuous of the State to assert that "the evidence complained of in these proceedings did not alter the balance of the aggravating and mitigating circumstances" (Answer Brief at 58), when the State itself argued to the jury that the bad conduct evidence in fact **allowed** the jury to accord more weight to the aggravation and less weight to the mitigation. It is not

the mere existence of aggravating circumstances that controls the prejudice analysis; the question is whether the jury's determination as to the weight of the evidence would reasonably have been affected.

The State fails to address Mr. Valle's other arguments in support of prejudice. For example, Mr. Valle argued the abundant number of side bar conferences which occurred as a result of disputes arising over admission of rebuttal to the Skipper evidence is also a factor which must be considered in the prejudice analysis (Initial Brief at 46-47). Mr. Valle also asserted that the Court must consider the cumulative effect of error which occurred at Mr. Valle's resentencing, namely the State's improper introduction of lack of remorse evidence and victim impact testimony. This Court's previous determination of harmless error may no longer be considered harmless when taken as a whole with the evidence presented at the evidentiary hearing below. Because the State does not address these arguments, their merit must be taken as conceded by the State, and, under Strickland and this Court's previous remand, Mr. Valle has established prejudice.

CONCLUSION

Based on the record and the arguments set forth here, Mr. Valle requests that his death sentence be vacated, and for any other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 24, 2000.

TODD G. SCHER
Florida Bar No. 0899641
Litigation Director
101 NE 3d Avenue.
Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284
Attorney for Appellant

Copies furnished to:

Fariba Komeily
Assistant Attorney General
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, FL 33131