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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Mr. Valle's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Valle's claims after an evidentiary hearing ordered by this Court.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court of the 1988 resentencing;

"S.R." -- supplemental record on direct appeal to this Court of the 1988 resentencing

"PC-R." -- record on 3.850 appeal to this Court.

"Supp. PC-R." -- supplemental record on 3.850 appeal to this Court.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Valle has been sentenced to death. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Valle, through counsel, accordingly urges that the Court permit oral argument.

CERTIFICATE OF FONT

This brief is typed in 12 point Courier not proportionately

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STATEMENT OF THE CASE

Mr. Valle was charged by indictment dated April 13, 1978, with first degree murder, attempted first degree murder, possession of a firearm by a convicted felon, and grand theft. At his first trial in 1978, Mr. Valle was sentenced to death on the first degree murder charge, a consecutive term of 30 years on the attempted murder, 15 years on the possession of a firearm charge, and a concurrent 5 year term on the grand theft charge. The sentence of death, 30 years and 15 years were reversed by this Court. Valle v. State, 394 So. 2d 1004 (Fla. 1981) [Valle I].

Following a retrial, Mr. Valle was sentenced to death on the murder conviction and to consecutive terms of 30 and 5 years on the other counts. Valle v. State, 474 So. 2d 796 (Fla. 1985) [Valle II]. This Court affirmed the judgment and sentence, but then remanded for a new sentencing hearing based on the United States Supreme Court's remand pursuant to Skipper v. South Carolina, 106 S. Ct. 1669 (1986). Valle v. Florida, 106 S. Ct. 1943 (1986); Valle v. State, 502 So. 2d 1225 (Fla. 1987) [Valle III].

On direct appeal of the resentencing proceeding, this Court affirmed Mr. Valle's convictions and sentences. Valle v. State, 581 So. 2d 597 (Fla. 1991) [Valle IV]. The United States Supreme Court denied certiorari on December 2, 1991. Valle v. Florida, 112 S. Ct. 597 (1991).

Mr. Valle filed his initial Rule 3.850 motion on April 6, 1993. On August 16, 1993, the circuit court denied the motion without prejudice giving Mr. Valle until December 2, 1993 to refile his post-conviction motion. Mr. Valle file his second post-conviction motion on December 2, 1993. Following a Huff[1] hearing, the circuit court summarily denied the motion without an evidentiary hearing. On appeal, this Court remanded for an evidentiary hearing on the issues pertaining to the "[trial judge's] conduct and counsel's failure to move for disqualification in the face of such knowledge" and ineffective assistance of counsel for unreasonably introducing evidence of Mr. Valle's prison behavior. Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997) [Valle V].

The circuit court conducted an evidentiary hearing on August 19, 1998 and October 14, 1998. After the discovery process and considerable consultation with counsel, Mr. Valle waived his claim pertaining to judicial misconduct (PC-R. 152-154). The evidentiary hearing proceeded on the issue of trial counsel's ineffectiveness for unreasonably presenting evidence of Mr. Valle's behavior while incarcerated which led to the admission of highly prejudicial evidence. At the hearing, Mr. Valle called the various attorneys who had represented him during his

[1]Huff v. State, 622 So. 2d 922 (Fla. 1993).

resentencing proceedings.[2]

During the pendency of the hearing, the trial court inquired whether the requirement that a judge personally prepare an order in a death penalty sentencing would "apply to this type of proceeding" (PC-R. 243). The State argued that it would be proper for the court to adopt a proposed order from a party "as long as both parties are aware and have the opportunity to object to the other side's approach. You could adopt or modify it" (PC-R. 2743). The court then requested "proposed orders" from the parties (PC-R. 243-44). Counsel for Mr. Valle objected "to having proposed orders" and if there were going to be such proposed orders, "I want to have an opportunity to be heard by the Court concerning the order" (PC-R. 244). Mr. Valle's counsel further argued:

> MR. STRAND: [] I 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 its 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 . . .

(PC-R. 245). The trial court emphasized that "I am going to write my own order in this case. I'm going to write my own order in this case, and I'm not going to sign off on either of your

[2]Mr. Valle will discuss the specific facts adduced at the evidentiary hearing in the body of the argument discussing that issue. See Argument II, infra.

orders, but I am just inviting help on both sides, that's what I am inviting" (PC-R. 245). The court reiterated that "I will write my own order in this case" (Id.).

Following the close of the evidence, the State filed a nineteen (19) page proposed order (PC-R. 256-74), along with a computer diskette for the judge (PC-R. 278). Mr. Valle also filed an order in accordance with the court's instruction (Supp. PC-R. 111-15). On receipt of the State's order, Mr. Valle immediately filed objections not only to the content of the order but because were the court to sign the order proposed by the State, the court "would be setting aside its responsibility to fairly and impartially determine the credibility of the witnesses," and it would "abrogate any duties and responsibilities to make factual and legal determinations based on the evidence presented, and in essence allows the State to become the ultimate factfinder" (PC-R. 277).

The day after receiving Mr. Valle's objections, the court entered an order denying relief in an order nearly identical to the State's proposed order (PC-R. 280-91). Mr. Valle filed a timely motion for rehearing (PC-R. 293-98). The court denied the motion for rehearing (Attachment A).[3] A timely notice of appeal was filed (PC-R. 303). This appeal follows.

[3]This order was mistakenly not included in the record on appeal and is thus attached to the instant brief for the Court's review.

SUMMARY OF THE ARGUMENTS

1. Mr. Valle's right to due process was violated by the lower court's adoption of the proposed order, written by the State, denying Mr. Valle relief. It is the duty of the lower court to evaluate the testimony and evidence presented during the evidentiary hearing and adjudicate the claims presented in Mr. Valle's 3.850 motion. Therefore, delegation of that responsibility to the State is improper, whether the delegation resulted from the judge's explicit direction or merely by adopting the State's proposed order. The lower court's order should be reversed with directions to conduct these proceedings before another judge in a manner that comports with due process.

2. Mr. Valle was denied the effective assistance of counsel at his 1988 resentencing, in violation of the Sixth, Eighth, and Fourteenth Amendments due to trial counsel's unreasonable presentation of model prisoner evidence. This unreasonable presentation of the model prisoner evidence was the result of counsel's failure to understand the procedural requirements of the remand from this Court and the subsequent resentencing. The admission of the model prisoner evidence opened the door for the State's massive rebuttal case during which the jury heard evidence including attempted escapes, prison misconduct, a previous jury recommendation and sentence of death, and the fact that Mr. Valle had already served ten years (effectively leaving the jury with choosing 15 years or death).

The rebuttal evidence was highly prejudicial, and had counsel not presented the model prisoner evidence it would have been inadmissible. If the jury had not heard the rebuttal evidence, a different result would have occurred in light of the 8-4 recommendation of death.

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.

During the pendency of the proceedings below, the trial court inquired whether the requirement that a judge personally prepare an order in a death penalty sentencing would "apply to this type of proceeding" (PC-R. 243). The State argued that it would be proper for the court to adopt a proposed order from a party "as long as both parties are aware and have the opportunity to object to the other side's approach. You could adopt or modify it" (PC-R. 2743). The court then requested "proposed orders" from the parties (PC-R. 243-44). Counsel for Mr. Valle objected "to having proposed orders" and if there were going to be such proposed orders, "I want to have an opportunity to be heard by the Court concerning the order" (PC-R. 244). Mr. Valle's counsel further argued:

> MR. STRAND: [] I 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 its 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 . . .

(PC-R. 245). The trial court emphasized that "I am going to write my own order in this case. I'm going to write my own order in this case, and I'm not going to sign off on either of your

orders, but I am just inviting help on both sides, that's what I am inviting" (PC-R. 245). The court reiterated that "I will write my own order in this case" (Id.).

Following the close of the evidence on Wednesday, October 14, 1998, the judge again indicated his desire for the submission of proposed orders by Friday, two (2) days away, because he wanted to "spend Monday writing up my own order after utilizing both of your orders" (PC-R. 529); the judge then indicated that he would set a hearing for Tuesday to announce his ruling (Id.). Mr. Valle's counsel again informed the court that he had the right to "review the State's order and file any objections," and was concerned that there was insufficient time between Friday and Tuesday to file objections in order for the court to review them by Tuesday:

> MR. STRAND: So if we submit them [proposed orders] on Friday, would we have an opportunity to file objections on Monday?
>
> THE COURT: I don't know. You can do anything that you want, but I'm going to walk into court Tuesday and announce the Court's ruling and hand my final order to the Clerk. I'm not going to delay this any further.

(PC-R. 531).

The State filed a nineteen (19) page proposed order (PC-R. 256-74), along with a computer diskette for the judge (PC-R. 278). Mr. Valle also filed an order in accordance with the court's instruction (Supp. PC-R. 111-15). On receipt of the State's order, Mr. Valle immediately filed objections:

> 1. Defendant objects to this Court signing the State's proposed order as it denies the Defendant the opportunity to a full and fair hearing since the judge is the ultimate fact finder, and therefore must make factual and legal determinations without undue influence by the State.
>
> 2. Defendant objects to this Court signing the State's proposed order because in so doing it would be a complete abrogation of this Court's duty to be fair and impartial in its role as the ultimate fact finder.
>
> 3. Defendant objects to this Court signing the State's proposed order because in so doing this Court would be setting aside its responsibility to fairly and impartially determine the credibility of the witnesses.
>
> 4. Defendant objects to this Court using any part of the State's proposed order, because even partial use or changing of the order in part, denies the Defendant the opportunity to a full and fair hearing, allows this Court to abrogate any duties and responsibilities to make factual and legal determinations based on the evidence presented, and in essence allows the State to become the ultimate fact finder.

(PC-R. 276-277).

Although Judge Margolius repeatedly and expressly indicated his intention to write his own order (PC-R. 529),[4] comparison of the State's proposed order and the court's final order denying relief establishes that the court's order is written almost verbatim to the State's proposed order. And although the font in

[4]Judge Margolius also expressed his disdain for the Court's opinion remanding Mr. Valle's case, stating that "I was chastised quite soundly in a manner that I really didn't quite appreciate" (PC-R. 536).

the body of the court's order is different from the font of the State's order, it is clear, for example, that the court used the computer disc provided by the State because the footnotes in the state's proposed order appear in the judge's order in the same font. The court's adoption of the order drafted by the State violated Mr. Valle's right to due process and to an impartial determination of his Rule 3.850 motion.

In the postconviction arena, as in trial proceedings, lower courts make findings of fact which become integral to the remainder of the proceedings in capital cases. However, when the lower court simply signs an order drafted by the State, the lower court abdicates its judicial responsibility to make a determination of the case before it, thereby violating the defendant's right to due process.

This Court has repeatedly held that it violates due process for a judge to delegate to the State the task of drafting sentencing orders in capital cases. In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Court addressed a situation where the responsibility for drafting the sentencing order was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death

> penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261.

The Patterson Court observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), it had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the State to reduce his findings to writing. Nibert, 508 So. 2d at 4. The record in Patterson demonstrated that there the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." Patterson, 513 So. 2d at 1262. This Court found that this constituted reversible error.[5] There is no meaningful

[5]The Eleventh Circuit Court of Appeals recently wrote that "[w]e have consistently frowned upon the practice of delegating the task of drafting important opinions to litigants." Chudasama v. Mazda Motor Corp., 123 F. 3d 1353, 1373 n.46 (11th Cir. 1997). The Court observed that "[t]his practice harms the quality of the district court's deliberative process" and "impedes [the reviewing court's] ability to review the district court's decisions." Id. Further, this practice creates "`the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact.'" Id. (citation omitted). See also United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 n.4 (1964) (observing that adversarial parties that draft orders "in their zeal and advocacy and their enthusiasm are going to state the case for their side . . . as strongly as they possibly can. When these

distinction between the State's drafting of a sentencing order and the drafting of an order denying postconviction relief. Both practices violate due process. Patterson; Huff v. State, 622 So. 2d 982 (Fla. 1993); Spencer v. State, 615 So. 2d 688 (Fla. 1993).

What occurred in Mr. Valle's case is improper. It was the duty of the lower court to adjudicate Mr. Valle's capital 3.850 motion, not delegate that responsibility to the State of Florida, the entity seeking to carry out his execution. The lower court made no independent "findings" based on a careful consideration of the record and the evidence presented. The court's actions in this case are particularly egregious given its repeated protestations that it would write its own order and not sign off on a proposed order:

> I will tell you right now, I am going to write my own order in this case. I'm going to write my own order in this case, and I'm not going to sign off on either of your orders . . .

(PC-R. 245).

> I'm not going to sign off on either one of your orders, and I will prepare my own order...

(PC-R. 530).

This was not simply a ministerial order, nor did Judge

> [orders] get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case").

Margolius announce his rulings on these issues on the record and ask the State to memorialize them in written form. The court's order reflects "findings" about deficient performance, prejudice and other matters which are within the exclusive province of the trier of fact to make, not the adversary's attorney. This Court should clearly state that this practice should not continue in capital cases.[6] The lower court's order should be reversed with directions to conduct these proceedings before another judge in a manner that comports with due process.

[6]This issue was raised recently in Young v. State, 739 So. 2d 553 (Fla. 1999). The Court found the issue moot, however, in light of the granting of relief in that case. Id. at 555 n.7. Several members of the Court, however, have expressed concern when trial courts adopt orders written by an adversarial party. LeCroy v. Dugger, 727 So. 2d 236, 242 (Fla. 1998) (Anstead, J., concurring in part and dissenting in part) (discussing "patent[] error" by trial court recited "in an order drafted by the State").

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.

In determining a claim of ineffective assistance of counsel, the proper standard to follow is Strickland v. Washington, 466 U.S 668 (1984). Under the two-prong test laid down in Strickland, Mr. Valle must show (1) that the performance of his counsel was deficient and (2) that the deficient performance prejudiced the defense. In terms of the specific issue raised by Mr. Valle, this Court's previous opinion set forth the legal test that needed to be established in order for Mr. Valle to make out a Sixth Amendment violation:

> [T]here is nothing in the record to rebut Valle's assertion that his remaining lawyers were operating under the mistaken belief that they were required to present Skipper evidence. Taking these allegations as true, we conclude they are legally insufficient under the Strickland standard to warrant an evidentiary hearing on whether Valle's lawyers introduced Skipper evidence at Valle's resentencing only because they believed this was required and if so, whether there is a reasonable probability that in the absence of the State's rebuttal evidence, Valle would not have been sentenced to death.

Valle V at 1334 (footnote omitted).

At the evidentiary hearing ordered by this Court, Mr. Valle, notwithstanding the violation of due process which occurred when the court adopted the State's proposed order, see Argument I, supra, established both unreasonable attorney performance and prejudice as set forth by this Court in Valle V. Thus Mr. Valle is entitled to a resentencing proceeding.

A. THE EVIDENTIARY HEARING.

Mr. Valle first presented the testimony of attorney Edith Georgi Houlihan. Ms. Houlihan explained that when Mr. Valle's case was remanded for the resentencing, she was "not in any way officially assigned" to Mr. Valle's case, but was assigned to Judge Norman Gerstein's division and followed Mr. Valle's case because "I was kind of learning a lot more about complicated representation" and "offered to assist in any way that I could" (PC-R. 167). She eventually became more involved in the case, although Mr. Valle's case "was the first resentencing that I had ever participated in, and certainly raised more complex issues than I had ever dealt with" (PC-R. 168). In terms of her specific role in the case, Ms. Houlihan "was not in a decision making strategic role" and "in terms of overall strategy I was really third or fourth at the bottom, and probably the fourth at the bottom would be correct out of the four. I was really not one of the key decision makers" (PC-R. 169). Rather, her role was to develop "the social background and the history of abuse, and that kind of mitigation" (PC-R. 169).

Ms. Houlihan testified that "[t]here was an ongoing dispute" between attorneys Elliot Scherker and Michael Zelman regarding the presentation of the Skipper evidence (PC-R. 169).[7] In terms

[7]Mr. Zelman was lead counsel, and Mr. Scherker was second chair.

of her own involvement on the Skipper issue, Ms. Houlihan reiterated that "I don't think that I had that kind of experience at that time to make those decisions, and those decisions seemed to be pretty much set before I got involved, the decisions as to what evidence was going to be put on" (PC-R. 170). In fact, as to any decisions made on the case, "I deferred to [Mr. Scherker's] judgment in terms of the strategy decisions in this case" (PC-R. 208). In terms of the dispute between Mr. Scherker and Mr. Zelman, Ms. Houlihan recalled:

> [M]y impression is that Mr. Scherker's firm belief and position throughout was that we had to put the Skipper evidence on or the case would be remanded by the Florida Supreme Court, and Manny would be remanded back to Death Row. That was my impression, but Elliot felt black and white on this issue that there was no doubt that the Skipper evidence would be put on so that really wasn't something that I ever discussed with him, but that was the tone of the conversation if that issue ever came up.

(PC-R. 170-71). Ms. Houlihan reiterated that the premise that they were operating under was that "we had to put it on":

> It wasn't really a matter of that strategy to the best of my knowledge, but everyone was operating on the assumption that this evidence had to be presented, this good prisoner conduct evidence had to be presented, because that was the reason that the case was being sent back, and if we didn't present it there would be no hearing.

(PC-R. 184). Ms. Houlihan "didn't hear any discussions about not putting [the Skipper evidence] on" and "was kind of scrambling to get ready for my stuff at the last minute and I was again, not

part of the overall strategy" (PC-R. 171).

As to Mr. Zelman's position on the Skipper evidence, Ms. Houlihan testified that "he was not comfortable putting it on" and in fact "that is why he got out because he did not want to put it on" (PC-R. 172). During a trip to death row for pretrial depositions, Mr. Zelman "was extremely pessimistic and negative about the prospective of putting [Skipper evidence] on so he didn't want to put it on" (PC-R. 172-73).

Ms. Houlihan was present during the resentencing, and recalled that the "traditional mitigation" she was trying to present "was emasculated by questions on Manny's conduct on Death Row and in prison" and that the direct examination of defense witnesses "was pretty much overshadowed by the evidence of escape attempts or whatever else was going towards us in rebuttal" (PC-R. 176-77). Ms. Houlihan testified that the damaging prison evidence "took away any impact of the direct examination of the child abuse and family background and coming to this country, and all of that, all those factors which had been testified to as having a great impact on his development. So, it was pretty much emasculated by the prisoner evidence coming out on cross" (PC-R. 177).

Because of Mr. Scherker's decision that the Skipper evidence had to be presented, Ms. Houlihan acknowledged there was "a hurdle, a major hurdle" in "trying to find a way to show the impact of his past up until the crime, as opposed to dealing with

the recent history or the prison history that we knew was coming," and "I don't know or I don't think that we physically resolved that (PC-R. 179). In her view of the case, "the attempted escapes evidence that was the rebuttal to our good prisoner evidence was definitely the most damaging thing" (PC-R. 182), particularly in light of the fact that "[t]here was no factual rebuttal to out traditional mitigation" (PC-R. 183). As Ms. Houlihan explained, "[t]he only factual rebuttal that they had to the good prisoner evidence was the attempted escape evidence, and the other type of misconduct that they tried to present" (PC-R. 183).

Mr. Valle then called Michael Zelman to testify at the evidentiary hearing. Mr. Zelman represented Mr. Valle on the appeal from his second trial and continued on the case for the resentencing (PC-R. 213-14). Mr. Zelman recalled that the reversal in Mr. Valle's case due to Skipper error was "[t]he first one that I knew about" (PC-R. 214).

Mr. Zelman explained that "there were several discussions" between him and Mr. Scherker about the need to present Skipper evidence at Mr. Valle's resentencing (PC-R. 215). Mr. Zelman detailed the genesis of the disagreement on this issue:

> Well, there had been, I would say, tenuous discussions like up to that disagreement. The discussions took place over a period of at least weeks, perhaps even longer, and I had come to the conclusion shortly before the resentencing was to begin that the defense was untenable in terms of convincing a jury

> to use the model prisoner argument as a reason for a life sentence. I felt that the impeachment which the State would have would be overwhelming and would completely devastate any chance that there was for a life recommendation from the jury. Mr. Scherker disagreed with me in the sense that he felt that we really had no choice.
>
> It was his point of view as expressed to me that if we failed to go forward with the Skipper evidence that the State would simply say that the remand had only been to permit us to introduce Skipper evidence, and therefore, if we chose not to, the Court would simply reinstate the prior jury recommendation, which was death and according to Mr. Scherker's logic we would have nowhere to go, we would have lost our one opportunity for this resentencing proceeding in failing to present the model prisoner evidence.

(PC-R. 216).

Mr. Zelman did not share Mr. Scherker's opinion on this issue because "there was no obligation that we were under to present the Skipper evidence, and that if we chose not to that we would be entitled to a [resentencing] regardless" (PC-R. 216-17). Mr. Zelman explained the basis for his opinion:

> Well, I had never, and to this day I'm unaware of any case that ever has held that on a remand of any kind whether it be a trial or resentencing or any other evidentiary matter that a party is obligated to undertake a particular defense, or a particular suggestion that had been suggested either from the evidence in the prior proceeding or from the appellate proceeding.
>
> I just have been unaware of any case that has held that I must present that kind of evidence because it was the issue on appeal. That was reason number one, and that alone was to me, very potent, and there was a

> secondary reason, which was that even if there could be some argument that perhaps there was an obligation to do this, the evidence that the State had to rebut the model prisoner evidence was all new for the most part -- I shouldn't say all new, because there was perhaps some evidence that existed prior to Mr. Valle's appeal, which began in 1981, or `82, but the bulk of it, the evidence that I was concerned about for impeachment of the model prisoner evidence, all came about after 1981 and therefore was not contemplated when the error occurred in the 1981 trial where it had been determined that the model prisoner evidence should be included, so the whole balance of the case had changed, and now there was no logical reason to go forward with the model prisoner evidence.

(PC-R. 217-18). Mr. Zelman explained that the rebuttal case being amassed by the State was enormous, and "it reached the point shortly before voir dire that the evidence was devastating" (PC-R. 225). In his view, the State's rebuttal would have "swamped" the traditional mitigation case being presented by Mr. Valle:

> Swamped it. Overshadowed it. I don't believe that you could reasonably expect jurors to vote for life in prison if they think that a killer might escape from prison, and the essence of the problem that we had was that Mr. Valle would be viewed as a serious escape risk.

(PC-R. 225).

Mr. Zelman eventually withdrew from the case because "there was no longer an attorney/client relationship between myself and Mr. Valle, and I felt that there was no place for me in the case, and I had no attorney/client relationship with the client" (PC-R.

220). Before withdrawing, Mr. Zelman met with Mr. Valle and Mr. Scherker, as well as possibly Ms. Houlihan and Ms. Gottlieb (PC-R. 221). Mr. Zelman explained what occurred during the meeting:

> [D]uring that meeting, I made some kind of an initial presentation to Mr. Valle that we had a disagreement, me and Elliot, and at that time I felt the model prisoner evidence should not be presented. I told him basically I thought that the rebuttal was too strong, and it would override or overshadow the good mitigation evidence that we did have, and that it would, I felt likely or very likely or probably, but it's stronger than likely result in a death recommendation. I took perhaps a minute or two minutes, and I did not go into any great detail.
>
> My recollection is that Mr. Scherker then spoke next, and he gave what I would call a non legal presentation of the issue. He spoke in terms of--and I'm not really paraphrasing him because I can't recall the specific words, but I can recall the gist of the way that he spoke, and it was; Manny, you have known me for many years, and I have helped you and I have worked on the case for many years and we have to do this, we have to go forward with the model prisoner evidence, this is your only chance, and he spoke for perhaps five or ten minutes and at that point Mr. Valle simply said something to the effect; well, I'm going to go with Elliott.

(PC-R. 221-22).

The way the issue was presented to Mr. Valle by Mr. Scherker was "more or less this is the only way that you can receive a life sentence. You have to trust me on this, we have to go forward with the model prisoner evidence. **I did not hear any legal analysis in Mr. Scherker's presentation to Mr. Valle**" (PC-

R. 222) (emphasis added). After Mr. Scherker's discussion, Mr. Zelman "felt there was nothing more that I could say that would have convinced Mr. Valle otherwise" (PC-R. 222). Mr. Zelman emphasized that Mr. Valle was not making a choice between various options, but rather "was simply choosing Mr. Scherker as his lawyer, and he no longer saw me as his lawyer, and that is the way that I saw his decision" (PC-R. 223-24). As Mr. Zelman explained after a question by the trial court:

> Had Mr. Valle made an intelligent decision to pursue that strategy I would have. It was the fundamental aspect of the case, and the client has the right to decide, but in my mind he didn't make that decision. Instead what he decided was that he wanted Mr. Scherker as his lawyer and not me, so that is why I left the case.

(PC-R. 229).

Finally, Mr. Valle presented the testimony of attorney Elliot Scherker. Mr. Scherker was an assistant public defender in the appellate division who represented Mr. Valle in his first direct appeal (PC-R. 464). Mr. Scherker participated minimally in Mr. Valle's retrial (PC-R. 465), but did not represent him on that direct appeal as a moratorium had been imposed on the Dade County Public Defender's Office prohibiting it from doing capital appeals due to case overloading (PC-R. 465-66). Following the reversal due to the Skipper violation, Mr. Scherker became involved again with the case as a second chair to Michael Zelman (PC-R. 467). At that time, Mr. Scherker's trial experience was

"[a]ll but nonexistent" (PC-R. 468). Prior to working on Mr. Valle's resentencing in 1988, Mr. Scherker had never been lead counsel in either a felony or misdemeanor jury trial (Id.).

When he began working on Mr. Valle's case for the resentencing, Mr. Scherker "believe[d] that I had to put on the evidence that was excluded in 1981, because other than that there was nothing wrong with the 1981 sentencing" (PC-R. 469). In his legal view, if he did not present the model prisoner evidence at the resentencing, "the 1981 sentence would have been valid" (PC-R. 470). Mr. Scherker explained:

> We were going to have a sentencing trial, and we were going to present the evidence that had been presented in 1981, because the jury was not there at the `81 trial, and we had to put on the non Skipper, if you will, litigation [sic] or the statutory mitigation, not litigation, and before I said that wrong too,m but we had to prepare whatever we had prepared for 1981, and in a theatrical sense the case wold have been tried, and I was looking at that from the perspective of an appellate lawyer, which is what I was and what I am, and if we did not win the sentencing trial or even if we did, and didn't get a life sentence from the trial judge, because it would have been--no matter what errors had been committed by the State or errors of law by the trial judge, the 1981 sentence would have been rendered valid by not presenting the evidence that was excluded in the 1981 trial.

(PC-R. 470-71). Mr. Scherker explained that he was concerned that the State could file a motion to have the remand withdrawn if he did not present the Skipper evidence that was the reason for the resentencing:

> Yes, I did think about that, quite frankly, and I considered it a rational possibility that if we were to announce in theory that we weren't presenting the evidence that was excluded in 1981, that the State might have grounds, though I had never seen it done, to ask the Florida Supreme Court to withdraw its mandate, and reinstate the 1985 affirmance because we had waived the only error that got us the new sentencing trial in the first place.

(PC-R. 471).

Mr. Scherker then discussed the "very sharp and painful disagreement" between himself and Mr. Zelman on the issue of presenting the Skipper evidence:

> Well, as the case was moving forward, Mr. Zelman and I had numerous discussions about going forward with the Skipper evidence, and I was adamant that we had to. I believed then and I believe now, that we had to.
>
> Mr. Zelman had concerns about trying the case in that posture, and ultimately it all came down to a meeting in the jury room during jury selection, fairly early in jury selection, after they closed the proceedings for the day with Mr. Zelman, Ms. Georgi, and Ms. Gottlieb who were also present, and, of course, Mr. Valle was present and Mr. Zelman essentially announced that he could not go forward with the presentation of the excluded evidence, and I restated my position that he absolutely had to, and I told Mr. Valle that we were going to because we had to.

(PC-R. 472).

Mr. Scherker discussed Mr. Zelman's concerns that "we would lose if we went forward with the excluded evidence, that if we would have presented that evidence to a jury we wouldn't have any chance of winning at trial" (PC-R. 473), but Mr. Scherker

believed that "[l]egally . . . we absolutely had to put on that evidence. In other words, my assessment of the Supreme Court of Florida's decisions from 1985 and 1987 were such that I did not feel that there was any option, and I still don't" (PC-R. 473). Mr. Scherker explained that the decision was his and his alone, and that while "Mr Valle and I talked about things as we had from the beginning of the representation, . . . **the decision wasn't his, and I didn't ask him to make the decision. The decision was mine**" (PC-R. 474) (emphasis added). Following the meeting with Mr. Valle, Mr. Scherker testified that Mr. Zelman decided to withdraw from the case because "he did not believe that Mr. Valle had made a decision to go forward, and absent a decision by Mr. Valle to go forward with the Skipper evidence he could not and would not go forward, and could not participate in the trial" (PC-R. 475).

Significantly, Mr. Scherker explained that his decision to present the model prisoner evidence was not a "decision" in the sense of a strategic choice based on an analysis of the strength of the evidence and its potential harm to the case for mitigation:

> I thought we had strong mitigation evidence on the so-called model prisoner theory. I thought we did in 1981 have strong mitigation evidence under the Skipper case, but no, did I do a risk reward analysis and determination of what they call now Skipper, no, and I didn't even reach that.

(PC-R. 475).

Mr. Scherker detailed the effect that the decision to present the Skipper evidence had on the defense case:

> I don't think the that the State had to do very much rebuttal because once we went forward, we went forward, and we were in the unheard of position, I guess, of telling the jury on a capital re-sentencing that our client had been on death row for ten years and that in the body of some of the disciplinary reports appear accusations of him attempting to escape from prison, and how that sounds to a lay jury I think is pretty obvious to anyone, and I think we ended up with what I think ultimately, and correct me if I am wrong, but if I recall in the courtroom after the proceedings, it was or I think it was originally nine to three, but in any event we ended up with an eight to four vote for death from the jury.

(PC-R. 476).

In Mr. Scherker's estimation, the most damaging evidence the State was able to adduce due to the introduction of the model prisoner evidence was "evidence in the disciplinary reports suggesting that Mr. Valle might have tried to cut his way out of the cell to escape, and there was another one involving a key that I don't recall as well, and that was obviously very damaging evidence to present to a jury when you are trying to persuade the jury to spare your client's life" (PC-R. 477). In fact, "[t]he focus of this trial ended up being Manny Valle on death row at Florida State prison" (PC-R. 479). Mr. Scherker had no strategic reason for wanting the jury to know this information, as well as the fact that Mr. Valle had been previously sentenced to death,

and explained that "[t]he only reason all of that came out, was we had to go forward with the Skipper evidence" (PC-R. 484). For example, had he not felt compelled to present the Skipper evidence, Mr. Scherker testified that "you would have had to put a gun on my head to get me to agree to an instruction to the jury that my client had been on death row for ten years" (PC-R. 521). Mr. Scherker acknowledged that "if this case had not been reversed in the posture that it was and I was free to make strategic choices, of course, we would have labored mightily to keep anybody from opening the door" (PC-R. 525).

B. ARGUMENT.

As noted in Section A, supra, this Court's prior opinion established that Mr. Valle would prevail under the Strickland test for ineffective assistance of counsel if he could establish (1) that his attorneys were operating under the mistaken belief that they were required to present Skipper evidence, and (2) that absent the damaging evidence presented to rebut the Skipper evidence, confidence is undermined in the outcome of the sentencing decision. Mr. Valle has established both prongs of Strickland and is entitled to relief.

Because the issue of ineffective assistance of counsel is a mixed question of law and fact, this Court's review is plenary and it must review the record to determine whether the facts established below support the conclusion that counsel was not deficient and that there was no prejudice. Strickland v.

Washington, 466 U.S. 668 (1984); Baxter v. Thomas, 45 F. 3d 1501, 1512-13 (11th Cir. 1995). If the Court determines that the "legal effect" of the facts presented below establish a Sixth Amendment violation, then relief is warranted. Porter v. State, 723 So. 2d 191 (Fla. 1998).[8]

1. Deficient Performance.

The record conclusively establishes that Mr. Valle's resentencing counsel "were operating under the mistaken belief that they were required to present Skipper evidence." Valle V, at 1334. During the evidentiary hearing, the State offered no witnesses, nor any substantial evidence to rebut the overwhelming evidence of ineffective assistance of counsel. While the trial court wrote that "[t]o portray the actions of defense counsel as serious errors in judgement [sic], that they felt bound by the Florida Supreme Court's opinion and mandate to put on the Skipper evidence is simply not supported by the record" (PC-R. 287), it is in fact the lower court's order that is not supported by any record evidence whatsoever.

[8]Although the Court's previous opinion indicated that "the court may take into consideration the credibility of the witnesses," the trial court here made no credibility findings. Rather, it ignored the testimony altogether, and then failed to apply the proper legal analysis to the evidence presented. Of course, the State shares the blame with the trial court for these errors, as the State's proposed order was adopted nearly *in toto* by the lower court, despite the lower court's protestations that "I'm not going to sign off on either one of your order, and I will prepare my own order" (PC-R. 530). See Argument I, supra.

Mr. Valle had only one attorney -- Mr. Zelman -- who had any significant experience trying a capital case before a jury. Although Mr. Zelman's experience was somewhat greater, all of the witnesses testified that Mr. Scherker, the least experienced trial attorney, decided to go forward with the model prisoner evidence because of his unreasonable belief that he was required to do so. Ms. Houlihan testified that she was never in a decision making role (PC-R. 169), and the decisions regarding which evidence was to be presented to the jury was decided before she became involved (PC-R. 170). Although Ms. Houlihan played no decision making role pertaining to the presentation of the model prisoner evidence, she was aware of Mr. Scherker's position on the issue:

> Mr. Scherker's firm belief and position throughout was that we had to put the Skipper evidence on or the case would be remanded by the Florida Supreme Court, and Manny would be remanded to Death Row.
>
> [] Elliot felt black and white on this issue that there was no doubt that the Skipper evidence would be put on so that really wasn't something that I ever discussed with him, but that was the tone of the conversation if that issue ever came up.

(PC-R. 170-171).[9]

[9]The trial court noted its belief that "Ms. Georgi tried somewhat to down play her involvement in the case" (PC-R. 282). First and foremost, this discussion in the trial court's order is a verbatim cut-and-paste from the State's proposed order. Compare PC-R. 282 with PC-R. 258. Nevertheless, regardless of the number of witnesses Ms. Houlihan was assigned to or whether

Michael Zelman's testimony also unequivocally established that Mr. Scherker was laboring under the mistaken belief that the Skipper evidence had to be presented during Mr. Valle's resentencing. Mr. Zelman stated that he disagreed with Mr. Scherker's belief that the model prisoner evidence must be presented:

> I had come to the conclusion shortly before the resentencing was to begin that the defense was untenable in terms of convincing a jury to use the model prisoner argument as a reason for a life sentence. I felt that the impeachment evidence which the State would have would be overwhelming and would completely devastate any chance that there was a life recommendation from the jury. Mr. Scherker disagreed with me in the sense that he felt that we really had no choice.
>
> It was his point of view as expressed to me that if we failed to go forward with the Skipper evidence that the State would simply say that the remand had only been to permit us to introduce Skipper evidence, and therefore, if we chose not to, the Court would simply reinstate the prior jury recommendation, which was death and according to Mr. Scherker's logic we would have nowhere to go, we would have lost our one opportunity for this resentencing proceeding in failing to present the model prisoner evidence.

(PC-R. 215-216).

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she participated in taking depositions, the significant testimony from Ms. Houlihan was unequivocal, unrebutted, and supported by the testimony of the other attorneys: she was not involved in any discussions pertaining to the model prisoner evidence, nor did she hear any discussions involving the possibility of not presenting that evidence, and it was Mr. Scherker's firm belief that the Skipper evidence had to be presented.

Mr. Zelman was and is unaware of any case which held that on resentencing a party is required to present a particular defense based on the appellate proceeding (PC-R. 217). This is not merely Mr. Zelman's belief, but in fact, no case exists. Therefore, any legal conclusion that a remand may be withdrawn because the defense does not present specific evidence is unreasonable.

As a result of the disagreement on the legal issue, counsel felt there was no other means of resolution but to address Mr. Valle. Mr. Zelman testified that this meeting with the Mr. Valle was not a strategy discussion, but simply Mr. Valle choosing between attorneys (PC-R. 224). Mr. Zelman presented a brief overview of his position on the model prisoner evidence to Mr. Valle, without explaining the pros and cons in any great detail (PC-R. 221). According to Mr. Zelman, Mr. Scherker then presented a "non legal presentation of the issue." Id. When asked by the trial court why he discontinued his representation of Mr. Valle, Mr. Zelman replied:

> Had Mr. Valle made an intelligent decision to pursue that strategy I would have. It was the fundamental aspect of the case, and the client has the right to decide, but in my mind he didn't make that decision. Instead what he decided was that he wanted Mr. Scherker as his lawyer and not me, so that is why I left the case.

(PC-R. 229). This testimony shows that there was no reasonable choice made by Mr. Valle, nor any participation by Mr. Valle in a

strategy decision, because there was no choice of strategies offered to him.

Likewise, Elliott Scherker testified that he believed he was required to present the model prisoner evidence, otherwise, it was his "grave concern" that if presentation of this evidence was waived it was possible that the State could move the Florida Supreme Court to withdraw the mandate for a new sentencing (PC-R. 515). Mr. Scherker stated:

> if we were to announce in theory that we weren't presenting the evidence that was excluded in 1981, that the State might have grounds, though I have never seen it done, to ask the Florida Supreme Court to withdraw its mandate, and reinstate the 1985 affirmance because we had waived the only error that got us the new resentencing trial to begin with.

(PC-R. 471) Mr. Scherker testified that his decision was a legal conclusion and as such, he never presented any options to Mr. Valle because the decision was his own, and not Mr. Valle's (PC-R. 474). Mr. Scherker simply knew the evidence must be presented. Mr. Scherker specifically stated there was no risk-reward analysis, or weighing of the costs and benefits (PC-R. 475).

The trial court's order took issue with Mr. Scherker's testimony on this point, noting that his testimony "is undercut by Mr. Scherker's having filed a motion in limine in an attempt to have the rebuttal evidence prohibited, as well as writing to his expert witnesses and informing them of the defendant's prison

problems and recognizing that they would have to deal with explaining their opinions in light of those problems during their testimony" (PC-R. 286). Once again, it is vital to note that this passage is another verbatim cut-and-paste from the State's proposed order. Compare PC-R. 286 with PC-R. 261. 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 the actual testimony itself on this point. With respect to why he filed the motion in limine, Mr. Scherker clearly explained that the motion in limine had been filed 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.[10]

Mr. Scherker admitted that he was not aware of any case in which the Florida Supreme Court withdrew a remand, nor were any colleagues in appellate practice familiar with such a case (PC-R. 516) However, given the absence of any case law on the subject, Mr. Scherker still felt compelled to proceed with the model prisoner evidence. This testimony clearly shows unreasonable conduct on the part of Mr. Scherker. Because of his unreasonable unyielding position that the evidence must be presented, Mr. Scherker failed to adequately research this legal conclusion.

The testimony of Mr. Scherker, Mr. Zelman and Ms. Houlihan conclusively establishes that the any discussions between counsel and between counsel and Mr. Valle regarding the Skipper evidence were void of any strategic analysis. As a result of counsel's failure to adequately weigh and analyze the pros and cons of

[10]The trial court's order (in another section cut-and-pasted from the State's proposed order) further "noted" a legal argument made on October 10, 1987, prior to the resentencing proceeding, in which Mr. Zelman tried to persuade the judge to waive a jury (PC-R. 283). See R. 1003. The argument to waive a jury reinforces the damaging nature of the State's rebuttal case to the model prisoner evidence and that counsel, because Mr. Scherker insisted that the presentation of the Skipper evidence was required, took every measure to limit its harm. Both Mr. Zelman and Mr. Scherker recognized that any legal argument they made was as an advocate for the client, and in no way reflected personal feelings regarding the evidence (PC-R. 231, 492).

presenting this evidence, these risks became a reality during Mr. Valle's resentencing.

Based on the evidence presented by Mr. Valle, and the State's failure to rebut this evidence, Mr. Valle's trial counsel was ineffective for introducing evidence of Mr. Valle's prison behavior. Mr. Scherker unreasonably believed he was required to present the model prisoner evidence otherwise face the possibility that the State would move for withdraw of the remand and this Court would simply reinstate the previous death recommendation. This belief of Mr. Scherker's, that he was required to present the Skipper evidence was an erroneous interpretation of the law at the time of Mr. Valle's resentencing. Failure to understand the procedural requirements applicable to a resentencing proceeding constitutes deficient performance. Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993) ("Counsel's failure to comprehend the most fundamental requirement governing the admissibility of evidence in capital sentencing proceedings was clearly unreasonable").

Counsel's representation of Mr. Valle fell outside the scope of reasonably professional assistance when counsel failed to explore any alternative course of action in lieu of presenting the model prisoner evidence. Strickland v. Washington, 466 U.S. 668 (1984); State v. Bolender, 503 So. 2d 1247 (Fla. 1987). Counsel failed to conduct any risk/reward analysis and instead of informing Mr. Valle of the potential risk involved, allowed Mr.

Valle to choose attorneys, not strategies. Because trial counsel believed a legal conclusion required him to present the model prisoner evidence, he did not attempt to determine if Mr. Valle agreed with its presentation. Under the standard of Strickland, counsel was deficient.

2. Prejudice.

In its opinion remanding for an evidentiary hearing, this Court wrote that Mr. Valle would establish prejudice 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 at 1334. In this case, Mr. Valle has clearly established that confidence is undermined in the jury's 8-4 recommendation in favor of the death penalty.[11]

Just as with deficient performance, this Court's review of prejudice is plenary. Strickland; Baxter. Thus, while the Court owes no deference to the legal conclusions reached by the lower

[11]Mr. Valle would note that the actual recommendation of the jury has been the subject of dispute in these proceedings. Following the resentencing proceedings, trial counsel filed a petition for writ of error coram nobis accompanied by an affidavit of trial counsel who had spoken with one of the jurors following the end of the proceedings (R. 893). The petition alleged that the jury had initially voted 7-5 in favor of death, but that subsequent discussions among the jurors included the possibility of parol should Mr. Valle receive a life sentence, as well as Mr. Valle's attempted prison escape (R. 889). Prior to imposing sentence, the trial court denied the petition for writ of error coram nobis, as well as a motion to interview the jurors (R. 6053-56; 891).

court, 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. The law is clear that in order to determine if prejudice exists, a court reviewing an ineffectiveness claim "must consider the totality of the evidence before the judge and jury." Strickland, 466 U.S. at 695. The focus of inquiry should be on the proceeding whose result is being challenged. Id.

A proper prejudice analysis encompasses "the totality of the evidence," not the mere fact that aggravators were presented by the State. Collier v. Turpin, 155 F. 3d 1277, 1296 (11th Cir. 1998). Here, the trial court relied largely on the evidence and jury recommendation from the 1981 sentencing in determining whether the 1988 jury was prejudiced by the introduction of model prisoner evidence and subsequent rebuttal evidence. First and foremost, this is the identical argument raised by the State in Valle V in support of the State's argument that Mr. Valle was not entitled to an evidentiary hearing. In fact, in its rehearing motion before this Court, the State argued that the Court "seemingly ignored" its arguments regarding Strickland's prejudice prong (Appellee's Motion for Rehearing at 12). Appellee's motion was denied, and the Court clearly rejected the State's legally flawed prejudice analysis.

Nevertheless the State continues to make this faulty argument which was adopted by the trial court. Although the

trial court saw fit to emphasize that its analysis of prejudice was "based on the entire record **not** necessarily because of the [prior jury] vote" (PC-R. 290), the black and white words of the order belie the court's own statement:

> It is clear that, as recognized by Mr. Zelman prior to trial, without any new mitigating evidence being presented to a jury, the result at the resentencing would be the same as in 1981. In 1981, the substantially identical testimony concerning the mitigating factors related to the defendant's background and mental state were presented to the jury. In addition, in 1981, there was testimony, without any rebuttal, that the defendant had been a model prisoner at the Stockade. **However, despite that testimony, the jury recommended death by a vote of 9 to 3. In 1988, even with the nonviolent prisoner testimony and its rebuttal, the jury recommended death, this time with a 8-4 vote. Thus, the Court finds that if the defense had not put on the nonviolent prisoner testimony, there is no reasonable probability that the outcome would have been different.**

(PC-R. 290) (emphasis added).[12]

Including this evidence and witness testimony from the 1981 sentencing in its consideration of the present issues, the trial court exceeds the scope of Strickland. The evidence presented at the 1981 sentencing is wholly irrelevant to whether confidence is undermined in the 8-4 death recommendation rendered in the 1988 resentencing proceedings. The 1981 proceedings were found to be

[12]This part of the lower court's order was taken verbatim from the State's proposed order. See PC-R. 273.

unconstitutional in Valle I. The State and trial court are unable to speculate regarding the strategy of counsel during 1981, and Mr. Scherker clearly testified that "[t]he only reason all of that came out, was we had to go forward with the Skipper evidence" (PC-R. 484).

The trial court merely looked at the similarities of the traditional mitigation presented in 1981 and 1988 without ever discussing the effect that the harmful evidence had on the jury's 8-4 recommendation of death:

> It should be further noted that Mr. Zelman's proffered strategy for the 1988 proceeding of using the defendant's family history, together with other non-prison behavior related mitigation evidence, had been the previous strategy in the 1981 sentencing hearing...
>
> ...This court finds that the evidence presented in 1981 was substantially similar to the non-Skipper evidence presented in 1988...
>
> ...In 1981, the substantially identical testimony concerning the mitigating factors related to the Defendant's background and mental state were presented to the jury...However despite that testimony, the jury recommended death by a vote of 9 to 3. In 1988, even with the non-violent prisoner testimony and its rebuttal, the jury recommended, death this time with a vote of 8 to 4.

(PC-R. 289-290).

This comparison to the 1981 proceeding is not only irrelevant, but is a flawed prejudice analysis. Rather, the proper focus for determining prejudice is the affect that the

presentation of the Skipper evidence had on **the jury** and its close 8-4 recommendation. This Court has previously held that a close jury recommendation is a factor in assessing prejudice. See Rose v. State, 657 So. 2d 567, 574 n.10 (Fla. 1996) (closeness of jury vote is "part of the factual background we must consider in determining the issue of prejudice"); Phillips v. State, 608 So. 2d 778 (Fla. 1992) (considering jury's 7-5 death recommendation in assessing prejudice to defendant); Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993) ("We note that four jurors voted for life imprisonment even in the absence of [favorable evidence not presented due to trial counsel's unreasonable failure to present it]").

That the mistaken belief that Skipper evidence had to be presented had a devastating impact on the focus of Mr. Valle's resentencing is apparent. The damaging nature of counsel's unreasonable decision first became apparent during jury selection when counsel, because of the belief that he was required to present Skipper evidence, acquiesced to telling the jury that Mr. Valle had been on death row for ten years, as this Court noted in Valle IV:

> Valle further claims that his prior death sentence became a feature of the resentencing proceeding. At the outset, it should be noted that Valle requested the judge to instruct the jury that he previously had been sentenced to death and that the sentence had been vacated and should be given no weight. Valle requested this instruction because he

> wanted to present evidence that he had positively adapted to prison life since his conviction. The court gave the requested instruction.

Valle IV at 45 (emphasis added). However, had he not felt compelled to present the Skipper evidence, Mr. Scherker testified that "you would have had to put a gun on my head to get me to agree to an instruction to the jury that my client had been on death row for ten years" (PC-R. 521). The State specifically questioned Mr. Scherker regarding this point:

> Q So that the only reason that the jury heard that he had been previously sentenced to death, was your introduction of the model prisoner evidence, or did you have a strategic reason for letting them know that?
>
> A Heavens, no. The only reason that all of that came out, was that we had to go forward with the Skipper evidence.

(PC-R. 484).

The argument alluded to in the trial court's order (in yet another section cut-and-pasted from the State's proposed order) that the negative information about Mr. Valle's prison history would have come in anyway, see PC-R. 285, ignores the effect that the unreasonable belief regarding the presentation of the Skipper evidence had on the manner in which the mitigation case was required to be presented. As this Court noted in Valle IV, because of the presentation of the Skipper mitigation, "it is clear that the state could introduce rebuttal evidence of specific prior acts of prison misconduct and violence." Valle IV

at 46. Further, due to the presentation of the Skipper evidence, Mr. Valle's defense team was "in the unheard of position, I guess, of telling the jury on a capital re-sentencing that our client had been on death row for ten years and that in the body of some of the disciplinary reports appear accusations of him attempting to escape from prison" (PC-R. 476). Clearly, but for the belief that they were required to present the Skipper evidence, the entire mitigation case could have been presented in a different light to avoid opening the door to any prison conduct, as Mr. Scherker explained: "if this case had not been reversed in the posture that it was and I was free to make strategic choices, of course, we would have labored mightily to keep anybody from opening the door" (PC-R. 525).

The specter of the introduction of the prison conduct evidence had a direct impact on the "traditional mitigation" case that was being presented by Ms. Houlihan; the impact of the direct examination of family background, Mr. Valle's life in Cuba, and coming to this country and how these factors affected his life was overshadowed by the prisoner evidence (PC-R. 177). When asked what problem had to be overcome during the traditional mitigation case, Ms. Houlihan responded:

> Well, I wanted to convince the jury that what we knew about Manny's background did have an impact on him and did affect his conduct during this crime, and I knew that overshadowing the background information was the specter of how many years he was on Death Row, and that was a problem, trying to find a

> way to show the impact of his past up until the crime, as opposed to dealing with the recent history or the prison history that we knew was coming. So, yes, that was a problem. It was a hurdle, a major hurdle.

(PC-R. 178-179).

As noted above, the lower court's order failed to address the effect that the presentation of Mr. Valle's bad prison record had on **the jury's 8-4 death recommendation**. As Mr. Scherker noted, "[t]he focus of this trial ended up being Manny Valle on death row at Florida State prison" (PC-R. 479). Each of the witnesses at Mr. Valle's evidentiary hearing testified that the escape evidence presented by the State in rebuttal to the model prisoner evidence overwhelmed the traditional mitigation case. When asked how the escape evidence affected the traditional mitigation, Mr. Zelman stated:

> Swamped it. Overshadowed it. I don't believe that you could reasonably expect jurors to vote for life in prison if they think that a killer might escape from prison, and the essence of the problem that we had was that Mr. Valle would be viewed as a serious escape risk.

(PC-R. 225). Both Ms. Houlihan and Mr. Scherker testified that had they not been forced to present the model prisoner evidence, the door would not have been opened for the State's rebuttal. All the witnesses testified that since escape is not a statutory aggravator, the jury would not have heard the evidence if the State was not able to present the rebuttal.

The State took full advantage of the situation during closing arguments, which is a proper consideration for assessing the prejudice suffered by Mr. Valle. Cf. Kyles v. Whitley, 514 U.S. 419, 444 (1995) (in assessing the materiality of suppressed evidence, "[t]he likely damage [to the State's case] is best understood by taking the word of the prosecutor himself").[13] In its arguments before the jury, the State explicitly hammered on the Skipper evidence to show that aggravating circumstances should be given more weight:

> 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

[13]The test for materiality of a Brady violation is the same as the analysis for prejudice under Strickland. United States v. Bagley, 473 U.S. 481 (1985).

balance").

The prosecution also used the prison conduct evidence to show that Mr. Valle was a liar:

> When he told those experts that he hadn't been in that cell for a long time and then we find out he's been living there alone for two years. Maybe it's not the experts' fault if he doesn't think that was the defendant's fault for having the bars sawn [sic] off. Maybe he does think somebody else was in there for a period of time, but that's not the experts' fault, that's the defendant's fault. He's the one who's lying to them to get the best advantage.

(R. 5881) (emphasis added).

The State used the prison conduct evidence to also launch into a tirade that Mr. Valle's experts were not credible, that Mr. Valle is a dangerous violent man, and that the defense was a "fantasy" and "dream time":

> But to say that Lloyd McClendon is an expert, to say his expertise from being on death row himself for killing a person during a robbery should give you any credence whatsoever, I submit has no value. And the reason it has no value, and I wrote this chart up previously and I'm going to do it again, that was his expert opinion in 1981, that this defendant would follow the rules and keep out of trouble.
>
> Have we been listening to that for six days? Have we been fighting about whether or not he followed the rules, but how many rules he broke? Whether he broke eight rules, whether they were dangerous rules, whether they were nondangerous rules. Does anybody think that he followed the rules and kept out of trouble? Well, that was his expert opinion in 1981.

If his expert opinion about what the future is going to be in 1981 is this far from being correct, then I can tell you what his 1988 opinion about whether or not the defendant is not an escape risk and will be a model prisoner is worth because what we know about the defendant is that he's incapable of following rules. This isn't the first time he's been in trouble. So, we know about his ability to deal with the rules on the outside in society.

The Judge has told you already about four prior convictions. Two times before, that he's been in prison. This is his third time in prison. Anybody understand that he is capable of following the rules and keeping out of trouble? And once he got into jail, there was eight disciplinary reports including two that involved attempted escapes, and his little notes when he came back to Dade County Jail just two or three months ago to his friend, Mr. Vaughn, you know, "I need help with an escape."

Is that following the rules, keeping out of trouble? Are we supposed to consider this as mitigation, that he's been a good boy. **That's fantasy. That's dream time.** That's the type of fantasy Mr. McClendon wants you to think about. Mr. McClendon thinks that escape attempt in 1984 was a dream.

* * *

Is this a dream? Is this a fantasy escape? Is there anybody who thinks that someone is the defendant's cell, a one-man cell for the last two years just happened to have done this on a fantasy? Anybody think that it didn't take a hell of a lot of effort to saw through this, to replace it with cardboard, to putty it up, to paint over it?

And what do we know that the defendant and the other defendant, the other person who tried to escape had in their perspective rooms, two hacksaw blades, cardboard shims,

> some putty, a cut-off towel bar, a rope that was made out of a sheet, three hats, two pairs of gloves with reinforced fingers, some paint, address book, phone numbers, a compass, a flashlight and some quarters. Anybody think this is just a fantasy escape attempt?
>
> We know the difference between fantasy and reality. We know when somebody has a handcuff key in their talcum powder and $95 and they know they're going to leave the jail facility to come to court that they're going to be transported in a car or a van along the way, that that's not a fantasy that you've got those things for a real purpose. You have those things to try to escape. Is that following the rules and keeping out of trouble?
>
> **The people in the State of Florida consider this defendant an extreme escape risk. We don't need to hear from ten experts whether or not he's going to be good or bad or violent in the future. The people who see him everyday, who deal with him everyday think he's an extreme escape risk. Is that something in mitigation, that he's the worst of the worst, that he is in the most dangerous category, the extreme escape risk?**

(R. 5893-96) (emphasis added). See also R. 5916 ("I don't want you to engage in a fantasy. I don't want you to buy into McClendon's fantasy when you get back there and deliberate. He had this fantasy about what that escape was really like").

None of the prosecution's argument was considered by the lower court in assessing the prejudice to Mr. Valle, nor was the fact that the jury could have determined that the aggravating circumstances were not entitled to as great weight as urged by the State. While the lower court believed that there were "three

very powerful aggravating circumstances involved in this killing of a police officer" (PC-R. 291), the jury could have found otherwise. See Hallman v. State, 560 So. 2d 223, 226-27 (Fla. 1990) (jury recommendation of life may reasonably be based upon jury's conclusion that aggravators do not exist or are of little weight). The weight and existence of the aggravation was hotly disputed by the defense, which argued, for example, that three of the aggravators advanced by the State -- avoiding arrest, interference with a government function, and murder of a law enforcement officer -- were "all the same thing. They are not three different aggravating factors" (R. 5942).[14] As to the cold, calculated, and premeditated aggravating circumstance, the defense also contested that it had been proven beyond a reasonable doubt, arguing that "we are not talking about ordinary premeditation" but rather "a heightened premeditation, a much greater premeditation of planning, calculating, thinking about it" (R. 5943). Thus the existence and relative strength of the aggravation was within the jury's province to weigh, and in light of the prejudicial nature of the bad conduct evidence, it is more than reasonably likely that at least two jurors would have been swayed and would have instead voted for life had the bad conduct evidence not been presented.

The excessive number of sidebars which occurred during the

[14]In fact, the trial judge merged these three aggravating factors into one. Valle IV at 42.

resentencing is also a factor to consider in assessing the prejudicial impact of the State's efforts to discredit Mr. Valle's experts and its affirmative presentation of the bad conduct evidence. Ms. Houlihan, Mr. Zelman and Mr. Scherker each recalled the numerous bench conferences which were held during the 1988 resentencing. Ms. Houlihan testified that previous trial objections were renewed at side bar and almost every question of an expert had to be proffered outside the presence of the jury (PC-R. 180). Mr. Scherker characterized the number of bench conferences as "inordinate" and "innumerable" (PC-R. 480). The innumerable side bar conferences have an obvious affect on a jury. When asked how the unusual number of side bar conferences affected the jury, Ms. Houlihan replied:

> Well, like juries typically react, they are not happy about it, and it interrupts everything and they sense that the defense is hiding something or doing something wrong or whatever, and it is never a positive thing for the defense to be called side bar constantly by the Court or by the prosecution's objections.

(PC-R. 181). The bench objections which created the necessity for side bar conferences were directly related to the model prisoner evidence and attempting to limit the State's rebuttal case.

The lower court's analysis of prejudice also failed to consider the cumulative effect of the error which occurred at Mr. Valle's resentencing. For example, on direct appeal, this Court

found that "the state improperly introduced in its case-in-chief the testimony of a witness that Valle had shown no remorse over the killing." Valle IV at 46. The Court, however, found the error harmless. Id. Moreover, the Court found error in that "there were some prosecutorial arguments and a little testimony that improperly focused on the loss felt by Officer Pena's family and friends and on Officer Pena's personal characteristics." Valle IV at 48. However, the Court found them insufficiently prejudicial "in their content and quantity to require reversal." Id. In light of the record as it now is before the Court, the prior determinations of harmlessness cannot stand; at the very least, the effect of the State's improper introduction of lack of remorse evidence and the improper victim-impact evidence are factors in the analysis of whether Mr. Valle was prejudiced by the introduction of the Skipper evidence.

C. CONCLUSION.

In light of the evidence presented and the arguments set fort above, Mr. Valle has established both prongs of the Strickland test for ineffective assistance of counsel. Therefore, Mr. Valle is entitled to a resentencing proceeding.

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 November 8, 1999.

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