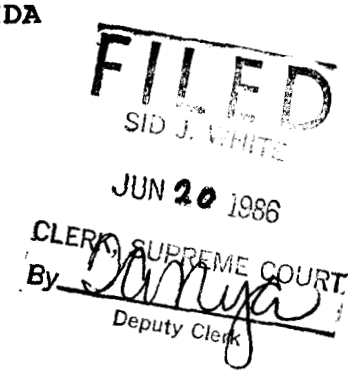
IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,176



MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

Michael Zelman of
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INTRODUCTION

This cause is an appeal from a judgment of guilt and imposition of a death sentence. The appellant, MANUEL VALLE, was the defendant in the lower court and the appellee, THE STATE OF FLORIDA, was the prosecution. In this brief the parties will be referred to either by name or as they stood below. The record will be designated by the following symbols:

"R" - Record on Appeal

"T" - Transcript of lower court proceedings

STATEMENT OF THE CASE

The defendant was indicted for first degree murder, attempted first degree murder, possession of a firearm by a convicted felon, and auto theft. (R.14-24A). Following jury trial he was found guilty of first degree murder and attempted first degree murder, and upon non-jury trial he was found guilty of possession of a firearm by a convicted felon. (R.961, 962; T.1551). After the sentencing hearing the jury's advisory verdict of death was returned. (T.1546). The trial court adjudicated the Defendant guilty and sentenced him to death on the first degree murder conviction, with consecutive prison terms of thirty and five years respectively imposed on the convictions for

attempted first degree murder and possession of a firearm by a convicted felon. (R.1057). Appeal was then instituted. (R.1189).

This Court initially affirmed in all respects. *Valle v. State,* 474 So.2d 796 (Fla. 1985). Upon certiorari review the Supreme Court of the United States vacated and remanded for further consideration in light of *Skipper v. South Carolina,* 476 U.S. ____, 106 S.Ct. 1669 (1986). *Valle v. Florida,* 476 U.S. ____, 106 S.Ct. 1943 (1986). This Court then allowed simultaneous supplemental briefs to be filed.

STATEMENT OF FACTS

> On April 2, 1978, Officer Louis Pena of the Coral Gables Police Department was on patrol when he stopped appellant and a companion for a traffic violation. The events that followed were witnessed by Officer Gary Spell, also of the Coral Gables Police Department. Officer Spell testified that when he arrived at the scene, appellant was sitting in the patrol car with Officer Pena. Shortly thereafter, Spell heard Pena use his radio to run a license check on the car appellant was driving. According to Spell, appellant then walked back to his car and reached into it, approached Officer Pena and fired a single shot at him, which resulted in his death. Appellant also fired two shots at Spell and then fled. He was picked up two days later in Deerfield Beach.

Valle v. State, 474 So.2d, at 798.

During the sentencing phase the defendant showed that he had been incarcerated in 1975 at the Dade County Stockade. (T.1495). Eurvie Wright, who had been the

stockade supervisor, said the defendant had been a "model prisoner." (T.1496-7). Wright could not say the defendant was presently rehabilitated and did not offer opinion regarding the defendant's future prison behavior. (T.1498).

The defendant next called John Buckley, a professional corrections consultant, who teaches at both Harvard University and the University of Massachusetts. (T.1505-7). The prosecutor objected to testimony by Buckley and a hearing was held outside the jury's presence. (T.1506).

The defendant proffered that Buckley is an expert on prisons and corrections, that he had examined the defendant, and that in Buckley's opinion the defendant would be a model prisoner. (T.1506-7). Upon the court's inquiry the defendant stated that there were other similar defense witnesses, including a corrections psychiatrist. (T.1508-9). The defendant argued the relevancy of these witnesses as follows:

> I have assumed Mr. Adorno is going to argue that this person deserves the electric chair. I think it is fair to say, and I think that the jury, in making that decision, should know what is going to happen if they choose the other alternative. I think they should know if they do, based upon the expert's testimony that they are going to hear and have presented, that they should see what the other alternative is, and it is a pretty thick bet that they will not have anything to worry about from this guy.

(T.1509).

The court found the evidence irrelevant and excluded

it from the jury's consideration. (T.1507, 1508-9). The defendant's immediate request for a formal evidentiary proffer with testimony was met with the ruling that such could be done but not in the court's presence. (T.1510). The defendant then rested. (T.1511).

In argument to the jury the prosecutor addressed Wright's testimony as follows:

> Then we go to the model prisoner argument. The guy is a model prisoner look, he gets out, and look what he does. First of all, he steals a car. Second of all, he violates his probation, and third of all, he commits the ultimate crime, he executes a police officer and attempts to execute another one.

(T.1524-5).

Following imposition of sentence a formal evidentiary proffer of the excluded mitigating testimony was taken outside the court's presence. (R.1059-1112). James Buckley testified that he had previously been court qualified as a corrections expert, that he had evaluated the defendant and through court documents had become familiar with the facts. (R.1073, 1074). Buckley found that if incarcerated the defendant would be a leader among other prison inmates and would help bring order to the institution. (R.1074-5).

The defendant next presented the testimony of Lloyd McClendon, assistant prison administrator for the State of Ohio and another previously court qualified corrections expert who had evaluated the defendant and familiarized

himself with the case. (R.1079-1083). McClendon believed that the defendant was not a typical inmate and was not violent, that he would obey prison rules and stay out of trouble, and that he would try to educate himself. (R.1084-5). McClendon concluded that the defendant would be a model prisoner who would leave prison a model citizen. (R.1087-8).

The defendant's last proffered witness was Dr. Brad Fisher, an associate professor of psychology employed by the United States Government to write a book regarding inmate evaluation and classification. (R.1089). He had testified as an expert forty to fifty times. (R.1095). Dr. Fisher performed an eight to ten hour comprehensive evaluation of the defendant and concluded he would be a non-violent prisoner and would be a constructive influence upon other inmates. (R.1106-9).

Subsequent to the evidentiary proffer the court reviewed the witnesses' testimony and ruled that exclusion had been proper. (R.1113-1115A; T.1569-70,1572). It is upon these facts that the Supreme Court directed consideration of *Skipper v. South Carolina,* 476 U.S. ____, 106 S.Ct. 1669 (1986).

SUPPLEMENTAL POINT ON APPEAL

WHETHER DEATH MAY CONSTITUTIONALLY BE IMPOSED WHERE MITIGATING EVIDENCE THAT THE DEFENDANT WILL BE A MODEL PRISONER WAS EXCLUDED AND WHERE THE PROSECUTOR EXPLOITED THE EXCLUSION WITHOUT OPPORTUNITY FOR REBUTTAL.

ARGUMENT

DEATH MAY NOT CONSTITUTIONALLY BE IMPOSED WHERE MITIGATING EVIDENCE THAT THE DEFENDANT WILL BE A MODEL PRISONER WAS EXCLUDED AND WHERE THE PROSECUTOR EXPLOITED THE EXCLUSION WITHOUT OPPORTUNITY FOR REBUTTAL.

After informing the jury through a lay witness that he had previously been a model prisoner, the defendant sought to introduce mitigating evidence from three highly qualified corrections experts that he would be so again if his life was spared. (T.1495-7, 1505-9; T.1073-5; 1079-88, 1089-1108). The court erroneously found this testimony irrelevant and excluded it. (T.1507, 1508-9, 1569-70; R.1113-5A). The prosecutor obtained a death recommendation after sarcastically arguing that the defendant's behavior showed he was anything but a model prisoner. (T.1524-5). The court then sentenced the defendant to death without consideration of the excluded mitigating evidence. (T.1569-70; R.1046-9, 1113-5A). These rulings violated the clear mandate of *Skipper v. South Carolina*, 476 U.S. ___, 106 S.Ct. 1669 (1986).

In *Skipper* the accused was allowed to show that he previously adopted well to prison life. However, he was not permitted to call jailers and a "regular jail visitor" to further substantiate his claim. The prosecution argued to the jury that the accused would be a dangerous prisoner if sentenced to life. The South Carolina Supreme Court upheld the death sentence because it believed that an

accused could show past prison behavior, but that evidence of future adaptability to incarceration was irrelevant. All nine Justices of the United States Supreme Court held the death sentence unconstitutional.

A six-judge majority found the sentencing procedure violative of *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d (1982). The majority declared:

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas,* 428 U.S. 262, 275 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, *Jurek v. Texas, supra; see, also Barefoot v. Estelle,* 463 U.S. 880 (1983). *Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.* Under *Eddings*, such evidence may not be excluded from the sentencer's consideration.

106 S.Ct., at 1671 (footnote omitted, emphasis added).

Skipper's majority holding was underscored by rejection of the prosecution's three contentions. First, the majority determined that the excluded witnesses were not offering inadmissible lay opinions on future behavior. Second, distinguishing past prison conduct from future

behavior as a test for admissibility was found "elusive." Finally, in rejecting the prosecution's argument that the mitigating evidence was cumulative, the majority held that because the proffered testimony was more credible than that actually admitted there was reversible error.

Skipper does indeed answer all remaining issues in this appeal. While the defendant presented some lay testimony of his *past* prison conduct, this evidence was only a circumstantial indication of the *future*. But the defendant sought to explicitly demonstrate *Skipper's* mitigating factor through highly probative, direct, expert testimony. The excluded witnesses were well recognized corrections consultants who had interviewed the defendant and familiarized themselves with the case. (T.1505-9; R.1073-5, 1079-88, 1089-1108). Each believed the defendant would be a model prisoner. (R.1074-5, 1087-8, 1106-8). The lay witness who testified admitted he had no opinion on the defendant's present or future state of rehabilitation. (T.1498). Since the jury never received any expert opinion or direct evidence on the crucial question of the defendant's future prison behavior, the excluded testimony was not cumulative to anything. Moreover, because the Supreme Court of the United States has specifically held that expert testimony is particularly helpful and important when resolving future dangerousness in a capital case, *Barefoot v. Estelle*, 463

U.S. 880, 103 S.Ct. 3383 (1983), the excluded evidence was undoubtedly the best that could be offered.

Skipper mandates vacation of the death sentence not only for exclusion of mitigating evidence, but because the defendant was not permitted to rebut the prosecution's exploitation of the exclusion. The Supreme Court[1] found the South Carolina prosecutor's jury argument, that Skipper would be dangerous in prison, violative of *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (capital sentencer may not consider evidence without rebuttal opportunity). In this case, the prosecutor made the same impermissible argument by telling the jury the defendant would repeat the same criminal behavior that led to his "model prisoner" incarceration. (T.1524-5). Just as in *Skipper*, the death sentence imposed below cannot stand.

CONCLUSION

Based upon the preceding cases, authorities, and policies, the defendant seeks vacation of the death sentence and remand for a new sentencing trial.

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[1] The majority joined the concurring opinion. See, Skipper v. South Carolina, 476 U.S., at note 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Richard L. Polin, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, on this 19 day of June, 1986.

Respectfully submitted,

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