IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,084

MANUEL 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 the appeal of an order summarily denying Manuel Valle's motion for postconviction relief and an amendment thereto. The motion for postconviction relief was brought pursuant to Fla. R. Crim. P. 3.850.

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

"R" -- record on direct appeal to this Court;

"PC-R" – record on instant 3,850 appeal to this Court;

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

REQUEST FOR ORAL ARGUMENT

Mr. Valle has been sentenced to death, The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. 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.

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STATEMENT OF THE CASE AND THE FACTS

The Circuit Court of the Eleventh Judicial Circuit, Dade County, entered the judgments of conviction and sentence under consideration.

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. (R1. 7-10). 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, and 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 the Florida Supreme 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 (R2. 1045-1057); Valle v. State, 474 So.2d 796 (Fla. 1985) [Valle II]. The Florida Supreme Court affirmed the judgment and sentence, but then remanded for a new sentencing hearing on remand from the United States Supreme Court Valle v. State, 502 So. 2d 1225 (Fla. 1987) [Valle Ill].

On direct appeal of the resentencing proceeding, the Florida Supreme Court affirmed Mr. Valle's convictions and sentences. Valle v. State, 581 So. 2d 40 (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, this Court denied the motion without prejudice giving Mr. Valle until December 2, 1993

to refile his post conviction motion. Mr. Valle then filed a timely postconviction personally verified by Mr. Valle. In that motion, Mr. Valle raised twenty claims:

CLAIM I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. VALLE'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE **FOURTEENTH AMENDMENT TO THE UNITED** STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. MR. VALLE CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS **MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND,**

CLAIM II

THE TRIAL COURT AND THE FLORIDA **SUPREME COURT IMPROPERLY DENIED MR.** VALLE'S PETITION FOR WRIT OF CORAM NOBIS. NEWLY DISCOVERED EVIDENCE **REVEALS THAT MR. VALLE WAS PREJUDICED** BY IMPROPER JURY AND PROSECUTORIAL CONDUCT.

CLAIM III

THE JURY WAS IMPROPERLY INSTRUCTED ON **THE COLD,** CALCULATED, AND **PREMEDITATED AGGRAVATING FACTOR, IN** VIOLATION OF ESPINOSA V. FLORIDA, **STRINGER V.** BLACK, MAYNARD V. **CARTWRIGHT,** HITCHCOCK V. **DUGGER, AND** THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM IV

MR. VALLE WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED THREE SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM V

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. VALLE'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, MR. VALLE'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR.

CLAIM VI

COUNSEL FOR THE STATE ENGAGED IN EX-PARTE COMMUNICATIONS WITH THE TRIAL JUDGE DURING THE PENDENCY OF MR. VALLE'S TRIAL. TRIAL COUNSEL KNEW OF THE COMMUNICATIONS AND FAILED TO REMOVE SAID TRIAL JUDGE. TRIAL COUNSEL HAD NO STRATEGIC REASON FOR THIS FAILURE. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT DOING SO. MR. VALLE WAS PREJUDICED THEREBY.

CLAIM VII

THROUGHOUT MR. VALLE'S SENTENCING, THE STATE FILLED, OR ASSISTED IN FILLING, MR. VALLE'S COURTROOM WITH AN OVERWHELMING PRESENCE OF UNIFORMED POLICE OFFICERS. THESE POLICE OFFICERS INTIMIDATED BOTH THE TRIAL JUDGE AND JURY. WERE IT NOT FOR THE STATE'S ACTIONS, THE TRIAL JURY WOULD HAVE RECOMMENDED A LIFE SENTENCE AND THE TRIAL JUDGE WOULD HAVE IMPOSED THE SAME.

CLAIM VIII

MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED IN EFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

CLAIM IX

MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE DURING HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL INEFFECTIVELY FAILED TO OBJECT TO THE STATE'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. TRIAL COUNSEL FAILED TO DISCOVER AND REMOVE PREJUDICED JURORS. THE JURORS' PREJUDICES ADVERSELY AFFECTED THE OUTCOME OF BOTH THE GUILT AND PENALTY PHASES OF MR. VALLE'S TRIAL.

CLAIM X

MR. VALLE'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. VALLE TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. VALLE TO DEATH.

CLAIM XI

MR. VALLE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM DURING THE TRIAL COURT PROCEEDINGS FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE. MR. VALLE'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITALSENTENCING DETERMINATION WERE DENIED.

CLAIM XII

THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. VALLE'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. DEFENSE COUNSEL'S FAILURE TO ARGUE EFFECTIVELY CONSTITUTED DEFICIENT PERFORMANCE.

CLAIM XIII

THE PROSECUTORS' MISCONDUCT DURING THE COURSE OF MR. VALLE'S CASE RENDERED MR. VALLE'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE STATE PRESENTED UNCHARGED COLLATERAL CRIMES IMPROPER ARGUMENT TO THE JURY. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING. THE TRIAL COURT'S ACTIONS DID NOT PERMIT COUNSEL TO BE EFFECTIVE.

CLAIM XIV

MR. VALLE WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM XV

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. VALLE'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XVI

MR. VALLE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

CLAIM XVII

MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. VALLE'S CASE IN CHALLENGE TO THE STATE'S CASE. A FULL ADVERSARIAL TESTING DID NOT OCCUR, THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. VALLE'S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

CLAIM XVIII

MR. VALLE IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING.

CLAIM XIX

MR. VALLE'S TRIAL OUTCOME WAS MATERIALLY UNRELIABLE DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, THE NEWLY DISCOVERED EVIDENCE, THE IMPROPER **RULINGS OF THE TRIAL COURT, OR ALL THE PRECEDING AT MR. VALLE'S TRIAL.**

CLAIM XX

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

The State filed its response, asserting that Claims II, III, IV, VI, VII, X, XII, XIII, XIV, XVIII, and XX either were, or could have been addressed on direct appeal; that Claims II, VI, VIII, IX, Xl, XV, XVII, XIX were legally insufficient; and, that Mr. Valle should be allowed neither to complete his Chapter **119** civil suits against agencies outside of the jurisdiction of the trial court, nor to amend his Rule 3.850 motion. A Huff hearing was held on August 26, 1994. Thereafter, the Court summarily denied Mr. Valle's motion in an order prepared by the State. (PC-R. **105).** The Court did not attach any portion of the record to his order. Mr. Valle filed a motion for rehearing, which was also summarily denied. This appeal follows.

SUMMARY OF ARGUMENT

1. Mr. Valle was entitled to an evidentiary hearing on the claims presented to the trial court. The allegations contained in those claims, if proven, would have entitled Mr. Valle to relief. The trial court erred by refusing to accept those allegations as true for the purposes of determining whether an evidentiary hearing was required. Mr. Valle was entitled to an evidentiary hearing to establish that he was not guilty of first degree murder even though the claim contained no facts other than those alleged elsewhere in his motion. The facts alleged elsewhere in his motion established the factual basis for this claim. Moreover, Mr. Valle would have pled this claim with greater specificity had the trial court not forced him to go forward without first allowing him to obtain public records.

2. This Court's decision in Hoffman v. State, **613** So. 2d 405 (Fla. 1992) requires the 3.850 court to allow capital defendants a reasonable amount of time to pursue civil actions against state agencies outside of the jurisdiction of the 3.850 court who have refused and/or failed to provide public records. The circuit court erred in refusing to allow Mr. Valle's a reasonable amount of time to pursue his civil actions against the Florida Department of Law Enforcement and the Florida Department of Corrections. The circuit court also erred in refusing to require the Dade County State Attorney's Office to provide Mr. Valle with a list of materials which it claimed to be exempt from Chapter 119 disclosure and the statutory basis for such exemptions. Mr. Valle was entitled to such a list under Fla. Stat 119.07(2)(a). Without such a list, Mr. Valle was denied the right to present argument regarding the validity of exemptions claimed by the State. Jennings v. State, 583 So.2d 316

(Fla. 1991). See also, Huff v. State, 622 So. 2d 982 (Fla. 1993). Mr. Valle should have been allowed to amend his Rule 3.850 motion when all records were received.

3. Mr. Valle's claim that trial counsel was ineffective for failing to remove a judge who had engaged in ex parte communications with the prosecution was supported by factual allegations and was not clearly rebutted by the record. He was entitled to present evidence to establish his claim. The trial court improperly denied an evidentiary hearing.

4. Mr. Valle was entitled to an evidentiary hearing on his claim that he had been deprived of the effective assistance of counsel during the penalty phase of his capital trail. Mr. Valle made specific factual allegations that the sentencing judge had engaged in ex parte communications with the State, that he had socialized with State witnesses in the presence of the jury, and that he had kissed the victim's wife in front of the jury, but that trial counsel had failed to object. Mr. Valle also alleged that there was no strategic basis for trial counsel's failure. Mr. Valle also specifically alleged that trial counsel had opened the door for extremely damaging evidence of Mr. Valle's alleged attempted escape from the Florida State Penitentiary by presenting evidence of good prison behavior and that trial counsel had done so due to his ignorance of the law, Mr. Valle specifically alleged that additional mitigating evidence could have been presented to the jury had counsel fully investigated Mr. Valle's case. The fact that counsel may have presented some mitigating evidence does not clearly refute this claim.

5. Mr. Valle was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for not effectively objecting to the State filling the courtroom with uniformed officers and other supporters of the State's position and excluding members of counsel's

staff, for the purpose of intimidating the trial judge into imposing a sentence of death and preventing the effective assistance of counsel.

6. Mr. Valle was entitled to an evidentiary hearing on whether newly discovered evidence establishes the prejudice prong of Mr. Valle's previously denied claim that prosecutorial and/or juror misconduct entitled Mr. Valle to penalty phase relief. The facts alleged, if true, would entitle Mr. Valle to relief.

7. Mr. Valle was entitled to relief on his claim that his jury was improperly instructed on the cold, calculated, and premeditated aggravating factor. Mr. Valle fulfilled the prerequisites to preserve this claim under James v. State, 615 So. 2d 668 (Fla. 1993). A reasonable juror could have found that the alleged murder was not cold, calculated, and premeditated as properly defined.

8. Mr. Valle was entitled to relief on his claim that his jury had been improperly instructed on the aggravating factors of the murder was committed to disrupt or hinder the exercise of a governmental function or the enforcement of laws (Fla. Stat. §921.141(5)(g)), the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody (Fla. Stat. §921.141(5)(e)), and the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties (Fla. Stat. §921.141(5)(j)), based upon the state's theory that Mr. Valle killed Officer Pena to prevent his arrest. Mr. Valle fulfilled the prerequisites to preserve this claim under James v. State, 615 So. 2d 668 (Fla. 1993). A reasonable juror could have given separate weight to each of these duplicative aggravating factors.

9. Mr. Valle was entitled to relief on his claim that the facial invalidity of Florida capital sentencing statute was not cured by subsequent narrowing during his capital sentencing.

10. Mr. Valle specifically alleged that his trial counsel was ineffective for failing to properly preserve his Slappy and Neil claim. This Court found that the issue was not properly preserved. Mr. Valle was entitled to demonstrate that his trial counsel had no strategic basis for failing to properly preserve this issue and that his failure constituted deficient performance.

11. Mr. Valle's sentencing jury was improperly instructed that Mr. Valle bore the burden of demonstrating that evidence in mitigation outweighed evidence in aggravation. Mr. Valle fulfilled the prerequisites to preserve this claim under James v. State, 615 So. 2d 668 (Fla. 1993). He is entitled to relief.

12. Defense counsel's failure to argue effectively constituted deficient performance allowing the introduction of non-statutory aggravating factors and the State's argument upon non-statutory aggravating factors which rendered Mr. Valle's death sentence fundamentally unfair and unreliable, in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments.

13. Mr. Valle specifically alleged that trial counsel was ineffective for failing to object to patently improper argument by the prosecutor. Mr. Valle alleged specific evidence establishing the prejudice prong of this claim. He is entitled to an evidentiary hearing to demonstrate that counsel had no strategic basis for his failure to object and that there was a reasonable possibility that had trial counsel properly objected, the outcome of Mr. Valle's penalty phase would have been different,

14. Trial and appellate counsel were ineffective for failing to effectively argue that Mr. Valle was denied a reliable sentencing in his capital trial because the sentencing judge refused to find the existence of mitigation established by the evidence in the record, contrary to the Eighth and Fourteenth amendments.

15. Mr. Valle should be allowed to amend his postconviction motion, including, but not limited to, Claims XV, XVI, XVII, XVIII, and XIX, to include facts and claims arising from, or rendered viable by, materials obtained through Chapter 119. Mr. Valle was entitled to an evidentiary hearing on his newly discovered evidence claim even though the claim contained no facts other than those alleged elsewhere in his motion. The facts alleged elsewhere in his motion established the factual basis for this claim. Moreover, Mr. Valle would have pled this claim with greater specificity had the trial court not forced him to go forward without first allowing him to obtain public records. Mr. Valle was entitled to an evidentiary hearing on his Brady claim even though the claim contained no facts other than those alleged elsewhere in his motion. The facts alleged elsewhere in his motion established the factual basis for this claim. Moreover, Mr. Valle would have pled this claim with greater specificity had the trial court not forced him to go forward without first allowing him to obtain public records. Mr. Valle was entitled to an evidentiary hearing on his Guilt phase ineffective assistance of counsel claim even though the claim contained no facts other than those alleged elsewhere in his motion. The facts alleged elsewhere in his motion established the factual basis for this claim. Moreover, Mr. Valle would have pled this claim with greater specificity had the trial court not forced him to go forward without first allowing him to obtain public records.

16. Mr. Valle was entitled to have all errors which occurred at his capital trial and sentencing examined together to determine whether, taken as a whole, they deprived him of an adversarial testing. The prejudice from multiple constitutional errors cannot be determined independently.

ARGUMENT I

MR. VALLE WAS DENIED DUE PROCESS AND A FULL AND FAIR HEARING ON HIS MOTION TO VACATE.

In summarily denying Mr. Valle's Rule 3.850 motion, the trial judge, the Honorable Richard V. Margolious, repeatedly rejected this Court's explicit decisions on the record as he again and again refused to accept specific factual allegations as support for Mr. Valle's claims of error.

Mr. Valle plead and specifically informed the Court that he was pursuing records in the possession of, inter alia, the Florida Department of Law Enforcement and the Department of Corrections (PC-R. 48), and requested leave to amend his motion after receiving all public records. The State argued that the Court had only Mr. Valle's allegations and counsel's representations that such efforts were being made and that Mr. Valle had not presented evidence to support the same, therefore, the Court should not allow Mr. Valle time to obtain records from those agencies or to amend his postconviction motion. (PC-R. 106-107). Notwithstanding Mr. Valle's allegations, the Court refused to allow Mr. Valle the opportunity to obtain these records and amend his motion. (PC-R. 105).

Mr. Valle's motion contained allegations that trial counsel was aware that the trial judge had kissed the widow of the victim and fraternized with other friends of the victim in view of the jury, yet failed to move for his disqualification. (PC-R. 21). Even though judge Margolious acknowledged that, if these allegations were true, Mr. Valle's motion would have to be seriously considered, he refused to accept them as true, stating:

> THE COURT: [I] made a note with regard to -- on page 21 of the pleading where the motion talks about the Judge

kissing the widow of the victim. Again, do you have any – is there anything to support that at all?

MR. KISSINGER: We'll produce –

THE COURT: How is anybody to know what you are alleging is accurate?

MR. KISSINGER: We can produce witnesses. Well. the allegation has to be taken as true at this point. We'll produce witnesses should we be given an evidentiary hearing to substantiate that allegation.

* * *

THE COURT: Would that be the people – I mean, if a juror told me he saw a judge kissing the widow of a victim, you know, during a conversation [sic] of whether to give death, that will –, you know – your motion has to be strongly considered.

* * *

THE COURT: Is it noted on the record anywhere? I always wondered about that. What's to prevent any member of the family to just make any allegations they want? They don't get the result they wanted, and they just say, "Hey, let's just make up a story. Let's say that the Judge was having sex with the juror, Let's just go and make it up. Let's make up whatever we want," you know.

Does that mean I have to give you an evidentiary hearing because someone from the family comes in with some, you know, some allegation? Am I required to give you an evidentiary hearing?

(PC-R. 56-58).

Similarly, when Mr. Valle alleged that the State intentionally packed the courtroom with law enforcement officers to intimidate the trial judge and specifically excluded members of defense counsel's staff, Judge Margolious refused to accept specific factual allegations as true:

THE COURT: [Y]et you accuse the State of taking some action to fill the seats. I mean, what evidence is there to

support that? Is there an affidavit signed by any police officer to say that: "the only reason I was in Court that day is because some prosecutor told me to be there?"

MR. KISSINGER: Your, Honor, I believe that it's -- again, we are getting in situations where the allegation has to be taken as true as the way it's stated. What the Court is doing at this point is asking us to go forward with our facts --

THE COURT: So you are -- what are you saying?

MR. KISSINGER: -- and determines whether --

THE COURT: There's no level of evidence that has to be -- if you merely make the allegations, you can stop somebody from being executed? The law requires that? That somebody immediately has to be stopped from being executed if you just make an allegation? Is that the law in the State of Florida? That seems to be what you're arguing.

MR. KISSINGER: What I am saying is that the allegation, what the rule requires by its terms is that factual allegations have to be made and that those factual allegations have to be sufficient, if true, to support a claim for relief. Now the specific facts don't need to be -- affidavits don't need to be attached, names of witnesses don't need to be attached, nothing.

THE COURT: so --

MR. KISSINGER: The facts have to support the claim for relief.

THE COURT: And your interpretation of the law is -- let's say, hypothetical now. The Governor has signed the death warrant, the Court's have denied everything and they are ready to execute Joe Blow tomorrow morning, right?

MR. KISSINGER: Yes, Judge.

THE COURT: They're going to kill him at 8:00 o'clock tomorrow morning, you know. The defense attorney says, "Hey, we've got to come up with something. Wait a second. Why don't we just allege something unscrupulous? Why don't we say that the Judge was having sex with the victim's husband or husband or wife? That will get us a delay."

So if a lawyer does this, some unscrupulous lawyer, I am required to stop that execution and have an evidentiary hearing?

MR. KISSINGER: Your Honor, that's correct.'

'Counsel proceeded to explain that such a situation would be rare in a successive postconviction action where procedural bars and the rules of newly discovered evidence

(PC-R. 66-68).

In denying Mr. Valle's motion for rehearing in this case, judge Margolious repeated his hostility toward the rules for postconviction proceedings laid out by this Court.

> THE COURT: Well suppose the defendant doesn't know about it, just found out about it just a couple of days before the execution. You have to have an evidentiary hearing. Judge, we are claiming that judge X, you know, was drunk, stupid and said "I can't wait to execute this son of a bitch". I have a relative who will swear to that in open court. We have to have an evidentiary hearing in this hearsay [sic] and cancel the execution.
>
> * * *
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> MR. KISSINGER: I think the Court will be in the same scenario as this.
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> THE COURT: The wife confesses to the crime.
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> MR. KISSINGER: Sure, although I would note that I believe the case was involving Marvin Johnson, the Florida Supreme Court recently granted a stay after that very kind of evidence that an inmate acme forward and after him -this guy confessed to me telling me he did it. I have been scared to come forward.
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> THE COURT: Well, that's a fact of life. There are a lot of judges in the United States that even though they have sworn to uphold the law, they are just against the death penalty physiology [sic]. This is not unreasonable to think that some of these judges just might -
>
> Obviously I don't think any judge in the Florida Supreme Court of this ill but it is not unusual to think some judge in the United States who's [sic] philosophy is against the death penalty just at any chance to delay the execution. I'm not making that statement - I have read some of the columns that talk about the death penalties and you know, it is not unreasonable to think there might be a judge who feels that way somewhere in United States. You pick up the paper and there is always a judge granting a stay left and right, 10, 15 years after the commission of the crime, you know, which I think is outrageous, but this is my personal opinion.

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could bar many claims (PC-R. 24).

* * *

[T]hat's why I think a judge aught [sic] to do is follow the law and put their personal position aside. When you put this robe on, you agree to completely put aside – if you are really true to you oath, put aside your philosophical view and follow the law. But I do think that there comes a point in time, you know, in all this – is just a bunch of intellectual jerking around. There is a time that if the appeals are not successful, that sentences are carried out.

How old is this case?

MR. KISSINGER: Three years old.

MS. BRILL: Crime occurred in 1978.

THE COURT: The family members of the victim are still alive?

MS. BRILL: Oh yes, sir.

THE COURT: Well thank God for that.

It will be interesting if they pass away before the defendant has to face the sentence. That will be ironic.

(PC-R. 11-13).

The grant of an evidentiary hearing when the fact alleged are unrebutted by the record and would entitle the defendant to relief is not "intellectual jerking around." It is the law of this State.

This Rule 3.850 Motion filed by Mr. Valle was the first and only motion filed since this Court affirmed his resentence to death in 1991. A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1 138 (4th DCA 1992). A trial court may not summarily deny without "attach(ing) portions of the files and records conclusively showing the appellant is entitled to no relief," Rodriauez v. State, 592 So. 2d 1261 (2nd DCA 1992). See also Bell v. State, 595 So. 2d 1018 (2nd DCA 1992); Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992).

The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows on its face that [Mr. Valle] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982). "This Court must determine whether the two allegations . . . are sufficient to require an evidentiary hearing. Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief (citations omitted)." Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986)(emphasis added). "Because an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." 484 So. 2d at 1241 (emphasis added). See also Mills v. State, 559 So. 2d 578, 578-579 (Fla. 1990)(citation omitted) ("treating the allegations as true except to the extent rebutted by the record, we find that a hearing on this issue is needed.") "The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).

> Without reaching the merits of any of these claims, we nevertheless believe that a hearing is required under rule 3.850. In its summary order, the trial court stated no rationale for its rejections of the sresent motion. It failed to attach to its order the portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.

> The state argued that the entire record is attached to the order in the Court file before us, thus fulfilling this requirement. However, such a construction of the rule would render its language meaningless. The record is attached to *every* case before this Court, Some greater degree of specificity is required. Specifically, unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.
>
> We thus have no choice but to reverse the order under review and remand for a full hearing conforming to rule 3.850.

Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990)(emphasis added). See also Lemon v. *State*, 498 So. 2d 923 (Fla. 1986).

The trial court's dismissal in this case is in stark contrast to the clear and unmistakable requirements of the law. The trial court failed to use the record or files in this case to conclusively show that Mr. Valle is not entitled to relief. No analysis was attempted whatsoever. Instead, the Court chose to simply disregard and/or disbelieve the facts alleged by Mr. Valle. As set forth more completely herein, these fact would have entitled Mr. Valle to relief. The dismissal order ignores the express requirements of Rule 3.850 and is oblivious to the substantial body of case law from this Court holding that courts must comply with the rule. As in Hoffman, this Court has "no choice but to reverse the order under review and remand," 571 So. 2d at 450, and order a full and complete evidentiary hearing on Mr. Valle's 3.850 claims.

ARGUMENT II

THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW MR. VALLE A REASONABLE AMOUNT OF TIME IN WHICH TO PURSUE CIVIL ACTIONS PURSUANT TO HOFFMAN. THE TRIAL COURT ALSO ERRED IN NOT REQUIRING THE DADE COUNTY STATE ATTORNEY TO PROVIDE A LIST OF

EXEMPTIONS AS REQUIRED UNDER CHAPTER 119 OF THE FLORIDA STATUTES. THE TRIAL COURT ALSO ERRED IN DISMISSING MANY OF MR. VALLE'S CLAIMS WITHOUT ALLOWING HIM TO AMEND HIS MOTION AFTER OBTAINING ALL PUBLIC RECORDS.

A. Failure to Allow Prosecution of Hoffman Suits

In his postconviction motion, Mr. Valle alleged that a number of state agencies outside of the jurisdiction of the trial court had failed to provide public records and that he had initiated civil suits in the appropriate counties. Both in his motion and during argument on his motion, counsel for Mr. Valle asked the trial court to allow him time to pursue those civil suits and the right to amend his motion after such records had been obtained (PC-R. 49-50). The trial court summarily denied Mr. Valle's postconviction motion without allowing Mr. Valle that opportunity. In Hoffman v. State, 613 So. 2d 405 (Fla. 1992), this Court was clear that the trial court should allow a capital defendant a reasonable amount of time within which to pursue civil actions to obtain public records from agencies outside of the jurisdiction of the trial court and a reasonable amount of time after obtaining such records to amend their postconviction motions. In this aspect, Hoffman was consistent with this Court's long-standing rule that capital defendants were entitled to public records, State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendvk v. State, 592 So. 2d 1076 (Fla. 1992).

Here the Court ruled on Mr. Valle's motion without ever allowing him to obtain public records from agencies outside of Dade County. The information sought by Mr. Valle was critical to his postconviction motion. It included the Florida Department of Law Enforcement's investigative file, the "1 -A" file. It included theretofore undisclosed

Department of Corrections records in the a storage room in the Florida State prison. Because the trial court denied Mr. Valle's motion without ever allowing him to complete his civil suits, he was deprived of his right to include the facts discovered in these materials in his postconviction motion. Access to some of that material was obtained after the circuit court had dismissed Mr. Valle's motion,* however, some of it has not, specifically, the FDLE "1-A" file.[3]

B. Failure to Require list of Exemptions

In its response to Mr. Valle's Chapter 119 requests, the Dade County State Attorney's Office asserted that a number of documents were exempt from disclosure. Though the State Attorney's Office submitted those documents for in camera inspection,[4] it refused to provide Mr. Valle with a list of the documents claimed to be exempt together with the statutory basis for the claimed exemptions, as required under Fla. Stat 119.07(2)(a). Despite Mr. Valle's objection to this procedure (PC-R. 65-66), the trial Court refused to direct the State Attorney to comply with Florida law.

This was error. It deprived Mr. Valle of the opportunity to be heard as to why such records were not exempt. This Court has not only held that there is a right to be heard on the legal issues presented in a postconviction motion, Hoffman, supra, it has specifically

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[2]In order to facilitate the speedy resolution of his Rule 3.850 motion, Mr. Valle continued to pursue public records, even after the 3.850 court had erroneously denied his motion, even though he was not reauired to do so.

[3]Mr. Valle's FDLE suit was voluntarily dismissed when this Court initially promulgated Rule 3.852,

[4]The State Attorney submitted these materials in an ex parte proceeding without any notice to Mr. Valle.

held that postconviction litigants have a right to be heard on the propriety of claimed exemptions from Chapter 119 disclosure. Jennings v. State, 583 So.2d 316 (Fla. 1991). Mr. Valle was entitled to a list of exemptions and a right to be heard.[5]

This matter should be remanded to the trial court with instructions to complete the Chapter 119 process and to allow Mr. Valle a reasonable amount of time following the receipt of public records within which to amend his postconviction motion.

C. Failure to Allow Mr. Valle to Amend his Motion

This Court has consistently extended the time period for filing Rule 3.850 motions after disclosure of Chapter 119 materials. Ventura v. State, 673 So. 2d 479 (Fla. 1996); Jennings v. State, 583 So. 2d 316 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano. In these cases, a period of sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials.

Mr. Valle should have been permitted to secure Chapter 119 compliance and allowed to amend once the requested records were disclosed. The court below denied him that opportunity both by refusing to allow him to complete his pending Hoffman civil actions before ruling upon his motion. Because the enactment of Rule 3.852, Fla.R.Crim.P. gives the 3.850 court jurisdiction to hear all outstanding Chapter 119 issues, this Court should remand Mr. Valle's case to the circuit court with so that Mr. Valle may obtain those records still outstanding and, within a reasonable amount of time thereafter, amend his postconviction motion.

'Because the State Attorney has even to this day failed to provide the information required under Fla. Stat. 119.07(2)(a), Mr. Valle cannot even present this Court with cogent argument as to why these records should not be exempt.

ARGUMENT III

THE TRIAL JUDGE ENCAGED IN EX-PARTE COMMUNICATIONS WITH THE STATE DURING THE PENDENCY OF MR. VALLE'S TRIAL. HE ALSO ENCAGED IN OTHER CONDUCT INDICATING A CLEAR BIAS IN FAVOR OF THE STATE. TRIAL COUNSEL KNEW OF THE CONDUCT AND YET FAILED TO REMOVE SAID TRIAL JUDGE. TRIAL COUNSEL HAD NO STRATEGIC REASON FOR THIS FAILURE. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT DOING SO. MR. VALLE WAS PREJUDICED THEREBY.

In support of this claim, Mr. Valle alleged that during the pendency of Mr. Valle's case, the Honorable Norman Gerstein, Mr. Valle's trial judge, engaged in ex-parte communications with counsel for the State. He alleged that Judge Gerstein engaged in ex parte communications with members of the prosecution team and that witnesses observed counsel for the state and the judge emerging from his chambers during trial discussing, what appeared to be, matters of some importance. Mr. Valle alleged that the jury could observe Judge Gerstein socializing with the multitude of Coral Gables police officers that were present daily in the courtroom, kissing the widow of the victim, and female police officers. He further alleged that Mr. Valle's trial counsel knew of this conduct, but failed to remove Judge Gerstein from Mr. Valle's case. He alleged that trial counsel decided, and intended, to disqualify Judge Gerstein, however, simply neglected to do so.

These allegations must be taken as true. See, Argument I. If they are proven, Mr. Valle would be entitled to the vacation of his sentence of death, The Code of Judicial Conduct requires that a judge disqualify himself if he has exhibited a bias in favor of a party by conducting ex parte communications with a party or otherwise exhibited bias or prejudice. Code of Judicial Conduct, Canon 3-A (4). Likewise, trial counsel at a minimum

is required to object and move for disqualification of a judge if he observes conduct that demonstrates judicial bias or becomes aware that ex parte communications had taken place with an opposing party. Strickland. This Court has correctly observed: [A] judge should not engage in any conversation about a pending case with one of the parties participating in that case. Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992) (emphasis added). "The most insidious result of ex parte communications is their effect [on the appearance of impropriety] of the tribunal." Id.

No tactical motivation was present, nor can be implied from counsel's inaction. Prejudice is presumed. Rose v. State, 601 So. 2d 1181 (Fla. 1992). Mr. Valle was entitled to an evidentiary hearing on this claim and thereafter relief. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

ARGUMENT IV

MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

In his petition, Mr. Valle made numerous factual allegations regarding the performance of his trial counsel. As more fully set forth in Argument III, Mr. Valle alleged that trial counsel witnessed at least two specific instances of judicial misconduct by the trial judge warranting disqualification yet failed to move for his recusal.

A. Unreasonable Introduction of Prison Behavior Evidence.

Mr. Valle alleged that trial counsel unreasonably presented prison behavior evidence which opened the door for the State to present evidence of Mr. Valle's alleged escape attempt. He alleged that trial counsel did so not because of any reasonable strategic decision, but solely because trial counsel believed that, because Mr. Valle had been awarded a new trial under Skipper v. South Carolina, 476 U.S. 1 (1986), he was required to present Skipper evidence during Mr. Valle's resentencing. Mr. Valle alleged that this belief was based upon trial counsel's ignorance of the law. Mr. Valle alleged, and the record reflects that the State then put on a massive rebuttal case, detailing numerous prior bad acts and exposing to the jury the fact that Mr. Valle had attempted to escape from death row. He also alleged that his sentencing jury recommended death based upon the evidence introduced through the State's rebuttal.

These allegation, when taken as true, would entitle Mr. Valle to relief. Trial counsel was not required to present Skipper evidence at resentencing simply because that had been the grounds for relief. Had he not presented Skipper evidence, the State would not have been able to introduce the massive rebuttal case. It was only because of trial counsel's erroneous beliefs that the jury heard this damaging evidence. Ignorance of the law is defective performance. Harrison v. Jones, 880 F.2d 1279 (11 th Cir. 1989). Merely labeling a decision one of strategy does not magically render representation effective. Horton v. Zant, 941 F.2d 1449 (1 1th Cir. 1991).

The prejudice from flowing from counsel's alleged deficient performance could not be clearer. The record contains an affidavit establishing that the jury relied on this evidence

in recommending a sentence of death (R. 884). Moreover, Mr. Valle need not show actual prejudice to be entitled to Rule 3.850 relief. He "needs to show only a reasonable probability that the result of the . ..proceeding would have been different" had resentencing counsel known the law and acted on it. Harrison, 880 F. 2d at 1283. Given the narrow 8-4 jury recommendation for death it cannot be said that there is no reasonable probability that had Mr. Valle's sentencing jury not heard the State's overwhelming rebuttal case, including evidence of Mr. Valle's allegedly serious escape attempt, the result would have been different. The swing of only two votes would have resulted in a recommendation for life which, given the substantial evidence which was, or should have been, presented in mitigation, would have been binding on the sentencing judge. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

B. Failure to Provide Support for Expert Testimony.

Mr. Valle alleged that his trial counsel failed to call corroborative witnesses who could have buttressed the expert testimony which trial counsel did present. He alleged that trial counsel knew that the trial court was concerned about the absence of such corroborative testimony, yet failed to take steps to alleviate the trial court's concerns. Mr. Valle alleged that trial counsel failed to adequately investigate Mr. Valle background and character and that had he done so he would have discovered further corroborative evidence. He alleged that trial counsel failed to properly prepare and examine those witnesses whom he did discover and that, had he done so, he would have been able to present at least some such evidence. He made specific allegations as to the evidence which could have been presented had counsel not rendered deficient performance. Counsel's minimal preparation

was prejudicially deficient performance. Cunningham v. Zant, 928 F. 2d 1006 (11 th Cir. 1991); Strickland.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 569 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 466 US. 903 (1990). "[I]n a capital case the attorney's duty to investigate al l possible lines of defense is strictly observed," Coleman v. Brown, 802 F.2d 1227, 1233(10th Cir.. 1986). Counsel's investigation of potential defenses must be reasonable. Pinnell v. Cauthron, 540 F.2d 938, 942 (8th Cir. 1976). "[T]he seriousness of the charges against [Mr. Valle] must be considered in assessing the reasonableness of [trial counsel's] decision." Chambers v. Armontrout, 885 F.2d 1318, 1320 (8th Cir. 1989)(en banc). The failure to investigate was deficient performance which prejudiced Mr. Valle by denying him an adversarial testing.

Trial counsel had a duty to present witnesses who would substantiate the assertions made by Dr. Toomer and Ms. Milledge and give a great weight to the credibility of their testimony. Instead, the jury was left with the impression that besides his twin sister, there were no other corroborative witnesses to relate to the jury the impact of the emotional abandonment of his childhood. These witnesses were readily available. Mr. Valle's mother could have corroborated the trauma of going from wealth to poverty and its impact on her family. Mr. Valle's teachers and coaches could have been called to corroborate Ms. Milledge's testimony and give it greater weight. Mr. Valle's wife could have testified as to Mr. Valle's mental state near the time of the crime and backed up the mental health expert's testimony regarding the pressure of his gambling habit, and the fact that he was a good

father. All of these factors are mitigating and go to support the mental health experts opinions that the judge found lacking as to the weight of their importance.

Given the fact that this Court held that the trial court had recognized that the evidence of Dr. Toomer and Ms. Milledge was mitigating in nature, but that it was outweighed by the evidence presented in aggravation, this evidence cannot be considered merely cumulative,

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 626 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison. The eighth amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we

> have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In everv case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added). The evidence presented in this claim demonstrates that the result of Mr. Valle's resentencing is unreliable.

Relief is proper.

ARGUMENT V

TRIAL COUNSEL KNEW OF, BUT DID NOT ARGUE EFFECTIVELY TO PREVENT, THE STATE FROM FILLING, ASSIST IN FILLING, MR. VALLE'S COURTROOM WITH AN OVERWHELMING PRESENCE OF UNIFORMED POLICE OFFICERS FOR THE PURPOSE OF INTIMIDATING THE TRIAL JUDGE AND JURY. OR EXCLUDING MEMBERS OF DEFENSE COUNSEL'S STAFF IN FURTHERANCE OF THIS IMPROPER ACTIVITY.

In support of this claim Mr. Valle alleged that throughout the Mr. Valle's sentencing proceeding, the State arranged the attendance of an overwhelming number of uniformed police officers. He also specifically alleged that members of Mr. Valle's trial counsel's staff were excluded from the courtroom by the state attorney's office so that more uniformed police officers could be present. He also alleged that these persons were placed in the courtroom for the purpose of intimidating the trial judge and jury and that they accomplished this purpose.

Once again, these facts must be taken as true unless conclusively rebutted by the record. See, Argument I. The only question which remains is whether the State may

exclude defense counsel's staff from the courtroom by filling the courtroom with its own supporters. The State may not interfere with the representation of a criminal defendant. United State v. Cronic, 446 U.S. 648 (1984). Moreover, Mr. Valle's rights were violated under Holbrook v. Flynn, 106 S.Ct. 1340 (1986).

In failing to effectively argue against the State's actions, trial counsel's performance was deficient. Counsel's failure to object to the State's conduct constitutes ineffective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir.), cert. denied. sub nom. Norris v. State, 115 S. Ct. 499 (1994). No tactical or strategic reason appears in this record to explain counsel's failure to object to the patently impermissible conduct.

These facts would entitle Mr. Valle to relief. He is entitled to present them at an evidentiary hearing. O'Callaghan.

ARGUMENT VI

THE TRIAL COURT IMPROPERLY DENIED MR. VALLE'S PETITION FOR WRIT OF CORAM NOBIS. NEWLY DISCOVERED EVIDENCE REVEALS THAT MR. VALLE WAS PREJUDICED BY IMPROPER JURY AND PROSECUTORIAL CONDUCT.

Mr. Valle alleged in his postconviction motion, and it is borne out by the record, that following his sentencing jury's eight to four death recommendation, Mr. Valle filed a petition for writ of error coram nobis wherein he alleged and supported with an affidavit: (1) that his sentencing jury had originally decided to recommend death by a margin of only seven to five; (2) that one of the jurors voting for a sentence of life imprisonment had, in the hope of being able to sway one more juror to vote for a life sentence and thus secure a life recommendation, urged the jury to take another vote; (3) that during the subsequent

deliberations jurors seeking to impose death adopted the State's improper argument that Mr. Valle would be eligible for parole in far less than 25 years and that Mr. Valle's attempted escape warranted the imposition of death; and, (4) that the judge could reject their death recommendation and impose life.

In its response, the State argued that these allegations failed to conclusively demonstrate that the entry of the judgment would have been prevented, as the result would have still been a seven to five recommendation of death, thus, they inhered in the verdict.

Mr. Valle, however, alleged in his motion that newly discovered evidence reveals that Judge Gerstein has admitted that he would have imposed a life sentence had the jury's recommendation of death been by a margin of no more than seven to five. Assuming that allegation to be true, see, Argument I, the State's only meritorious argument in opposition to Mr. Valle's Petition for Writ of Coram Nobis, and the only grounds upon which the trial court's, and this Court's, denial of that petition could have rested, no longer exists and Mr. Valle would have been entitled to relief.

Mr. Valle should have been given an evidentiary hearing to present support for the factual allegations contained in this claim. O'Callaghan.

ARGUMENT VII

THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury was given the following instruction regarding the cold, calculated, and premeditated aggravating factor:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Now, I instructed you that the defendant's conviction of first degree murder is insufficient in and of itself to require a finding that the homicide was cold, calculated and premeditated for the purpose of this aggravating circumstance.
>
> Killing with premeditation is the killing after a conscious decision to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of a premeditated intent to kill and the killing.
>
> The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. I instruct you for this aggravating circumstance to apply, the law requires there be heightened premeditation, that is a deliberate intent to kill that is more contemplative, more methodical and more controlled that the premeditation required for a conviction of first degree murder.

(R. 5994-5995).

This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Mavnard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. It was objected to at trial on the grounds of vagueness and overbreadth. An alternate instruction was submitted by Mr. Valle. The issue was raised on direct appeal with citation made to both Maynard, and Godfrev v. Georgia, 446 U.S. 420, 100 S. Ct. 1759 (1980). The United States Supreme Court has recognized the applicability of Espinosa to claims arising when a jury is presented with a cold, calculated, and premeditated instruction which is vague and overbroad. Hodges v. Florida, 113 S. Ct. 33 (1992).

Under no circumstances can the error be found to be harmless. Absent juror misconduct, the jury recommended death by only the narrowest of margins. Even ignoring such misconduct, the jury recommended death by a mere eight to four margin. A swing of only one or two votes would have resulted in a recommendation of a life sentence which, given the substantial mitigation in the record, would have bound the trial judge to impose a sentence of life. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Any harmless error analysis must also take into account that the trial court would have imposed a life sentence had the jury recommendation been seven to five in favor of death. In addition, it cannot be said that a jury would have found this aggravating circumstance under any definition. Indeed, under almost identical facts, this Court struck the cold, calculated and premeditated aggravating factor in Hill v. State, 473 So. 2d 1253 (Fla. 1985).

Though the circuit court held this claim to be procedurally barred, under James v. State, 615 So. 2d 668 (Fla. 1993), Mr. Valle was entitled to the retroactive benefit of the Essinosa decision because he had properly preserved this claim before the trial court and presented it on direct appeal.

ARGUMENT VIII

MR. VALLE WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED THREE SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Valle's jury was instructed on the aggravating factors of the murder was committed to disrupt or hinder the exercise of a governmental function or the enforcement

of laws (Fla. Stat. §921.141(5)(g)), the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody (Fla. Stat. §921.141(5)(e)), and the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties (Fla. Stat. §921.141(5)(j)), based upon the state's theory that Mr. Valle killed Officer Pena to prevent his arrest. This permitted impermissible "tripling" by the jury.

This Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Weltv v. State, 402 So. 2d 1139 (Fla. 1981). The jury in Mr. Valle's case was instructed on all of the aggravating factors listed above. The "tripling" of aggravating circumstances was flatly improper, The Florida Supreme Court has "repeatedly held that application of both of these aggravating factors is error where they are based on the same essential feature of the capital felony," Bello v. State, 547 So. 2d 914, 917 (1989). These aggravating circumstances therefore were improperly doubled in this case.

The jury, a co-sentencer, was allowed to rely upon all of these aggravating factors in reaching a recommendation for death. Mr. Valle's sentencing jury still voted for death by the narrowest of margins. The jury is a co-sentencer in Florida, and must be given adequate jury instructions. Johnson v. Singletary, No. 81, 121, Slip Op. at 2 (Fla. Jan. 29, 1993); Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992).

This type of "doubling" renders a capital sentencing proceeding fundamentally unreliable and unfair. See Weltv; Clark. It also results in an unconstitutionally overbroad

application of aggravating circumstances, Godfrey v. Georgia, 446 US. 420 (1980), and fails to genuinely narrow the class of persons eligible for death. The result is an improper capital sentence.

In James this Court held: (1) Eseinosa v. Florida, 112 S. Ct. 2926 (1992), constituted new law under Witt v. State, 387 So. 2d 922 (Fla.), cert denied 101 S.Ct. 796 (1980); and, (2) where a capital defendant has objected to overly broad or misleading jury instructions and has pursued those objections upon appeal, it "would not be fair to deprive him of the Espinosa ruling." Because Mr. Valle's trial counsel did object to the trial court's refusal to

instruct the jury that these aggravating circumstances should merged, and raised this issue on direct appeal, it would similarly "not be fair" to deprive Mr. Valle of the Espinosa decision.'

Under no circumstances can the State show the error to be harmless beyond a reasonable doubt, The jury recommended death by a mere eight to four margin. A swing of only two votes would have resulted in a recommendation of a life sentence which, given the substantial mitigation in the record, would have bound the trial judge to impose a sentence of life. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Any harmless error analysis must also take into account that the trial court would have imposed a life sentence had the jury recommendation been seven to five in favor of death.

These three aggravating factors were the feature of the State's case at sentencing. During sentencing, the State outlined each of these factors individually on a large display which it showed to the jury. It argued that the jury should consider each of these factors individually even though it knew that this was contrary to Florida law. Under these

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[6] Mr. Valle is fully aware of this Court's decision in Jackson v. State, 648 So. 2d 85 (Fla. 1994). To the extent that the United States Supreme Court's decision in Esninosa was considered in resolving Jackson, it is respectfully submitted that the Jackson decision was reached in error. Espinosa held that under Florida law, the penalty phase jury was a sentencer for eighth amendment purposes and accordingly it must receive constitutionally adequate jury instructions defining aggravating circumstances. This Court has repeatedly held that it is improper for the sentencer to assign separate weight to these three aggravating circumstances where they are supported by a single set of facts. Mr. Valle's jury was instructed that each of these aggravating factors could be assigned separate weight. There is simply no possible distinction between a jury which might give weight to an improper aggravating factor because it has been left unguided, as in Espinosa, and a jury who has been expressly directed to give weight to an improper aggravating factor, as is the case here.

circumstances, the State simply cannot demonstrate that this gross Eighth amendment error was harmless beyond a reasonable doubt, Clemons v. Mississippi, 110 S. Ct. 1441 (1990).

Under James, this claim was not procedurally barred and Mr. Valle was entitled to relief.

ARGUMENT IX

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. VALLE'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, MR. VALLE'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR.

At the time of Mr. Valle's trial, sec. 921.141 (5), Fla. Stat. (1987), provided:

> AGGRAVATING CIRCUMSTANCES. -Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody.
>
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
>
> (i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties

This Court has narrowed the application of subsection (i), holding that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). This Court requires trial judges to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So, 2d 490, 493 (Fla. 1985). Likewise, the trial court properly found that the provisions of subsections (e), (g), and (j), were unconstitutionally duplicative. Indeed, the trial court considered the three aggravating circumstances as only a single circumstance.

In a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutional aggravating factor, even if other, valid aggravating factors obtain. Richmond, 113 S. Ct. at 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.

In Florida, the jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa v.

Florida, 112 S. Ct. 2926, 2928 (1992). This indirect weighing of the facially vague and overbroad aggravator violates the Eighth and Fourteenth Amendment. Id. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing construction. Id. at 2928.

Espinosa was a repudiation of this Court's prior reasoning that the judge's consideration of the narrowing construction cured the facially vague and overbroad statutory language. See Smalley v. State, 546 So. 2d 720 (Fla. 1989); Suarez v. State, 481 So. 2d 1201 (Fla. 1985); Deaton v. State, 480 So. 2d 1279 (Fla. 1985); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Espinosa was a change of "fundamental significance." Witt v. State, 387 So. 2d 922, 931 (Fla. 1980). Richmond and Espinosa have established that Mr. Valle's sentence of death rests on fundamental error. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. lohnson, 18 Fla. L. Weekly 55, 56 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. lones, 377 So. 2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Valle's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224

(Fla. 1988). Unfortunately, Mr. Valle's jury received wholly inadequate instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. This was fundamental error. State v. Jones.

Moreover, the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. It impinges upon a liberty interest. Thus, the application of the statute violated due process. State v. Johnson, 18 Fla. L. Weekly at 56. Mr. Valle is entitled to Rule 3.850 relief.

Under no circumstances can the error be found to be harmless. The jury recommended death by a mere eight to four margin. A swing of only two votes would have resulted in a recommendation of a life sentence which, given the substantial mitigation in the record, would have bound the trial judge to impose a sentence of life. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Any harmless error analysis must also take into account that the trial court would have imposed a life sentence had the jury recommendation been seven to five in favor of death.

ARGUMENT X

MR. VALLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE DURING HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL INEFFECTIVELY FAILED TO OBJECT TO THE STATE'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. TRIAL COUNSEL FAILED TO DISCOVER AND REMOVE PREJUDICED JURORS. THE JURORS' PREJUDICES ADVERSELY AFFECTED THE OUTCOME OF BOTH THE GUILT AND PENALTY PHASES OF MR. VALLE'S TRIAL.

At resentencing, trial counsel recognized that the State was utilizing its peremptory challenges in a racially biased manner. Trial counsel attempted to object, but did so ineffectively, thus failing to preserve the issue for appeal. This issue was meritorious. Though this Court addressed the issue in a footnote to its opinion on direct appeal, it did so without the proper record required under Neil and Slappy. Indeed, Slappy and Neil mandate relief under such circumstances. Had counsel performed effectively, Mr. Valle would have been entitled to relief. He is entitled to relief now.

ARGUMENT XI

MR. VALLE'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. VALLE TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR. VALLE TO DEATH.

Mr. Valle's jury was improperly instructed that mitigating factors must outweigh aggravating factors. Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Valle's capital proceedings. To the contrary, both the court and the prosecutor shifted to Mr. Valle the burden of proving whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Valle herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement. Defense counsel raised a timely objection to the errors.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullanev v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985),

Hitchcock v. Duaaer, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Prosecutorial argument and judicial instructions at Mr. Valle's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Valle, but also unless Mr. Valle proved that the mitigation he provided outweighed and overcame the aggravation, The trial court then employed the same standard in sentencing Mr. Valle to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard obviously shifted the burden to Mr. Valle to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The instructions gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

The standard which the prosecutor argued, upon which the judge instructed Mr. Valle's jury, and upon which the judge relied is a distinctly egregious abrogation of Florida law and therefore the Eighth Amendment. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious"). In this case, Mr. Valle, the capital defendant, was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his penalty phase instructions to the jury, after a timely objection by trial counsel, the judge explained that the jury's job was to determine if the mitigating circumstances outweighed the aggravating circumstances:

> You are instructed that this evidence is presented in order that you might determine first whether sufficient aggravating circumstances exist that would justify the death penalty and, secondly, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 3708-3709).

There can be no doubt that the jury understood that Mr. Valle had the burden of proving whether he should live or die. According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Therefore, Mr. Valle is entitled to relief in the form of a new sentencing hearing in front of a jury, due to the fact that his sentencing was tainted by improper instructions.

ARGUMENT XII

DEFENSE COUNSEL'S FAILURE TO ARGUE EFFECTIVELY CONSTITUTED DEFICIENT PERFORMANCE ALLOWING THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS WHICH RENDERED MR. VALLE'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The State introduced non-statutory aggravating factors regarding the possibility of parole with the imposition of a life sentence and Mr. Valle's alleged lack of remorse. The State alleged at sentencing that if the court imposed a life-sentence with the twenty-five calendar-year minimum-mandatory term required by Section 775.082(1), Fla. Stat. (1987), Mr. Valle would be eligible for parole "some 15 years and several months from now." The lead prosecutor, Mr. Laser also represented to the court that "twenty-five years, six months from the day he is a sentenced prisoner, he is eligible for parole", and the second prosecutor, Mr. Rosembaum, stated that "the parole commission told us that." (R. 4682, 4686, 4690).

When these assertions were challenged by trial counsel Mr. Laser refused to "be cross-examined," and the court declined to "order the state to divulge the source of the state's information." (R. 4694-95). Following a recess, Mr. Laser proffered a conversation with a parole commissioner who was "of the opinion and would testify as an expert and member of the parole commission that this defendant under these circumstances would be eligible for parole on the fifth of April of the year 2003, 25 years and one day after incarceration." (R. 4700-01).

The trial court did not order the State to produce this unnamed commissioner as a witness and allowed cross-examination of defense witnesses, Mr. Buckley and Dr. Fisher, through hypothetical questions regarding Mr. Valle's eligibility for parole fifteen years from the date that a possible life sentence would be imposed in the case. (R. 471 O-l 1, 4945-53).

The possibility of parole in a capital case is an improper consideration. Norris v. State, 429 So.2d 688 (Fla. 1990); Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 464 U.S. 1074 (1984); Miller v. State, 373 So.2d 882 (Fla. 1079). This Court has specifically stated:

> "[t]here is no place in our system of jurisprudence for this argument, which was patently and obviously made for the purpose of influencing the jury to recommend the death penalty for fear that otherwise the defendant, in due course, will be released from prison and will kill again."

Teffeteller v. State, 439 So.2d at 845.

The statements of Mr. Valle's juror which appear of record demonstrate that the possibility of parole in Mr. Valle's case greatly influenced the jurors' decision to impose a death sentence. Following a initial vote for a 7-5 vote for a death sentence and a request for a second vote, "there were subsequent discussions among jurors, during which other jurors, in urging a death recommendation, argued that Mr. Valle would be paroled in if given a life sentence." (R. 889). The trial court's allowance of trial defense counsel's instruction to the jury that "possibility of parole cannot be considered... as a reason for imposing a death sentence." (R. 874, 6000) did not ensure that the subject of parole would not be considered at all and Mr. Valle was greatly prejudiced.

The trial court permitted the State to comment on Mr. Valle's alleged lack of remorse throughout the sentencing hearing despite well settled law that lack of remorse evidence may be "presented to rebut nonstatutory mitigation evidence of remorse presented by a defendant." Walton v. State, 547 So.2d 666, 625 (Fla. 1989) (emphasis added). Detective Wolfe testified on direct examination in the State's case-in-chief:

> Q. Mr. Wolfe, during your conversation with the defendant on April 4th of 1978, did he ever express any remorse for killing Officer Pena?
> A. No, sir, not to me.
> Q. Was he ever upset about what he did?
> A. No, sir.
> Q. Was he ever upset when he talked to you when you talked to him that day about what he did in Coral Cables?
> A. No, sir.

(R. 4068-69).

Mr. McClendon and Mr. Buckley testified that Mr. Valle had expressed concern over the family and friends of the victim and how they were coping with the victim's death. (R. 4203, 4597). However, neither defense witness was cross-examined about these statements.

The prosecution stated the following during closing arguments:

> "Mr. Buckely says, 'In 1981, I asked the defendant if he felt remorse for the victim's family.' He said, 'Yes'. Is that we prove remorse? It's been ten years now. Have we seen any evidence of remorse? Was there a letter? Was there a phone call? Was there a word spoken saying I'm sorry for the terrible things I did? Was there a sound uttered by the defendant?"
>
> ***
>
> "He's got ice water in his veins. Almost like, you know, all in a days work. Keep myself out of jail. Kill two officers, walk back to my car and go home. No remorse, no concerns."

(R. 5882, 5930). Trial defense counsel's objections to these remarks were overruled by the trial court. (R.6042, 6048).

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Mavnard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Valle's constitutional rights. Penrv v. Lynaugh, 108 S.Ct. 2934 (1989).

Though counsel objected to this misconduct, he failed to present adequate grounds for his objection. In failing to effectively argue against the State's actions, trial counsel's performance was deficient. Counsel's failure to object to the State's conduct constitutes ineffective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir.), cert denied sub Q Norris v. State, 115 S. Ct. 499 (1994). No tactical or strategic reason appears in this record to explain counsel's failure to object to the patently impermissible information that the State injected into Mr. Valle's penalty phase. Relief was proper.

ARGUMENT XIII

COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE PROSECUTORS' MISCONDUCT DURING THE COURSE OF MR. VALLE'S CASE WHICH RENDERED MR. VALLE'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE STATE PRESENTED UNCHARGED COLLATERAL CRIMES IMPROPER ARGUMENT TO THE JURY. THE TRIAL COURT'S ACTIONS DID NOT PERMIT COUNSEL TO BE EFFECTIVE.

Trial counsel's performance was deficient to the extent that he failed to object and/or failed to effectively argue against the rampant prosecutorial misconduct which occurred in this case. The trial court's repeated allowance of the improper prosecutorial comments also rendered trial counsel ineffective. As a result, Mr. Valle's sentencing was dominated with improper and inflammatory evidence and comment.

The prosecutors' improper comments and arguments both individually, and cumulatively, deprived Mr. Valle of his rights under the Sixth, Eighth, and Fourteenth Amendments. Due process and the right to a fair trial may be breached when a prosecutor engages in improper argument. United States v. Evster, 948 F.2d 1196 (11 th Cir. 1991).

The prosecution utilized Mr. Valle's prior death sentence as a strategic tactic. The jury was informed of the 1981 proceedings on cross-examination of defense witnesses:

> Q. Mr. McClendon[,] I'm certain you recall the sentencing proceeding on this matter in 1981.
> A. Yes, sir.
> ***
> Q. [Sheriff Buckley,] in 1981, you were going to testify that the defendant would be a
> model inmate; is that correct?.
> ***
> Q. [Dr. Toomer], Did you have occasion to evaluate Mr. Manuel Valle here in court?
> A. Yes, I did.
> Q. When did you do that evaluation?
> A. My most recent evaluation of Mr. Valle was during the month of September of this past year.
> Q. Had you done an earlier evaluation of Manny?
> A. Yes, I did. During the 1981 year.
> ***

> Q. [Mr. Ted Key], When the defendant...was at Florida State Prison, did you review his file to see if he was psychologically screened.
> A. Yes, sir.
> Q. Was he screened?
> A. He was. He received psychological screens on both his initial arrival and, as a result, returned back in 1981.

(R. 4286, 4674, 5317, 5639).

The despite defense counsel's objections, the trial court repeatedly denied defense motions for mistrials.

One last effort was made by the prosecution to comment on Mr. Valle's prior death sentence before the trial court imposed the current death sentence:

> [T]here is history to this case.
> With all of its wrongdoing,...this case is here, not for the first time, not for the second time, but for the third time. And I'll grant you that perhaps thee should be no value given to the fact that the other jurors in the past two heard the facts of this case have made similar recommendations, but at some point we have to say to ourselves, the voice of the community by a two-third or greater majority, has three times spoken upon the matters that were presented to them, saying that this type of case in which they would recommend the death sentence...

(R. 6139).

The prosecutor, repeatedly and improperly presented evidence of collateral uncharged crimes allegedly committed by Mr. Valle. Trial counsel objected and moved for a mistrial. The trial court denied counsel's motion, The prosecutor's argument was so unfairly prejudicial that a mistrial was the only proper remedy. Garron v. State, 528 So. 2d 353 (Fla. 1988).

During the cross-examination of Ms. Milledge, the prosecution asked her the type of unlawful crimes Mr. Valle committed to fund his gambling habit, "Did he ever describe any types of unlawful or improper methods of funding his gambling?...Tell me about it. What do you remember about the other offenses." (R. 5105). Additionally, the prosecution introduced, by pretense of cross-examination, Detective Toledo's testimony from the defendant's 1976 violation of probation of probation hearing, where the defendant allegedly attempted to run him down following a traffic stop. This witness was never cross-examined at the violation of probation hearing nor when he testified at the 1978 trial. At the conclusion of the 1978 proceedings, the State announced that it would not file an information charging Mr. Valle with any crimes that arose from that incident and stated at the resentencing that charges were not filed because "at that time he already had a first degree murder charge against him," (R.3639-40). Ironically, the prosecutor admitted that he did not believe that Detective Toledo would be a "good witness" for him if called to testify. (R.4119-20). The trial court also noted that Detective Toledo "does definitely have an expressed bias." (R. 4120). The misuse of the probation-violation case violated the requirements described in Hildwin v. State, 531 So.2d 124 (Fla. 1988), aff'd. S . (1989), for the introduction of uncharged acts of misconduct by direct evidence.

The prosecution, in violation of Florida law, commented to the trial court and jurors regarding Mr. Valle's alleged lack of remorsefulness during closing argument. A purported lack of remorse is inadmissible in capital proceedings in Florida. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1984). The prosecution made repeated and blatant remarks urging the jury to consider the character of the victim, the devastating effects the victim's death had on the

surviving family members, and the "unfairness" of the sentencing proceedings to vindicate the victim's death:

> There are lots of people in this courtroom. You don't need to look very far to know there are people on both sides who have shed a lot of tears, maybe some on the witness stand, some just in the audience, some just at home over the last ten years.
> . . . You have to put that type of sympathy out of your mind and consider why it is that one person is crying on the witness stand and one person is crying in the audience. The reason for that, the fault lies strictly because of the actions of Manuel Valle on April 2nd of 1978.
> . . . if you want to place the fault somewhere, the fault lies there; that his sister cries, that widows cry, that children cry or that parents cry.

(R.5875-76).

> There is something inherently unfair about this proceeding. Nobody got up here and argued to you about whether or not Officer Pena was salvageable; whether or not there [were] aggravating and mitigating circumstances in his life that caused him to be executed. The system has its own special ways of working, but nobody was here to beg for mercy for the officer or do anything else...

(R.5903).

> Lou Pena was a Coral Gables cop. He was doing his normal job, a lazy afternoon patrolling the streets, protecting the people of Coral Gables, earning a living, supporting his family.
>
> * * *
>
> Remember that, on April 2nd, 1978 the defendant was the judge, jury, and assassin of a 100 percent innocent man, Lou Pena. There were no lawyers representing Lou Pena. There were no side bars, no experts on whether Lou Pena would be a good father.

(R. 5919, 5932-33).

"A prosector's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty

to strike foul ones.'" Rosso v. State, 505 So. 2d 61 1 (Fla. ___ DCA 1987) (quoting Beraer v. United States, 295 U.S. 78 (1935)). The Rosso case defines a proper closing argument:

> The Florida supreme court (sic) has summarized the function of closing argument:
>
> > The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso, 505 So. 2d at 614.

This argument was intended only to inflame the jury. The remarks were of the type that the Florida Supreme Court has found provoke "an unguided emotional response," a clear violation of Mr. Valle's constitutional rights. Penry v. Lynaugh, 108 S. Ct. 2934 (1989). The Florida Supreme Court has held that when improper conduct by a prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990).

This evidence was presented to Mr. Valle's jury as a result of his counsel's deficient performance and the trial court interference. There is a reasonable probability that had counsel's performance not been deficient, the outcome of Mr. Valle's sentencing would have been different. Mr. Valle is entitled to relief. Strickland.

ARGUMENT XIV

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO EFFECTIVELY ARGUE THAT MR. VALLE WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL

BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion. thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty, Proffitt v. Florida, 428 U.S. 242 (1976). On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F. 2d 1438, 1449 (1 1th Cir. 1986). Where that finding is clearly erroneous, the defendant is "entitled to a new resentencing," Id. at 1450. Mr. Valle's trial and appellate counsel failed to effectively present this basic argument. Though the evidence supporting statutory and non-statutory mitigating circumstances was uncontradicted, counsel conceded that statutory mitigating factors had not been established. Valle IV, at 48. That concession was in error.

The sentencing judge in Mr. Valle's case found no mitigating circumstances. Finding three aggravating circumstances, the court imposed death (R3. 899-908, 6191-6192). The court's conclusion that no mitigating circumstances were present, however, is belied by the record.

> Mitigating evidence must at least be weighed in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence.

Santos v. State, 16 F.L.W. 633, 634 (Fla. 1991).

During the resentencing, the defense presented a number of witnesses who testified to statutory and nonstatutory mitigating. The state presented no witnesses to rebut their testimony.

Unrefuted testimony by Ms. Milledge and Georgina Martinez established that Mr. Valle's neglected and abusive childhood, his heroic efforts in saving another from drowning, his good performance in school, also his deep remorse for his actions. Lester Cole testified as to Mr. Valle's remorse for his stealing checks for gambling money.

Mr. Valle's friends, Robert Digarcia and Robert Castillo testified about their experiences high school. Dr. Jethro Toomer, a psychologist, offered unrefuted evidence that Mr. Valle suffered from transient situational personality disorder called gross reaction stress. He testified about the reaction that Mr. Valle had in stressful situations and the effect of his abusive childhood in such situations. All of this statutory and non-statutory mitigation was present. In Mr. Valle's case, the trial court, without the benefit of any contrary evidence on the record, discarded this unrefuted mitigation.'

Each of these constitutes a mitigating factor. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The jury and judge were required to weigh and give effect to all of Mr. Valle's mitigation against the aggravating factors. According to the trial court, no mitigating factor existed "to a degree which would cause it to mitigate the crime or the sentence." (R3. 907). Clearly, throughout the resentencing the court misconstrued the law to believe that

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'As much mitigation as was presented, it was but the tip of the iceberg. Much more was readily available and not presented because of the failure of counsel to fully investigate and prepare. Cunningham v. Zant, 928 F. 2d 1086 (11 th Cir. 1991).

mitigation had to be relevant to the time period of the crime. During Ms. Milledge's testimony the court cautioned defense counsel:

> THE COURT: Do you think you can like get to more relevant things pretty soon.
>
> Ms. Georgi: Your Honor, I object to the Court's and the prosecutor's indication that this is somehow not important testimony.
>
> THE COURT: Did I say it wasn't important? I said more relevant. If you are going to instruct every time the Court-if you are good going to object every time the Court will have an instruction, I have a problem. I have a right to limit what the Court believes is repetitive or redundant or potentially relevant. So, I'm just giving you forewarning to try to get on more relevant areas.

(R3. 5046).

Obviously, Mr. Valle was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 462 U.S. 862, 879-80 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 US. 586 (1978).

ARGUMENT XV

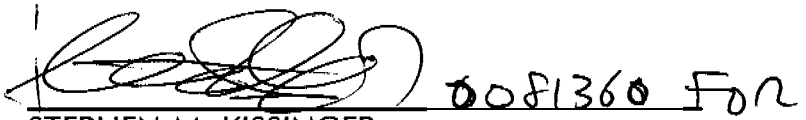
MR. VALLE SHOULD BE ALLOWED TO AMEND HIS POSTCONVICTION MOTION, INCLUDING, BUT NOT LIMITED TO, CLAIMS XV, XVI, XVII, XVIII, AND XIX, TO INCLUDE FACTS AND CLAIMS ARISING FROM, OR RENDERED VIABLE BY, MATERIALS OBTAINED THROUGH CHAPTER 119.

The circuit court denied Mr. Valle's postconviction motion despite the fact that throughout his motion, Mr. Valle alleged that he was unable to further plead due to the fact that state agencies had withheld public records. The court's denial was improper. The factual basis for many of the claims was set forth elsewhere in Mr. Valle's motion, e.g. Claims **II, VI, VII, VIII,** and incorporated by reference into the latter claims. Moreover, Mr. Valle should have been allowed to complete his efforts to obtain public records and to amend his motion to include claims and/or supplement claims based upon facts discovered or rendered viable through the Chapter 119 process, even though some claims contained only claim headings and the allegation that public records had not been received. Ventura ; Jennings; Engle; Provenzano. In Ventura, the defendant began his motion with the allegation that he had been unable to obtain public records, but included many claims which contained nothing but the claim heading. This Court held that Mr. Ventura was entitled to obtain outstanding public records and, after public records had been received, to amend those claim headings to include relevant facts, The same result is required here. Mr. Valle should be allowed to complete the public records process and thereafter to amend his postconviction motion.

CONCLUSION

Based on the record and the arguments presented herein, Mr. Valle respectfully urges the Court to reverse the lower court's order, order a full evidentiary hearing, and vacate his unconstitutional convictions and sentences, or, in the alternative, to reverse the lower court's order, to order an evidentiary hearing on Mr. Valle's Chapter 119 Claim, to allow Mr. Valle a period of 60 days after the receipt of all public records to which he is entitled to amend his Rule 3.850 motion.

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 11, 1997.



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