IN THE SUPREME COURT OF FLORIDA

TERANCE VALENTINE,

Appellant,

v.

Case No. SC10-1463
Lower Tribunal No. 88-12996

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Terance Valentine was convicted of the 1988 first-degree murder of Livia Romero, the attempted first degree murder of Ferdinand Porche, and other related offenses, and sentenced to death. Valentine v. State, 616 So. 2d 971 (Fla. 1993). Following retrial due to an error in jury selection, the same convictions and sentences were imposed. On appeal, the attempted murder conviction was vacated, but the other convictions and death sentence were affirmed. Valentine v. State, 688 So. 2d 313 (Fla. 1996), cert. denied, 522 U.S. 830 (1997). This Court described the following facts in its initial opinion:

> Livia Romero married Terance Valentine while she was a teenager in Costa Rica and the couple emigrated to the United States in 1975, settled in New Orleans, and adopted a child. After seeking to divorce Valentine in 1986, Romero married Ferdinand Porche and the family moved to Tampa, where they began receiving telephoned threats from Valentine. On September 9, 1988, Valentine armed himself, forced his way into the family's home, wounded Porche, drove both Romero and Porche to a remote area and shot them. Romero survived and immediately told police Valentine was her assailant.
>
> Several weeks after being released from the hospital, Romero began receiving telephone calls from Valentine, which she taped using a telephone and recorder supplied by police. Valentine was eventually arrested and charged with armed burglary, kidnapping, grand theft, first-degree murder and attempted first-degree murder. His motion to suppress a conversation taped on November 7 was denied; an edited tape was played for the jury; and the court subsequently declared a mistrial after the jury was unable to reach

a unanimous verdict.

The entire fifteen-minute tape was played for the jury on retrial. Additional evidence included Romero's testimony and that of Porche's neighbor, who testified that on September 9 he saw two men sitting in a faded red and white or red and gray Ford Bronco parked opposite his house between 1 and 3 p.m. Nancy Cioll, a friend of Valentine's and Romero's, testified that about two weeks after the killing, Valentine visited her driving a maroon, gray and black Ford Bronco. She said he confessed to the shootings, demonstrated how he had shot Romero, and said he had made a mistake leaving Romero alive. Valentine's alibi defense that he was in Costa Rica at the time of the shootings was disbelieved by the jury and he was convicted on all counts. During the penalty phase, Valentine represented himself and called his daughter and two friends to testify on his behalf.

Valentine, 616 So. 2d at 972. In the appeal following the retrial, the Court recited the trial court's description of the crimes:

On September 9, 1988, Ferdinand Porche returned to his home in mid-afternoon expecting to meet his pregnant wife and small child. Instead he was greeted by a bullet in the back which [severed his spinal cord and] rendered him paralyzed from the waist down. Mr. Porche was then confronted by Mr. Valentine who announced "this is my revenge." Mr. Porche was forced to crawl into a bedroom where he found his wife nude, bound, and gagged and his baby crying and covered in blood. Mr. Valentine then pistol whipped Mr. Porche. Mr. Porche's face was lacerated, his jaw was broken, and several teeth were knocked out. According to the medical examiner there were at least three separate blows to Mr. Porche's face. After administering this beating Mr. Valentine made his purpose clear, announcing, "I'm gonna kill you, but you're gonna suffer. This is not going to be easy." Further tortuous acts included stabbing Mr. Porche in the buttocks--the knife stopping only because it struck bone, kicking Mr. Porche in the chest, and dragging him after he was bound hand and foot with

> [baling] wire. The medical examiner testified that all of the above injuries occurred while Mr. Porche was alive, that none was immediately life threatening, and none would immediately result in a loss of consciousness. Mrs. Porche testified that Mr. Porche told her he was in so much pain that he did not know why he did not lose consciousness. Mrs. Porche testified she could feel him touch her as if to reassure her while they were in the back of the Blazer being transported [to an isolated area].
>
> While the fatal gunshot resulted in near instantaneous loss of consciousness and death, the ordeal leading up to his death was quite lengthy. Mr. Porche was beaten and degraded in his home. Trussed like an animal he was kidnapped and taken on a nine-mile trip to his slaughter. Either due to the gunshot wound to his spine or through the stress of the ordeal Mr. Porche lost control of his bowels and was covered with his own excrement.
>
> Paralyzed and bound hand and foot with wire there was nothing Mr. Porche could do to save himself. Nor was there anything he could do to protect his wife, who he knew was the ultimate object of Mr. Valentine's barbarous intent. Nor could he know what would happen to his ten-month-old daughter or what would become of Mrs. Porche's adopted child. The horror, terror and helplessness that Ferdinand Porche experienced prior to being shot in the eye at point blank range are evident.

Valentine, 688 So. 2d at 315-16.

At the 1994 trial, Livia Maria Romero testified that she married Valentine in Costa Rica in 1973, and they came to the United States in 1975 (DA. V7/464-67).[1] They lived in Miami for over a year then moved to New Orleans (DA. V7/467). They adopted a child, but it was not a happy marriage; Valentine was

[1] Record cites with the "DA." designation refer to the record on appeal from the 1994 trial and sentencing. See Valentine v. State, Florida Supreme Court Case No. 84472.

physically and emotionally abusive (DA. V7/468-477). Valentine travelled frequently for work and ultimately they separated; Romero tried to divorce him while he was down in Costa Rica, and she believed that she had (DA. V7/477-78, 484).

Romero met Ferdinand Porche in 1983 and in December, 1986, they married then moved to Tampa (DA. V7/484-86). The daughter she and Valentine had adopted came with her and Porche to Tampa; she and Porche also had a daughter born in October, 1987 (DA. V7/487, 507). Valentine was very angry about her relationship with Porche, and his threatening letters to her were admitted into evidence (DA. V7/485-87, 500-03). She testified she did not tell Valentine about the move, that she did not know where Valentine was or how to contact him at that time, and did not want to ever see him again (DA. V7/487). However, at some point, Valentine obtained her phone number, and started making angry, threatening calls to her in December, 1987 (DA. V7/506-08). The calls continued until September 9, 1988, when Valentine showed up at her house to carry out his vicious threats (DA. V7/508). She had not seen Valentine for two to three years by that time (DA. V7/509).

On cross examination, Romero testified that she married Porche in Harvey, Louisiana on December 2, 1986 (DA. V10/956-57). She had divorced Valentine in the same parish, Jefferson

(DA. V10/961). She had gone to an attorney in November, 1985, seeking a divorce, and the attorney had given her a document indicating the divorce was final in November, 1986 (DA. V10/961-62). However, the defense admitted certificates from Jefferson Parish which showed there was no record of her divorce from Valentine or her marriage to Porche (DA. V10/966).

At the 1994 penalty phase, Valentine waived the advisory jury recommendation and presented his mitigation directly to the trial judge (DA. V16/1801-15). The defense offered three witnesses: Iris Sterling, a long-time family friend from Costa Rica (DA. V16/1821-28); Francis Pineda, Valentine's older sister (DA. V16/1828-41); and Emigrey Rios, another family friend (DA. V16/1842-44). At a subsequent hearing, the court accepted a stipulation from the parties that Dr. Michael Gamache had evaluated Valentine and would testify that Valentine had a good prison record and was capable of adjusting to incarceration and prison life (DA. V19/217). The court also agreed to take judicial notice that the bailiffs and court personnel indicated that Valentine was well behaved during trial (DA. V19/218-19).

The sentencing order reflects that the court found four aggravating factors: a prior violent felony conviction based on the attempted murder conviction; committed during a burglary/kidnapping; heinous, atrocious or cruel; and cold,

calculated and premeditated (DA. V3/491-95). The court gave slight weight to the mitigating factors found, including Valentine's lack of prior violence, Valentine's work history and skills that could contribute to the prison system, Valentine's large family that would continue to love and support him, and Valentine's cooperation at his arrest and behavior as a model prisoner (DA. V3/496-99).

Following this Court's affirmance, the United States Supreme Court denied review on October 6, 1997. Valentine v. Florida, 522 U.S. 830 (1997). Postconviction review was initiated with the filing of a "shell" motion on May 28, 1998 by the Office of Capital Collateral Regional Counsel - Middle Region (V1/75-103). CCRC-M was permitted to withdraw and registry counsel Nick J. Sinardi was appointed to represent Valentine (V2/222-23). A motion to vacate was filed (V2/291-V4/724), which included Issue VI, asserting prosecutorial misconduct (V2/320-29), and Issue XI, asserting ineffective assistance of counsel (V2/338-59). The State responded (V4/733-V5/891), and a hearing was held on August 1, 2002 pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), before the Honorable Rex Barbas (V15).

Following the hearing, the court entered an Order denying Issue VI as procedurally barred (V5/912-913) and granting an

evidentiary hearing on some aspects of Valentine's ineffective assistance of counsel claim (V5/915-921). The subclaim asserting that trial counsel had been ineffective for failing to object to prosecutorial misconduct was summarily denied as refuted by the record, but a hearing was granted as to counsel's failure to object to one statement in the guilt phase closing argument regarding Valentine having called his family after the crime, despite the testimony of some family members denying any contact (V5/918-919). Valentine was later permitted to amend his previously denied claim regarding an alleged Vienna Convention violation and was granted a hearing on the claim as amended (V6/1069, 1080-84).

At Valentine's request, Mr. Sinardi was discharged, and Daniel Daly was appointed to represent him (V8/1460-61, 1515, 1519). An amended motion to vacate was filed which modified one claim and added a claim alleging that execution by lethal injection was unconstitutional (V1522-25). After another Huff hearing on January 7, 2007, the court denied the modified claim and denied the lethal injection claim without prejudice, giving Valentine the opportunity to amend the claim with facts relating to the December, 2006 execution of Angel Diaz (V8/1583-85).

Mr. Daly thereafter moved to withdraw as counsel, noting threats and accusations that had been leveled against him by

Valentine (V8/1586-88). The court permitted the withdrawal and appointed Valentine's current attorneys at CCRC-M (V9/1650-52). Another amended motion was filed, which repeated the allegations from the first substantive motion as to Issue VI (V9/1709-17) and Issue XI (V9/1726-47); new claims asserting ineffective assistance of counsel at penalty phase, cumulative error, and possible incompetency to be executed were also presented (V9/1747-59). The evidentiary hearing was expanded to include the new Issue XII, alleging counsel failed to adequately investigate and prepare for the penalty phase (V11/2051-53).

The evidentiary hearing was held on October 13-14, 2008 (V17-V19) and July 22, 2009 (V20). Valentine presented Walter M. Lopez, Jr., his attorney at the 1994 retrial (V17/159-187); Dr. Henry Dee, a neuropsychologist (V17/188-260); Dr. Ronald Wright, a forensic pathologist (V17/263-297); Eddie Gray, a friend and former associate of Valentine's in an illegal drug business (V18/305-311); and Valentine also testified on his own behalf (V18/312-359). The State recalled Walter Lopez (V19/377-389) and presented Karen Cox, one of the prosecutors from the 1994 retrial (V19/390-405); Jorge Fernandez, a former homicide detective (V19/406-409); and Dr. Michael Gamache, the mental health expert retained by trial counsel (V19/412-428). The final defense witness was trial counsel Simson Unterberger

(V20/436-529).

As pertinent to this appeal, the following testimony was provided at the hearing:

Walter Lopez testified that he took over representing Valentine for penalty phase of the 1994 retrial when attorney William Fuente became a judge (V17/159-60). The original 1990 trial had been handled by the public defender's office (V17/160). Fuente had started the work for the new penalty phase, and Lopez met with him, getting his notes and discussing the information that had been developed to that point (V17/172-73).

Lopez was an experienced capital litigator, having joined the Florida Bar in 1968 and practiced criminal law nearly exclusively for forty years (V17/159, 177). He had five capital defendants prior to Valentine, and had fully prepared those cases through sentencing, although only one defendant actually ended up on death row (V19/378-79). Other cases started out as capital but became something else along the way (V17/180; V19/379). Lopez was familiar with the ABA guidelines in effect at the time of the resentencing and believed that the defense team had complied with their directives (V17/164-65, 172).

Lopez knew that Fuente, guilt phase counsel Simson Unterberger, and defense investigator Sonny Fernandez had, more

than once, gone to Costa Rica to locate guilt and penalty phase witnesses (V17/171-72). The investigator had also been to other places where Valentine had lived, including Texas and Louisiana (V17/176). Fuente had also retained Dr. Gamache as a confidential expert (V17/161, 173-74; V19/381). Lopez had worked with Gamache in the past, and knew he was commonly used for forensic issues, including those relevant to capital sentencing (V17/174).

Lopez met with Valentine many times and never had any indication of any concerns about Valentine's competency himself, or from Fuente or Gamache (V17/174-76). There was no sign of any mental infirmity, or Lopez would have explored the issue more extensively (V17/175-76). Lopez knew that the standard for mental mitigation was different than that for competency (V17/183). Lopez met with Gamache personally and probably would not have presented Gamache as a witness, even if there had been a jury; there were no real mental issues and Lopez did not want to present evidence which would be inconsistent with the alibi defense at trial, although there had been cases where he'd had to do that in the past (V17/169-70, 181-82, 186).

Dr. Henry Dee testified as an expert in forensic psychology and neuropsychology (V17/188, 191). Dee evaluated Valentine and reviewed a number of records and other materials (V17/194-99).

Dee concluded Valentine suffers from hypomania, an overinflated sense of self, with supreme, unrealistic self-confidence, which was both a mental and emotional disturbance (V17/200-04, 214). Valentine had a bipolar disorder, a mood disturbance which had been present for many years (V17/216). However, Dee noted that Valentine did not want his attorneys to present any evidence of an emotional defect, and that Valentine had been tight-lipped about his history and background to his defense team at the time of trial; he had provided incorrect information and withheld information from his attorneys that may have been useful (V17/202). Notes from the investigators reflected that Valentine was touchy about mental mitigation and did not want it developed (V17/245).

Dee's testing reflected a full scale IQ of 113, but also revealed memory impairment, another indication of brain injury (V17/216-20). Dee opined that this damage provided an additional mental or emotional disturbance, based on frontal lobe dysfunction (V17/225-26). The consequence of this disturbance would be to make Valentine more irritable and impulsive (V17/226). According to Dee, the crimes Valentine committed were poorly planned and poorly executed; Dee acknowledged that Valentine had travelled from several states away to shoot the victims and agreed that there had been a plan,

but characterized it as ineffective since evidence and witnesses were left behind (V17/226).

Dee did not know what Gamache had done in the case and did not criticize anything Gamache may have done or found at the time (V17/233, 236). Although Dee believed that Valentine's phone calls to Livia after the crimes demonstrated Valentine's magical, grandiose thoughts, he admitted that another possible explanation would be Valentine was just trying to scare Livia and intimidate her into not testifying; if this was Valentine's motive, the calls were effective and reflected rational thinking (V17/239). Dee agreed that Valentine was mean, jealous, and exacting his revenge with these crimes, but believed that his mental impairments also existed (V17/251-52).

Valentine testified that he married Livia in Costa Rica around 1972 or 1973 (V18/317). He divorced her while he was in Union County in 1995 but it took until 2000 for the paperwork to be finalized; thus, they were married in September, 1988 (V18/317). However, at the trial, the jury heard her referred to as Livia Porche over and over, as both attorneys, the judge, and all the paperwork used that name (V18/318). He believed at the time of his arrest that he and Livia were divorced at that time, although he had never seen the paperwork (V18/340-41). He did not recall whether he told investigators at the time that

they were divorced (V18/341-42). He did not recall having been interviewed by Dr. Gamache and only called his family twice after his arrest, including talking to a nephew in Costa Rica (V18/338, 357).

Former Assistant State Attorney Karen Cox testified that she recalled the status of Livia's marriage to Valentine was a point of contention at trial (V19/401). The validity of any Louisiana divorce was a big issue, and it was difficult to get to the bottom of Louisiana law (V19/401). Cox believed that Livia did not want to be addressed as Valentine; Livia believed herself to be married to Porche and that was how she held herself out to the community, it was the name she used (V19/401-02). Cox did not know the actual marital status, but Livia was certain that she had seen the paperwork in Louisiana (V19/402). Cox used the name Livia Porche not to inflame the jury but just to identify the person she was presenting to the jury (V19/405).

Dr. Michael Gamache testified that he has practiced forensic psychology and neuropsychology since being licensed in Florida in 1985 (V19/414). Gamache is experienced in evaluating capital defendants and is familiar with typical penalty phase issues; he estimated he had worked on ten to twenty capital cases before evaluating Valentine in 1994 (V19/415-16). Gamache did not have any independent recollection of meeting with

Valentine, Fuente, or Lopez, and he no longer had any file on the case (V19/419). He would have evaluated Valentine for the presence of mental mitigation, but there was no record of his opinion or the potential mitigating factors he may have offered for counsel's consideration (V19/421-22). His invoice reflects that he examined Valentine for about three hours, but Gamache could not say whether this included any neurological testing (V19/424-25).

Simson Unterberger represented Valentine as guilt phase counsel at the 1994 retrial (V17/170-71; V20/436). Unterberger started practicing law in Hillsborough County in 1973, spending his first six or seven years at the public defender's office (V20/445). This was not his first capital case; Unterberger estimated he had tried ten capital cases over his career, before leaving Hillsborough County in 2000 (V20/436-37, 445-46, 499-500). In preparing for the retrial, Unterberger had access to the prior trial transcripts and used an investigator (V20/475-78). He met with Valentine repeatedly before the trial and there were no indications that Valentine had any mental health issues which needed to be explored for mitigation; Valentine appeared to be intelligent, understanding and responsive (V20/500-01).

Unterberger testified that Livia had several surnames that

surfaced in discovery, and he determined that Livia and Valentine had never been divorced (V20/437). Livia claimed to have obtained a divorce from a specific parish in Louisiana, but there was no record of it (V20/438). Unterberger knew that she used the name Livia Porche at times but could not speak to the accuracy of her name and did not recall what motions may have been filed with regard to the issue (V20/438-39). Unterberger was not concerned that the jury may have had a false impression about Livia's marriage to Valentine because he had been able to show that there had not been a divorce (V20/440).

Following the filing of written closing arguments (V12/2205-2342), the court below issued an Order on July 2, 2010, denying Valentine's motion for postconviction relief (V13/2419-71). This appeal follows.

SUMMARY OF THE ARGUMENT

The court below properly denied Valentine's claims of ineffective assistance of counsel. Valentine failed to establish that trial counsel was ineffective for failing to object to the disputed comments in the prosecutor's guilt phase closing argument. The court below reviewed the record and concluded that most of the comments were reasonable inferences to be drawn from the evidence. The court determined that no deficient performance or prejudice had been demonstrated, and properly denied this claim.

Valentine's assertion of ineffective assistance of counsel for failing to investigate and present evidence of mental mitigation is similarly meritless. The court below conducted an evidentiary hearing and held that trial counsel was not deficient in relying on the mental status examination conducted prior to trial by Dr. Gamache. The decision not to present Dr. Gamache as a penalty phase witness was reasonable and the presentation of a new mental health expert in postconviction does not satisfy Valentine's burden of proving ineffective assistance. In addition, the court properly found that no prejudice occurred, as presenting testimony from Dr. Dee would not have changed the outcome of the penalty phase.

ARGUMENT

ISSUE I

THE COURT BELOW DID NOT ERR IN DENYING VALENTINE'S CLAIM THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT.

Valentine initially asserts that he was provided ineffective assistance of counsel when his trial attorney failed to object to or prevent repeated misstatements of fact by the prosecutor. The legal standards to be applied to Valentine's claims of ineffective assistance of counsel are well established. The seminal case of Strickland v. Washington, 466 U.S. 668 (1984), governs the analysis of a constitutional challenge to the adequacy of legal representation. In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the

defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 690. Only a clear, substantial deficiency will meet this test. See Johnson v. State, 921 So. 2d 490, 499 (Fla. 2005). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695. The deficiency must have affected the proceedings to such an extent that confidence in the outcome is undermined. Johnson, 921 So. 2d at 500.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689; Chandler v. United States, 218 F.3d 1305, 1313-19 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001); Johnson, 921 So. 2d 499-500; Asay v. State, 769 So. 2d 974, 984 (Fla. 2000). Judicial scrutiny of attorney performance must be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for

a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. The defendant bears the heavy burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy, and that prejudice resulted. Strickland, 466 U.S. at 689; Chandler, 218 F.2d at 1313; Johnson, 921 So. 2d at 500; Asay, 769 So. 2d at 984.

In this case, Valentine was represented by Walter Lopez and Simson Unterberger, both of whom shared a wealth of experience with defendants accused of capital crimes (V17/159, 177, 180; V19/378-79; V20/436-37, 445-46, 499-500). When reviewing the performance of such seasoned trial attorneys, the strong presumption of correctness ascribed to their actions is even stronger. Chandler, 218 F.3d at 1316.

Finally, this Court has repeatedly recognized that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Henry v. State, 937 So. 2d 563, 573 (Fla. 2006), quoting Stewart v. State, 801 So. 2d 59 (Fla. 2001), and Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000).

Valentine's first issue asserts that the State committed

repeated and egregious acts of misconduct throughout the 1994 retrial by referring to the female victim as “Livia Porche” or the “ex” Mrs. Valentine, despite the fact that Valentine and Livia were not divorced at the time of the offenses. According to Valentine, counsel’s failure to object or to preclude the State from presenting the victims as a married couple when they actually were living in adultery inflamed the passions of the jury, and if counsel had only filed a motion to prevent the implication that Valentine and Livia were no longer married, Valentine would have been acquitted of first degree murder.

Although Valentine claims that he was granted an evidentiary hearing on this issue, in fact the issue was summarily denied. Valentine’s postconviction motion alleged prosecutorial misconduct based on prosecutor Cox’s guilt phase closing argument as a substantive claim for relief as Claim VI. Valentine alleged in Claim XI that trial counsel had provided ineffective assistance; subclaim XI(6) alleged that counsel had failed to object to repeated instances of misconduct, as outlined in Claim VI. The only allegation within Claim XI(6) for which a hearing was granted was the assertion of misconduct based on the prosecutor’s comment about Valentine having called his family from prison.

In rejecting this claim, the trial court specifically held,

"the victims lived together as husband and wife, had a baby, and functioned as a family. Consequently, the Court does not find the comments by the prosecutor regarding the relationship of the victims inflammatory, misleading, or prejudicial to the jury" (V5/918). Valentine has not disputed the court's findings or demonstrated any error in this ruling. The record fully supports the finding that Livia and Ferdinand held themselves out as a family and that Livia's marriage to Valentine was over in all but possibly the most technical sense. Both Livia and Valentine believed that their marriage had ended long before Livia and Ferdinand were attacked.

In addition, despite the summary denial, Valentine correctly notes that some of the evidence presented at the hearing related to this issue. Therefore, a proper review of the issue accords deference to any factual findings made below, with legal rulings to be considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

At the hearing, Valentine testified that he was married to Livia at the time of the offense, and their divorce was not sought until 1995, after his retrial (V18/317). He complained about the jury having heard her referred to as Livia Porche over and over, as both attorneys, the judge, and the paperwork used this name (V18/318). He acknowledged that he believed at the

time of his arrest that he was divorced from Livia (V18/340-41).

Former Assistant State Attorney Karen Cox recalled the status of Livia's marriage to Valentine was a big issue at trial, as it had been difficult to understand the applicable Louisiana law (V19/401). Cox knew Livia considered herself married to Porche, and did not want to be addressed as Valentine (V19/401-02). Cox did not know the actual status of the Valentine marriage, but Livia was certain that she had seen the divorce paperwork in Louisiana (V19/402). Cox did not use the name Livia Porche to inflame the jury but just to identify the person she was presenting (V19/405).

Trial counsel Simson Unterberger testified that several surnames surfaced for Livia in discovery, and the defense discovered that Livia and Valentine had never been divorced (V20/437). There was no record of the divorce Livia claimed to have obtained in Louisiana (V20/438). Unterberger was not concerned that the jury may have had a false impression about Livia's marriage to Valentine because he had been able to show that there had not been a divorce (V20/440).

Valentine's argument focuses on the actions of Karen Cox, claiming that Cox had a pattern of misconduct which includes having presented a witness in court to testify under an alias when she was a federal prosecutor, for which she was disciplined

in 2001. The Florida Bar v. Cox, 794 So. 2d 1278 (Fla. 2001). Notably, this "history" cannot suggest that counsel was ineffective since it did not take place until after Valentine had been convicted and sentenced. Attorney Unterberger testified that he was not aware of any unethical conduct by Cox at the time of Valentine's retrial (V20/446).

Valentine's attempt to align this case with the misconduct Cox later committed in federal court is unpersuasive. In this case, no one was confused or misled about Livia's identity. While the state of her marriage to Valentine may have been subject to dispute, there is no question that both Livia and Valentine believed they were divorced at the time of the attack. Livia, Ferdinand, and Giovanni, Livia and Valentine's adopted eleven-year-old daughter, had been living together as a family in Brandon for nearly two years (DA. V7/486, 506-07, 510). Livia and Ferdinand also had a daughter, Emily, that had been born almost a year before the crimes (DA. V7/507, 510).

Valentine claims prejudice, asserting Cox "made it appear as though Terence Valentine was a deranged ex-husband attacking a happily married couple" (Appellant's Initial Brief, p. 32). In fact, it now appears Valentine was a deranged husband attacking a happy couple who everyone thought was married at the time. This slight change in roles does nothing to diminish the

horror of the brutal acts Valentine committed on Livia and Ferdinand, and there is no reasonable basis to find that the jury would not have convicted Valentine of first degree murder had it not heard Livia referred to as Mrs. Porche.

The record supports the trial court's ruling to deny Valentine's claim of ineffective assistance of counsel on this basis. This Court must affirm the denial of postconviction relief on this issue.

ISSUE II

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING OTHER CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Valentine next claims that the trial court erred in summarily denying other allegations of ineffective assistance of counsel premised on his attorney's failure to object to other assertions of prosecutorial misconduct. This issue presents a legal ruling, subject to *de novo* review. Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008) (postconviction motion denied solely on the pleadings presents a legal issue, reviewed *de novo*).

Valentine asserts that counsel failed to object to the prosecutor's guilt phase closing argument, where (1) the prosecutor argued facts without evidentiary support, asserting that Dr. Miller noted blood spatter in the back of the Blazer; (2) the prosecutor expressed her personal belief in the defense presentation of the case; and (3) the prosecutor bolstered her case by suggesting that no one else had any motive to commit these crimes except Valentine. The court below determined that the allegation of ineffective assistance of counsel for failing to object to the comments noted was refuted by the record (V5/918).

The prosecutor's comment about the blood spatter found in the back of the Blazer was supported by evidence at trial;

Corporal Arthur Picard testified that he observed the blood spatter, and pictures from the interior of the vehicle were admitted into evidence which showed the blood spatter (DA. V11/1128, 1131-32). Although Dr. Miller did not personally examine the Mr. Porche's body in the back of the Blazer, he did review the photographs and specifically noted the presence of blood spatter illustrated in the pictures (DA. V11/1176-77). Thus, there was evidentiary support for the prosecutor's argument, and no objection was necessary, or even appropriate. Because this claim was refuted by the record, it was properly summarily denied.

Moreover, the prosecutor's discussion of the defense theory that Livia was lying because she hoped to secure a lot of money from Valentine was not improper. In fact, the prosecutor does not criticize or ridicule the defense, she simply describes the theory, noting counsel "somehow" wants the jury to believe it. The prosecutor does not offer her personal opinion or use offensive language to describe the defense; there is nothing improper in suggesting to a jury that a defense is not credible when that conclusion is supported by the record. A prosecutor may properly comment on the implausible nature of a defense as presented, and no misconduct has been demonstrated which warranted any objection.

The last subclaim, suggesting improper bolstering, reflects only that the prosecutor pointed out that Valentine was the only person with the motive to commit the horrendous acts against Livia and Ferdinand. Certainly a prosecutor cannot personally vouch for the credibility of a witness, or suggest that there is additional evidence which supports the State's case. Lowe v. State, 2 So. 3d 21, 43 (Fla. 2008); Gorby v. State, 630 So. 2d 544, 547 (Fla. 1993). As this Court has held, "Improper bolstering occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." Williamson v. State, 994 So. 2d 1000, 1013 (Fla. 2008), quoting Hutchinson v. State, 882 So. 2d 943, 953 (Fla. 2004). There was no improper bolstering by the State in Valentine's trial, as the prosecutor did not offer any extra-record basis to strengthen Livia's credibility for the jury.

Valentine has again failed to demonstrate any error in the denial of this claim. Even if this Court finds that any of the prosecutor's comments were improper and that reasonable counsel should have objected, the statements fall far short of the misconduct which must be shown to warrant a new trial, as they did not vitiate the fundamental fairness of the trial. See Anderson v. State, 18 So. 3d 501, 518 (Fla. 2009) (rejecting

claim of ineffective assistance of counsel for the failure to object to improper prosecutorial comments, where prosecutor commented on quality of defense and mentioned evidence which had not been presented). The court below noted that attorney Unterberger "made a number of other objections throughout the State's closing argument" (V13/2436). In addition, the jury was initially instructed and later reminded that what the attorneys argued was not evidence, and that jurors should rely on their own recollection of the testimony (Order at 18; DA. V15/1659-60, 1712, 1723, 1755, 1760).

On these facts, no deficient performance or prejudice has been shown. This Court must affirm the denial of postconviction relief on this issue.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING VALENTINE'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE AT THE SENTENCING PHASE.

Valentine's final issue disputes the ruling denying his claim of ineffective assistance of counsel at the penalty phase of his capital trial. This claim was developed at an evidentiary hearing below; the trial court's factual findings are entitled to deference, while the legal rulings are reviewed *de novo*. Stephens, 748 So. 2d at 1033. As will be seen, this claim was properly denied below, and this Court must affirm the ruling to deny relief.

In denying this claim below, the court specifically found that counsel performed reasonably, but even if the mental mitigation found by Dr. Dee should have been presented, it would not have made any difference to the outcome (V13/2468-70). The court noted that counsel had Valentine evaluated by Dr. Gamache, and counsel was not deficient in choosing to present only a stipulation that Gamache would testify that Valentine had a good prison record and was capable of adjusting to prison life (V13/2469). The court thoroughly evaluated the postconviction testimony offered by Dr. Dee, but ultimately concluded that even adding the statutory mitigator of extreme disturbance, the

strong aggravating factors, including both cold, calculated, and premeditated and heinous, atrocious or cruel, would still outweigh the mitigation, had Dee testified (V13/2462-66, 2469-70).

According to Valentine, his attorneys did not have him evaluated by a competent mental health professional, and consequently valuable mental health mitigation was never offered for consideration at sentencing. With regard to this issue, Walter Lopez testified at the hearing that he explored the availability of mental mitigation through an expert initially retained by William Fuente, who served as Valentine's penalty phase counsel until he was sworn in as a judge (V17/159-64). Lopez knew the expert, Dr. Michael Gamache, had conducted a psychological examination of Valentine and reviewed a number of records in an attempt to discover mental mitigation (V17/170-71). Lopez had used Dr. Gamache as an expert in the past and knew that Gamache was commonly used for forensic issues, including capital mitigation work (V17/173-74). Lopez conferred with Fuente and Gamache and ultimately entered into a stipulation with the prosecution that Valentine could adjust well to prison life and make a positive contribution if sentenced to life (V17/169-72).

Both Unterberger and Lopez met with Valentine frequently over the course of their representation in this case (V17/175; V20/500). Neither attorney ever saw or heard anything that caused either one of them to question Valentine's competency or mental health (V17/174-76; V20/500-501). Valentine appeared to be intelligent, understanding and responsive to Unterberger (V20/500-501). Valentine's postconviction expert, Dr. Henry Dee, noted that Valentine did not want his attorneys to present any evidence of an emotional defect, and in fact was rather tight-lipped about his history and background (V17/202). Valentine provided some information to investigators which was incorrect and withheld information from his attorneys that could be useful to them (V17/202). According to Dee, Valentine would minimize any psychopathology and present himself as sharp, intelligent and capable (V17/210-11).

Lopez was familiar with his burden on mitigation and with the statutory mental mitigating factors in particular, but he was reluctant to pursue these mitigators because they would be inconsistent with the guilt phase defense of alibi. Although Lopez had previously argued an inconsistent position in penalty phases in other cases and understood that it was separate from the guilt phase proceeding, it was difficult to be part of a

team that was taking a contrary position (V17/181-86). Although Valentine claims that Lopez focused on competency rather than mental mitigation, Lopez testified that he was aware that the statutory mitigators were broader than competency concerns and he was familiar with the mitigators and the relevant penalty phase issues (V17/182-85).

Unfortunately, Dr. Gamache did not recall much of his work in this case, but he did testify to his general practice on developing mental mitigation (V19/417-23). Dr. Gamache has been licensed in Florida since 1985, and has a wealth of experience with the issues that arise in capital cases (V19/414-16). Valentine did not present any evidence suggesting that Gamache's work had been deficient and did not offer any specific criticisms of his findings in this case. Walter Lopez testified that if Gamache had provided anything in addition to the mitigation outlined in his letter, the defense would have used it in the penalty phase (V19/379-80).

On these facts, no deficient performance has been shown with regard to Lopez's actions in investigating and presenting mental health mitigation. Lopez explored the issue with a retained expert, consulted other attorneys familiar with the case, and made a reasonable strategic decision about the best

way to present the expert's findings. Although Valentine complains that Gamache did not conduct a full neuropsychological battery of testing, he has not demonstrated that such an evaluation was constitutionally necessary. Similarly, there is no constitutional obligation for an attorney to seek the advice of a second expert with regard to mental mitigation, particularly in a case where the defendant shows no sign of any mental disease or disorder and where any further mental mitigation would be inconsistent with the guilt phase defense.

Trial counsel have great discretion in determining whether and how to present mental health evidence. Jones v. State, 928 So. 2d 1178 (Fla. 2006). In addition, many cases have recognized that the presentation of more favorable mental health testimony in postconviction does not render counsel's investigation into mitigation ineffective. Pace v. State, 854 So. 2d 167, 175 (Fla. 2003); Davis v. State, 875 So. 2d 359, 372 (Fla. 2003); Rivera v. State, 859 So. 2d 495, 504 (Fla. 2003); Asay v. State, 769 So. 2d 974, 985-86 (Fla. 2000); Pietri v. State, 885 So. 2d 245, 261 (Fla. 2004) (no ineffective assistance where counsel made reasonable efforts to secure a mental health expert to examine the defendant for mitigation purposes); Jones v. State, 732 So. 2d 313, 320 (Fla. 1999); see

also, Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) (noting that, "mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that counsel was ineffective for failing to produce that expert at trial").

Lopez obviously considered his options and made a tactical decision about the scope of the defense case in mitigation. The law is well settled that, when such strategic decisions are made, counsel cannot be deemed to have been ineffective. Sexton v. State, 997 So. 2d 1073, 1085 (Fla. 1985) (denying ineffective assistance claim based on presentation of mental mitigation); Darling v. State, 966 So. 2d 366, 377-78 (Fla. 2007) (noting attorneys are entitled to rely on trial experts); Burns v. State, 944 So. 2d 234, 243-44 (Fla. 2006) (upholding reasonableness of decision against presenting mental mitigation); Looney v. State, 941 So. 2d 1017, 1029 (Fla. 2006) (same). Counsel in this case investigated potential mitigation through Dr. Gamache, and made a strategic decision as to the best evidence to present. Such an informed, reasonable decision refutes any allegation of deficient performance with regard to the failure to present additional mental mitigation evidence.

Moreover, even if some possible deficiency could be found

on these facts, Valentine has clearly failed to demonstrate any possible prejudice. Dr. Dee testified at the evidentiary hearing that Valentine's exaggerated sense of grandiosity led Dee to believe that Valentine suffered from an extreme mania, an overinflated sense of self and a supreme, unrealistic self-confidence that amounted to both a mental and an emotional disturbance (V17/200-01). Dee characterized this as a mood disturbance, specifically a bipolar disorder which manifested itself through inappropriate mood states (V17/214-16). Dee also believed that Valentine suffered from brain damage, which was another extreme mental or emotional disturbance (V17/226). Dee concluded that brain damage was a possibility because Valentine's sister testified in the penalty phase that Valentine had sustained several head injuries as a young child, including one time when Valentine was rendered unconscious, and because Valentine's testing revealed a discrepancy between his memory functioning and his mental functioning (V17/204-08, 218-23).

The mitigation offered by Dr. Dee would not be entitled to any significant weight for a number of reasons. First of all, his conclusions are speculative and not particularly supported by his own testimony. For example, he concludes that there is brain damage based on anecdotal testimony by Frances Valentine

about head injuries when Valentine was young, but Dee has somewhat overstated the testimony, noting that Frances indicated at one point that Valentine was unconscious "for a substantial period of time," while Frances testified that Valentine was knocked unconscious but did not indicate the condition lasted for any particular time, let alone the "substantial" time that Dee attributed to it (V17/205; see DA. V16/1830-32). Dee finds support for his brain damage diagnosis in the psychological testing he conducted, which reflected that Valentine's general memory functioning was significantly lower than his general mental functioning (V17/219-22), but Dee did not identify any testing, such as MRI or PET scans, that could verify or confirm the damage and he could not identify where any damage was localized (V17/222-23).

Dee also concluded that Valentine demonstrated his mania by writing letters to his attorneys, giving directions and trying to act as co-counsel (V17/215), but most attorneys appreciate that many criminal defendants are active participants with the defense team, and Dee admitted Valentine may have simply wanted to have input and that this was not necessarily part of his exaggerated self-worth (V17/245). Dee was under the impression that Valentine had waived the presentation of any mitigation and

cited this as another example of a defect in his mental functioning (V17/201-02, 230), but actually Valentine only waived the jury recommendation and Dee, in fact, admitted that his stated reason for doing so seemed rational (V17/239-42). Similarly, Dee acknowledged that Valentine's threatening phone calls to Livia after the offenses could be seen as reasonable and rational if Valentine's motive was to scare Livia and intimidate her into not testifying, but Dee saw them instead as an example of Valentine's magical, grandiose thoughts (V17/199-201, 239).

Dee's conclusions are also difficult to reconcile with the facts of this case. For example, Dee concludes that Valentine's brain damage would cause him to be more impulsive, impairing his memory, judgment, and ability to plan effectively, and Dee in fact went so far as to characterize the attack on Livia and Ferdinand as poorly planned and poorly executed (V17/226-27, 245-46). According to Dee, if the crime had been planned well, Valentine may not have been caught (V17/226). While this comment may theoretically apply to every defendant convicted of murder, a reasonable jury would have difficulty accepting the credibility of any expert that opined these offenses were not well planned; Valentine traveled a significant distance, armed

himself with weapons and tools, and laid in wait for his victims to come home. Most reasonable people would readily conclude that, if not for Livia surviving both gunshots to her head and for Valentine's subsequent threats and bragging, Valentine would have gotten away with murder, just as his accomplice was able to do.

Finally, even if Dr. Dee's testimony is taken at face value, his mitigation would not come close to countering the strong aggravating factors in Ferdinand's senseless, brutal murder. The sentencing court found four aggravating factors, including both heinous, atrocious or cruel and cold, calculated and premeditated, which this Court has characterized as two of the most serious aggravators set out in the statutory scheme. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). The horrific details were set out in the sentencing order and thereafter quoted in this Court's opinion from the retrial:

> On September 9, 1988, Ferdinand Porche returned to his home in mid-afternoon expecting to meet his pregnant wife and small child. Instead he was greeted by a bullet in the back which [severed his spinal cord and] rendered him paralyzed from the waist down. Mr. Porche was then confronted by Mr. Valentine who announced "this is my revenge." Mr. Porche was forced to crawl into a bedroom where he found his wife nude, bound, and gagged and his baby crying and covered in blood. Mr. Valentine then pistol whipped Mr. Porche. Mr. Porche's face was lacerated, his jaw was broken, and several teeth were knocked out. According to the medical examiner there were at least three separate

> blows to Mr. Porche's face. After administering this beating Mr. Valentine made his purpose clear, announcing, "I'm gonna kill you, but you're gonna suffer. This is not going to be easy." Further tortuous acts included stabbing Mr. Porche in the buttocks-the knife stopping only because it struck bone, kicking Mr. Porche in the chest, and dragging him after he was bound hand and foot with [baling] wire. The medical examiner testified that all of the above injuries occurred while Mr. Porche was alive, that none was immediately life threatening, and none would immediately result in a loss of consciousness. Mrs. Porche testified that Mr. Porche told her he was in so much pain that he did not know why he did not lose consciousness. Mrs. Porche testified she could feel him touch her as if to reassure her while they were in the back of the Blazer being transported [to an isolated area].
>
> While the fatal gunshot resulted in near instantaneous loss of consciousness and death, the ordeal leading up to his death was quite lengthy. Mr. Porche was beaten and degraded in his home. Trussed like an animal he was kidnapped and taken on a nine-mile trip to his slaughter. Either due to the gunshot wound to his spine or through the stress of the ordeal Mr. Porche lost control of his bowels and was covered with his own excrement.
>
> Paralyzed and bound hand and foot with wire there was nothing Mr. Porche could do to save himself. Nor was there anything he could do to protect his wife, who he knew was the ultimate object of Mr. Valentine's barbarous intent. Nor could he know what would happen to his ten-month-old daughter or what would become of Mrs. Porche's adopted child. The horror, terror and helplessness that Ferdinand Porche experienced prior to being shot in the eye at point blank range are evident.

Valentine, 688 So. 2d at 315-16. On these facts, the court below properly concluded there would be no reasonable probability of a life sentence even if Dr. Dee had been presented as a defense penalty phase witness.

Valentine has again failed to establish either deficient performance or any possible prejudice on the part of his attorneys in investigating and presenting the defense case in mitigation at his penalty phase. This Court must affirm the denial of this claim as well.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order entered below denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley, James Viggiano, and Ali Andrew Shakoor, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida, 33619, this 3rd day of June, 2011.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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