

IN THE SUPREME COURT OF FLORIDA

TERANCE VALENTINE,

Petitioner,

v.

CASE NO. SC11-427

EDWIN G. BUSS,

Secretary, Florida

Department of Corrections, and

PAMELA JO BONDI,

Florida Attorney General,

Respondents.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW, Respondents, Edwin G. Buss, Secretary, Florida Department of Corrections, and Pamela Jo Bondi, Florida Attorney General, by and through the undersigned counsel, and hereby respond to the Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of March 7, 2011. Respondents respectfully submit that the petition should be denied as meritless.

FACTS AND PROCEDURAL HISTORY

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 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 will continue to love and support him, and Valentine's cooperation at his arrest and behavior as a model prisoner (DA. V3/496-99).

On appeal, Valentine was represented by Assistant Public Defender Douglas S. Connor. Mr. Connor filed an 89-page brief, presenting nine issues, alleging trial court error: (1) in ruling that the husband/wife privilege was inapplicable to bar Romero's testimony on Porche's murder; (2) in denying his motion to suppress his statements to Det. Fernandez; (3) in denying his motion to strike the expert's footprint testimony as too speculative; (4) in declining his motion to appoint a jury selection expert; (5) in denying his motion to grant him the concluding argument to the jury in spite of his presentation of

alibi witnesses; (6) in giving the standard reasonable doubt instruction; (7) in convicting him of attempted first degree murder because it may rest on attempted felony murder, a nonexistent crime; (8) in finding that the murder was committed in a cold, calculated and premeditated manner; and (9) in failing to find several mitigating circumstances. Valentine, 688 So. 2d at 316, n.6.

As noted, this Court vacated the attempted murder conviction and sentence, but affirmed judgment and sentencing on all remaining counts. The United States Supreme Court denied review on October 6, 1997. Valentine v. Florida, 522 U.S. 830 (1997). Postconviction review was sought, an evidentiary hearing was conducted, and collateral relief was denied on July 2, 2010 (PC. V13/2419-2471). The appeal from the denial of postconviction relief is currently pending in this Court. Valentine v. State, Case No. SC10-1463.

#### **ARGUMENT IN OPPOSITION TO CLAIMS RAISED**

Petitioner Valentine alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for

claims of trial counsel ineffectiveness. See Valle v. Moore, 837 So. 2d 905 (Fla. 2002); Rutherford v. Moore, 774 So. 2d 637, 645 (Fla. 2000). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Valentine asserts that Mr. Connor failed to raise issues which would have compelled appellate relief. However, Valentine has not demonstrated that any of the omitted issues would have been successful on appeal. To the contrary, none of the omitted issues he identifies would have been found meritorious. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel).

The United States Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and

focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Habeas relief is not warranted on Valentine's meritless claims.

#### CLAIM I

##### **WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO CLAIM THAT VALENTINE WAS DENIED A FAIR TRIAL BY THE PROSECUTOR'S CLOSING ARGUMENT.**

Valentine's first argument asserts that his appellate counsel rendered constitutionally deficient performance by failing to present an issue challenging the propriety of the prosecutor's guilt phase closing argument. It must be noted initially that this claim is procedurally barred; Valentine's petition repeats the same arguments about the prosecutor's argument that were offered in his postconviction proceeding. The propriety of the prosecutorial comments was disputed substantively in Issue VI of the motion for postconviction relief; Issue XI(6) also asserted ineffective assistance of trial counsel for failing to object to these same comments (PC. V9/1709-17, 1726-47). The fact that this issue, as pled in the



petition, analyzes the prosecutor's comments substantively and offers no analysis of what appellate counsel may or may not have done demonstrates that this is a substantive claim of prosecutorial misconduct, disguised as an assertion of ineffective assistance of counsel. See Nelson v. State, 43 So. 3d 20, 35 (Fla. 2010) ("Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion"); Swafford v. Dugger, 569 So. 2d 1264, 1266 (Fla. 1990) ("Allegations of ineffective assistance of appellate counsel may not be used to evade the rule against using habeas corpus as a second appeal").

In fact, Valentine was provided an evidentiary hearing as to trial counsel's failure to object to the statement about Valentine having called his family after his arrest; there was also testimony at the hearing with regard to the use of Livia Romero's name at trial, and what was known about the status of the Valentine marriage at that time. In light of the fact that some aspects of this issue were developed factually in postconviction, repeated consideration of the claim in the context of a habeas petition is barred. Because habeas review is not available as a second appeal, this claim must be rejected procedurally. Green v. State, 975 So. 2d 1090, 1115 (Fla.

2008); Brown v. State, 894 So. 2d 137, 159 (Fla. 2004) ("Habeas petitions, however, should not serve as a second or substitute appeal and may not be used as a variant to an issue already raised").

Even if the issue is considered, no relief is warranted. Valentine has not demonstrated that the prosecutor's comments would have been challenged by any reasonable appellate attorney. In addition, he has not shown a reasonable probability of a different result if counsel had raised this claim. Accordingly, habeas relief should be denied.

Significantly, only one of the comments which Valentine claims should have been presented for consideration in a prosecutorial misconduct claim was preserved for appellate review. As to the other comments, Valentine does not identify a particular ruling which should have been challenged, and does not characterize the comments as amounting to fundamental error. Therefore, his allegation of deficient performance based on the failure to present an appellate issue is facially insufficient. Nelson, 43 So. 3d at 35 (noting the only exception to general rule that counsel is not ineffective for failing to raise an unpreserved issue is for fundamental error); Brown, 894 So. 2d at 159 ("Procedurally barred claims not properly raised during trial cannot form a basis for finding appellate counsel

ineffective absent a showing of fundamental error"); Owen v. Crosby, 854 So. 2d 182, 188-89 (Fla. 2003); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993).

In addition, the cases which Valentine relies upon to prove prosecutorial error were not available to appellate counsel. Valentine cites extensively to Ruiz v. State, 743 So. 2d 1 (Fla. 1999), where the same prosecutor was found to have offered improper comments in her closing argument, but Ruiz was not decided until after Valentine's appeal had concluded. The statements at issue in this case are not the same comments condemned in Ruiz. Most of the other cases noted by Valentine are more recent than Ruiz, and similarly would not have been available for any appellate argument.

The comment Valentine objected to at trial was the prosecutor's claim that Valentine's sister Elizabeth had been called the day after the crimes, but that Elizabeth did not provide any information on where to find her brother at that time (DA. V15/1708). The objection was overruled as the trial judge concluded the statement was a reasonable inference from the evidence. Det. Fernandez had testified that he had called Elizabeth the day a warrant was issued on Valentine, September 10, 1988, which was the day after the shootings (DA. V12/1275). The authorities were trying to locate Valentine, but Fernandez

never heard back from Elizabeth before Valentine was found by law enforcement (DA. V12/1275-78). Based on this testimony, the trial court properly overruled the objection. Had this ruling been presented as an issue on appeal, it would have been affirmed as any challenge is meritless.

The postconviction court determined that Valentine's claim of ineffective assistance of counsel for failing to object to the prosecutor's guilt phase closing argument was substantially refuted by the record, as the comments were not improper (PC. V5/918-19). For the same reasons asserted in defense of that ruling in Valentine's postconviction appeal, this was the correct result. Because the comments were reasonable inferences to be drawn from the evidence, any objection at trial or on appeal would be rejected. Therefore, Valentine cannot demonstrate either deficient performance for failing to challenge the comments or any possible prejudice.

As no deficient performance or prejudice has been established, this claim must be rejected and habeas relief denied.

CLAIM II

**WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING  
TO PRESENT A CLAIM OF CUMULATIVE ERROR.**

Valentine next contends that Mr. Connor provided constitutionally unreasonable assistance because he did not offer an issue claiming his trial was tainted by cumulative error. Once again, Valentine has failed to demonstrate either deficient performance or prejudice, and his claim of ineffective assistance of appellate counsel must be rejected.

As pled in the habeas petition, Valentine relies on postconviction allegations of ineffective assistance of counsel and acknowledges that this issue did not exist at the time of the direct appeal (Petition, p. 18). The admission that the claim could not have been presented on direct appeal defeats Valentine's assertion that counsel was ineffective for failing to assert cumulative error in the direct appeal brief.

In addition, Valentine's claim is facially insufficient, as he does not identify, even in general terms, any particular errors which should have been cumulated. In the appeal, this Court determined that Valentine's conviction for attempted first-degree murder may have been premised on an impermissible felony murder theory, and vacated the conviction and sentence. However, this Court analyzed the potential error and concluded that it could not have infected the death sentence or any other

aspect of the case. Valentine, 688 So. 2d at 317-18. This Court rejected all other claims, finding no error at all in the other issues presented.

Because only one error was identified in the direct appeal, there were no additional errors to combine for a cumulative effect. Given the absence of separate, individual claims of error, this issue has no merit, and habeas relief must be denied. Nelson v. State, 43 So. 3d 20, 34 (Fla. 2010); Everette v. State, 54 So. 3d 464, 487-88 (Fla. 2010).

### **CLAIM III**

#### **WHETHER VALENTINE IS ENTITLED TO HABEAS RELIEF DUE TO POTENTIAL FUTURE INCOMPETENCY.**

Valentine next contends he may be incompetent to be executed in the future. However, he acknowledges that his claim is not ripe, and that no relief is due at this time. Accordingly, Valentine's habeas petition must be denied. Nelson, 43 So. 3d at 34; Anderson v. State, 18 So. 3d 501, 522 (Fla. 2009); State v. Coney, 845 So. 2d 120, 137, n. 19 (Fla. 2003).

**CONCLUSION**

Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

**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.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(1).

Respectfully submitted,

PAMELA JO BONDI  
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