IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,754

MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

A. Prior Proceedings And Historical Facts

Manuel Valle was charged by indictment with first degree murder, for the 1978 killing of police officer Luis Pena, with a firearm; attempted first degree murder of police officer Gary Spell, with a firearm; possession of a firearm by a convicted felon; and automobile theft. (R. 1-4).[1]

At his first trial, Valle was convicted of first degree murder, attempted murder, and possession of a firearm, as charged. Valle v. State, 394 So. 2d 1004 (Fla. 1981) (Valle I). Valle had pled guilty to the severed charge of automobile theft. Id. The jury recommended the death penalty and the trial judge, the Honorable Ellen J. Morphonios, imposed the death sentence. Id. On direct appeal, this Court reversed the convictions and sentences for the murder, attempted murder and possession of a firearm, and remanded the case for a new trial as defense counsel was not deemed to have had sufficient time to prepare for trial. Id.

At the retrial, in 1981, Valle was again convicted on the three counts. The new jury recommended the death penalty by a vote of 9 to 3, and the new trial judge, the

[1] The symbol "R" denotes the record on appeal in Florida Supreme Court Case No. 54,572.

Honorable James Jorgenson, again imposed the death sentence. (2R. 1045, 1057).[2] Valle appealed his convictions and sentences to this Court, in Case No. 61,176, Valle v. State, 474 So. 2d 796 (Fla. 1981)(Valle II).

On July 11, 1985, this Court affirmed Valle's convictions and sentences. On September 17, 1985, rehearing was denied. Valle II, 474 So. 2d at 796. This Court set forth the following historical facts of the crimes:

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

Valle II, 474 So. 2d at 798.

Valle then petitioned the Supreme Court of the United States for a writ of

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[2] The symbol "2R" represents the record on appeal in Florida Supreme Court Case No. 61,176. The symbol "2T" represents the transcript of the trial court proceedings included in the record in Florida Supreme Court Case No. 61,176.

certiorari. On May 5, 1986, that Court granted the petition, vacated Valle's death sentence, and remanded the case to this Court for further consideration, in light of Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L. Ed. 2d 1 (1986), regarding the admissibility of model prisoner testimony. Valle v. Florida, 476 U.S. 1102, 106 S.Ct. 1943, 90 L.Ed.2d 353 (1986). On January 5, 1987, this Court remanded the case for a new sentencing hearing, to be conducted before a new jury. Valle v. State, 502 So. 2d 1225 (Fla. 1987) (Valle III). This Court determined that although some past model prisoner testimony had been presented at the re-trial, other such evidence as to future model prisoner, had been excluded. This Court determined that the excluded model prisoner evidence was not harmless error. Valle III, 502 So. 2d at 1225-6. Rehearing was denied on March 19, 1987. Id.

On February 3, 1988, the resentencing proceeding commenced before another new jury, and a new judge, the Honorable Norman Gerstein. On February 25, 1988, the jury recommended death by a vote of 8 to 4. (3R. 882).[3] The trial court conducted a further hearing on March 6, 1988. On March 16, 1988, the trial court imposed the death penalty for the first degree murder of Luis Pena. (3R. 897-908, 6189-93). The trial court found the existence of five aggravating factors: (1) Valle was previously convicted of a felony

[3] The symbol "3R" represents the record on appeal in Florida Supreme court Case No. 72,328.

involving the use or threat of violence to the person; (2) the killing was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (3) the killing was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (4) the killing was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and, (5) the victim was a law enforcement officer engaged in the performance of his official duties. (3R. 900-903). The second, third and fifth reasons were merged and were not treated as separate factors. Id. The lower court found that there was no evidence of any statutory mitigating circumstances. (3R. 904-907). The court further found that the evidence did not establish any nonstatutory mitigating circumstances, or alternatively, that any such mitigating circumstances were outweighed by the aggravating factors. (3R. 906-907).

Valle appealed his sentence of death to this Court, which affirmed the resentencing on May 2, 1991. Rehearing was denied on July 5, 1991. Valle v. State, 581 So. 2d 40 (Fla. 1991) (Valle IV). On October 1, 1991, Valle filed a petition for writ of certiorari in the Supreme Court of the United States. That petition was denied on December 2, 1991. Valle v. Florida, 502 U.S. 986, 112 S. Ct. 597, 116 L.Ed.2d 621 (1991).

On April 5, 1993, Valle filed his first Motion to Vacate Judgments of Conviction

and Sentence. While this original post-conviction motion contained 21 claims, most of the alleged claims were devoid of any factual allegations, and were accompanied by allegations that the claims could not be properly pled due to ongoing Chapter 119 requests. Id. The State filed a response to this motion, asserting that the motion was legally insufficient and should be summarily denied, noting that Valle had until December 2, 1993, to file a legally sufficient motion.

On August 4, 1993, the lower court held a hearing on the first motion for post-conviction relief, and denied the motion, without prejudice, to allow Valle to file a legally sufficient motion. On December 1, 1993, the defendant then filed a second Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend, raising twenty (20) claims. The State then filed a comprehensive Response to Second Motion to Vacate Judgments of Conviction and Sentence, after which a Huff v. State, 622 So. 2d 982 (Fla. 1993), hearing on the second amended motion was held on August 26, 1994. After hearing legal argument from counsel, and having inquired into the factual basis for the Appellant's claims, the judge ruled that there were insufficient allegations to warrant any evidentiary hearing, and the motion was denied. Valle's Motion to Reconsider Order Denying Defendant's Motion for Post-Conviction Relief was heard and denied at a hearing on January 27, 1995.

Valle then appealed to this Court which remanded for an evidentiary hearing on two (2) claims of ineffective assistance of counsel, which are at issue in the current proceedings before this Court. Valle v. State, 705 So.2d 1331 (Fla. 1997). Rehearing was denied by this Court on February 23, 1998.

B. This Court's Directions For The Conduct Of The Evidentiary Hearing On Remand.

As noted above, this Court remanded for an evidentiary hearing on two issues. First, this Court held that Defendant's allegations of ineffective assistance of counsel for failure to move for the disqualification of the resentencing judge were sufficient to warrant an evidentiary hearing:

> Valle's motion alleged that Judge Gerstein had kissed the victim's widow and fraternized with friends of the victim in full view of the jury and that counsel was aware of this behavior but failed to move for Judge Gerstein's disqualification. ....
>
> We conclude that the allegations in Valle's motion regarding Judge Gerstein's conduct and counsel's failure to move for disqualification in the face of such knowledge were sufficient as a matter of law to warrant an evidentiary hearing. .... Our reading of the Huff hearing transcript reveals that the court's true concern was that Valle had not submitted any affidavits to support these allegations.... Accordingly, we remand with directions that the Court conduct an evidentiary hearing on this issue.

Valle, 705 So. 2d at 1333. This Court also required an evidentiary hearing as to whether resentencing counsel unreasonably introduced evidence of his prison behavior, also

known as *Skipper* evidence, and if so, whether there is a reasonable probability that in the absence of the State's rebuttal, Valle would not have been sentenced to death:

> Also among his claims of ineffective assistance of counsel, Valle asserted that his defense team unreasonably introduced evidence of his prison behavior, also known as *Skipper* evidence. Although this Court's 1987 reversal of Valle's death sentence was due to the improper exclusion of *Skipper* evidence at his 1981 trial, the defense's introduction of this evidence at Valle's resentencing opened the door for the State to present evidence of an escape attempt committed by Valle between the time his prior sentence was reversed and the time of his resentencing proceeding. Valle argued below and in this appeal that the defense's presentation of *Skipper* evidence was due to an erroneous belief by the defense team that it was required to present *Skipper* evidence since our reversal had been based on its earlier exclusion.
>
> The State responds that the defense's presentation of prison behavior evidence was a reasonable strategic decision agreed to by Valle. In support of this argument, the State points out that Valle agreed on the record to the withdrawal of Michael Zelman, one of his four lawyers, and posits that in so doing, Valle approved of his remaining lawyers' strategy. Even if we presume that Mr. Zelman withdrew because of a disagreement with Valle's other lawyers, it is impossible to determine from the record what the subject matter of this disagreement was. Moreover, there is nothing in the record to rebut Valle's assertion that his remaining lawyers were operating under the mistaken belief that they were required to present *Skipper* evidence. Taking these allegations as true, we conclude they are legally sufficient under the *Strickland* standard to warrant an evidentiary hearing on whether Valle's lawyers introduced *Skipper* evidence at Valle's resentencing only because they believed this was required (FN3) and if so, whether there is a reasonable probability that in the absence of the State's rebuttal evidence, Valle would not have been sentenced to death.

> [FN3] In making this determination, the court may take into consideration the credibility of the witnesses, such portions of the trial record as may be applicable, and any other circumstance bearing on the issue.

Valle, 705 So. 2d at 1334.

On remand, the post conviction court, on March 19, 1998, conducted a hearing to set the date of the evidentiary hearing (PCR3. 312-25). At the hearing, Defendant's counsel asserted some alleged financial constraints. Id. The lower court, mindful of the 20-year delay in this case noted in this Court's opinion,[4] scheduled the evidentiary hearing for July 2, 1998, after the start of the fiscal year. Id. The Defendant, however, filed a Petition for Extraordinary Relief in this Court seeking to delay the evidentiary hearing. Valle v. State, Florida Supreme Court Case No. 92,664. This Court granted the Petition, and ordered that the evidentiary hearing take place "by the end of August, 1998." See order dated April 8, 1998, Case No. 92, 664. The evidentiary hearing thus commenced on August 19, 1998.

C. Evidence Presented At The Evidentiary Hearing on Remand

C1. Evidence With Respect To The First Claim On Remand.

At the commencement of the evidentiary hearing, the defense counsel announced that he was filing a "notice of waiver" with respect to the Defendant's complaints as to

[4] Valle, 705 So. 2d at 1336 (Wells J. concurring).

the resentencing judge's conduct before the jury. (PCR3. 152-3; 62).[5] The post conviction judge then conducted a personal colloquy of the Defendant, and ascertained that the latter was voluntarily and knowingly abandoning any claim as to any contact between the resentencing judge and the victim's wife. (PCR3. 153-54). The defense then proceeded with testimony from three of the four resentencing counsel, on the second claim of ineffectiveness.

C2. Evidence As To The Second Claim On Remand.

Ms. Edith Georgi Houlihan testified that she joined the Dade County Public Defender's Office in 1981. (PCR3. 166). Prior to that she had been a law clerk for "General Court" Judge Rogers, and the law firm of "Greenberg, Traurig." Id. At the time of the 1988 resentencing at issue herein, Ms. Georgi was the "senior trial counsel" in the resentencing judge, Judge Gerstein's, division. (PCR3. 167). At this time, she had tried at least two (2) other capital cases, from voir dire through the conclusion of sentencing. (PCR3. 168, 190-91). Ms. Georgi was one of the four (4) attorneys who represented Valle at the 1988 resentencing at issue herein.

On direct examination by the defendant's post-conviction counsel, Ms. Georgi

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[5] The Symbol PCR3 ___, represents the record on appeal in the instant case, Florida Supreme Court Case No. 94,754. The symbol SPCR3. ___, represents the supplemental record on appeal in this case.

testified that there was "ongoing dispute as to strategy" between two (2) of Valle's other attorneys, Messrs. Scherker and Zelman. (PCR3. 169). She stated that her "impression" was that Mr. Scherker "felt compelled to present" Skipper evidence, because he "thought the remand would be taken away," if this evidence was not presented. (PCR3. 170, 184). Mr. Zelman, on the other hand, with whom she had taken depositions at the Florida State Prison several months prior to the resentencing, felt very pessimistic and negative about presenting Skipper evidence. (PCR3. 172). Ms. Georgi stated that as a result of this ongoing dispute as to strategy, Mr. Zelman ceased his representation during voir dire because he did not want to put on Skipper evidence. (PCR3. 172-73; 170). Ms. Georgi emphatically insisted, however, that she had never been involved in any discussions with respect to the presentation of Skipper evidence, nor any strategy of any kind. (PCR3. 171-72, 184). This was apparently because Mr. Scherker was regarded "as the guru of legal appellate matters." (PCR3. 185). Ms. Georgi added that she was "kind of scrambling" to get ready for presentation of "traditional mitigation," after Mr. Zelman's departure. (PCR3. 171, 173). She stated that she "wasn't really involved in a trial capacity. I was really very last minute in this effort." (PCR3. 174). Ms. Georgi concluded that her presentation of traditional mitigation was "pretty much emasculated by the prisoner evidence coming out on cross." (PCR3. 176-77).

On cross-examination, however, Ms. Georgi admitted that her recollection of the

resentencing presentation of traditional mitigation being "emasculated" by cross-examination on model prisoner evidence was wrong. (PCR3. 200, 202). In fact, the "traditional mitigation" evidence witnesses had not been cross-examined with respect to Valle's prior history on Death Row. Id. It should also be noted that Ms. Georgi had presented the bulk of the defense mitigation at the resentencing. She had presented the testimony of the family members, the character witnesses, the mental health expert, Dr. Toomer and, the social history expert, Evelyn Milledge. (PCR3. 189). Ms. Georgi stated that she was presenting the "same type" of evidence as that presented in 1981. (PCR3.196).

Moreover, Ms. Georgi's testimony as to a last-minute "scrambling" to present witnesses was also refuted on cross-examination. Ms. Georgi admitted that she had been involved in taking depositions of witnesses several months prior to resentencing. (PCR3. 190). She also admitted that she had been assigned the responsibility for presenting testimony from her witnesses at least a month prior to Mr. Zelman's departure from resentencing. (PCR3. 187-89).

Finally, Ms. Georgi's protestations that she was not involved in any strategy determinations or discussions with respect to Skipper evidence, were also directly refuted by her record representations at the resentencing. At the resentencing proceeding, Ms.

Georgi had affirmatively represented that she had had "hours of discussions" with the defendant with respect to Mr. Zelman's disagreement as to presentation of Skipper evidence:

> THE COURT: Back on the record. Mis Georgi, you have discussed this with Mr. Valle?
>
> MS. GEORGI: Yes, Your Honor.
>
> THE COURT: There is no question in your mind that he understands all the ramifications and that he is satisfied and wishes that you and Mr. Scherker and Miss Gottlieb continue to represent him without Mr. Zelman?
>
> THE DEFENDANT: Yes, sir.
>
> MS. GEORGI: Yes, Your Honor.
>
> THE COURT: You do understand at some later time you will end up giving up your right to complain that Mr. Zelman was not here?
>
> THE DEFENDANT: I understand.
>
> THE COURT: Are there any questions you want to ask me about that Mr. Valle?
>
> THE DEFENDANT: No.
>
> THE COURT: Anything at all you don't understand?
>
> THE DEFENDANT: No, I understand it.
>
> MISS GEORGI: We have had hours of discussions about this.

(3R. 2334-38) (emphasis added).

Mr. Michael Zelman was the next witness at the hearing below, and testified that he became a member of the Florida Bar in 1977. (PCR3. 213). He first became involved in Valle's case in late 1981, on appeal from Valle's second trial. Id. He represented the defendant on direct appeal of that trial in the Florida Supreme Court, on writ of certiorari in the United States Supreme Court, and continued his representation through the remand from the latter Court. (PCR3. 213-4).

Mr. Zelman then participated in the resentencing as a trial attorney, with assistance from Mr. Scherker, Ms. Gottlieb and Ms. Georgi. (PCR3. 214-15). Mr. Zelman testified that in the weeks prior to resentencing, he and Mr. Scherker had several discussions with respect to the Skipper evidence, and that they were in disagreement as to the presentation of such evidence at the resentencing. (PCR3. 215-16). Mr. Zelman testified that he "felt that the impeachment which the state would have would be overwhelming," and that Mr. Scherker, "disagreed with me in the sense that he felt that we really had no choice." (PCR3. 216). According to Mr. Zelman, Scherker was of the opinion that if the Skipper evidence was not presented, the Court would simply reinstate the prior jury recommendation. Id.

Mr. Zelman added that they then had discussions "about the strategic issue of whether maybe we shouldn't admit this evidence because the rebuttal is so bad." (PCR3.

219). He stated that, "the results of that simple conversation was that [Scherker] disagreed with me, and I felt strongly and I felt that it had to be decided by the client." Id. Mr. Scherker had, "made a comment that as a legal practical matter failure to introduce that evidence meant that there would be an imposition of the existing or, I should say, a reimposition of the existing jury recommendation of death and that was unacceptable, and I agreed that that was the result, but I didn't think that that would be the result legally, so that is what the disagreement was." (PCR. 219-20) (emphasis added).

Mr. Zelman testified that as an "indirect" cause of this disagreement he left the defense team, after voir dire had commenced and some potential jurors had been questioned. (PCR3. 220). Mr. Zelman stated that the direct reason for leaving the case was that he felt that, "there was no longer an attorney/client relationship between myself and Mr. Valle." Id.

Mr. Zelman explained that prior to leaving the case, the attorneys had a meeting with Valle and each presented his point of view, without the alleged "legal analysis" that had led to the disagreement:

> [MR. ZELMAN]: There was a meeting with Mr. Valle, myself and Mr. Scherker, and I believe Ms. Georgi and Ms. Gottlieb. . . . [d]uring that meeting, I made some kind of an initial presentation to Mr. Valle that we had a disagreement, me and Elliot, and at that time I felt the model prisoner evidence should not be presented. I told him basically I

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

(PCR3. 221-22) (emphasis added). Mr. Zelman agreed that in summary, he told Valle, "if we put on some of this prisoner stuff we are going to get killed in court, and there is no way that we will get the recommendation that you want, and Mr. Scherker's position is: trust me on this, this is the only shot that you got on getting a life recommendation, and this is the course that we ought to follow, and at that time the client chose Mr. Scherker's choice." (PCR3. 239).

Mr. Zelman reemphasized that he, "did not hear any legal analysis in Mr. Scherker's presentation to Mr. Valle." (PCR3. 222). The alleged legal opinion that there would be no resentencing, or the remand would be recalled if Skipper evidence was not

presented, was never communicated to the defendant. Id. Mr. Zelman stated, "the purpose of the meeting in this large room that I described was to address in my mind the strategy that would be pursued, meaning whether or not the model prisoner evidence be presented or not." (PCR3. 224) (emphasis added). He added, "Mr. Scherker clearly did not tell Mr. Valle if we don't go forward with the model prisoner evidence they will reimpose the prior death recommendation. It was not put to him in those terms." (PCR3. 238).

It should be noted that Mr. Zelman's recollection of a "short" presentation to the defendant was contradicted by his open court record statements at the resentencing:

> THE COURT: You have discussed with him (defendant) the pros and cons of you being here?
>
> MR. ZELMAN: Yes.
>
> THE COURT: At long length?
>
> MR. ZELMAN: What I would consider to be sufficient.

(R3. 2334-38) (emphasis added). More importantly, the record also reflects that Mr. Zelman himself had admitted, in open court prior to the resentencing, that in light of the prior trials and jury recommendations in this case, the failure to present model prisoner testimony would probably result in the same jury recommendation of death as had occurred in the prior proceedings:

> [MR. ZELMAN]: The court inquired whether there were

> other mitigating circumstances. I said nothing substantially. Ms. Brill responded, well, they did present in 1981 expert testimony on two statutory mitigating factors that didn't work, didn't work in 1981. It was a death advisory recommendation.
>
> So we know if we strip ourselves voluntarily of the rehabilitation evidence, we know what that advisory verdict is going to be. That's why we are in this situation where we go forward with our mitigating evidence, or new mitigating evidence. One, that evidence was excluded in '81. We have to tell them [resentencing jury] about his life on death row over the last ten years. If we don't tell them, we know what the situation is going to be had.

(R3. 1003; PCR3. 231) (emphasis added). Finally, despite his testimony that Mr. Scherker felt that model prisoner evidence had to be presented as a matter of law, Mr. Zelman acknowledged that Scherker had in fact filed motions stating that he would not be presenting Skipper, or past model prisoner testimony, but rather evidence that the Defendant's behavior would be acceptable, in an effort to preclude the State's rebuttal of the prior escape attempt. (PCR3. 236-37; SR3. 104-5; R3. 1176-84; 1211-25).

The evidentiary hearing herein was then continued because of the unavailability of Mr. Scherker and Ms. Gottlieb, due to their child's illness. (PCR. 240-41). The hearing was continued to September 24, 1998. (PCR3. 242). That hearing was canceled, however, due to the Defendant's post-conviction counsel's illness in the family. (PCR3. 309-10). The hearing was then rescheduled for October 14, 1998. (PCR3. 310). On the above date, the defense presented its last witness, Mr. Elliot Scherker. (PCR3. 462, et

seq.).

Mr. Scherker testified that he has been a member of the Florida Bar since 1975, at which time he joined the Dade County Public Defender's Appellate Division. (PCR3. 462-3). He remained with the Public Defender's Office until 1992, at which time he joined the law firm of Greenberg & Traurig. Id. During his tenure at the Public Defender's Office, he "fairly regularly" attended the yearly three (3) day seminars on capital litigation. (PCR3. 484). Indeed, he often either moderated or participated in the instructing panels at said seminars. Id. He initially became involved in this case in 1978, during the first trial. (PCR3. 463). Although the Public Defender's Office did not represent the Defendant at that time, Mr. Scherker went to the courtroom, observed the trial, and conversed with Valle during said trial. Id. Mr. Scherker then became lead counsel on direct appeal of the 1978 trial. (PCR3. 463-64). At this juncture, Mr. Scherker had been lead counsel on at least two (2) prior capital appeals, as well as having served as "second chair" on "at least two or three other" capital cases. (PCR3. 464).

Valle's case was reversed on appeal, while Scherker represented him, and the latter continued his representation of the Defendant through the 1981 retrial. (PCR3. 465). Mr. Scherker was the "second chair" during this retrial. Id. He presented character and family witnesses during the sentencing phase of the retrial. (PCR3. 466). On direct

appeal of the retrial, Mr. Scherker did not formally represent the Defendant due to a moratorium by the Florida Supreme Court, prohibiting the Public Defenders from pursuing capital appeals unless they could do so in a timely manner. Id. Mr. Scherker was, however, in contact with and assisted Mr. Zelman in the appeal of the retrial. (PCR3. 234). Upon remand for resentencing, Scherker again formally resumed his representation of the Defendant, along with Mr. Zelman, Ms. Georgi and Ms. Gottlieb. (PCR3. 466-67).

Mr. Scherker stated that at the 1988 resentencing proceeding, "I believe that I had to put on the evidence that was excluded in 1981, because other than that there was nothing wrong with the 1981 sentencing." (PCR3. 469). Mr. Scherker stated that he thought that if the model prisoner evidence was not presented at the 1988 resentencing, then "the 1981 sentence would have been valid." (PCR3. 470). He explained that if they "didn't win the sentencing trial, without the Skipper evidence," then there was no chance of [Valle] getting a life sentence in this proceeding." (PCR3. 471). Scherker was then asked if he had, "any concerns about the State possibly filing a motion to have the remand withdrawn." Id. He responded:

> [MR. SCHERKER]: Yes, I did think about that, quite frankly and I considered it a rational possibility that if we were to announce in theory that we weren't presenting the evidence that was excluded in 1981, that the State might have grounds, though I have never seen it done, to ask the Florida Supreme Court to withdraw its mandate, and reinstate the 1985

> affirmance because we had waived the only error that got us the new sentencing trial in the first place.

(PCR3. 471) (emphasis added). Mr. Scherker stated that he had discussed the above analysis with other colleagues, as well as the capital division public defenders in Palm Beach County. (PCR3. 517).

Mr. Scherker then admitted that he knew that the resentencing herein was a new proceeding at which there was no obligation to present or not present any particular witness or evidence:

> Q. And you understood, of course, that when you put on a full sentencing trial you were not obligated to call the same witnesses you called the last time?
>
> A. No, of course not.
>
> Q. And the witnesses that you do call are not obligated to say the same things as they did the last time; correct?
>
> A. Of course not.
>
> Q. So there may be different evidence presented at any time of hearing than there was at a previous hearing?
>
> A. Yes, sir, of course.
>
> Q. And you understood that long before you began this proceeding?
>
> A. Yes.

(PCR3. 518).

Mr. Scherker then stated that he and Mr. Zelman had a disagreement as to presentation of model prisoner testimony at resentencing. (PCR3. 472). He stated that after numerous discussions with Mr. Zelman, the attorneys then had a meeting with Valle. Id. At the meeting, Mr. Zelman had expressed his feeling that "we would lose if we went forward with the excluded evidence." (PCR3. 473). Mr. Zelman's position was "a strategic opinion." Id. Mr. Scherker, on the other hand, did not feel that there was any "option." Id. As a result, Mr. Zelman left the defense team. (PCR3. 474).

Scherker testified that the decision to present Skipper evidence was his and not Mr. Valle's, because the latter was never asked to make a decision. (PCR3. 474). He also stated that his decision was based on "legal analysis," and did not even reach "risk-reward analysis." (PCR3. 475).

However, Mr. Scherker then admitted that he had in fact analyzed "how good or how harmful" the Skipper evidence would be in front of a jury, as he: "thought that we had strong mitigating evidence on the so-called model prisoner theory." Id. Scherker explained that he had found three (3) experts who opined that, despite Valle's disciplinary record, he would be a non-violent prisoner who would adapt, if given a life sentence. (PCR3. 504-6). The experts' testimony at the resentencing was that "none" of Valle's disciplinary reports were "serious," and that the escape attempt "didn't appear to

resemble a real escape attempt." Id. Scherker thus admitted that if the resentencing jury had accepted the experts' testimony, then it would have recommended a life sentence. (PCR3. 506).

Moreover, despite his statement that he had made no "risk analysis," Scherker was confronted with his own letters to various experts, written months prior to the resentencing. (PCR3. 496; 498-500). In these letters, Scherker had detailed Valle's prison disciplinary reports, had expressed his concern as to the potential damage of these before the jury, and stated various strategies for limiting the potential damage. Id.

Scherker also stated that both he and Mr. Zelman had agreed that, even if model prisoner evidence was not presented, Valle's prior prison conduct could be brought out by the state during the cross-examination of the traditional mitigation witnesses, who testified as to the Defendant's social history and background. (PCR3. 501-4). All of said witnesses knew that Valle had been on Death Row for 10 years, and were familiar with his history. Id. Indeed, Mr. Zelman had agreed that some of these witnesses, such as the background/social historian, Evelyn Milledge, had relied upon the reports of prior prison behavior experts and could be cross-examined on the history that she had utilized, thus opening the door to Valle's prior prison conduct. Id. (see also R3. 5017). Mr. Scherker thus testified that because the prior prison conduct might be introduced anyway, he felt

that he should at least get his own experts to testify. (PCR3. 503). As noted previously, these experts testified that the disciplinary reports were not serious, that there was no real escape attempt by the Defendant, and that the Defendant would not be violent in the future. (PCR3. 505-6). Mr. Scherker agreed that the remainder of the evidence at resentencing was essentially the same as that presented during the 1981 retrial. (PCR3. 487-90)

Finally, Mr. Scherker's protestations that he felt obligated to present model prisoner evidence, solely based upon a "legal analysis," were contradicted by his own actions at the time of resentencing. As noted by Mr. Scherker, the Skipper decision involves the presentation of both past good behavior in prison, and predictions of future "model" conduct. However, prior to the resentencing, Mr. Scherker had filed a motion in limine, expressly stated that he would not present any evidence of "past" good behavior in prison, but would only present future adaptability, in order to preclude the State's evidence of Valle's prior prison behavior. (PCR3. 480, 512-13; SR3. 104-5; 3R. 1176-84, 1211-25). After this motion was denied, prior to the presentation of the defense case, Mr. Scherker then again represented to the court that he would not even present future "model" prisoner testimony; that he would limit his presentation to "non-violent" adaptation, again in order to preclude evidence of prior prison conduct. (PCR3. 512-13; R3. 4152-54). As noted by Mr. Scherker, neither the Skipper decision, nor the remand

for resentencing by this Court had mentioned such "non-violent" behavior substitution for "model" prisoner evidence. (PCR3. 512-13).

The defense then rested its case, without presenting any testimony from the fourth attorney involved in the case, Ms. Gottlieb. (PCR3. 527). The post-conviction judge then allowed both parties to present arguments as to their respective positions. (PCR3. 528-69).

After extensive questioning by the post-conviction judge during the final arguments, the judge requested proposed orders from both parties. (PCR3. 569). The parties agreed to serve the proposed orders on each other. Id. In accordance with a prior agreement, the court also granted the Defendant an opportunity to file any objections to the State's proposed order, and agreed to consider same prior to entering any final order. (PCR3. 569-70; 531). Thereafter, both parties did in fact file proposed orders (PCR3. 256-74; SPCR3. 111-14), and the Defendant filed objections to the State's proposed order. (PCR3. 275-79). The post-conviction judge then entered his final order denying post-conviction relief, after having considered both parties' proposed orders and the Defendant's objections. (PCR3. 280) The detailed findings with respect to each of the two (2) claims at issue in these remand proceedings have been set forth below.

D. Post-Conviction Court's Order Denying Relief

1) Order On The First Claim On Remand

As noted previously, the Defendant, at the commencement of the evidentiary hearing ordered by this Court, decided to waive the first claim on remand, i.e., allegations that the resentencing judge had kissed the victim's widow and fraternized with the victim's friends, all in full view of the jury. The post-conviction court, after having colloquied the Defendant and ascertained that the Defendant agreed with such waiver, denied said claim. (PCR3. 280-81). In an abundance of caution, after the conclusion of testimony at the evidentiary hearing, the post-conviction judge again questioned Defendant's counsel with respect to the waiver and ascertained that Defendant did not wish to proceed with this claim:

> THE COURT: There is one thing that I need to address before you start and this won't count from your time. Okay?
>
> MR. STRAND: Yes.
>
> THE COURT: The Supreme Court sent this back for an evidentiary hearing on two issues, and one of those issues concerns some alleged incident involving Judge Gerstein and you chose at the beginning of this hearing to file a pleading waiving your right to have an evidentiary hearing on the issue of some alleged impropriety regarding Judge Gerstein; is that correct?
>
> MR. STRAND: Yes, that is correct, Judge.
>
> THE COURT: I feel obligated to ask you why you would argue many, many months ago and suggest to this Court that some alleged impropriety occurred and indicate to the Court

your request for an evidentiary hearing, and then after the Supreme Court of Florida saw fit to chastise me for not giving you an evidentiary hearing you then came into court and indicated that you didn't want one?

It gives rise to at least -- and I'm not saying that I have this state of mind -- but some independent observer might think that it was nothing more than a ruse. How would you respond to that other person's suggestion that had occurred?

MR. STRAND: Well, Judge, I think that there is a real simple explanation and it has to do with the procedures required to work under 3.850.

What happens is that we are required to file a 3.850 motion within a deadline, and prior to the time of filing a 3.850 motion we do investigate and we try to make a determination if there are claims that have merit that should be pled, and prior to the filing of the 3.850 motion, the trial court can allow us to go and depose people or get orders of the court to do things, and there is no rule in 3.850 that will allow us to go and depose Judge Gerstein, prior to the 3.850 motion so what I can say is that prior counsel wasn't me, it was some other lawyer before I worked here who had found indicia and in fact there may have been some misconduct on the part of the Judge, and under the ruling of 3.850 that allegation was filed as a claim, and then we came forward and when the Supreme Court ordered a hearing on it that put us into the realm of discovery, which is State versus Lewis (phonetic), the Florida Supreme Court case which allows us to have discovery pre-evidentiary hearing and Judge, without belaboring it, it is quite simple; the State did depositions and I did depositions and after deposing Judge Gerstein, I made the determination that Mr. Valle had an excellent claim of inefficient assistance of counsel and that he should prevail on that claim, and that, in fact, we didn't need to bring the claim with Judge Gerstein in, and Judge Gerstein came forward and gave a deposition and quite frankly his testimony convinced me that this was the best claim to go forward on.

(PCR3. 532-34).

* * *

> THE COURT: I am just wondering how that will play out in years to come when people read that decision. You know, ten years from now some lawyer is going to read that decision, you know, long after this case is forgotten and say; hey, here is something that we can use, let's allege that the judge did something improper, something morally improper or just horrendous and refuse to support it in any way, hopefully, we will get a judge that is not aware of this case, and the Judge will deny a motion for an evidentiary hearing and again we have this problem. And couldn't that happen?
>
> MR. STRAND: Well, Judge, I think that that could happen, but the problem that the lawyer would have is that I wouldn't want to be that lawyer.
>
> THE COURT: I wouldn't either.
>
> MR. STRAND: I wouldn't want to be that lawyer coming back into court and not having made a valid claim.
>
> THE COURT: I am wondering how it is going to play out when the Florida Supreme Court -- I don't know, I guess that there will be a review of this decision, regardless of which way that I will go, but I wonder how the Florida Supreme Court is going to react when they find out in this case that you withdrew the request for the evidentiary hearing, and I hope that you don't incur any wrath because the Supreme Court of Florida seems very quick to, you know, vent its wrath at people involved in this case. I certainly found that out even though my own involvement in this case is extremely minimal compared to all of the years that the case has been around. I was chastised quite soundly in a manner that I really didn't quite appreciate.

(PCR3. 535-36).

2) Order On The Second Claim On Remand

As noted previously, this Court also remanded for an evidentiary hearing on whether the Defendant's attorneys introduced model prisoner testimony at the Defendant's resentencing only because they believed this was required, and if so, whether there is a reasonable probability that in the absence of the State's rebuttal evidence, Valle would not have been sentenced to death. Valle v. State, 705 So. 2d at 1334. The post-conviction judge found that the Defendant had neither demonstrated deficient conduct, nor any prejudice, as required in Strickland v. Washington, 466 U.S. 668 (1984). (PCR3. 281-91).

2a) Failure To Demonstrate Deficient Conduct

The post-conviction judge first summarized the evidence presented by three (3) of the four (4) resentencing attorneys at the evidentiary hearing. (PCR3. 281-86). The court then held that: a) the defense team had recognized that if they presented substantially the same evidence that they had in the 1981 retrial, the result of the 1988 resentencing would have been the same - i.e. - a jury recommendation and sentence of death; and, b) that the record, "clearly demonstrates a recognition by Mr. Scherker that he well and fully knew that he did not have to put on the same evidence at the resentencing hearing that was excluded at the prior hearing in 1981":

> The Court finds that there was a recognition by the defense team that if the same mitigation were to be presented at the resentencing hearing as was presented in 1981, that the results would be the same. Mr. Zelman recognized it when

he told that to the trial court during the pretrial motions. Ms. Georgi testified that other than the Skipper evidence, the defense would be basically presenting the same type of evidence, only trying to amplify it. Mr. Scherker also recognized that the non-Skipper mitigating evidence was essentially the same in both sentencing hearings in 1981 and 1988; which had proven ineffective.

The Florida Supreme Court held that this Court must decide whether trial counsel believed that they were required to present the Skipper evidence, and if so, whether there is a reasonable probability that in the absence of the State's rebuttal evidence, the defendant would not have been sentences [sic] to death. This is essentially the two-prong test for ineffective assistance of counsel enunciated in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), wherein it was stated:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

In making the determination of whether counsel was deficient, this Court may take into consideration the credibility of the witnesses, such portions of the trial record as may be applicable, and other circumstances bearing on the issue. It should be further noted that an attorney's own admission that he or she was ineffective is of little persuasion in determining whether a defendant received ineffective assistance of counsel. Breedlove v. State, 692 So. 2d 874, 877 fn.3 (Fla. 1994).

Taking those factors into consideration, this Court finds that trial counsel, Mr. Scherker, Ms. Gottlieb, and Ms. Georgi's performance in the resentencing hearing was not deficient, in that their errors were not so serious that they were not functioning as counsel guaranteed under the Sixth Amendment, and were not so serious that they deprived the defendant of a fair sentencing hearing. To portray the actions of defense counsel as serious errors in judgement, that they felt bound by the Florida Supreme Court's opinion and mandate to put on the Skipper evidence is simply not supported by the record.

First, it must be stressed that the evidence which the Florida Supreme Court held should have been admitted in the 1981 trial, was not only evidence that the defendant had been a model prisoner, but also that the defendant would be a model prisoner in the future. Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987). Recognizing that subsequent to the 1981 trial, there was new evidence that the defendant had not been a model prisoner, including evidence of an escape attempt; defense counsel, on January 21, 1998, filed a Motion in Limine Re: Uncharged Acts of alleged Misconduct. In that motion and memorandum of law, defense counsel, Mr. Scherker, argued that he was not seeking to introduce evidence that the defendant had been a model prisoner, but rather his potential for future acceptable behavior in prison if sentenced to life imprisonment, and, as such, evidence of prior acts of misconduct of the defendant during his prior incarceration, was not relevant to rebut his future behavior. (S.R. 104-105; R. 1176-1184; 1211-1225). This motion was denied by the trial court. (R. 1217-1219). After the State concluded its case in chief, defense counsel offered to modify its claims and would not introduce evidence that the defendant would be a model prisoner in the future, but rather they would introduce evidence that the defendant would be a non violent prisoner. (R.4152). Defense counsel again asked that if they modified their claim, whether the trial court would exclude the evidence of the defendant's behavior in prison. The trial court noted that it had the ability to limit evidence where it's prejudicial impact outweighed its probative value.

(R. 4152). The trial court eventually allowed in much of the same rebuttal evidence. Despite Mr. Scherker's testimony that this was not anything different than what he had previously argued in the motion in limine, the Court finds that this clearly demonstrates a recognition by Mr. Scherker that he well and fully knew that he did not have to put on the same evidence at the resentencing hearing that was excluded at the prior hearing in 1981.

Mr. Scherker had his three expert witnesses testify that the defendant would be a non violent prisoner if given a life sentence and preserved his objections to the State's introduction of any of his prison acts as rebuttal. Lloyd McClendon, an expert in corrections, testified that the defendant would be a nonviolent prisoner and would make a satisfactory adjustment if sentenced to life imprisonment. (R. 4210-4211, 4284-4285). Mr. McClendon also testified in a manner attempting to minimize the defendant's problems in prison. He stated that the defendant had told him that he did not cut the bars in the his [sic] cell, and that keys were often found in inmates' possession, and that no implements or escape paraphernalia had been found in the defendant's cell. (R. 4249-4251, 4269-4276). He also testified that escape is a common fantasy among inmates, and that escape from death row would not be possible. (R. 4277-4278). Mr. McClendon further testified that the remaining disciplinary reports were nonviolent in nature and did not indicate that the defendant would be a problem inmate in a non-death row environment. (R. 4259-4261). Similar testimony was elicited from the other defense corrections experts, John Buckley (R. 4593-4594, 4650-4652) and Dr. Brad Fisher (R. 4888-4912).

The Court concludes that the evidence demonstrated that defense counsel, despite their claim to the contrary, did not believe that they were required by the mandate of the Florida Supreme Court to introduce evidence that the defendant was, and, in the future, would be a model prisoner. Rather it is clear, that these experienced attorneys believed that without additional mitigating evidence, substantially different from that introduced in 1981, the result of the

> sentencing proceeding would be the same. To that end, they decided not to introduce past model prisoner or future model prisoner testimony, but rather modified it to present nonviolent prisoner testimony, which they believed would preclude the rebuttal evidence of the defendant's bad acts in prison; a belief which continued though the appeal of the defendant's third death sentence. Such actions are reasonable and clearly not deficient under the standards of Strickland v. Washington, supra.

(PCR3. 286-89) (emphasis added).

2b) Failure To Demonstrate Prejudice

The post-conviction judge also found that no prejudice had been demonstrated, as: 1) in light of the prior trials herein, there was no reasonable probability that the outcome would have been different if the defense had not put on the non-violent prisoner testimony; and, 2) the weighty aggravators herein outweighed the only non-statutory mitigation found in the instant case and which had been given "little weight" by the resentencing judge:

> Even if this Court were to find that defense counsel's actions were deficient, which it clearly does not find, this Court does find that the defendant was not prejudiced by those actions. In explaining the appropriate test for proving prejudice, the United States Supreme Court held that "the defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, 466 U.S. at 694, 104 S.Ct. at 2068.
>
> It should be further noted that Mr. Zelman's proffered strategy for the 1988 proceeding of using the defendant's

family history, together with other non-prison behavior related mitigation evidence, had been the previous strategy in the 1981 sentencing hearing.

This Court finds that the evidence presented in 1981 was substantially similar to the non-Skipper evidence presented in 1988.

All testimony must be evaluated in light of the facts of the crime and the aggravating factors found by the trial court. Summarized briefly, the defendant, while on probation was driving a stolen car, when stopped by the late Officer Pena. While the officer was making a 'records check', the defendant, after telling his friend, who was in the car with him, that "I'm going to bust him", retrieved a handgun, calmly walked up to the officer, and shot and killed Pena in the neck, causing Pena to choke on his own blood. He then shot and attempted to kill Officer Gary Spell, and then fled from the scene. He was arrested several days later in another county, while armed with the murder weapon. He confessed to his crimes.

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

> conclusion based on the entire record **not** necessarily because of the above-stated vote.
>
> The trial court in its 1988 sentencing order, found no statutory mitigating circumstances, and gave little weight to the nonstatutory mitigating circumstances. They could not have reasonably outweighed the three very powerful aggravating circumstances involved in this killing of a police officer, which was done in cold, calculated and premeditated manner, for the purpose of avoiding arrest, and at the same time attempting to commit the first degree murder of another police officer. As such, any deficiency by counsel was clearly not prejudicial under the dictates of Strickland v. Washington, supra. See, e.g., Robinson v. State, 707 So. 2d 688 (Fla. 1998); Von Poyck v. State, 694 So. 2d 686 (Fla. 1997); Breedlove v. State, 692 So. 2d 874 (Fla. 1997); Turner v. Dugger, 614 So. 2d 1015 (Fla. 1992); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); Tompkins v. State, 549 So. 2d 1370 (Fla. 1989); Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986).

(PCR3. 289-91) (emphasis added).

The post-conviction judge then heard and rejected the Defendant's motion for rehearing, on November 24, 1998. (PCR3. 572-81). This appeal has ensued.

SUMMARY OF ARGUMENT

1. Appellant's argument as to a due process violation is procedurally barred and without merit. The record reflects that the Defendant had prior notice of and agreed to the presentation of proposed orders by both parties. Thereafter, the defense had the opportunity to review the State's proposed order and file objections thereto. The lower court considered both the Defendant's proposed order and his objections. Moreover, the lower court did not adopt the State's proposed order in toto.

2. The testimony presented at the evidentiary hearing below, in conjunction with the record of the prior proceedings in this case, amply support the post conviction court's findings that resentencing counsel presented non-violent prisoner evidence as a matter of strategy -- not mistaken belief, and that no deficient conduct was thus demonstrated. The lower court's finding of lack of prejudice, in light of the balance of the three (3) powerful aggravating circumstances and insignificant non-statutory mitigation, is also well supported by the record.

ARGUMENT

I.

THE CLAIM OF DUE PROCESS VIOLATION IS PROCEDURALLY BARRED AND WITHOUT MERIT, WHERE THE DEFENDANT AGREED TO THE PREPARATION OF PROPOSED ORDERS BY BOTH PARTIES, IN FACT PRESENTED HIS OWN PROPOSED ORDER, AND WAS FURTHER ALLOWED TO FILE OBJECTIONS WHICH IN TURN WERE FULLY CONSIDERED BY THE POST-CONVICTION COURT PRIOR TO THE ENTRY OF THE FINAL ORDER.

The Defendant argues that this Court should reverse the proceedings below, and remand for another evidentiary hearing, before a different judge, because the post-conviction judge "almost verbatim" adopted the State's proposed order. See Brief of Appellant at pp. 9, 12-13. This contention is without merit, as the record herein reflects that the State submitted a 19 page single spaced proposed order (PCR3. 256-074). The trial judge's final order, in contrast, is written in a font almost twice as large as that of the State's, and is less than 12 pages long! The "almost verbatim" characterization by the defense is thus without merit.

Moreover, the State would note that the defense's characterization of its objections in the court below is misleading. The Defendant in the court below did not raise the arguments relied upon herein. Initially, when the post-conviction court requested proposed orders by both parties, the Defendant objected on the grounds that, a) he should

have sufficient time to do so; and, b) that while he should be allowed to submit a proposed order, the State should be precluded from doing so!:

> THE COURT: . . . I would like you both to have proposed orders for me on that day because I want to be able to, if we finish this hearing on Thursday, I'm going to do everything in my power to sign off on my order by Friday, the following day and that is all.
>
> MR. STRAND [Defense Counsel]: Judge, I'm going to warn you that I would object to having proposed orders, and I think that the simple matter of it is that I won't be able to prepare my order until I hear what Mr. Scherker and Ms.Gottlieb say on the stand, and Judge, if we do proposals we need to know --
>
> THE COURT: I'm inviting a proposed order from the defense.
>
> MR. STRAND: That is correct Your Honor.
>
> THE COURT: You object to that?
>
> MR. STRAND: No, I object to Ms. Brill [prosecutor] being allowed to give any order, but not me.

(PCR3. 442-43) (emphasis added). The lower court then addressed the Defendant's concerns and granted him sufficient time to submit a proposed order, in addition to providing an opportunity to be heard on the State's proposed order. (PCR3. 443-45). The Defendant thus did not renew his prior objections:

> THE COURT: Well, I am inviting both sides to have proposed orders as well as memorandums of law.
>
> MR. STRAND: Judge, not to be argumentative, but I don't want to prepare the order until I finish presenting my

evidence.

THE COURT: All right.

MR. STRAND: If we are going to present proposed orders then I want to have an opportunity to be heard by the Court concerning the order.

THE COURT: How about maybe not a proposed final order, how about a proposed initial draft, would that be all right?

MR. STRAND: Yes, Judge, I would object to the whole thing, and here's what I would ask the Court to do, I think that the Court should listen to the evidence and make the consideration based on the arguments and if the Court wants a memo then the Court should write its own order using its own considered judgment for the language and so forth, and if the Court decides that it wants to have proposed orders I still object based on --

THE COURT: I will tell you right now, I am going to write my own order in this case. I'm going to write my own order in this case, and I'm not going to sign off on either of your orders, but I am just inviting help on both sides, that is what I am inviting.

MR. STRAND: Judge, as long as I have a chance to respond on what they write.

THE COURT: I will write my own order in this case.

MR. STRAND: I understand that, and I was suggesting that you do and I just want an opportunity to respond to what Ms. Brill and Mr. Laeser writes, and if I see anything that is incorrect legally, I want to make the Court aware of that.

THE COURT: So, I guess that it is unrealistic for me to get a final order the following day. Do you think that a week later would be sufficient?

> MR. STRAND: Yes, Judge, a week would do it. I am not trying to make trouble, I'm trying to make record.
>
> THE COURT: No, I want to satisfy you and send up a record where there are not a lot of additional collateral issues.
>
> MR. STRAND: Right, and not a lot of time.

(PCR3. 443-45) (emphasis added).

Thereafter, the defense again agreed to the submission of proposed orders by both parties, after being assured that the proposed orders would be submitted after the conclusion of all the evidence, and with an additional opportunity for pointing out any areas of disagreement with the State's proposed order:

> MR. STRAND: Judge, just to let you know, under the case law, Mr. Valle has the right to have counsel review the State's order and file any objections and if counsel is concerned that maybe the testimony is different that there is different case law --
>
> THE COURT: I will ask that each side send copies of their proposed order and again I am underlining the words rough copies, copies of the proposed rough orders need to be sent to each other on Friday and as I said before I will submit and I will prepare my own order.
>
> I'm not going to sign off on either one of your orders, and I will prepare my own order and basically I want prepared orders to help me with preparation of my order and that is all.
>
> MR. STRAND: So if we submit them on Friday, would we have an opportunity to file objections on Monday?
>
> THE COURT: I don't know. You can do anything that you

> want, but I'm going to walk into court Tuesday and announce the Court's ruling and hand my final order to the Clerk. I'm not going to delay this any further.
>
> MR. STRAND: I understand that, Judge.
>
> THE COURT: You know, if you can get something to me --
>
> MR. STRAND: -- Monday morning at the end of your docket or something?
>
> THE COURT: Yes, and even Monday after lunch I will be in the office working on this, and if someone can drop it by even at lunchtime or sometime before I would be happy to look at it.
>
> MR. STRAND: Your Honor, I just think that there is case law that says that Mr. Valle has the right to file an objection to anything they submit.
>
> THE COURT: I would be happy to consider it. That motion is granted.
>
> MR. STRAND: Okay. Thank you very much.

(PCR3. 530-31) (emphasis added). The record then reflects that, after the completion of the presentation of all the evidence and the parties' oral arguments thereon, the defense again agreed to both parties submitting proposed orders:

> THE COURT: . . . The Court will be in recess then until tomorrow morning at nine o'clock. Let's just go over what we indicated. You will both submit proposed orders sometime Friday and will each of you send those proposed orders to each other?
>
> MR. STRAND: We can, we can fax them back and forth, Judge.

> THE COURT: Okay. Make arrangements to do that and make sure that I have it Monday morning, and I will work and try to finish my order Monday afternoon and I will announce the Court's decision Tuesday morning, which is, I guess, October 20th.
>
> All right.
>
> MR. STRAND: Judge, you have calendar Monday morning?
>
> THE COURT: Yes, the regular trial calendar.
>
> MR. STRAND: Can I get those objections in about ten o'clock, Judge?
>
> THE COURT: Okay. That is fine. I hope to finish my Monday morning calendar with any kind of luck between 11:00 and 11:20, and I will probably look over the case file and then go back and read whatever you have submitted. Yes, that will be fine if you have it to me by ten o'clock on Monday, it guarantees that I certainly will give it weight, yes.

(PCR3. 569-70) (emphasis added).

In accordance with the above agreements, both parties then submitted proposed orders. (PCR3. 256-74; SPCR3. 111-15). The defense, again in accordance with its prior agreement, was then allowed an opportunity to file objections to the State's proposed order, after having reviewed same. (PCR3. 276-79). The post-conviction judge specifically stated that he had not only "considered the proposed orders submitted by both sides," but that he also "considered the defendant's objections to the State's proposed order." (PCR3. 280). As noted previously, the post-conviction court's final order reflects

that it was not a verbatim adoption of the State's order, and was in fact approximately half as long as the proposal submitted by the State. (PCR3. 280-91).

The State would also note that the vast bulk of the prosecution's proposed order contained an accurate summary of the testimony presented at the evidentiary hearing, an accurate summary of the prior proceedings in this case, and case law precedent in this State. (PCR3. 256-74). The Defendant's objections in the Court below, and even in this Court, have not challenged the accuracy of the facts or law presented in the State's proposed order. There is no requirement that a court "reinvent the wheel" as to recitation of record facts and law in every order. Indeed, as noted by the United States Supreme Court in Anderson v. Bessemer City, 470 U.S. 564, 572 (1985), "even when the trial court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." See also, Mills v. State, 684 So. 2d 801, 804 (Fla. 1996)(trial court's order denying post-conviction relief "for the reasons contained in the State's response", was proper and upheld); Diaz v. Dugger, 719 So. 2d 865, 867 (Fla. 1998)(post conviction court's request for the State to prepare the final order was proper, where Defendant had notice of said request and an opportunity to submit objections or alternative order); Fla. R. Civ. P. 1.080(h)(1) ("the court may require that orders or judgments be prepared by a party,").

The Appellant's reliance upon Patterson v. State, 513 So. 2d 1257 (Fla. 1987), and progeny, is unwarranted. First, an order denying post-conviction relief is not the same as a death sentence order. A sentencing order is a statutorily required evaluation of aggravating and mitigating factors, which must be detailed so as to allow this Court to perform its proportionality review. A motion for post-conviction relief, in contrast, is brought after the convictions and sentence have been affirmed and presumed to be correct. Moreover, even in the case of a sentencing order, when the sentencer makes verbal findings, after notice to both parties, and then requests the State to prepare an order based on those findings, there is no error. Nibert v. State, 508 So. 2d 1 (Fla. 1987). Likewise, any reliance upon Huff v. State, 622 So. 2d 688 (Fla. 1993) and Spencer v. State, 615 So. 2d 688 (Fla. 1993) is unwarranted, as these cases, unlike the situation herein, involved the preparation of orders by one party, without prior notice to the other party, and without an opportunity for the latter to file objections or alternative orders. In sum, the instant claim of due process violation is barred and without merit.

II.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING, IN LIGHT OF THE EVIDENCE THAT RESENTENCING COUNSEL HAD PRESENTED NONVIOLENT PRISONER TESTIMONY AS A MATTER OF STRATEGY, AND, BECAUSE NO PREJUDICE HAS BEEN DEMONSTRATED AS A RESULT OF THE

WEIGHTY AGGRAVATING FACTORS ESTABLISHED AT RESENTENCING AND THE INSIGNIFICANT NON-STATUTORY MITIGATION PRESENTED.

The Appellant argues that the post-conviction court below erred in rejecting his claim of ineffectiveness. The record evidence relied upon by the court below, and virtually ignored by the Appellant, however, supports the post-conviction court's ruling.

As noted previously, this Court remanded for an evidentiary hearing to first determine whether resentencing counsels' conduct in presenting Skipper evidence was deficient, because they were operating under a mistaken belief that they legally had to present such evidence. Valle v. State, 705 So. 2d at 1334. The evidence presented in the court below demonstrated that there was no such mistaken belief, and the post-conviction court accordingly found no deficient conduct. (PCR3. 281-89). Moreover, this Court also instructed the lower court to determine whether Valle had demonstrated any prejudice, even if his resentencing counsel had presented Skipper evidence due to deficient conduct. Id. The post-conviction court determined that no prejudice had been demonstrated, in light of the prior proceedings in the instant case, the overwhelming aggravating circumstances established at resentencing, and the insignificant non-statutory mitigation presented. (PCR3. 289-92). The State respectfully submits that the lower court's findings were amply supported by the evidence and should thus be affirmed.

A. Failure To Demonstrate Deficient Conduct

The evidence at the evidentiary hearing in the lower court amply demonstrates that resentencing counsel were not operating under any mistaken belief that they had to offer Skipper evidence. First, Mr. Zelman, the capital attorney with "significant experience," relied upon by the Appellant,[6] unequivocally testified that his position at the resentencing was that the defense did not have to present Skipper evidence. (PCR3. 415-16). He testified that he viewed the presentation of such evidence to be a matter of "strategy." (PCR3. 219, 425-26, 473). He felt that the presentation of the evidence at issue was harmful. (PCR3. 415). He stated that he had made his views known to the rest of the defense team, as well as to the Defendant. (PCR3. 221-22, 224, 239, 431, 473). Mr. Zelman, at the hearing in the lower court, testified that prior to his departure he had had a meeting with the rest of the attorneys and the Defendant, for the purpose of addressing: "the strategy that would be pursued meaning whether or not the model prisoner evidence would be presented or not." (PCR3. 423). Mr. Zelman stated that at this meeting:

> I made some kind of an initial presentation to Mr. Valle that we had a disagreement, me and Elliot, and at that time I felt the model prisoner evidence should not be presented. I told him [Valle] basically I thought that the rebuttal was too strong, and it would override or overshadow the good mitigation evidence that we did have, and that it would, I felt likely or very likely or probably, but it's stronger than likely result in a death recommendation. I took perhaps a minute or two minutes, and I did not go into any great detail.

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[6] See Brief of Appellant at p. 28.

> My recollection is that Mr. Scherker then spoke next, and he gave what I would call a non legal presentation of the issue. He spoke in terms of -- and I'm not really paraphrasing him because I can not recall the specific words, but I can recall the gist of the way that he spoke, and it was: Manny, you have known me for many years, and I have helped you and I have worked on the case for many years and we have to do this, we have to go forward with the model prisoner evidence, this is your only chance, something like that. Something along those lines, and he spoke for perhaps five or ten minutes and at that point Mr. Valle simply said something to the effect; well I'm going to go with Elliot.

(PCR3. 420-21). It should be noted that the above representations as to the "short" duration of the strategy explanations to the Defendant were directly refuted by resentencing counsel's record statements at the resentencing of this case. Mr. Zelman at the time had expressly told the resentencing court that he had discussed with the Defendant the "pros and cons' of his views for "what I would consider to be sufficient [length of time]." (3R. 2334-38). Indeed, another one of the resentencing counsel represented that they had, "had hours of discussions about this." Id.[7]

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[7] The State's brief during the last post conviction appeal before this Court had recited the resentencing judge's colloquy with the Defendant as to the latter's agreement with Zelman's departure. The State argued that the colloquy established that Valle had agreed with the strategic decisions of his attorneys. 705 So. 2d at 1334, brief of Appellee, Case No. 88,203, at pp 42-46, 3R. 2334-39. This Court stated, however, that: "[e]ven if we presume that Mr. Zelman withdrew because of a disagreement with Valle's other lawyers, it is impossible to determine from the record what the subject matter of this disagreement was." 705 So. 2d at 1334. As seen from the evidence presented at the hearing below (See pp. 10-25 herein), it is now abundantly clear that Zelman withdrew because of his disagreement as to presentation of Skipper evidence. The State thus again respectfully submits that the Defendant and his counsels' representations at the resentencing, that they fully understood Zelman's strategic reasons for departure, are

Moreover, Mr. Zelman himself, at the time of the resentencing, had expressly admitted that, if the previously excluded Skipper evidence was not presented at the resentencing, then the defense team knew that the resentencing advisory verdict, like that in 1981, would be a death recommendation (PCR3. 231; 3R. 1003):

> MR. ZELMAN: The Court inquired whether there were other mitigating circumstances [apart from Skipper evidence]. I said nothing substantially. Ms. Brill responded, well, they did present in 1981 expert testimony on two statutory mitigating factors. That didn't work, didn't work in 1981. It was a death advisory recommendation.
>
> So we know if we strip ourselves voluntarily of the rehabilitation [Skipper] evidence, we know what that advisory verdict is going to be....

Id.

The State recognizes that Zelman also testified that one of the other defense lawyers, Scherker, felt that the Skipper evidence had to be presented, or else this Court's remand would be recalled, or the prior 1981 sentence would become valid. However, the unequivocal and undisputed testimony herein also establishes that no such "legal" compulsion or analysis was ever communicated to the Defendant before, during, or after the meeting where the attorneys discussed the strategy decision of whether to present Skipper evidence with the Defendant (PCR3. 221, 238)("Mr. Scherker clearly did not tell Mr. Valle if we don't go forward with the model prisoner evidence they will reimpose

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binding.

the prior death recommendation. It was not put to him in those terms.").

Furthermore, Mr. Scherker's testimony that he felt compelled to present Skipper evidence, was expressly contradicted and belied by his written motions and verbal arguments during the resentencing.[8] It should be noted that the Skipper decision and the remand for the resentencing herein from this Court, involve both "past" model prisoner or good adjustment behavior, and, future "model prisoner behavior." At the resentencing herein, Scherker filed a motion in limine, expressly stating that he was willing to forgo one component of the Skipper evidence -- that is "past" model prisoner testimony, in order to preclude the State's rebuttal. (3SR.104-5, 3R. 1179). Mr. Scherker then argued that "our expert witness will not be testifying that Mr. Valle has been a model prisoner. There is an important distinction... we are giving that up." (3R. 1179). Subsequently, immediately prior to the presentation of the defense case, Mr. Scherker again announced another change of position, this time stating that he would "abandon" any claim of even "a model prisoner," and would "proceed solely with the claim that Mr. Valle will be a non violent prisoner." (3R. 4152). As noted by the lower court, Scherker's record willingness to forego the various components of Skipper evidence at resentencing, amply

[8] As noted by the lower court, self serving admissions of deficiency by an attorney are "of little persuasion in determining whether a defendant received ineffective assistance of counsel. Breedlove v. State, 692 So. 2d 874, 877, n.3 (Fla. 1994)." (PCR3. 287).

demonstrates that he did not feel compelled to present such evidence because of this Court's remand, or other "legal" analysis.

Moreover, even at the evidentiary hearing below, Scherker's testimony demonstrates that the decision to present prison behavior testimony was strategic, despite his protestations otherwise. Scherker testified that both he and Zelman agreed that even if they did not present any Skipper evidence, Valle's prior prison conduct could be presented by the State, through the cross-examination of the traditional mitigation witness, who testified as to Defendant's social history and background. (PCR3. 501-4). All of said witnesses knew that Valle had been on death row for 10 years, and were familiar with his history. Id. Indeed Mr. Zelman had agreed that some of their witnesses, such as the background/social historian, Milledge, had relied upon the reports of prison behavior experts, and could thus be cross examined on the history that she had utilized. Id. See also, Muehlman v. State, 503 So. 2d 310 (Fla. 1987)(a party is allowed to cross examine an expert witness on the history utilized by that witness in order to determine whether the expert's opinion has a proper basis). Mr. Scherker thus testified that because the prior prison conduct might be introduced anyway, he felt that he should at least get his own experts to testify. (PCR3. 503). Scherker added that he "thought that we had strong mitigation evidence on the so-called model prisoner theory." (PCR3. 475). He explained that he had found three (3) experts who opined that, despite Valle's

disciplinary record, he would be a non violent prisoner who would adapt, if given a life sentence. (PCR3. 504-6). The expert testimony at the resentencing was that "none" of Valle's disciplinary reports were "serious," and that the escape attempt didn't appear to resemble a real escape attempt." Id. The resentencing record supports Scherker's testimony in the court below. An expert in corrections, Mr. McClendon, testified that the defendant would be a non violent prisoner and would make a satisfactory adjustment if sentenced to life imprisonment. (3R.4210-4211, 4284-4285). Mr. McClendon also testified in a manner attempting to minimize the defendant's problems in prison. He stated that the defendant had told him that he did not cut the bars in the his [sic] cell, and that keys were often found in inmates' possession, and that no implements or escape paraphernalia had been found in the defendant's cell. (3R. 4249-4251, 4269-4276). He also testified that escape is a common fantasy among inmates, and that escape from death row would not be possible. (3R. 4277-4278). Mr. McClendon further testified that the remaining disciplinary reports were non violent in nature and did not indicate that the defendant would be a problem inmate in a non-death row environment. (3R. 4259-4261). Similar testimony was elicited from the other defense corrections experts, John Buckley (3R. 4593-4594, 4650-4652) and Dr. Brad Fisher (3R. 4888-4912).

In sum, the post conviction's court conclusion that no deficiency was demonstrated is amply supported by the record. As noted by the lower court:

> Defense counsel, despite their claim to the contrary, did not believe that they were required by the mandate of the Florida Supreme Court to introduce evidence that the defendant was, and, in the future, would be a model prisoner. Rather it is clear, that these experienced attorneys believed that without additional mitigating evidence, substantially different from that introduced in 1981, the result of the sentencing proceeding would be the same. To that end, they decided not to introduce past model prisoner or future model prisoner testimony, but rather modified it to present nonviolent prisoner testimony, which they believed would preclude the rebuttal evidence of the defendant's bad acts in prison; a belief which continued through the appeal of the defendant's third death sentence. Such actions are reasonable and clearly not deficient under the standards of Strickland v. Washington, supra.

(PCR3. 289). See also, State v. Bolender, 503 So. 2d 1247, 1250 (Fla. 1987)("strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected.").

B. Failure To Demonstrate Prejudice.

As seen above, the post conviction court properly found that the resentencing counsels' conduct had not been deficient. Although not required under Strickland v. Washington, the lower court also addressed the prejudice prong of ineffectiveness,[9] and concluded that no reasonable probability of a different outcome had been demonstrated. (PCR. 289-291.). The lower court's conclusion is amply supported by the records of this

[9] This was in accordance with this Court's mandate.

cause, and in accordance with both Strickland and this Court's precedents.

The Appellant argues that prejudice must be determined in a vacuum solely focused on the "closeness" of the jury vote during the 1988 resentencing. A jury's vote or recommendation, however, must be assessed in light of the circumstances of the crime, and the evidence in aggravation and mitigation. Prejudice, after all, requires a showing of a reasonable probability that the "balance of aggravating and mitigating circumstances would have been different." Robinson v. State 707 So. 2d 688, 695 (Fla. 1998). In the instant case, the Appellant first argues that the 1981 jury recommendation and result should not have been considered because this Court found that proceeding to be unconstitutional. The only reason for such a finding was, however, that the defense had been precluded from presenting Skipper evidence. Valle, 502 So. 2d at 1225. The circumstances, of the crime and the aggravation in that proceeding was the same as that in the resentencing. Moreover, as noted by the trial court and as conceded by the Appellant, the family/background and mental health mitigation (ie. the non Skipper evidence) in both proceedings were substantially similar. PCR. 289-90. Brief of Appellant p. 37.[10] Thus even without the Skipper evidence rebuttal complained of herein, a jury recommended the sentence of death by a vote of 9-3 in the 1981

[10] An exhaustive analysis of the mitigation evidence at both proceedings is contained in the State's proposed order in the lower court, PCR3. 365-72, and relied upon herein.

proceeding. The "devestation" complained of at resentencing due to the State's rebuttal, resulted in a more favorable vote of 8 to 4! In any event, as noted by the lower court, the failure to demonstrate prejudice was "not necessarily because of the above stated vote."

The lower court emphasized the balance of "three very powerful aggravating circumstances involved" versus the paucity of even non-statutory mitigation presented at the 1988 resentencing. (PCR3. 290-1). As aptly noted by the post conviction judge during final arguments in the lower court:

> THE COURT: Doesn't it stretch the boundaries of common sense to think other than that these folks, these thirty-six people out of the community relied and gave great weight to the fact that this case involved the killing of a police officer? I mean, to think that--and I am not saying and I don't want to indicate where I am heading here, but it seems to stretch common sense to think that their decision would be based on Skipper evidence or the lack thereof, or the rebuttal that is going to come in when you present the Skipper evidence, and it seems almost--ignoring the fact that Manuel Valle killed a police officer and then, I believe, didn't he flee afterwards?
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> MR. STRAND: Yes, he did, Judge.
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> THE COURT: Wasn't that one of the arguments?
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> MR. STRAND: Yes, he was convicted of killing a police officer and of shooting at another police officer and fleeing, that is correct, Your Honor.
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> THE COURT: Immediately?

> MR. STRAND: Immediately, yes.
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> THE COURT: Well, how would you respond to that?
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> MR. STRAND: Well, Judge, I would respond that that is an aggravating circumstance that the State proved. It is just what I would call an automatic aggravating matter.
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> THE COURT: Isn't that a powerful aggravating circumstance?
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> MR. STRAND: I don't know if I would call it a powerful aggravating circumstance, but one that a jury will consider in this day and age and will give some weight to.
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> THE COURT: The jury is entitled to give it what weight it deems appropriate.
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> MR. STRAND: True and we can't speculate on what weight they will give it. Maybe in my mind and your mind we think that it is a powerful aggravating circumstance, but we can't speculate what the jury would think.

(PCR3. 5445).

As noted by the lower court in the final order, there were three (3) "very powerful aggravating circumstances involved in this killing of a police officer, which was done in cold, calculated and premeditated manner, for the purpose of avoiding arrest, and at the same time, attempting to commit the first degree murder of another police officer." (PCR3. 291). The resentencing court had found no statutory mitigating circumstances, and gave little weight to the non statutory circumstances. (PCR3. 290). Valle, after all had an IQ of 127, well above average. (3R. 5368-730. There was no evidence of brain damage and no evidence of any major mental disorders. Id. The Defendant's family,

while he was growing up in Cuba, were well off, with a nice house, food, clothing, and servants. (3R. 5448). Despite financial and work problems when the family arrived in the United States, the father continued to give his family the best house, clothing and food that he could. (R3. 5485-6). While the Defendant was disciplined by his father when he was a young child, all of his other siblings were treated similarly. (R3. 5483-87). None of the other siblings had turned to a life of crime. The evidence complained of in these proceedings did not alter the balance of the aggravating and mitigating circumstances. As such the lower court properly found that no prejudice had been demonstrated. Robinson, supra; Strickland v. Washington.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the lower courts' order denying post conviction relief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE** was furnished by prepaid first class mail to **TODD G. SCHER**, Chief Assistant CCRC - South, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, on this ____day of February, 2000.

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