IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2865

MANUEL VALLE,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Valle was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions, death sentence and other sentences, as well as the affirmance of those convictions and sentences, violated fundamental constitutional guarantees. This petition challenges Mr. Valle's 1981 retrial and 1988 resentencing. Citations to the direct appeal record of the 1981 retrial shall be as (1981 R. page number). Citations to the transcript of the 1981 retrial shall be as (1981 T. page number). Citations to the direct appeal record of the 1988 resentencing shall be as (1988 R. page number). All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, ' 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, ' 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Valle requests oral argument on this petition.

PROCEDURAL HISTORY

Mr. Valle was charged by indictment dated April 13, 1978, with first degree murder, attempted first degree murder, and possession of a firearm by a convicted felon. At his first trial in 1978, Mr. Valle was convicted as charged, sentenced to death on the first degree murder charge and to terms of imprisonment on the other charges. This Court reversed the convictions and sentences on direct appeal and ordered a new trial. Valle v. State, 394 So. 2d 1004 (Fla. 1981) (Valle I).

Mr. Valle was retried in 1981 and convicted as charged. He was sentenced to death on the first degree murder conviction and to consecutive terms of imprisonment on the other charges. This Court affirmed the convictions and sentences. Valle v. State, 474 So. 2d 796 (Fla. 1985) (Valle II). The United States Supreme Court vacated Mr. 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 (1986). Valle v. Florida, 476 U.S. 1102 (1986). This Court then ordered a jury resentencing on the first degree murder conviction. Valle v. State, 502 So. 2d 1225 (Fla. 1987) (Valle III).

At his 1988 resentencing, Mr. Valle again received a death sentence. This Court affirmed the sentence on direct appeal.

Valle v. State, 581 So. 2d 40 (Fla. 1991) (Valle IV). The United States Supreme Court denied certiorari. Valle v. Florida, 112 S. Ct. 597 (1991).

Mr. Valle filed a motion under Fla. R. Crim. P. 3.850 in 1993. The circuit court denied the motion without an evidentiary hearing. On appeal, this Court remanded for an evidentiary hearing. Valle v. State, 705 So. 2d 1331 (Fla. 1997) (Valle V).

The circuit court conducted an evidentiary hearing in 1998 and subsequently denied relief. This Court affirmed. Valle v. State, 778 So. 2d 960 (Fla. 2001).

CLAIMS FOR RELIEF

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF EITHER OR BOTH THE CONVICTIONS AND SENTENCES.

A. INTRODUCTION.

Mr. Valle had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeals to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Valle's retrial and resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Valle's] direct appeal[s]." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Valle's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failures to present the meritorious issues discussed in this petition demonstrates that their representation of Mr. Valle involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original). In light of the serious reversible errors that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeals would have been different, and new direct appeals must be ordered.

B. FAILURE TO RAISE ON APPEAL FROM THE 1988 RESENTENCING THE TRIAL COURT'S DENIAL OF MR. VALLE'S MOTION TO WAIVE THE ADVISORY JURY.

The crime for which Mr. Valle was convicted and sentenced to death occurred on April 2, 1978. Mr. Valle's 1978 conviction was reversed by this Court, and a new trial and sentencing were held in 1981. This Court reversed the 1981 death sentence and ordered a resentencing, which occurred in 1988. As a result of this history of his case, before the 1988 resentencing, Mr. Valle moved to waive the advisory jury (1988 R. 152-54). The trial court denied that motion (1988 R. 1034-35). Although the law supported Mr. Valle's right to waive the jury at resentencing, appellate counsel failed to raise this issue on direct appeal.

Mr. Valle's motion to waive the advisory jury argued in part:

> 3. Due to the procedural posture of this case, the defendant believes that a full and fair sentencing proceeding cannot be conducted before a jury. The offense for which the defendant is to be sentenced occurred on April 2, 1978. Through no fault of the defendant, a jury now empaneled to decide the proper sentence will be advised that the offense occurred almost 10 years ago and that the defendant has been previously convicted of the offense. Speculation on the part of the jurors as to why the case is before them is natural and unavoidable, and the defendant believes will inure to his extreme prejudice.
>
> 4. Additionally, the mitigation which the defendant was improperly denied at the sentencing proceeding in 1981 can no longer

> be presented in a credible and reliable manner to a jury, regardless of the state's potential rebuttal case. This cause is before the Court for resentencing because the Supreme Court of Florida concluded that the exclusion of proffered mitigatory testimony that petitioner, if sentenced to life imprisonment, would adapt successfully to prison, violated his Eighth Amendment right to a fair sentencing proceeding. *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987).
>
> 5. After consultation with the expert witnesses, it has become clear that their testimony cannot be presented in an intelligible manner without extensive reference to defendant's behavior since his incarceration on death row. At the time of defendant's 1981 trial, it was possible for the experts to draw their conclusions based solely upon defendant's previous Dade County Jail sentences and their predictive evaluations. However, the length of defendant's incarceration is now such that the question of his adaptability to prison life will turn in large part upon his behavior since he has been on death row.
>
> 6. Informing a jury of lay persons that defendant has been on death row due to his conviction in this case would likely obliterate any chance that his mitigatory evidence could be fairly considered and weighed. Defendant's only choice is to request a waiver of the advisory jury.

(1988 R. 153).

The trial court heard argument on the motion (1988 R. 990-1005, 1019-1035). The defense emphasized that the nature of the mitigating evidence to be presented would necessarily require informing a jury that Mr. Valle had been on death row for ten years (1988 R. 990, 998, 1003). Defense counsel argued that the

defendant had the right to request a waiver of the advisory jury, which the court could grant or deny, and that the state could be heard but could not veto the request (1988 R. 991). The state argued that the defendant could not waive the advisory jury if he had not waived a jury for the guilt/innocence phase of trial and that since the defendant cannot waive the guilt/innocence jury without the state's consent, the defendant also could not waive the advisory jury without the state's consent (1988 R. 992-94). The court disagreed with this interpretation of the law (1988 R. 995-96). Defense counsel pointed out that in Huff v. State, 495 So. 2d 145, 152 (Fla. 1986), the defendant had been allowed to waive the advisory jury over the state's objection (1988 R. 999). The court stated, "they have a lawful right to request it under the case law, that it's discretionary on the Court, that it's easier for the Court not to grant it, but that's not going to be the d[e]finitive factor" (1988 R. 1001). The court suggested that the victim's family might have a right to object and that the court might discuss this with the victim's family (1988 R. 1002-03).

At a later hearing, the state reported that the victim's family wanted an advisory jury (1988 R. 1019-20). The state continued to argue that the state had the right to object to the defendant waiving the advisory jury (1988 R. 1020-21). The court stated that it understood the defense wanted to waive the jury

because it would be "highly prejudicial" for a jury to know Mr. Valle had already been on death row, but asked if that consideration was ameliorated by the fact that the judge would make the final decision on the sentence (1988 R. 1021-23). Defense counsel argued that because the judge was required to give the jury's recommendation great weight, the defense would start off "being put in a position of having to give great weight to a death recommendation before we even begin" (1988 R. 1023, 1026). The defense again emphasized that there was no way to present expert testimony regarding Mr. Valle's prison adjustment without mentioning that he had been on death row (1988 R. 1025), and that therefore the defense believed it could not present the case fairly to a jury (1988 R. 1027). The defense pointed out that the state had not argued that its case could not be fairly presented without a jury (1988 R. 1027). The state argued that the jury's recommendation was important for the Court to consider, but agreed that the state would present the same evidence regardless of whether or not there was a jury (1988 R. 1028). The court stated:

> There is a lot to be said for the community being able to tell the Court what its recommendation is.
>
> The Court, again, is the one that has to make the decision, but it means a lot to hear what the community has to say.
>
> It means a lot to me to hear that the

> family wants a jury. There are a lot of things that go into my decision.

(1988 R. 1029-30).

The defense summarized its position:

> To present that ten year history and an analysis of that behavior, cannot be done in front of twelve persons, twelve lay persons who are not trained in law to exclude and properly characterize inflammatory evidence.
>
> To start off with twelve people looking at that evidence, and we believe a majority of whom would then vote for death; and then to argue to the Court to not give that so much weight, is an unnecessary handicap which would work against Mr. Valle in this case.
>
> Not because he is the one who got himself in this situation or because of the State or anyone else. The Court by its latest decision by the Florida Supreme Court on this case was given a clean slate.
>
> We were told to start again and to do that we cannot do it with a jury. That is the point.

(1988 R. 1032). The court denied the request to waive the jury, stating:

> This court is bound to make whatever decision it finally thinks is appropriate after listening to the jury and giving great weight to it.
>
> This is the greatest decision a Circuit Court Judge ever makes.
>
> I frankly would prefer to have the jury give me their recommendation. I may not agree with it when I get done.
>
> Sometimes I will agree with them and

> sometimes I will not agree with them. That is why I am a Circuit Court Judge. That is what I do.
>
> I will try to come up with the type of decisions that will assist you in presenting a fair case before the jury.
>
> The ultimate decision is mine regardless of what they think. I will give it great weight, but the final decision rests on me alone eventually.
> I will assist you all in any way I can. I think that is the fairest thing to do considering all the circumstances.

(1988 R. 1034-35).

A jury sentencing proceeding is not required as a matter of constitutional law, Spaziano v. Florida, 468 U.S. 447, 464-66 (1984), and is provided for under Florida law as an added protection for the defendant. State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973). Thus, Section 921.141(1), Florida Statutes (1985) (in effect at the time of Mr. Valle's resentencing), provided that capital sentencing proceedings shall be conducted before a jury "unless waived by the defendant." This provision permitted a defendant to waive an advisory jury. Huff v. State, 495 So. 2d 145, 152 (Fla. 1986) (capital defendant may "waive an advisory jury recommendation"); State v. Carr, 336 So. 2d 358, 359 (Fla. 1976) ("the defendant may waive the advisory jury proceeding"); Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974) (right to advisory jury is "essential right of the defendant" which may be waived if record "show[s] that the defendant voluntarily and

intelligently waived the right"). Accord Lopez v. State, 536 So. 2d 226 (Fla. 1988) (upholding death sentence where "Lopez waived sentencing before a jury").

Under this precedent, the trial court erred in refusing to allow Mr. Valle to waive the advisory jury. This issue was preserved at trial and available for appeal. Appellate counsel was ineffective in failing to raise the issue.

C. FAILURE TO RAISE ON APPEAL FROM 1988 RESENTENCING THE INADEQUATE AND UNCONSTITUTIONAL JURY INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATOR.

At Mr. Valle's 1988 resentencing, trial counsel requested the following instruction regarding the cold, calculated and premeditated aggravating factor:

> I further instruct you that the defendant's conviction for first-degree murder is insufficient, in and of itself, to require a finding that the homicide was cold, calculated and premeditated for the purposes of this aggravating circumstance. The law requires that there be heightened premeditation, that is, a cold-blooded intent to kill that is more contemplative, more methodical, and more controlled than the premeditation required for a conviction of first-degree murder, for this aggravating circumstance to apply.
>
> "Premeditation," within the meaning of the first-degree murder statute, requires proof that the homicide was committed after the defendant consciously decided to commit the act. For a defendant to be convicted of first-degree murder, the period of time between the conscious decision and the murder must only be long enough to allow for any reflection, however brief, by the defendant

> prior to the act.
>
> As I have previously instructed you, this aggravating circumstance requires proof of a careful plan or prearranged design above and beyond the period of reflection required for a finding of guilt of premeditated murder. I instruct you that you must find such heightened premeditation, that is, a calculated and careful plan, before you can find this aggravating circumstance applicable to this case.

(1988 Second Supplemental Record Vol. II, p. 223).[1] In support of this requested instruction, defense counsel cited Rogers v. State, 511 So. 2d 526 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Hardwick v. State, 461 So. 2d 79 (Fla. 1984); and White v. State, 446 So. 2d 1031 (Fla. 1984) (1988 Second Supplemental Record Vol. II, pp. 223-24).

After argument on this requested instruction during the charge conference, the court agreed to give part of it to the jury (1988 R. 5731-51). The court subsequently provided the jury the following instruction on the cold, calculated and premeditated aggravating factor:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
>
> Now, I instructed [sic] you that the defendant's conviction for first degree murder is insufficient in and of itself to

[1]This instruction was entitled "Defendant's Requested Instruction No. 7."

> require a finding that the homicide was cold, calculated and premeditated for the purposes of this aggravating circumstance.
>
> Killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of a premeditated intent to kill and the killing.
>
> The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. I instruct you for this aggravating circumstance to apply, the law requires there by heightened premeditation, that is a deliberate intent to kill that is more contemplative, more methodical and more controlled than the premeditation required for a conviction of first degree murder.

(1988 R. 5994-95).

At best, this instruction was confusing. The only sentence of this instruction which actually addressed any limiting construction of the aggravator is the final sentence. Most of the instruction defines the premeditation required for a first degree murder conviction and reasonably could have been interpreted by lay jurors as instructing them that this aggravator applied if the state established the premeditation required for a first degree murder conviction. The instruction did not clearly inform the jury that most of the definition being provided was the definition of premeditation for first degree murder. The instruction did not include the language regarding

"a careful plan or prearranged design" requested by defense counsel.

At the time of Mr. Valle's resentencing and direct appeal, this Court had held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). This aggravating factor "emphasizes cold calculation before the murder itself." Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984); White v. State, 446 So. 2d 1031, 1037 (Fla. 1984). The jury instruction in Mr. Valle's case did not provide the jury with this limiting construction.

The instruction on the cold, calculated and premeditated aggravating factor given to Mr. Valle's jury violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988), and the Eighth and Fourteenth Amendments. Richmond v. Lewis, 113 S. Ct. 528 (1992), requires not only that states adopt a narrowing construction of an otherwise vague aggravating factor, but also that the narrowing construction actually be applied during a "sentencing calculus." Richmond, 113 S. Ct. at 535. In Florida, as this Court has recognized, the penalty phase jury is part of the "sentencing calculus." See Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993). The only way for a penalty phase jury to apply a narrowing construction of an aggravating factor is for the jury

to be told what that narrowing construction is. Walton v. Arizona, 497 U.S. 639, 653 (1990).

Mr. Valle's jury was not told about the limitations on the cold, calculated and premeditated aggravating factor, but presumably found it present. Espinosa, 112 S. Ct. at 2928. It must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa, 112 S. Ct. at 2928.

Reversal is required unless the error was harmless beyond a reasonable doubt, Stringer, which it was not. The jury recommended death by an eight to four margin. The jury was not told of the prohibition against "doubling" aggravating factors in regard to the three law enforcement aggravators upon which it was instructed.[2] It cannot be said that the jury would have found this aggravating factor under any definition. Further, the mitigation in the record would have supported a life recommendation.

Appellate counsel was ineffective in failing to raise an issue regarding the jury instruction on the cold, calculated and premeditated aggravating factor on direct appeal. Trial counsel had preserved the issue. Appellate counsel's omission undermines confidence in the outcome of Mr. Valle's direct appeal.

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[2]The issue regarding the lack of a doubling instruction--or in Mr. Valle's case, "tripling"--was raised on direct appeal.

D. FAILURE TO RAISE ON APPEAL FROM 1988 RESENTENCING THAT THE STATE TAINTED THE JURY POOL AND OBTAINED MANY CAUSE EXCUSALS OF JURORS BY TELLING JURORS THEY WERE REQUIRED TO RECOMMEND DEATH IF AGGRAVATORS OUTWEIGHED MITIGATORS.

Beginning early in its voir dire, the state informed prospective jurors that they were required to recommend a death sentence if aggravating factors outweighed mitigating factors. The state repeated this incorrect description of the law numerous times, despite repeated objections by defense counsel and admonitions from the court. As voir dire progressed, it became clear that this incorrect description of the law influenced prospective jurors to indicate they could not recommend death. Defense objections to the state excusing these jurors for cause were overruled. Although this issue was preserved at trial, appellate counsel did not raise it on direct appeal.[3]

The state described the penalty deliberations to prospective jurors as follows:

> The first question you have to ask once you retire to the jury room is: Are there aggravating factors? The Judge will tell you specifically what they are. You will have heard the evidence and will tie it up during closing. If you say, no, there are no aggravating factors, you must stop there and recommend life. If you find that we have

[3]Appellate counsel did raise an issue regarding the impropriety of the state's comments during voir dire and closing argument that jurors were required to recommend death if aggravating factors outweighed mitigating factors, but did not raise any issue regarding how these comments tainted the jury selection procedure.

> proven beyond a reasonable doubt that there are aggravating factors, you go on.
>
> Did the defendant reasonably convince you that there are mitigating factors? If they didn't reasonable [sic] convince you there are mitigating factors and you already found there are aggravating factors, the law says you must recommend the death penalty because you only found aggravating factors and you haven't found any mitigating factors. So there is nothing to balance and weigh. It's a shutout. And you must, the law commands that you must recommend death.

(1988 R. 2707-08). Defense counsel objected to this description, arguing, "there are no circumstances under which a jury is compelled to return a death sentence" (1988 R. 2709, citing Alvord v. State, 322 So. 2d 533 (Fla. 1975)). The state repeated this description many times (See, e.g., 1988 R. 2713, 2714-15, 2717, 2728). Defense counsel repeatedly objected (1988 R. 2717-22, 2733-36). The court suggested that the state rephrase its description to ask jurors whether they "could" recommend death if "sufficient" aggravating factors were established (1988 R. 2720-21).

The state then began asking the prospective jurors questions such as the following:

> If after hearing the evidence and you find that there were sufficient aggravating factors and you find that those aggravating factors outweigh the mitigating factors, either there are mitigating mitigating [sic] factors or there aren't, and you find there are sufficient aggravating that outweigh them, at that point, the law instructs you if

> you do find that, you should recommend the death penalty, would you be able to recommend the death penalty?

(1988 R. 2722).

> [I]f you were on the jury and after all the evidence was presented, if you were to find there were sufficient aggravating factors and those outweigh the mitigating factors could you sign your name to a recommendation of death in this case?

(1988 R. 2723-24).

> If you find there are sufficient aggravating factors and they outweigh the mitigating factors and the Judge tells you what the law is and instructs you on the law, if you find that you should recommend death, would you be able to sign your name to a recommendation recommending the death penalty for this defendant?

(1988 R. 2726).

> [I]f you find that after the hearing, that there were sufficient aggravating factors and they outweigh the mitigating factors and the Judge instructs you that if you find that that you must recommend the death penalty, could you sign your name to a death recommendation?

(1988 R. 2728) (See also 1988 R. 2730, 2731, 2733). Defense counsel objected, arguing that the prosecutor was continuing to misstate the law:

> [T]he repeated hypothets: "If you find sufficient aggravating and if you find the aggravating circumstances outweigh the mitigating circumstances, will you follow the law and return a death recommendation?" is not the law in the State of Florida. I would point the Judge to look at the statute and

> the jury instructions.
>
> The jury instructions, I think, are very carefully worded on just this point. "Before the jury can consider death, they have to find there are sufficient aggravating circumstances to justify the death penalty." [B]ut the instructions then go on to tell them to weigh the aggravating and mitigating circumstances in terms of the conclusion. There is no mandatory obligation as a result, of the way, the process which requires to vote on a death recommendation. The jury only needs to be able to consider.
>
> There's an option with the death penalty and the specific language: "If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give it whatever weight you feel it should receive."
>
> And then it says: "The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations."
>
> There is no mandatory death recommendation based on the weighing process. I think the statute bears this out, to consider the aggravating and mitigating and return a verdict. The jury instructions are very cautiously for just that reason consistent with the statute.

(1988 R. 2733-35). The prosecutor agreed to rephrase his question to ask jurors "can you" recommend death (1988 R. 2736). The prosecutor then proceeded to ask the prospective jurors, if aggravating factors outweighed mitigating factors, "can you

return a recommendation of death" or "can you sign your name to a death recommendation" (1988 R. 2739, 2741, 2744, 2745, 2746, 2747, 2749, 2750, 2752, 2753, 2754, 2756, 2757).

Prospective jurors understood the prosecutor to be telling them that the law required a death recommendation in some circumstances. For example, Juror Brooks responded to the prosecutor:

> First of all, if this is a case and I see in my mind fairness, that it should be -- the law says that we should recommend death, the Judge orders me to, I can sit here and honestly at this moment say, yes, I can.

(1988 R. 2739). The prosecutor and Juror Hudson had the following exchange:

> [PROSECUTOR]: If you found there were sufficient aggravating factors and outweighed the mitigating factors, could you sign your name and recommend the death penalty to the Judge?
>
> JUROR HUDSON: Well, yes. I guess, after -- I guess after I hear all the evidence.
>
> [PROSECUTOR]: You hear all the evidence. No way we would ask you to without you hearing all the evidence. You hear the law on the death penalty. If you found there were sufficient aggravating factors and outweighed the mitigating factors, could you sign your name and recommend the death penalty to the Judge?
>
> JUROR HUDSON: I don't want to, but I guess I could.
>
> [PROSECUTOR]: When you say you don't want to, what do you mean by that?

> JUROR HUDSON: Well, I don't want to recommend death.
>
> [PROSECUTOR]: Excuse me?
>
> JUROR HUDSON: I don't want to recommend death.
>
> [PROSECUTOR]: You don't want to recommend death?
>
> JUROR HUDSON: No. Because it's the law and I have no choice, I have to do it.

(1988 R. 2752-53). Juror Upshaw asked the prosecutor, "What would happen to me if the law says you have to, says you have to sign the death penalty and you refuse?" (1988 R. 2757).

Defense counsel objected to the prosecutor asking whether jurors could "sign" a death recommendation (1988 R. 2740, 2741, 2758-59), and to the prosecutor telling the jury the law required a death recommendation (1988 R. 2760-61). Defense counsel argued, "It is clear that several jurors have enunciated their belief, now that the Court is going to instruct them to find death in this case or to find life" (1988 R. 2760). Defense counsel requested the following curative instruction: "If you find that there are sufficient aggravating circumstances and if the mitigating circumstances are outweighed by the aggravating, the law does not require that you return a death recommendation" (1988 R. 2761). The court denied the requested instruction (1988 R. 2761-62).

The court believed Florida law was "if in the jury's mind they found sufficient aggravating circumstances to give the death penalty and they did not believe that there were sufficient aggravating circumstances outweighed by mitigating circumstances, the law says they ought to give the death penalty" (1988 R. 2764; see also 1988 R. 2769, 2771). Defense counsel argued:

> Bottom line weighing process, that the jury is to resolve does not require a death sentence on the basis of whether there are sufficient aggravating circumstances to outweigh the mitigating circumstances. They are to weigh the circumstances and then, based on these considerations, and I believe that's what the standard instruction says, determine what is the proper sentence.
>
> There is no problem with the state asking them if they can consider giving a death penalty, but the law does not require if there's sufficient aggravating circumstances and the circumstances are not outweighed by the mitigating circumstances that they must return a death verdict. There is no mandatory death verdict under any circumstances in Florida law.

(1988 R. 2764). The court repeated its denial of the curative instruction (1988 R. 2774).

As voir dire continued, prospective jurors indicated their understanding that they were required to recommend death in certain circumstances. For example, the following exchange occurred between defense counsel and juror Sommerville:

> [DEFENSE COUNSEL]: Miss Sommerville, despite what you expressed to us about your opinions which we respect, if you were asked to sit on

this jury, would you follow the law?

JUROR SOMMERVILLE: I don't see how I could. I don't know how I could get around that situation from what you described. I can understand a situation where the crime would be so awful what can you call them, aggravating circumstances far outweigh the mitigating. There would be no question in my mind but I still could not invoke, vote for the death penalty.

[DEFENSE COUNSEL]: You're telling us even if you were selected to be on the jury, you wouldn't follow the law if the Judge gave it?

JUROR SOMMERVILLE: If that's the law, no, I wouldn't.

. . . .

[DEFENSE COUNSEL]: Is it your understanding that the law would require you to vote for death in that situation you described?

JUROR SOMMERVILLE: The law would ask me to do that. I don't know what I would do. I would have to be excused or state that I couldn't do that.

[DEFENSE COUNSEL]: If you were instructed on your individual question, how to weigh the factors--

JUROR SOMMERVILLE: Right, I understand this.

[DEFENSE COUNSEL]: Whether the right amount of evidence is reached, would you follow that law?

JUROR SOMMERVILLE: Yes.

[DEFENSE COUNSEL]: It seems that your feeling that you can't serve on this jury is based on your belief there are some cases where you would have to vote for death as a juror?

JUROR SOMMERVILLE: Right. If I were to

follow the law.

[DEFENSE COUNSEL]: If that is not the law, if the law never tells you that you have to vote for death, could you be on the jury?

JUROR SOMMERVILLE: Yes.

(1988 R. 2839-41). The court excused juror Sommerville over defense objection (1988 R. 2841).

While the court was hearing challenges for cause, the defense objected that the way the state had conducted its questioning had tainted the jury pool:

> [T]he way the state conducted their voir dire was to give the impression, more than the impression to the jury there are cases where they are going to have to recommend the death penalty. That's not the law in the State of Florida. That has poisoned several of these people who would have otherwise been able to say they could follow the law.

(1988 R. 2881-82).

> [T]he state has indicated to them that they have to give the death penalty in a particular case and that's just not the law. They always have that reservation and it's impossible for me now to come back with Mrs. Hicks who has wavered a little bit, by the way, and said, I don't know. I'm not there yet. I've never been through this before. They have unnecessarily tainted her with the wrong impression of signing the form of necessarily giving the death penalty.

(1988 R. 2882-83).

> In the beginning of this . . . [juror Allen] said she hadn't thought about it. She could consider it in some cases. Now, the state has indicated to her that she is going to

> have to give it in this case. That is an unfair, untrue statement of the law and that's why she's taken the position she's taken. They have tainted her unfairly.

(1988 R. 2884).

> I have exactly the same position I have on Miss Hudson as I have on Miss Allen. . . . Based on what she said last week, she said, "I guess if he deserves it,@ she would give the death penalty. She said she would not automatically give it for a police officer." She's one of those jurors who has been educated erroneously by the state. So, now she cannot answer the questions properly to understand the law and follow the law because she believes she must give it in this case.

(1988 R. 2885).

> Last week [juror Clark] said on individual questioning out of the presence of the other jurors, It depends. It depends in response to the Court's questions. She would not give it automatically and she would not never give it. . . . But she had reservations last week for both sides and she again has been erroneously educated by the prosecutor's suggestions in this jury selection process that she would have to to [sic] give it if she sat as a juror.

(1988 R. 2887).

> Again, I would renew my argument that the state has indoctrinated these people, especially people like Miss Martin who started out with a feeling, strolling feeling. Now, they feel like they will be forced to return a death penalty vote.

(1988 R. 2890). On the basis of these arguments, the defense objected to the cause excusals of jurors Madruga, Hicks, Allen, Hudson, Smith, Clark and Martin (1988 R. 2882, 2883, 2884, 2885,

2886-87, 2887, 2891).

The defense later reiterated its objection that some jurors had changed their minds regarding whether or not they could consider the death penalty in response to the state telling them the law required a death verdict if aggravating factors outweighed mitigating factors (1988 R. 3129-31). The defense noted that ten jurors had been excused for cause on the basis that they would automatically vote for life (1988 R. 3135). Finally, the defense asked that the state be prohibited from asking jurors to commit to a death sentence, that the state be prohibited from asking jurors if they can sign their names to a verdict form, and that the state be prohibited from telling the jury law which was not in the standard jury instructions (1988 R. 3143-44; 3307-11; 3440-43). The court denied the requests (1988 R. 3144; 3311; 3443).

The prosecutor misstated the law when he informed prospective jurors that if aggravating factors outweighed mitigating factors, the jury must recommend death. This Court has stated:

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other

case.

Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975). The United States Supreme Court has said that it is constitutional for a jury to dispense mercy even in a case deserving of the death penalty. Gregg v. Georgia, 428 U.S. 153, 203 (1976). Since the time of Mr. Valle's resentencing, this Court has held several times that it is improper to tell jurors they must recommend death if aggravating factors outweigh mitigating factors. Brooks v. State, 762 So. 2d 879 (Fla. 2000); Urbin v. State, 714 So. 2d 411, 421 n.12 (Fla. 1998); Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996)("a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors"); Garron v. State, 528 So. 2d 353, 359 & n.7 (Fla. 1988) (misstatement of law to argue "that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty").

The prosecutor's misstatement of the law to prospective jurors deprived Mr. Valle of a fair and impartial jury and of a jury which represented a fair cross-section of the community. The purpose of voir dire examination is to secure a fair and impartial jury. King v. State, 390 So. 2d 315 (1980); Lewis v. State, 377 So. 2d 640 (1980); Cross v. State, 102 So. 636 (1925). The requirement of an impartial jury is rooted in the Sixth and Fourteenth Amendments. See Sheppard v. Maxwell, 384 U.S. 333

(1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961). Although a trial court has broad discretion in determining the appropriateness of voir dire questioning, exercise of that discretion is "subject to the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310 (1931).

In a capital case, a prospective juror cannot be disqualified regardless of opinions or beliefs regarding capital punishment if he or she is "willing to consider all of the penalties provided by state law" and is not "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). "[A] person who has a `fixed opinion against' or who does not `believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law--to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." Boulden v. Holman, 394 U.S. 478, 483-84 (1969). A prospective juror may not be excluded from a capital case for personal opposition to the death penalty unless the juror's beliefs would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412,

420 (1985).

In Mr. Valle's case, however, the prosecutor's misstatement of the law negated any inquiry into whether prospective jurors with concerns about capital punishment would be able to "abide by existing law." Having been told incorrectly that they were required to recommend a death sentence under certain conditions, prospective jurors with scruples regarding capital punishment were influenced to say they could not follow such instructions. Excusal of such misled jurors deprived Mr. Valle of a fair and impartial jury.

A jury which represents a fair cross-section of the community is also a basic requirement under the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See Duren v. Missouri, 439 U.S. 357 (1979); Ballew v. Georgia, 435 U.S. 223 (1978); Taylor v. Louisiana, 419 U.S. 522 (1975). The rationale behind the fair cross-section requirement is to include diverse persons in the jury pool. Peters v. Kiff, 407 U.S. 493, 503-04 (1972). A prima facie violation of the fair cross-section requirement is established if a distinctive group is excluded from the jury, if that group is underrepresented on jury venires, or if the underrepresentation is due to the systematic exclusion of the group in the jury selection process. Duren, 439 U.S. at 364.

In Mr. Valle's case, a group with a particular attitude was

excluded from the jury as a result of the prosecutor's misstatement of the law. As this Court has held, a jury is never required to recommend a death sentence, regardless of whether or not aggravating factors outweigh mitigating factors. Jurors who said they could not follow a command to recommend death under certain circumstances were nevertheless excluded from Mr. Valle's jury.

The prosecutor's inaccurate statement of the law during voir dire deprived Mr. Valle of a fair and impartial jury and of a jury composed of a fair cross-section of the community. This error was preserved at trial and available for presentation on direct appeal. Appellate counsel provided ineffective assistance in failing to raise it.

E. FAILURE TO RAISE ON APPEAL FROM THE 1981 RETRIAL THE TRIAL COURT'S DENIAL OF THE MOTION TO SUPPRESS PHYSICAL EVIDENCE.

Mr. Valle was arrested on April 4, 1978, by Deerfield Beach police officers Edward Rodriguez and James Twiss. Officer Rodriguez saw Mr. Valle walking through a parking lot and called to him to stop. The officer then ordered Mr. Valle to put down the bag he was carrying, and Mr. Valle complied. The officer then directed Mr. Valle to walk toward him, which Mr. Valle did, stopping on the officer's order about halfway between Officer Rodriguez and the bag. When the officer asked Mr. Valle if he had any identification, Mr. Valle said his identification was in

the bag and offered to retrieve it. Officer Rodriguez said no and told Mr. Valle that Officer Twiss would get the identification from the bag. As Officer Twiss walked toward the bag, Officer Rodriguez asked Mr. Valle if he minded Officer Twiss going into the bag, and Mr. Valle said no. Officer Twiss opened the bag and found a gun under some clothing.

The defense filed a motion to suppress the gun found in the bag (1981 R. 885-900). The court held a hearing on the motion.[4] At the suppression hearing, the state's first witness was Officer Rodriguez. Officer Rodriguez testified that on April 4, 1978, he saw Mr. Valle standing by A1A, the beach highway (1981 T. 273-74). Officer Rodriguez was dressed in his police uniform and driving a marked police car (1981 T. 274). The officer noticed Mr. Valle because he was dressed in long pants and a banlon shirt, while other people in the area were dressed in beach attire, and because another person dressed like Mr. Valle walked away when he saw the officer (1981 T. 274-75). After Officer Rodriguez drove past Mr. Valle and pulled off the road, he saw Mr. Valle walk through a parking lot for the Deerfield Pavilion toward the ocean (1981 T. 275). Officer Rodriguez looked at some

[4]Evidence was taken twice on the motion to suppress the gun. The first hearing was conducted before Judge Scott (1981 T. 28-124), who later granted a motion to disqualify him (1981 T. 178). The hearing was then conducted a second time before the successor judge.

wanted posters he had in his car and thought the two men he had seen fit the general description of the men wanted for the murder of a Coral Gables police officer (1981 T. 275-76).

Officer Rodriguez called for a backup officer and went back to the area where he had seen Mr. Valle and the other man (1981 T. 276). Officer Twiss arrived, and Officer Rodriguez asked him to go to a gas station across the road where he could see the pavilion and tell Officer Rodriguez if he could see Mr. Valle (1981 T. 276-77). Officer Twiss saw Mr. Valle sitting on a bench and then start walking (1981 T. 277-78).

Officer Rodriguez drove to an area where he could intercept Mr. Valle (1981 T. 278-79). As his car was moving very slowly, Officer Rodriguez opened the car door, drew his gun and stopped the car (1981 T. 279). Officer Rodriguez stepped out of the car with his gun pointing downward and stood with the car door between him and Mr. Valle (1981 T. 279-80).

Officer Rodriguez ordered Mr. Valle to stop three times, and on the third time, Mr. Valle stopped, turned around and asked if the officer was addressing him (1981 T. 281-82). Officer Rodriguez was about forty feet from Mr. Valle (1981 T. 282). The officer told Mr. Valle to put his bag down and turn around, which Mr. Valle did (1981 T. 282). The officer told Mr. Valle to come toward him and then told him to stop when he was halfway between the officer and the bag (1981 T. 282). Officer Rodriguez told

Mr. Valle to pull his shirt up and turn around all the way so the officer could see if Mr. Valle was armed, and Mr. Valle complied (1981 T. 282).

Officer Rodriguez asked Mr. Valle if he had any identification, and Mr. Valle said his identification was in the bag (1981 T. 283). When Mr. Valle offered to get his identification from the bag, Officer Rodriguez told him no and said Officer Twiss would get it (1981 T. 283). Officer Rodriguez asked Mr. Valle if he objected to Officer Twiss going to the bag, and Mr. Valle said no (1981 T. 284). Officer Twiss asked Mr. Valle the same question, and Mr. Valle said no (1981 T. 284).

Officer Twiss went to the bag, lifted a shirt from it and found a gun (1981 T. 284). Both officers then drew their guns on Mr. Valle (1981 T. 284). This was the first time Officer Rodriguez's gun was visible to Mr. Valle (1981 T. 284).

On cross-examination, Officer Rodriguez testified that when he told Mr. Valle that Officer Twiss would go to the bag, Officer Twiss was either directly to Officer Rodriguez's side on the other side of the police car or just approaching there (1981 T. 294-95). Officer Twiss had his gun in his hand before and during the time he went to Mr. Valle's bag (1981 T. 295).

The state next called Officer Twiss. Officer Twiss testified that on April 4, 1978, he was dressed in his uniform and carrying a revolver in a holster on his right side (1981 T.

299). Officer Twiss came up to Officer Rodriguez's position as Mr. Valle was pulling his shirt back down (1981 T. 300). As Officer Twiss came up to Officer Rodriguez, Rodriguez asked Mr. Valle if it was all right for Twiss to retrieve Mr. Valle's identification from his bag, and Mr. Valle said it was (1981 T. 301). Officer Twiss testified that as he was moving toward Mr. Valle, his gun was in his holster and his right hand was on the gun (1981 T. 301-02). Officer Twiss opened Mr. Valle's bag and found a gun under two windbreakers (1981 T. 302). When he showed the gun to Officer Rodriguez, both officers pointed their guns and Mr. Valle and ordered him to the police car (1981 T. 302).

On cross-examination, Officer Twiss testified that he was running when he came up to Officer Rodriguez's car (1981 T. 306). From the time he came upon Officer Rodriguez and Mr. Valle talking, he had a direct line of sight to Mr. Valle (1981 T. 306). Mr. Valle could clearly see Officer Twiss (1981 T. 307).

The defense called Officer Schultz of the Deerfield Beach Police. Officer Schultz testified that on April 4, 1978, the police did not apply for a warrant to search Mr. Valle's bag (1981 T. 308).

The defense called Mr. Valle as a witness. Mr. Valle testified that on April 4, 1978, he was stopped by Officer Rodriguez, who told him to put down his bag and come toward the officer (1981 T. 312-13). Mr. Valle complied with Officer

Rodriguez's orders to stop when he was halfway between the bag and the officer and to raise his shirt and turn around (1981 T. 313). When Officer Rodriguez asked if Mr. Valle had identification, Mr. Valle said it was in the bag and asked if he could get it (1981 T. 313). Officer Rodriguez said, "No, this officer will get it for you" (1981 T. 313). At that time, Officer Twiss had his hand on his gun and was running by Officer Rodriguez's car toward Mr. Valle (1981 T. 313). Officer Rodriguez asked if Mr. Valle minded if the other officer went into the bag and got the identification (1981 T. 313). Officer Rodriguez was standing behind the door of his car with his right hand straight down, and Mr. Valle believed he had his gun in his right hand (1981 T. 314).

On cross-examination, Mr. Valle testified that he did not see Officer Rodriguez's gun (1981 T. 314). Three years earlier, when the motion to suppress was first heard, Mr. Valle had testified that he did see Officer Rodriguez's gun (1981 T. 314-17). Mr. Valle testified he gave Officer Rodriguez permission to go into the bag because he did not think he had a choice (1981 T. 317-18). Mr. Valle believed he did not have a choice because he thought Officer Rodriguez was hiding a gun behind the car door and because Officer Twiss was running toward him with his hand on his gun (1981 T. 318).

After the testimony concluded, the defense argued that Mr.

Valle had a Fourth Amendment right of privacy as to his bag and that the search was not a search incident to arrest (1981 T. 357). The defense argued that the police could have seized the bag and obtained a warrant to search it, but did not (1981 T. 357). The defense argued that Mr. Valle did not voluntarily consent to the search of the bag and that the officer asking him for consent was gratuitous when Mr. Valle had already been told he could not return to the bag himself (1981 T. 358). The defense argued Mr. Valle's "consent" was simply acquiescence to the officers' authority (1981 T. 358).

The court orally denied the motion to suppress, finding that Mr. Valle gave a valid consent and that even if he had not, the officers had "prudent probable cause" to search the bag (1981 T. 364). After Mr. Valle's trial, the court entered a written order denying the motion to suppress (1981 R. 1051-53). The court found that Mr. Valle's consent was valid, was not a mere acquiescence to authority, and was voluntary (1981 R. 1051). The court also found that the officers had probable cause to believe that Mr. Valle was the person wanted for the murder of a police officer and that he was armed and dangerous (1981 R. 1051). Thus, the court found that the officers acted properly in stopping and detaining Mr. Valle (1981 R. 1052). The court found that once Mr. Valle said his identification was in his bag, the officers "had a right for their own protection and to properly

perform their sworn duties as law enforcement officers to look in the bag for that identification" (1981 R. 1052). The court also found that the officers' purpose in looking in the bag was to find Mr. Valle's identification and that discovery of the gun was therefore lawful (1981 R. 1053). The court found that until Officer Twiss discovered the gun and Mr. Valle was arrested, the bag was "actually and potentially within Valle's reach and control" because "it would have taken Valle only six or seven steps to reach it" (1981 R. 1052). The court also opined that although the officers' purpose in looking in the bag was to find Mr. Valle's identification, the officers "would have been equally justified in searching the bag for a weapon in light of their knowledge and the exigencies of the situation" (1981 R. 1052).

Under law established at the time of Mr. Valle's retrial and direct appeal, the trial court erred in denying the motion to suppress the gun, and direct appeal counsel was ineffective in failing to raise this issue.

A warrantless search is presumptively unlawful, and the state must establish that such a search is within a few carefully drawn exceptions. See, e.g., Katz v. United States, 389 U.S. 347 (1967); Norman v. State, 379 So. 2d 643 (Fla. 1980). The fact that a search is conducted without a warrant is *prima facie* evidence of its illegality, placing the burden upon the state to prove that it was lawful. See Andress v. State, 351 So. 2d 350

(Fla. 4th DCA 1977); State v. Hinton, 305 So. 2d 804 (Fla. 4th DCA 1975).

The trial court found the search in this case lawful based upon "prudent probable cause." Two exceptions relevant to this case are a search incident to an arrest and a search upon probable cause and exigent circumstances. In determining the applicability of these exceptions to the warrant requirement, "if a doubt exists as to whether the officer was reasonable in concluding that a search was justified, such a doubt must be resolved in favor of the defendant whose property was searched." Taylor v. State, 355 So. 2d 180, 185 (Fla. 3d DCA 1978) (citation omitted).

A valid search incident to arrest is limited to a search of the person "and the area into which an arrestee might reach to grab a weapon or evidentiary items"; the search cannot extend beyond "the area `within his immediate control'--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763 (1969). The determinative question when a purported Chimel search extends beyond the body of the arrested person is whether the person had access to the area searched. Granville v. State, 348 So. 2d 641, 642 (Fla. 2d DCA 1977); Ackles v. State, 270 So. 2d 39, 42 (Fla. 4th DCA 1972). A search of an area into which the person cannot have access

because he is in custody at a distance from the area is not a search incident to arrest. Ulesky v. State, 379 So. 2d 121, 123 (Fla. 5th DCA 1979); State v. Skrobacki, 331 So. 2d 376, 378 (Fla. 1st DCA 1976).

A search which extends beyond the parameters of a search incident to arrest can only be justified by probable cause and exigent circumstances commanding an immediate warrantless search. McClellan v. State, 359 So. 2d 869, 873 (Fla. 1st DCA 1978). To validate such a search, the state must not only establish probable cause, but must demonstrate that the exigencies of the situation rendered it impossible or impractical to obtain a warrant prior to the search. Norman v. State, 379 So. 2d 643 (Fla. 1980); Martin v. State, 360 So. 2d 396 (Fla. 1978). "Exigent circumstances" such as will justify a warrantless search are defined as circumstances "in which police action must be `now or never' to preserve the evidence of the crime." Roaden v. Kentucky, 413 U.S. 496, 503 (1973).

In United States v. Chadwick, 433 U.S. 1 (1977), police arrested three men and seized a footlocker which the police believed was carrying illegal drugs. The men and the footlocker were taken to the police station, where the police searched the footlocker and found marijuana. From the time of the arrests, the footlocker was under the exclusive control of the police. 433 U.S. at 4. The Supreme Court held that the Fourth Amendment

applied to searches of personal effects such as luggage and found the search unlawful. 433 U.S. at 11-15. The Court stated that this conclusion was not altered by the fact that the police could have readily obtained a search warrant: "when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." 433 U.S. at 15-16.

In Arkansas v. Sanders, 99 S. Ct. 2586 (1979), police received a tip that the defendant would be arriving at the airport with a green suitcase containing marijuana. The police observed the defendant arrive with the green suitcase and leave the airport in a taxi. The police stopped the taxi and removed and searched the suitcase, revealing marijuana. The Supreme Court found that the officers had "ample probable cause" to believe the suitcase contained marijuana and thus were justified in stopping the taxi and seizing the suitcase. 99 S. Ct. at 2592. However, because police had the suitcase under their exclusive control after seizing it, no exigent circumstances allowed them to conduct a warrantless search of the suitcase. Id. at 2594.

At the time of Mr. Valle's retrial and direct appeal, Florida courts had uniformly applied Chadwick and Sanders. See Ulesky v. State, 379 So. 2d 121 (Fla. 5th DCA 1979); Cobb v.

State, 378 So. 2d 82, 83 (Fla. 3d DCA 1979); Shafi v. State, 377 So. 2d 787, 788 (Fla. 1st DCA 1979); Liles v. State, 375 So. 2d 1094, 1095 (Fla. 1st DCA 1979); Haugland v. State, 374 So. 2d 1026, 1029 (Fla. 3d DCA 1979); State v. Southwell, 369 So. 2d 371, 372 (Fla. 1st DCA 1979).

Chadwick, Sanders and the Florida cases applying them show that the trial court erred in denying the motion to suppress the gun on the ground that the search was supported by "prudent probable cause." As Chadwick and Sanders demonstrate, the trial court's finding that the officers had probable cause to detain Mr. Valle does not establish the validity of the search. As to the trial court's other findings, Chadwick and Sanders again demonstrate that the search was not valid. The police officers had Mr. Valle and his bag under their control. Mr. Valle was twenty feet away from the bag and complied with the officer's order not to return to it. Mr. Valle thus was in no position to retrieve a weapon from the bag or to destroy evidence. As in Chadwick and Sanders, no exigent circumstances existed requiring an immediate search of the bag. The officers had the bag under their control and thus were required to obtain a warrant in order to search it.

The trial court also denied the motion to suppress the gun because the court found Mr. Valle had given valid consent to the search. However, the law established at the time of Mr. Valle's

retrial and direct appeal shows that Mr. Valle's purported "consent" was not voluntary.

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court held that the voluntariness of a consent to search is determined from the totality of the circumstances. 412 U.S. at 227. Consent may not be coerced, either explicitly or implicitly. 412 U.S. at 228. Coercion may arise from the nature of the police questioning or the environment in which it takes place. 412 U.S. at 247. When the subject of a search is not in custody and the state attempts to justify a search as consensual, the state must demonstrate that the consent was in fact voluntary and not the result of duress or coercion, express or implied. 412 U.S. at 248.

In Bumper v. North Carolina, 391 U.S. 543 (1968), the defendant's grandmother allowed police to search her house after an officer told her he had a warrant to search. The Supreme Court held that the state cannot meet its burden of establishing that consent was voluntary "by showing no more than acquiescence to a claim of lawful authority." 391 U.S. at 548-49.

Under Schneckcloth and Bumper, Mr. Valle did not voluntarily consent to the search of his bag. Although the trial court found that Mr. Valle's consent was voluntary and not simply acquiescence to authority, the court made no factfindings to support these legal conclusions. It is undisputed that Officer

Rodriguez told Mr. Valle he could not return to his bag and that Mr. Valle complied with that command. It is also undisputed that Officer Twiss was approaching at a run, with his hand on his gun. Under these circumstances, Mr. Valle's "consent" was nothing more than acquiescence to the officers' authority and was not voluntarily given.

The state cannot establish that the error in denying the motion to suppress the gun had "no effect" on the verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). "The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." Id. at 1135. The state introduced the gun into evidence and presented forensic testimony regarding the gun and cartridges. The state relied upon the gun and its characteristics in closing argument. The error was not harmless.

The denial of the motion to suppress the gun was preserved at trial and available for appeal. Appellate counsel was ineffective in failing to present this issue.

F. CONCLUSION.

Several meritorious arguments were available for direct appeal, yet appellate counsel unreasonably failed to assert them.

These errors, singularly or cumulatively, demonstrate that Mr. Valle was denied the effective assistance of appellate counsel.

CONCLUSION

For all of the reasons discussed herein, Mr. Valle respectfully urges the Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Sandra Jaggard, Office of Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131-2407, on December 28, 2001.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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