IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2865

MANUEL VALLE,

Petitioner,

v.

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

Respondent.

REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY[1]

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

A. WAIVER OF ADVISORY JURY. Respondent concedes that this issue was preserved at trial, but argues that appellate counsel was not ineffective in failing to raise it because the issue lacks merit (Response at 16). Respondent presents two arguments against the merits of this issue, both of which rest upon factual and legal errors.[2]

First, Respondent argues that the trial court did not error in denying the motion to waive the advisory jury because "the lower court indicated that the jury's recommendation of death would not affect its proper consideration of the evidence if it believed it was tainted" (Response at 20). This argument is factually incorrect. Respondent several times summarizes the record as indicating that the court believed it did not have to accept the waiver because the court was the final sentencer. For example, Respondent says the record reflects that "[t]he court then indicated that it did not believed [sic] that Defendant's argument was entitled to much weight because it was the final sentencing

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[1]As to matters not addressed in this reply, Mr. Valle relies upon the discussion presented in the petition.

[2]Respondent correctly does not rely upon the argument presented in the trial court that a capital defendant cannot waive the penalty phase jury without the consent of the state (See 1988 R. 992-94). This Court has held that such a waiver is proper without the state's consent. State v. Hernandez, 645 So. 2d 432 (Fla. 1994).

authority" (Response at 18, citing 1988 R. 1021-23), and that "[t]he court then stated that it still did not believe that it would affect its sentencing decision to have a jury that recommended death" (Response at 19, citing 1988 R. 1026).

Respondent neglects to mention, however, that in these same portions of the record, the court repeatedly stated it would give the jury recommendation great weight. For example, the following exchange occurred between the court and defense counsel:

> THE COURT: The fact of the matter is that even if we had the jury--in any event, if the jury gives death and I think life, then that is what I give.
>
> You can present the same case to them and me with them, or without them. I still am the one who has to make the decision, not them.
>
> MR. ZELMAN [defense counsel]: Except that Your Honor is bound by the Supreme Court of Florida to give the jury's consideration great weight.
>
> THE COURT: <u>And the Court would give them great weight</u>.

(1988 R. 1022-23) (emphasis added). The court later reiterated, "The Court gives tremendous weight to what the jury has to say" (1988 R. 1026). The court several times stated it preferred to have a jury, an indication that the court would consider that recommendation:

> It's easier for the Court to have a jury than not have the jury for myself as a personal matter. I would much rather have a jury than not.

(1988 R. 994-95).

> 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.

(1988 R. 1029-30). In denying the motion to waive the jury, the court repeated it would give the jury recommendation great weight:

> 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) (emphasis added).

The state even argued that the defense motion to waive the jury should be denied because it was important for the court to have the jury's input:

> MR. ROSENBAUM [prosecutor]: I believe the jury recommendation is to basically tell this Court in the conscience of the community what they believe a proper penalty for a person who commits this particular offense.
>
> It is the State's position that sentencing or an advisory jury sentence, it is very important for this Court to have that recommendation before the Court makes its decision on what the proper sentence is.

(1988 R. 1028). The state later repeated this argument: "We would

think that we want Your Honor assisted by the voice of the community. This is a tremendous decision to make" (1988 R. 1033).

The record thus clearly reflects that the court intended to give the jury recommendation great weight, as required by Florida law. The court never said, as Respondent contends, that it would somehow reduce the weight given the jury's recommendation if the court believed that recommendation was tainted. Indeed, there is no provision under Florida law for such a procedure. In the trial court, the state never argued--and correctly so--that the court could apply a sliding scale to the jury's recommendation depending upon whether or not that recommendation was tainted.

In support of its argument that the trial court properly denied the motion to waive the jury because the court was the final sentencer and could adjust the weight given the jury's recommendation, Respondent cites Sireci v. State, 587 So. 2d 450, 452 (Fla. 1991) (Response at 20). Sireci is factually distinguishable from Mr. Valle's case, where the trial judge never said he would give the jury's recommendation less weight if he believed it was tainted. Sireci is also distinguishable because in that case the defendant wanted to waive the jury simply to avoid having the jury know he had previously been sentenced to death. In contrast, in Mr. Valle's case, the majority of the defense case in mitigation focused on Mr. Valle's behavior in prison, which necessitated presenting detailed evidence regarding death row and the fact that Mr. Valle had been on death row for ten years. Thus,

Mr. Valle's concerns about presenting his mitigation case to a jury went far beyond the concern raised in Sireci. Mr. Valle's concerns went to the heart of his case for a life sentence.

Further, Mr. Valle respectfully submits that Sireci was wrongly premised upon the trial judge's statement that "if he found the jury was influenced by improper considerations, he had `the ability and the duty to lessen the reliance upon the jury's verdict.'" Sireci, 587 So. 2d at 452. This Court has consistently recognized the effect of the jury's recommendation on the judge's sentencing decision. When first addressing Florida's capital sentencing statute in State v. Dixon, 283 So. 2d 1 (Fla. 1973), this Court pointed out that the statute required that the jury make a penalty recommendation and that the trial judge determined the sentence "guided by . . . the findings of the jury." Id. at 8. This Court has long recognized that the jury's recommendation affects the judge's and this Court's consideration of the appropriate sentence: "Both the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed." Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974). Florida case law establishes that a trial judge is required to pay deference to the jury's recommendation by giving that recommendation "great weight," whether that recommendation be for life, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death. Smith v. State, 515

So.2 d 182, 185 (Fla. 1987), *cert. denied*, 485 U.S. 971 (1988); Grossman v. State, 525 So. 2d 838, 829, n. 1 (Fla. 1988).

There is no provision under Florida law for adjusting the weight given to a jury's recommendation depending upon whether that recommendation was "tainted." A jury's recommendation is either reliable or unreliable. Rather than applying some sliding scale of weight to a "tainted" jury recommendation, Florida law requires resentencing if error occurs before the jury. See Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure").

Respondent's second argument that this issue lacks merit is that "the record does not reflect that Defendant personally made a knowing, intelligent and voluntary waiver of the advisory jury" (Response at 21). This argument is simply frivolous. Respondent points to the state's argument in the trial court that Mr. Valle was required to personally waive the penalty phase jury (Response at 17, citing 1988 R. 991-92). Defense counsel responded that Mr. Valle was being interviewed by a defense expert, but that "He can be brought out as soon as it's appropriate for him to execute a waiver" (1988 R. 992). Respondent says, "Defendant was not brought before the court" (Response at 17). However, Respondent neglects to mention that the court did not rule on the motion at that hearing, but scheduled another hearing for further argument on the motion and that, importantly, the state never again brought up any

concerns about a personal waiver. Significantly, the trial court did not deny the motion based upon any lack of a personal waiver by Mr. Valle. As defense counsel stated, Mr. Valle was available to execute a waiver if the court was going to grant the motion. Since the court denied the motion, it was never necessary for Mr. Valle to execute a waiver.

Contrary to Respondent's assertions (Response at 20), the trial court did abuse its discretion in denying the motion to waive the penalty phase jury. The court's reasons for denial rested solely on the court's desire to receive a jury recommendation (1988 R. 1034-35) ("I frankly would prefer to have the jury give me their recommendation"). The court did not address Mr. Valle's concerns about presenting his mitigation case to a jury, but said only he would "assist you in presenting a fair case before the jury" (Id.). The court concluded, "I think that is the fairest thing to do considering all the circumstances" (Id.). The court did not explain why or to whom--whether to the victim's family, the state, the court, Mr. Valle--this was the "fairest thing to do." This ruling was certainly not fair to Mr. Valle, who was in the position of requesting a jury waiver through no fault of his own, but because the trial court had erred at the previous sentencing in refusing to admit Mr. Valle's evidence of prison adjustment.

This issue was preserved for appeal, and its omission undermines confidence in the outcome of Mr. Valle's direct appeal. Appellate counsel was ineffective in failing to raise it.

B. CCP INSTRUCTION. Respondent argues that defense counsel agreed to the instruction ultimately given. Respondent argues:

> [T]rial counsel never objected that the wording of the instruction was confusing. In fact, after the parties agreed to the framework to modify Defendant's proposed instruction, Defendant stated that the framework was "okay" and then drafted the instruction that was finally given to the jury.

(Response at 25-26). Respondent is confusing defense counsel's acquiescence to the trial court's ruling with agreement. After the court and counsel discussed premeditation and "heightened" premeditation, the state summarized the court's decision: "Let me see if I think I understand where the Court is going. In terms of five, six or seven . . . what the Court is suggesting that we give them the standard definition of premeditation. Supplement that with the first paragraph of instruction number seven" (1988 R. 5736-37). The court responded, "Yes" (1988 R. 5737). The parties then debated the defense request for a definition of "calculated," to which the state objected (1988 R. 5737-45). The court then ruled, "I'm prepared to give paragraph one [of Defendant's Requested Instruction No. 7] and I'm prepared to give paragraph two. I'm not prepared to give paragraph three" (1988 R. 5745). The court further said it would instruct on those two paragraphs, although "[n]ot necessarily in that order" (Id.). Thus, when defense counsel said, "Okay" (id.), counsel was abiding by the court's ruling, not waiving an objection. The court then gave counsel specific directions on how to phrase the instruction (1988 R. 5747-48). When the court summarized its rulings on requested

instructions five, six and seven, defense counsel asked, "Can we have an agreement they're all preserved?" (1988 R. 5751).

Counsel then composed an instruction in accordance with the court's ruling. Counsel reversed the order of the paragraphs defining premeditation and "heightened" premeditation and omitted the definition of "calculated" (Compare 1988 Second Supplemental Record, Vol. II, p. 223 [Defendant's Requested Instruction No. 7] with 1988 R. 5994-95 [jury instruction]). After the court instructed the jury and asked whether counsel had any objections, defense counsel stated, "Except as previously noted" (1988 R. 6006).

Respondent is therefore wrong to argue that defense counsel did not preserve an objection to the wording of the jury instruction. Counsel presented the requested instruction and argued that it be given to the jury. The court ruled on the request and told counsel how to draft the instruction. In abiding by the court's ruling, counsel did not waive any objections.

Respondent also argues that the instruction was not confusing and that omitting the definition of "calculated" was not error (Response at 26). While the court agreed to instruct the jury on the first-degree murder definition of premeditation and on the fact that this aggravator required "heightened" premeditation, the court refused to instruct the jury on the third paragraph of Defendant's Requested Instruction No. 7, which defined "calculated" (See 1988 Second Supplemental Record Vol. II, p. 223). Since the aggravator is phrased in the conjunctive--requiring proof of coldness,

calculation *and* premeditation--omitting the definition of "calculated" rendered the instruction inadequate and unconstitutional. See Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). Further, the trial court's ruling requiring defense counsel to reword and reverse the first two paragraphs of Defendant's Requested Instruction No. 7 rendered the instruction confusing, as explained in Mr. Valle's petition.

Respondent argues that appellate counsel was not ineffective in not raising a claim regarding the omitted definition of "calculated" because appellate counsel cannot be held ineffective for not predicting a change in the law and because the claim was not preserved (Response at 26-27). However, the law relied upon by trial counsel preserved this claim and was a basis for raising it on direct appeal. In requesting the definition of "calculated," trial counsel cited Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987) (1988 Second Supplemental Record, Volume II, p. 223; 1988 R. 5737-39). Trial counsel argued that Rogers "receded from the precedent on the definition of the aggravating circumstances" by defining "calculated" as "a careful plan or prearrange[d] design" (1988 R. 5737). Counsel argued, "Calculate, of course, is one of the three conjunctive aspects of this aggravating circumstance" (Id.). The state argued there was no need to define "calculated" because the jurors could use their own common sense to determine its meaning (1988 R. 5739). The court indicated it believed that the definition of "calculated" was meant for courts and not for jurors (1988 R. 5740). Defense counsel then argued:

> I think Cooper versus State and Pete versus State both speak to giving definitional instructions to the jury. I think it's more significant in terms of this word "calculated" that if the Supreme Court of Florida had to change its prior construction of the term. I think that's, if the Court had to change its construction, certainly a jury isn't going to know how to apply it consistent with the law.
>
> More recently, I'd say within the last year, the Supreme Court of Florida has recognized more and more the increased significance of the jury's determination and that that determination must be based upon proper guidance, and think that's why we have to define.

(1988 R. 5740-41) (emphasis added). When the court again indicated it believed definitions of aggravators were meant for courts rather than jurors (1988 R. 5742), defense counsel argued:

> There's been a, like I say, in the last year, a major shift, I think, in Florida jurisprudence about the significance of the jury's jury [sic] recommendation. The Riley case, I think, is the best example. The Riley case was originally affirmed by the Supreme Court of Florida on the issue of whether a new jury recommendation was necessary where the trial court sentencing order had erroneous findings on aggravating circumstances. And the Supreme Court of Florida said no and that was upheld in the federal courts because the jury recommendation was only a [sic] advisory.
>
> The Court has revisited that decision and has under discovered now the significance of the jury recommendation. I think the Caldwell decision has had great impact on the Court, and I think that we will see cases more and more asking the courts to explain these definitional terms, but I think we can go back and look at Cooper and Pete and I think even the Brown decision, the Supreme Court of Florida is talking about the imprecision of the criteria in the capital punishment statute. The jury will not know how to apply the aggravating circumstances. If we are are [sic] going to tell him about it, we should define it for them, how Florida law defines calculated, for example.

(1988 R. 5742-43) (emphasis added). The state continued to argue that the jurors would be able to define "calculated" for themselves, and the court denied the requested instruction on

"calculated" (1988 R. 5743-45).

Contrary to Respondent's argument, trial counsel preserved a claim that the jury instructions did not adequately define the cold, calculated and premeditated aggravator. Counsel pointed out that the significance of the jury's recommendation required that the jury be provided adequate guidance and that the jury would not know how to apply aggravators because the statutory language was imprecise. Counsel cited to Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987), in which this Court held, "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."

Trial counsel's arguments and citations preserved a claim that the cold, calculated and premeditated jury instruction was vague and overbroad. That is exactly what counsel argued in the passages quoted above. These arguments and citations provided a basis for raising this claim on direct appeal, and appellate counsel provided ineffective assistance in failing to do so.

C. JURY ISSUES. Respondent agrees that appellate counsel raised an issue on direct appeal 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 (Response at 28), as Mr. Valle pointed out in his petition (Petition at 16 n.3). Respondent also agrees that the issue regarding how these comments tainted the jury selection procedure was preserved at trial (Response at 29-34).

However, Respondent misses the point of this claim. Respondent argues that "most of the veniremember[s] whom Defendant claims should not have been excused for cause had stated that they would not recommend death under any circumstances before the State made the allegedly improper comments" and that "all of the veniremembers in question stated that they would never recommend death" (Response at 33) (emphasis added). Respondent also argues that the fair cross-section requirement was not violated because that requirement does not extend to the petit jury (Response at 33-34).

First, Respondent never argues that the prosecutor's comments were proper, apparently conceding their impropriety. Second, these improper comments clearly affected the entire venire, as the comments of prospective jurors set forth in Mr. Valle's petition show. The state appears to concede this point, arguing only that "most"--but not all--veniremembers whom the state excused for cause on the basis of inability to recommend death stated their opinions before the state's improper remarks. Thus, the improper comments deprived Mr. Valle of a fair and impartial jury and of a fair cross-section by negating any inquiry into whether jurors could abide by the law and by excluding a distinctive group from the jury.

D. MOTION TO SUPPRESS. Although agreeing that this claim was preserved at trial, (Response at 35), Respondent argues that the officers properly searched Mr. Valle's bag because he "was not handcuffed and was merely 20 feet from the bag" (Response at 43).

Respondent does not address the fact that Mr. Valle was obeying all of the officers's commands, including the command to stay away from the bag, and that therefore the officers could have easily seized the bag, waiting to search the bag until they obtained a warrant.

Respondent argues that California v. Acevedo, 500 U.S. 565 (1991), abrogated United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979) (Response at 43). Acevedo held that police may search a container when they have probable cause to believe it contains contraband or evidence. The officers in Mr. Valle's case did not testify that they had probable cause to search Mr. Valle's bag.

Respondent argues that the trial court properly found that Mr. Valle consented to the search because the court found Mr. Valle's testimony incredible (Response at 44). However, Respondent does not acknowledge that Mr. Valle's behavior in obeying the officers's commands demonstrates that he believed he had to acquiesce to those commands, as would any reasonable person in that situation.

CONCLUSION

For the reasons discussed herein and in his petition, 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, on March 20, 2002.

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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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