IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2865

MANUEL VALLE,

Petitioner,

vs.

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

Respondent.

ON PETITION FOR
WRIT OF HABEAS CORPUS

RESPONSE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS

On April 13, 1978, Defendant was charged by indictment with the first degree murder of police officer Luis Pena, with a firearm; the attempted first degree murder of police officer Gary Spell, with a firearm; and the possession of a firearm by a convicted felon.[1] (R. 1-4).[2] The crimes were alleged to have been committed on April 2, 1978. A jury trial commenced on May 8, 1978. (R. 21) The jury found Defendant as charged on all counts and recommended a death sentence. The trial court followed the jury's recommendation and sentenced Defendant to death. Defendant appealed his convictions and sentences to this Court, which reversed, finding that the trial court had abused its discretion in forcing Defendant to go to trial on such short notice. *Valle v. State*, 394 So. 2d 1004 (Fla. 1981).

The matter then proceeded to a retrial on July 29, 1981. (RTR. 36)[3] Defendant was again found guilty as charged on all counts. (RTR. 1042-44) The jury recommended a sentence of death by a vote of 9 to 3. (RTT. 1546) The trial court again followed the jury's recommendation and sentenced Defendant to death. (RTR. 1045-50)

---

[1] Defendant was also charged with grand theft auto, which was severed. (R. 45, 96)

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

[3] The symbol "RTR" denotes the record on appeal in Florida Supreme Court Case No. 61,176. The symbol "RTT" will refer to the transcript of proceedings in that matter.

The facts of the case, as found by this Court, were:

> 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.

Valle v. State, 474 So. 2d 796, 798 (Fla. 1991).

Defendant again appealed his convictions and sentences to this Court, raising four issues:

> I.
> WHETHER THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THE COURT FAILED TO SUPPRESS INCRIMINATING STATEMENTS OBTAINED BY INTERROGATING OFFICERS WHO REFUSED TO HONOR THE DEFENDANT'S INVOCATION OF HIS RIGHTS TO COUNSEL AND SILENCE.
>
> II.
> WHETHER THE DEFENDANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW WHERE THE GRAND AND PETIT JURIES WERE SELECTED IN A MANNER WHICH GROSSLY UNDERREPRESENTED THE DEFENDANT'S MINORITY GROUP AND DID NOT REFLECT A FAIR CROSS-SECTION OF THE COMMUNITY.
>
> III.
> WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE STATE ELICITED TESTIMONY, OVER OBJECTION, THAT THE DEFENDANT REFUSED TO ANSWER A QUESTION PUT TO HIM DURING CUSTODIAL INTERROGATION.
>
> IV.
> WHETHER THE APPLICATION OF SECTION 921.141, FLORIDA

STATUTES, IMPOSING DEATH UPON DEFENDANT VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The Improper Exclusion Of A Prospective Juror Who Merely Stated That She Would Have Difficulty Recommending A Sentence Of Death Requires That The Death Sentence Be Vacated.

B. Death May Not Be Imposed Where The Court Excluded Mitigating Character Evidence That The Statutory Alternative To Death Would Be Fulfilled By The Defendant's Incarceration As A Model Rehabilitated Prisoner.

C. Death May Not Be Imposed Where The Essential Safeguard Of A Valid Jury Recommendation Made In Conformity With Constitutional Law Was Nulified Because Erroneous Prejudicial Aggravating Evidence Was Admitted, Buttressed By Inflamatory Prosecutorial Argument, And Not Limited By Proper Instructions.

D. Death Is A Disproportionate Sentence In This Case.

Initial Brief of Appellant, Case No. 61,176. This Court affirmed. *Valle v. State*, 474 So. 2d 796 (Fla. 1985).

Defendant then sought certiorari review in the United States Supreme Court, raising three issues:

I.

WHETHER DISCRIMINATION AGAINST LATINS, BLACKS, AND FEMALES BY STATE JUDGES WHO PERSONALLY SELECT GRAND JURY VENIRES AND GRAND JURIES NOT FAIRLY REPRESENTING THE COMMUNITY, DENIED A WHITE LATIN MALE EQUAL PROTECTION AND DUE PROCESS.

II.

WHETHER DISCRIMINATION BY A STATE IN SELECTING PETIT JURY VENIRES THROUGH EXCLUSIVE RELIANCE UPON VOTER LISTS WHICH SUBSTANTIALLY UNDERREPRESENT LATINS IN THE COMMUNITY DENYS A LATIN HIS RIGHTS TO JURY TRIAL, EQUAL PROTECTION, AND DUE PROCESS OF LAW.

III.

WHETHER EXCLUSION IN A CAPITAL CASE OF REHABILITATIVE CHARACTER EVIDENCE THAT THE DEFENDANT WILL BE A MODEL PRISONER IF INCARCERATED FOR LIFE AND NOT EXECUTED VIOLATES THE EIGHTH AMENDMENT.

The Court vacated this Court's affirmance and remanded the matter for reconsideration in light of *Skipper v. South Carolina*, 476 U.S. 1 (1985). *Valle v. Florida*, 476 U.S. 1102 (1986). On remand, this Court vacated Defendant's sentence because of the exclusion of the "model prisoner" evidence. *Valle v. State*, 502 So. 2d 1225 (Fla. 1987).

Defendant's third sentencing trial commenced on February 3, 1988. (RSR. 53)[4] The jury recommended a sentence of death by a vote of 8 to 4. (RSR. 882) The trial judge again followed the jury's recommendation and imposed a sentence of death. (RSR. 899-908) In doing so, the trial court found five aggravating factors: prior violent felony, murder of a law enforcement officer, avoid arrest, hinder law enforcement and CCP. (RSR. 889-908) The trial court merged the murder of a law enforcement officer, avoid arrest and hinder law enforcement aggravators. (RSR. 899-908) The trial court found no mitigation. (RSR. 899-908)

Defendant again appealed to this Court, raising five issues:

I.

THE TRIAL COURT ERRED IN FAILING TO MAKE A FULL INQUIRY INTO ALLEGATIONS THAT THE PROSECUTORS HAD UTILIZED THE STATE'S PEREMPTORY CHALLENGES IN A RACIALLY

[4] The symbol "RSR" will refer to the record on appeal in Florida Supreme Court case no. 72,328. The symbol "RSSR" will refer to the supplemental record in that proceeding.

DISCRIMINATORY MANNER, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 16 OF THE CONSTITUTION OF FLORIDA.

II.

THE TRIAL COURT ERRED IN REFUSING DEFENDANT AN OPPORTUNITY TO EXERCISE A PEREMPTORY CHALLENGE SUBSEQUENT TO THE SWEARING OF THE JURY BUT PRIOR TO THE TAKING OF TESTIMONY, BASED UPON INFORMATION IMPARTED BY THE PROSECUTION AT THAT TIME, IN VIOLATION OF RULE 3.310 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

III.

EGREGIOUS PROSECUTORIAL MISCONDUCT DENIED DEFENDANT A FAIR AND RELIABLE JURY SENTENCING HEARING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Overkill In The State's Case-in-Chief.

B. Prejudicial Reliance Upon Prior Death Sentence.

C. Unfair And Prejudicial Cross-Examination Of Defense Witnesses And Denial Of Opportunity For Rebuttal.

D. Unfair And Prejudicial Denigration Of Statutory and Nonstatutory Mitigating Circumstances.

E. Unfair And Unconstitutional Application Of Aggravating Circumstances.

F. "Mandatory Death" Arguments.

IV.

THE UNFAIR AND PREJUDICIAL USE OF "VICTIM IMPACT" TESTIMONY AND ARGUMENT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

V.

THE TRIAL COURT'S IMPOSITION OF A DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Overbroad Application Of Section 921.141(5)(i), Florida Statutes (1987).

B. Restricted Consideration of Mitigating

Factors.

Initial Brief of Appellant, Case No. 72,328. This Court again affirmed. *Valle v. State*, 581 So. 2d 40 (Fla. 1991). Defendant again sought certiorari, which was denied on December 2, 1991. *Valle v. Florida*, 502 U.S. 986 (1991).

On December 1, 1993, Defendant filed his final amended motion for post conviction relief, raising 20 claims:

> I.
> ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT'S] CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. [DEFENDANT] CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.
>
> II.
> THE TRIAL COURT AND THE FLORIDA SUPREME COURT IMPROPERLY DENIED [DEFENDANT'S] PETITION FOR WRIT OF CORAM NOBIS. NEWLY DISCOVERED EVIDENCE REVEALS THAT [DEFENDANT] WAS PREJUDICED BY IMPROPER JURY AND PROSECUTORIAL CONDUCT.
>
> III.
> THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.
>
> IV.
> [DEFENDANT] WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED THREE SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

V.

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN [DEFENDANT'S] CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, [DEFENDANT'S] SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR.

VI.

COUNSEL FOR THE STATE ENGAGED IN EX PARTE COMMUNICATIONS WITH THE TRIAL JUDGE DURING THE PENDENCY OF [DEFENDANT'S] TRIAL. TRIAL COUNSEL KNEW OF THE COMMUNICATIONS AND FAILED TO REMOVE SAID TRIAL JUDGE. TRIAL COUNSEL HAD NO STRATEGIC REASON FOR THIS FAILURE. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT DOING SO. [DEFENDANT] WAS PREJUDICED THEREBY.

VII.

THROUGHOUT [DEFENDANT'S] SENTENCING, THE STATE FILLED, OR ASSISTED IN FILLING, [DEFENDANT'S] COURTROOM WITH AN OVERWHELMING PRESENCE OF UNIFORMED POLICE OFFICERS. THESE POLICE OFFICERS INTIMIDATED BOTH THE TRIAL JUDGE AND JURY. WERE IT NOT FOR THE STATE'S ACTIONS, THE TRIAL JURY WOULD HAVE RECOMMENDED A LIFE SENTENCE AND THE TRIAL JUDGE WOULD HAVE IMPOSED THE SAME.

VIII.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

IX.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE DURING HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL INEFFECTIVELY FAILED TO OBJECT TO THE STATE'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. TRIAL COUNSEL FAILED TO DISCOVER

AND REMOVE PREJUDICED JURORS. THE JURORS' PREJUDICES ADVERSELY AFFECTED THE OUTCOME OF BOTH THE GUILT AND PENALTY PHASES OF [DEFENDANT'S] TRIAL.

X.

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT] TO DEATH.

XI.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM DURING THE TRIAL COURT PROCEEDINGS FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE. [DEFENDANT'S] RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED.

XII.

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS RENDERED [DEFENDANT'S] DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. DEFENSE COUNSEL'S FAILURE TO ARGUE EFFECTIVELY CONSTITUTED DEFICIENT PERFORMANCE.

XIII.

THE PROSECUTORS' MISCONDUCT DURING THE COURSE OF [DEFENDANT'S] CASE RENDERED [DEFENDANT'S] CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE STATE PRESENTED UNCHARGED COLLATERAL CRIMES IMPROPER ARGUMENT TO THE JURY. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING. THE TRIAL COURT'S ACTIONS DID NOT PERMIT COUNSEL TO BE EFFECTIVE.

XIV.

[DEFENDANT] WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE

EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

XV.

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT [DEFENDANT'S] CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XVI.

[DEFENDANT] WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

XVII.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE [DEFENDANT'S] CASE IN CHALLENGE TO THE STATE'S CASE. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT'S] CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

XVIII.

[DEFENDANT] IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED AN ADVERSARIAL TESTING.

XIX.

[DEFENDANT'S] TRIAL OUTCOME WAS MATERIALLY UNRELIABLE DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, THE WITHHOLDING OF EXCULPATORY OR IMPEACHMENT MATERIAL, THE NEWLY DISCOVERED EVIDENCE, THE IMPROPER RULINGS OF THE TRIAL COURT, OR ALL THE PRECEDING AT [DEFENDANT'S] TRIAL.

XX.

[DEFENDANT'S] TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(PCR. 1-62)[5] After a *Huff* hearing, the post conviction court denied the motion without an evidentiary hearing. (PCR. 105)

Defendant appealed the denial of this motion to this Court raising 15 issues:

> I.
> [DEFENDANT] WAS DENIED DUE PROCESS AND A FULL AND FAIR HEARING ON HIS MOTION TO VACATE.
>
> II.
> THE TRIAL COURT IMPROPERLY REFUSED TO ALLOW [DEFENDANT] A REASONABLE AMOUNT OF TIME IN WHICH TO PURSUE CIVIL ACTIONS PURSUANT TO HOFFMAN. THE TRIAL COURT ERRED IN NOT REQUIRING THE DADE COUNTY STATE ATTORNEY TO PROVIDE A LIST OF EXEMPTIONS AS REQUIRED UNDER CHAPTER 119 OF THE FLORIDA STATUTES. THE TRIAL COURT ALSO ERRED IN DISMISSING MANY OF [DEFENDANT'S] CLAIMS WITHOUT ALLOWING HIM TO AMEND HIS MOTION AFTER OBTAINING ALL PUBLIC RECORDS.
>
> III.
> THE TRIAL JUDGE ENGAGED IN EX-PARTE COMMUNICATIONS WITH THE STATE DURING THE PENDENCY OF [DEFENDANT'S] TRIAL. HE ALSO ENGAGED IN OTHER CONDUCT INDICATING A CLEAR BIAS IN FAVOR OF THE STATE. TRIAL COUNSEL KNEW OF THE CONDUCT AND YET FAILED TO REMOVE SAID TRIAL JUDGE. TRIAL COUNSEL HAD NO STRATEGIC REASON FOR THIS FAILURE. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT DOING SO. [DEFENDANT] WAS PREJUDICED THEREBY.
>
> IV.
> [DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE ADDITIONAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

---

[5] The symbol "PCR" will refer to the record on appeal in Florida Supreme Court Case No. 88,203.

V.

TRIAL COUNSEL KNEW OF, BUT DID NOT ARGUE EFFECTIVELT TO PREVENT, THE STATE FROM FILLING, ASSIST IN FILLING, [DEFENDANT'S] COURTROOM WITH AN OVERWHELMING PRESENCE OF UNIFORMED POLICE OFFICERS FOR THE PURPOSE OF INTIMIDATING THE TRIAL JUDGE AND JURY. OR EXCLUDING MEMBERS OF DEFENSE COUNSEL'S STAFF IN FURTHERANCE OF THIS IMPROPER ACTIVITY.

VI.

THE TRIAL COURT IMPROPERLY DENIED [DEFENDANT'S] PETITION FOR WRIT OF CORAM NOBIS. NEWLY DISCOVERED EVIDENCE REVEALS THAT [DEFENDANT] WAS PREJUDICED BY IMPROPER JURY AND PROSECUTORIAL CONDUCT.

VII.

THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

VIII.

[DEFENDANT] WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED THREE SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

IX.

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIALLY INVALIDITY OF THE STATUTE WAS NOT CURED IN [DEFENDANT'S] CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, [DEFENDANT'S] SENTENCE OF DEATH IS PREMISED ON FUNDAMENTAL ERROR.

X.

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE DURING HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL INEFFECTIVELY FAILED TO OBJECT TO THE STATE'S DISCRIMINATORY USE OF PEREMPTORY CHALLENGES. TRIAL COUNSEL FAILED TO DISCOVER AND REMOVE PREJUDICED JURORS. THE JURORS' PREJUDICES

ADVERSELY AFFECTED THE OUTCOME OF BOTH THE GUILT AND PENALTY PHASES OF [DEFENDANT'S] TRIAL.

XI.

[DEFENDANT'S] SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO [DEFENDANT] TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING [DEFENDANT] TO DEATH.

XII.

DEFENSE COUNSEL'S FAILURE TO ARGUE EFFECTIVELY CONSTITUTED DEFICIENT PERFORMANCE ALLOWING THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENT UPON NON-STATUTORY AGGRAVATING FACTORS WHICH RENDERED [DEFENDANT'S] DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

XIII.

COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE PROSECUTOR'S MISCONDUCT DURING THE COURSE OF [DEFENDANT'S] CASE WHICH RENDERED [DEFENDANT'S] CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE STATE PRESENTED UNCHARGED COLLATERAL CRIMES IMPROPER ARGUMENT TO THE JURY. THE TRIAL COURT'S ACTIONS DID NOT PERMIT COUNSEL TO BE EFFECTIVE.

XIV.

TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO EFFECTIVELY ARGUE THAT [DEFENDANT] WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

XV.

[DEFENDANT] SHOULD BE ALLOWED TO AMEND HIS POSTCONVICTION MOTION, INCLUDING, BUT NOT LIMITED TO, CLAIMS XV, XVI, XVII, XVIII AND XIX, TO INCLUDE FACTS AND CLAIMS ARISING FROM, OR RENDERED VIABLE BY, MATERIALS OBTAINED THROUGH CHAPTER 119.

Initial Brief of Appellant, Case No. 88,203. The Court found that

most of the claims were properly denied summarily. *Valle v. State*, 705 So. 2d 1331 (Fla. 1997). However, this Court remanded for an evidentiary hearing on the claim that counsel was ineffective for failing to move for a mistrial and disqualification of the resentencing judge after he allegedly kissed the victim's widow in front of the jury and for presenting the model prisoner evidence. *Id.*

At the beginning of the evidentiary hearing on remand, Defendant withdrew his claim that counsel was ineffectively for failing to move for a mistrial and disqualification. (PCR2. 62, 152-53)[6] As such, the hearing addressed only the claim of alleged ineffectiveness for presenting the model prisoner evidence. After receiving testimony from Edith Georgi Houlihan, Michael Zelman, and Elliot Scherker, Defendant's attorneys at resentencing, the post conviction court rejected this claim, finding that Defendant had proven neither deficiency or prejudice. (PCR2. 280-92)

Defendant again appealed the denial of the motion, raising two issues:

> I.
> [DEFENDANT'S] RIGHT TO DUE PROCESS WAS VIOLATED BY THE LOWER COURT'S ADOPTION OF THE PROPOSED ORDER WRITTEN BY THE STATE DENYING RELIEF TO [DEFENDANT].
>
> II.
> [DEFENDANT] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND

[6] The symbol "PCR2" will refer to the record on appeal in Florida Supreme Court Case No. SC94754.

FOURTEENTH AMENDMENTS DUE TO TRIAL COUNSEL'S UNREASONABLE PRESENTATION OF MODEL PRISONER EVIDENCE.

Initial Brief of Appellant, Case No. SC94754. The Court rejected these arguments and affirmed the denial of the motion. *Valle v. State*, 778 So. 2d 960 (Fla. 2001).

On December 28, 2001, Defendant filed the instant petition for writ of habeas corpus, claiming the appellate counsel was ineffective on 4 grounds:

I.

FAILURE TO RAISE ON APPEAL FROM THE 1988 RESENTENCING THAT TRIAL COURT'S DENIAL OF [DEFENDANT'S] MOTION TO WAIVE THE ADVISORY JURY.

II.

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

III.

FAILURE TO RAISE ON APPEAL FROM THE 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.

IV.

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

This response follows.

ARGUMENT

I. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE A CLAIM REGARDING THE ALLEGED WAIVER OF THE ADVISORY JURY.

Defendant first asserts that his appellate counsel was ineffective for failing to raise an issue regarding the resentencing court's refusal to accept his waiver of a penalty phase jury. The standard for evaluating claims of ineffective assistance of appellate counsel is the same as the standard for determining whether trial counsel was ineffective. *Williamson v. Dugger*, 651 So. 2d 84, 86 (Fla. 1994), *cert. denied*, 516 U.S. 850 (1995); *Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the standard under which claims of ineffective assistance must be evaluated. A petitioner must demonstrate both that counsel's performance was deficient, and that the deficient performance prejudiced the defense.

Deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's

> conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Strickland, 466 U.S. at 694-695. The test for prejudice requires the petitioner to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at 694.

Moreover, appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved. *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla.), *cert. denied*, 516 U.S. 965 (1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992). Nor may counsel be considered ineffective for failing to raise an issue that was without merit. *Kokal v. Dugger*, 718 So. 2d 138, 143 (Fla. 1998); *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. Here, appellate counsel cannot be deemed ineffective because the claim was meritless.

Prior to the resentencing trial, Defendant filed a written motion to waive an advisory jury on resentencing.[7] (RSR. 152-54) In this motion, Defendant asserted that he wished to proceed without a jury because he believed that the jury would wonder why 10 years had elapsed between the crime and the resentencing and

[7] The motion was signed by counsel but not by Defendant personally.

because presentation of model prisoner evidence would require that the jury be informed of the nature of his incarceration since the time of the crime. *Id.*

At the hearing on the motion at which Defendant was not present, defense counsel asserted that Defendant had decided to waive an advisory jury because he could not present his model prisoner evidence without informing the jury that he had been on death row for the past ten years. (RSR. 990-91) He claimed that the trial court was required to accept his waiver. (RSR. 991) The State asserted that the right could not be waived if Defendant had not waived a guilt phase jury. (RSR. 991-92) The State reasoned that since the State had to consent to the waiver of a guilt phase jury, it also had to consent to the waiver of a penalty phase jury. (RSR. 992-94) The resentencing court rejected the State's argument about its consent. (RSR. 992-96)

The State also argued that Defendant had to personally waive the right to a jury. (RSR. 991-92) Defense counsel stated that Defendant could be brought before the court to personally waive an advisory jury. (RSR. 992) However, Defendant was not brought before the court.

The resentencing court indicated that it preferred to have an advisory jury. (RSR. 994-95) However, the court stated that it would permit the waiver despite its personal feelings. (RSR. 995) Defendant then indicated that he was seeking to waive the jury

recommendation because of the fact that model prisoner evidence would be the bulk of the mitigation and would require informing the jury about Defendant's incarceration. (RSR. 998-1001) The State then pointed out that the nature of Defendant's incarceration would have been before the jury at the time of the 1981 trial. (RSR. 1001-02)

The State then indicated that it wished to consult with the victim's family. (RSR. 1002) The resentencing court indicated that it was interested in hearing what the victim's family's position was on this issue. (RSR. 1002-03) The court also indicated that its decision on this issue might affect its rulings regarding the scope of the evidence the State would be permitted to present. (RSR. 1003-06) As such, the court indicated that it would reset this matter to give everyone time to consider their positions. (RSR. 1002-06)

When the hearing reconvened,[8] the State asserted that the victim's family wanted an advisory jury. (RSR. 1019-20) The State also indicated that it objected to the waiver. (RSR. 1021) The court then indicated that it did not believed that Defendant's argument was entitled to much weight because it was the final sentencing authority. (RSR. 1021-23) Defendant asserted that since the court would be giving great weight to a jury recommendation, he

[8] It is not clear from the record that Defendant was present.

felt that the jury learning that he had been on death row would prejudice him. (RSR. 1023-24)

The court then suggested that death row did not have to be mentioned and that the jury could instead be told that Defendant was kept in secure detention. (RSR. 1024-25) Defendant indicated that his experts could not offer an opinion without mentioning death row. (RSR. 1025-26) The court then stated that it still did not believe that it would affect its sentencing decision to have a jury that recommended death. (RSR. 1026)

Defendant asserted that he should not have to start with a jury recommendation of death and that the State would not be prejudiced by the lack of a jury recommendation. (RSR. 1026-27) The State then indicated that it felt it was important to have the jury function as the conscience of the community and that it might affect what the State presented. (RSR. 1028-29) The court also indicated that Defendant's claim regarding the model prisoner evidence was inherent in this type of evidence. (RSR. 1029) The court then indicated that it preferred to have an advisory jury because it made the final decision on sentencing regardless of the recommendation. (RSR. 1034-35)

As this Court has held, a trial court has discretion to accept a waiver of a penalty phase jury. *State v. Carr*, 336 So. 2d 358 (Fla. 1976); *see also State v. Hernandez*, 645 So. 2d 432, 435 (Fla. 1994); *Thompson v. State*, 389 So. 2d 197, 199 (Fla. 1980); *Palmes*

v. State, 397 So. 2d 648, 656 (Fla. 1981). As seen above, the resentencing court exercised its discretion after fully considering all of the arguments. In fact, this Court has upheld a trial court exercise of discretion in similar circumstances. In *Sireci v. State*, 587 So. 2d 450, 452 (Fla. 1991), the defendant sought to waive an advisory jury at his resentencing because the jury would become aware that he had previously been sentenced to death. There, as here, the lower court refused to permit the waiver. There, the lower court stated that it would place less reliance on the jury's recommendation if it believed it was tainted. Here, 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. As such, the lower court did not abuse its discretion in refusing to permit the waiver under *Sireci*, and counsel cannot be deemed ineffective for failing to raise this meritless issue. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Moreover, before a waiver may be accepted the record must affirmatively reflect that the defendant personally made a knowing, intelligent and voluntary waiver of the right to a penalty phase jury. *Lamadline v. State*, 303 So. 2d 17 (Fla. 1974). Here, Defendant did not sign the motion to permit a waiver. He was not present in court at the initial hearing on this motion. No written

waiver was submitted after that hearing, and the record is unclear whether Defendant was present at the second hearing. As such, the record does not reflect that Defendant personally made a knowing, intelligent and voluntary waiver of the advisory jury. Thus, this issue is without merit, and appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

II. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE CCP INSTRUCTION.

Defendant next asserts that his appellate counsel was ineffective for failing to raise an issue regarding the jury instruction on CCP. Defendant appears to contend that the instruction given was confusing and that it violated *Espinosa v. Florida*, 505 U.S. 1079 (1992). However, these claims should be rejected.

Defendant submitted three proposed jury instruction on CCP. (RSR. 734, RSSR. 195, 223) The first provided:

> (9) That 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.
>
> I instruct you that, for the purpose of applying this aggravating circumstance, the state must prove that the homicide was the result of a careful plan or prearranged design. Further, the state must prove that there was a particularly lengthy, methodic, or involved series of atrocious events, or a substantial period of reflection and thought by the defendant, prior to the actual homicide for this aggravating circumstance to be found applicable to this case.

(RSR. 734) The second stated:

> If you find that the homicide in this case was most likely committed after a short period of reflection, this aggravating circumstance cannot be found.

(RSSR. 195) The third provided:

> 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.

(RSSR. 223)

During the charge conference, the court considered these proposed instructions together. (RSR. 5731) Defendant argued that an expanded definition of CCP was necessary because the jury had not been involved in the guilt phase and had not heard the definition of premeditation in the first degree murder instruction. (RSR. 5731-32) He also wanted the jury to understand the difference between premeditation and heightened premeditation. (RSR. 5732-34)

The court agreed to instruct the jury on regular premeditation and then explain that heightened premeditation is necessary. (RSR. 5735) Defendant asserted that this could be accomplished by reading the third of his proposed instructions on CCP. (RSR. 5735) The State objected to the manner in which the court had stated that it planned to define heightened premeditation. (RSR. 5735) The court

then indicated that it thought that instructing the jury on the standard for premeditation from the first degree murder instruction and supplementing that with the first paragraph would accomplish what Defendant was seeking through his proposed instructions. (RSR. 5736-37)

Defendant then argued that some part of the third paragraph of third requested instruction was necessary to convey the appropriate information to the jury. (RSR. 5737-38) He claimed that this was necessary to define calculated for the jury. (RSR. 5738) The State objected because the definition proposed was a dictionary definition and was not something that needed to be explained. (RSR. 5739) After listening to both sides, the court stated that it was prepared to read the standard jury instruction on premeditation for first degree murder and then read the first paragraph of the third proposed jury instruction. (RSR. 5739-45) Defendant stated that doing so was "okay." (RSR. 5745) After some discussion about the grammar and wording of such an instruction, the parties agreed on a framework for an expanded instruction. (RSR. 5745-51) The court then stated that it was denying the first and second requested instructions and going to give the third as modified. (RSR. 5751)

Overnight, Defendant composed an instruction in accordance with the framework. (RSR. 5821, 5846, 5964) No objection was made to the wording.

The court instructed the jury:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification.
>
> Now, I instructed 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 purpose 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 be 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.

(RSR. 5994-95) At the conclusion of the instructions, Defendant stated that he had no objection to the instructions, "[e]xcept as previously noted." (RSR. 6006)

Defendant first asserts appellate counsel should have claimed that the instruction as worded was confusing because it did not specific when it was defining the premeditation necessary for first degree murder and the heightened premeditation for CCP. However, trial 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. (RSR. 5745, 5821, 5846, 5964) As such, this issue was not preserved and was waived. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved); *see also Harris v. State*, 580 So. 2d 804, 805 (Fla. 1st DCA 1991)(Where is defense is responsible for causing the alleged error in a jury instruction, issue regarding alleged error is waived). As appellate counsel cannot be deemed ineffective for failing to raise an unpreserved issue, this claim should be denied. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Moreover, the instruction was not confusing. Instead, it served the exact function that Defendant claimed was necessary to fulfill the purpose of his proposed instruction. It informed the jury that simple premeditation was insufficient to satisfy CCP, it defined simple premeditation and it emphasis the difference between simple premeditation and heightened premeditation. As such, the instruction was not improper. As appellate counsel cannot be deemed ineffective for failing to raise an issue that has no merit, this claim should be rejected. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

The claim regarding the alleged violation of *Espinosa* for failing to define calculated is also without merit. The appeal from the 1988 resentencing became final on December 2, 1991, prior

to the issuance of *Espinosa*. This Court has held that appellate counsel cannot be deemed ineffective for failing to predict the change in law in *Espinosa*. *See Rutherford v. Moore*, 774 So. 2d 637 (Fla. 2000). As such, this claim should be denied.

Moreover, trial counsel did not object to the jury instruction on the grounds that it was vague and overly broad, as seen above. As such, the claim that the instruction violated *Espinosa* because it was vague and overbroad was not preserved. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982)(objection must be based on same grounds raised on appeal for issue to be preserved). Appellate counsel cannot be deemed ineffective for failing to raise an issue that was not preserved. *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. As such, this claim should be denied.

III. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE STATE'S COMMENTS, WHERE THE ISSUE WAS RAISED AND CLAIM IS MERITLESS.

Defendant next asserts his appellate counsel was ineffective for failing to claim that the State's comments about the weighing process during voir dire misstated the law and tainted the selection of the jury. Defendant also appears to allege that several veniremembers were improperly excused for cause because of their views on the death penalty. He also seems to claim that he was denied a petit jury that represented a fair cross section of the community. However, these claims should be denied.

With regard to the claim that appellate counsel was ineffective for failing to claim that the State misstated that law regarding the weighing process, it is without merit. Appellate counsel did claim that the State's comments misstated the law. Initial Brief of Appellant, Case No. 72,328, at 113-16. This Court summarily rejected that claim on direct appeal. *Valle*, 581 So. 2d at 49. As appellate counsel did raise this issue on direct appeal, he cannot be deemed ineffective for failing to do so. Moreover, asserting different arguments in support of an issue that was raised on direct appeal or claiming that the argument that was made was inadequate are not grounds to reconsider the rejection of an issue. *Thompson v. State*, 759 So. 2d 650, 657 n.6 (Fla. 2000). As such, this claim should be rejected.

With regard to the claim that appellate counsel was

ineffective for failing to claim that the State improperly exercised cause challenges because of the veniremembers' views about the death penalty.

Before any of the allegedly improper comments were made, Ms. Sommerville stated that she did not believe in the death penalty and that she would have difficulty accepting the fact that Defendant had been found guilty. (RSR. 2621-22) Mr. Madruga stated that he did not believe in the death penalty but would follow the law. (RSR. 1896) He later indicated that he would have difficulty accepting the fact that Defendant had already been found guilty. (RSR. 2636-40) Ms. Brooks stated she was unsure about the death penalty. (RSR. 1913) Ms. Hicks stated that she did not believe in the death penalty and did not believe that it should ever be imposed. (RSR. 1951) Ms. Hudson initially averred that she believed in the death penalty, "if he deserve[d] it." (RSR. 2166) Ms. Jade Smith initially asserted that she did not believe in the death penalty but that she did not know what she would want if she was a victim. (RSR. 2180-81) Ms. Upshaw initially expressed ambivalence about the death penalty. (RSR. 2194) Ms. Allen initially indicated that she did not think the victim's family was acting properly in desiring that the death penalty be imposed on Defendant. (RSR. 2199-2200) She stated that she respected the fact that the death penalty was the law in Florida. (RSR. 2205) She also indicated that she had difficulty accepting

the fact that Defendant's guilt had been decided. (RSR. 2642-43) She stated that she had a religious objection to the death penalty and would not recommend it under any circumstances. (RSR. 2643) Ms. Clark stated that she would have difficulty accepting the fact that Defendant had already been found guilty. (RSR. 2657-58) Ms. Martin stated that she did not believe in the death penalty and believed that it should never be given. (RSR. 2321-22)

When the State had the first allegedly improper comment, the court reserved ruling and ordered the State to proceed to another area. (RSR. 2708-12) When the State asked Ms. Sommerville if she could recommend a death sentence, the lower court sustained the objection. (RSR. 2714-15) Instead, the court asked Ms. Sommerville if she could recommend death if she believed that she should do so in following the law. (RSR. 2715) Ms. Sommerville stated that she would not recommend death and that she would not put aside her personal beliefs. (RSR. 2715-16)

After this exchange, the State phrased it questions to ask if the law stated that a death sentence **should** be recommend, would or could the veniremember follow the law, without objection by Defendant. (RSR. 2722, 2723, 2726, 2729, 2730, 2731) During this questioning, Mr. Madruga indicated that he would not recommend death under any circumstances. (RSR. 2731)

After several comments were made, Defendant objected to the State allegedly commenting, "If you find sufficient aggravating

circumstances and if you find the aggravating circumstances outweigh the mitigating circumstances, will you follow the law and return a sentence of death." (RSR. 2733) The trial court and the State both indicated that the State had not worded its comments in that manner and that the State was not saying the recommendation of death was mandatory. (RSR. 2734-35) The court agreed that the State could ask if the veniremembers could recommend death under these circumstances. (RSR. 2734-38) The State proceeded to do so. (RSR. 2741, 2744, 2745, 2746, 2747, 2752, 2754) During this time, Ms. Hicks, Ms. Allen, Ms. Jade Smith, Ms. Clark, Ms. Upshaw and Ms. Martin indicated that they could not recommend death under any circumstances. (RSR. 2743, 2749, 2755, 2756, 2757-58) Ms. Hudson stated that she did not want to recommend death but would follow the law. (RSR. 2752-53) She later stated that she would not recommend death. (RSR. 2753)

During a break in voir dire, Defendant requested a jury instruction that would have informed the jury that it could recommend life regardless of the evidence. (RSR. 2758-61) During the discussion of this instruction, Defendant admitted that the jury was supposed to recommend death if the jury found sufficient aggravating factors to justify the imposition of a death sentence that were not outweighed by the mitigating factors. (RSR. 2770)

When Defendant started his voir dire, he asserted that the law would never require that any particular recommendation be given.

(RSR. 2784) Defendant then asked Mr. Madruga if he could consider the aggravators and mitigators and make a recommendation. (RSR. 2784-85) Mr. Madruga stated that he could discuss the issues but would always recommend life. (RSR. 2784-86) Ms. Sommerville also stated that she would be unable to recommend death under any circumstances. (RSR. 2790-92, 2797-99) Ms. Allen stated that she could not stand to be on a jury that recommended death even if she personally recommended life. (RSR. 2811-12) Ms. Jade Smith, Ms. Clark and Ms. Martin reaffirmed that they could not vote for death under any circumstance. (RSR. 2812-13, 2821-22) Ms. Upshaw stated that she could consider both penalties. (RSR. 2821) Ms. Hicks and Ms. Hudson claimed that they could be fair but would never recommend the death penalty under any circumstances. (RSR. 2822-29) Ms. Sommerville stated that she could only follow the law if the law permitted her to serve despite the fact that she had already decided to recommend life. (RSR. 2841) As a result, she was excused for cause. (RSR. 2841)

Defendant then exhorted the veniremembers to set aside their personal feelings and follow the law, which Defendant asserted only required the jurors to consider both penalties. (RSR. 2866-68) However, Ms. Hicks stated that she could not do so, even if the law never required that she vote for the death penalty. (RSR. 2868-71) Mr. Madruga, Ms. Allen, Ms. Martin, Ms. Jade Smith and Ms. Clark stated that they would always vote for life. (RSR. 2875-80) As a

result, Mr. Madruga, Ms. Hicks, Ms. Allen, Ms. Hudson, Ms. Jade Smith, Ms. Clark and Ms. Martin. (RSR. 2881-87, 1890-91) However, the court initially refused to strike Ms. Upshaw. (RSR. 2887-89) However, after further individual questioning, Ms. Upshaw stated that she would listen to, and consider the evidence, but would always vote for life and was excused for cause. (RSR. 3128) The State did not attempt to challenge Ms. Brooks for cause but did successfully challenge her peremptorially. (RSR. 3080)

As can be seen from the foregoing, most of the veniremember 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. Moreover, all of the veniremembers in question stated that they would never recommend death. As such, they were properly excused for cause. *Wainwright v. Witt*, 469 U.S. 412 (1985); *Fernandez v. State*, 730 So. 2d 277 (Fla. 1999). As the underlying issue has no merit, appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

The claim that appellate counsel was ineffective for failing to claim Defendant was denied a fair cross section of the community on his petit jury because of the State's comments is devoid of merit. The United States Supreme Court has repeatedly stated that

the right to a fair cross section does not extend to a petit jury and that "[d]efendants are not entitled to a jury of any particular composition." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *see also Holland v. Illinois*, 493 U.S. 474, 482-84 (1990); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Duren v. Missouri*, 439 U.S. 357 (1976); *State v. Riechmann*, 777 So. 2d 342, 353 n.14 (Fla. 2000). As such, the claim that the State's comments denied Defendant a jury that was representative of a fair cross section of the community is without merit, and appellate counsel cannot be deemed ineffective for failing to raise a meritless claim. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

IV. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE REGARDING THE SUPPRESSION OF THE GUN.

Defendant finally asserts that his appellate counsel was ineffective for failing to raise an issue regarding the denial of his motion to suppress the gun taken from him at the time of his arrest. He claims that appellate counsel should have claimed that the search was not valid as a search incident to arrest, that officers should have seized Defendant and the bag and obtained a search warrant because there were no exigent circumstances to justify a search of the bag and that Defendant's consent to the search was not valid. However, the lower court properly denied the motion to suppress. As such, appellate counsel cannot be deemed ineffective for failing to raise this meritless claim.

Prior to retrial, Defendant moved to suppress the gun found during his arrest. (RTR. 410-25) He claimed that the search was invalid as a search incident to an arrest and that while the police could have seized the bag in which the gun was found, the search of the bag was improper. (RTR. 410-25)

At the hearing on the motion to suppress the gun, Officer Edward Rodriguez testified that around 3:30p.m. on April 4, 1978, he was driving north on A1A in the area of the Tiara East Pavilion in Deerfield Beach. (RTT. 272-73) As he did so, he observed Defendant standing, facing away from him, looking around. (RTT. 274) Defendant was wearing long pants and a Banlon shirt, which was

unusual as everyone else in the area was in bathing suits. (RTT. 274-75) A second, similarly dressed, man was walking toward Defendant. (RTT. 275) The other man made eye contact with Off. Rodriguez and abruptly turned and walked in the other direction. (RTT. 275) Defendant froze until Off. Rodriguez passed him. (RTT. 275)

Off. Rodriguez pulled onto the side of the road about 150 yards past Defendant and watched him walk toward the ocean into a parking lot. (RTT. 275) Off. Rodriguez looked at a wanted poster that had been given to him that day and realized that Defendant and the other man matched the description of the individuals who had committed this crime. (RTT. 275-76) Off. Rodriguez radioed for backup and moved to a place where he could watch Defendant until his backup arrived. (RTT. 276)

When Officer James Twiss arrived as backup, Off. Rodriguez asked him to look across the street and see if he saw the two people that Off. Rodriguez had seen. (RTT. 276-77) Off. Twiss looked and saw Defendant, who had a bag with him, seated on a bench. (RTT. 277) As the officers watched, Defendant stood up and walked through the parking lot back toward the area of Tiara East. (RTT. 277-78) The officers decided to stop Defendant in the Tiara East area for safety reasons. (RTT. 278) The officers then went separately to that area. (RTT. 279)

As Off. Rodriguez got to the area, he stopped his car, pulled

his gun from its holster, held it next to his leg pointed down, stood behind the opened door of his car and ordered Defendant to stop three times. (RTT. 279-81) After the third order, Defendant stopped approximately 40 feet from Off. Rodriguez and asked if Off. Rodriguez was talking to him. (RTT. 281-82) Off. Rodriguez responded that he was and asked Defendant to put down his bad and turn around. (RTT. 282) Defendant did so, and Off. Rodriguez then asked Defendant to come toward him, which Defendant did. (RTT. 282) When Defendant was about 20 feet away from Off. Rodriguez, Off. Rodriguez asked Defendant to stop, pull up his shirt and turn around, which Defendant. (RTT. 282) Off. Rodriguez then told Defendant that he could put down his shirt. (RTT. 282)

Off. Rodriguez then asked if Defendant had identification. (RTT. 283) Defendant stated that his identification was in the bag and offered to get it from the bag. (RTT. 283) Off. Rodriguez declined the invitation and told Defendant that Off. Twiss would get it for him. (RTT. 283) Off. Rodriguez asked Defendant's permission for Off. Twiss to look in the bag for the identification. Defendant indicated that he had no objection to Off. Twiss going into the bag. (RTT. 284)

Off. Twiss looked into the bag and found a gun under a shirt. (RTT. 284) Both officers then pointed their guns at Defendant and ordered him to go to Off. Rodriguez's car. (RTT. 284) This was the first time that Off. Rodriguez had held his gun where Defendant

could see it. (RTT. 284) Off. Rodriguez then handcuffed Defendant and placed him in his car. (RTT. 285) On cross examination, Off. Rodriguez stated that Off. Twiss had his hand on his gun when he saw him. (RTT. 295)

Off. Twiss testified that he met with Off. Rodriguez regarding his observation of the two people on A1A on April 4, 1978. (RTT. 297-98) After speaking to Off. Rodriguez, Off. Twiss observed Defendant seated on a park bench in the Deerfield Beach Pavillion. (RTT. 298-99) When Defendant saw Off. Twiss, he got up, picked up his bag and started walking. (RTT. 299) Off. Rodriguez told Off. Twiss that he was going to stop Defendant near the Tiara East area. (RTT. 299) As Off. Rodriguez went in that direction, Off. Twiss ran toward that area, losing sight of Off. Rodriguez and Defendant as he did so. (RTT. 300)

Off. Twiss saw them again as he walked through the hedge next to the Tiara East area. (RTT. 300) By this time, Defendant was standing about 20 feet in front of Off. Rodriguez with his shirt pulled up. (RTT. 300) Off. Twiss saw that Off. Rodriguez had his gun drawn and down next to his leg. (RTT. 301) However, he stated that the door would have block Off. Rodriguez's gun from the view of anyone standing where Defendant was standing. (RTT. 301) As Off. Twiss walked toward the area, he had his gun in its holster with his hand on it. (RTT. 301-02)

As Off. Twiss approached Off. Rodriguez, Off. Twiss slowed his

pace to a walk. (RTT. 306) Off. Twiss heard Off. Rodriguez ask Defendant if Off. Twiss could look in Defendant's bag for Defendant's identification and Defendant respond that it was. (RTT. 301) Off. Twiss then went to the bag, opened it, moved two windbreakers looking for the identification, and found a gun. (RTT. 302) Off. Twiss also found an ID with a different name. (RTT. 303) Off. Twiss informed Off. Rodriguez that he had found a gun, removed his gun from its holster, and pointed it at Defendant. (RTT. 302) Off. Twiss observed that Off. Rodriguez had also pointed his gun at Defendant. (RTT. 302) Defendant was then ordered to the police car, handcuffed and put inside the police car. (RTT. 302-03)

After presenting the testimony of Off. Rodriguez and Off. Twiss, the State rested its case. (RTT. 307) Defendant then called Lt. Charles Schultz, who testified that he had also responded to the area as backup and had been looking for the second individual. (RTT. 308-10) He arrived at the site of Defendant's arrest after Off. Twiss was already in the area. (RTT. 308-10) He stated that the bag was at Defendant's feet at the time. (RTT. 311) He stated that the police did not have a warrant to search the bag. (RTT. 308)

Defendant then testified that he was standing on the side of A1A facing south when Off. Rodriguez turned onto A1A. (RTT. 311-12) He saw Off. Rodriguez drive past him and stop on the side of

the road about 100 yards away. (RTT. 312) Defendant then lost sight of Off. Rodriguez. (RTT. 312)

Defendant next saw Off. Rodriguez when Off. Rodriguez called to him and asked for identification. (RTT. 312) Off. Rodriguez also told Defendant to put down his bag at that time. (RTT. 312) Defendant stated that he was 10 to 15 yards from Officer Rodriguez at that time. (RTT. 312)

Off. Rodriguez told Defendant to walk toward him, and Defendant did so. (RTT. 313) When Defendant had walked about half the distance toward Off. Rodriguez, Off. Rodriguez told Defendant to stop and pull up his shirt, which Defendant did. (RTT. 313) Off. Rodriguez then asked Defendant for identification, and Defendant responded that it was in his bag and offered to get it. (RTT. 313) Off. Rodriguez declined the offer and said that Off. Twiss would get it. (RTT. 313) Defendant claimed that Off. Twiss was running passed him during this conversation. (RTT. 313) Defendant admitted that Off. Rodriguez asked his permission for Off. Twiss to look in the bag and get the identification. (RTT. 313) He asserted that he believed that Off. Rodriguez had his gun in his hand during the conversation. (RTT. 314)

On cross, Defendant admitted that he had not seen Off. Rodriquez's gun. (RTT. 314) Defendant stated that he did not remember having previously testified that Off. Rodriguez had his gun pointed at him throughout their encounter. (RTT. 315)

Defendant admitted that he had given Off. Twiss permission to look in his bag. (RTT. 317) However, Defendant claimed that he did not feel that he could refuse because Off. Twiss was running past him with his hand on his gun. (RTT. 317-18) Defendant acknowledged that he had claimed at the motion to suppress before the first trial that he felt he had to consent because Off. Rodriguez had his gun pointed at him. (RTT. 319-21) Defendant then rested his case. (RTT. 322)

Based on this evidence, Defendant argued that the bag was too far away from Defendant for the search to be considered incident to an arrest. (RTT. 356-57) Further, Defendant argued that the police could have seized the bag and obtained a warrant to search it but could not have searched it without a warrant. (RTT. 357) Defendant claimed that the request for consent to search the bag was ineffectual because the police had told Defendant he could not go into the bag. (RTT. 358)

The State responded that the police needed to verify Defendant's identity before arresting him and that refusing to permit Defendant to get his identification from the bag was permissible to protect the officers from harm, given that Defendant had already shot two police officers. (RTT. 359-64) The State also argued that the bag was close enough for Defendant to have reached it quickly and that Defendant consented to the search of the bag. (RTT. 359-64)

After listening to this argument, the trial court denied the motion. (RTT. 364) The trial court entered a written order denying the motion to suppress the gun. (RTR. 1051-53) The court found that Defendant had consent to the search of the bag, that Defendant's testimony to the contrary was incredible and that Defendant had not mere acquiesced to a show of authority. (RTR. 1051-53) The court also found that the officers acted properly in looking into the bag to obtain Defendant's identification because the officers believed that he was the person who had killed Officer Pena and that he would be armed and dangerous. *Id.* Finally, the court found that the bag was within Defendant's reach at the time of his arrest. *Id.*

With regard to the search incident to arrest, Defendant claims that the search was invalid because Defendant had been detained 20 feet from the bag before it was searched. However, in *New York v. Belton*, 453 U.S. 454 (1981), the Court upheld a search of a pocket of a jacket in a car after the defendant had been removed from the car and arrested as a proper search incident to arrest. In so doing, the Court rejected the argument that since the defendant had been removed from the car and arrested, the area inside the car, and containers therein, were no longer in his immediate control.

Based on *Belton*, this Court, in *Savoie v. State*, 422 So. 2d 308, 312-14 (Fla. 1982), upheld a warrantless search of a briefcase that the defendant had been carrying at the time of his arrest as

a proper search incident to arrest, even though the defendant had already been handcuffed and the briefcase had been seized by the police. *See also Gay v. State*, 607 So. 2d 454, 460-62 (Fla. 1st DCA 1992)(search of camera case found near where defendant was arrested after defendant had been transported to police station proper search incident to arrest); *Stone v. State*, 547 So. 2d 158 (Fla. 4th DCA 1989)(search of luggage found in overhead storage bin proper search incident to arrest even after defendant had been arrest and he and his luggage removed from a bus); *Jenkins v. State*, 426 So. 2d 1305 (Fla. 2d DCA 1983)(search of purse defendant dropped on order of police proper search incident to arrest even after defendant had been arrested, taken down a flight of stairs and handcuffed). Given that Defendant here was not handcuffed and was merely 20 feet from the bag at the time it was searched, the search of the bag was a proper search incident to arrest. As appellate counsel cannot be deemed ineffective for failing to raise a meritless claim, this claim should be denied. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11.

Moreover, the United States Supreme Court has since abrogated the line of cases following *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), upon which Defendant relies. *California v. Acevedo*, 500 U.S. 565 (1991). The Court has also held that a defendant may not successfully claim

ineffective assistance of counsel for failing to raise a claim based on law that was subsequently abrogated. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). As such, the claim should be denied.

Further, the trial court properly found that Defendant had consented to the search of his bag. It was undisputed that Off. Rodriguez asked for Defendant's permission for Off. Twiss to look into the bag for Defendant's identification and that Defendant gave such permission. Off. Twiss testified that he had slowed for a run and was walking up to Defendant and Off. Rodriguez when Defendant gave his consent. While Defendant stated that he only consented because he was afraid of Off. Twiss, who had his hand on his gun, which was still in the holster, Defendant eventually admitted that he had previously claimed that he consented because Off. Rodriguez had his gun pointed at Defendant. Defendant also admitted that he had not seen Off. Rodriguez's gun before the gun was found and that his prior testimony that he had seen the gun was untrue. As a result of these contradictions, the trial court expressly found that Defendant's testimony was incredible. There was no testimony that the officers actually threatened defendant or that the request for consent was made in threatening words or a threatening tone. Under these circumstances, it cannot be said that trial court clearly erred in finding that Defendant had consented to the search of the bag. *See State v. Angel*, 547 So. 2d 1294 (Fla. 5th DCA

1989)(fact that defendant has been lawfully detained before he consented does not make consent invalid); *State v. Gonzalez*, 467 So. 2d 723, 728 (Fla. 3d DCA 1985)(where defendant not ordered, directed or threatened before consent, consent voluntary). As such, the issue is without merit, and appellate counsel cannot be deemed ineffective for failing to raise it. *Kokal*, 718 So. 2d at 143; *Groover*, 656 So. 2d at 425; *Hildwin*, 654 So. 2d at 111; *Breedlove*, 595 So. 2d at 11. The claim should be denied.

Even if the trial court had erred in denying the motion to suppress the gun, Defendant would still not be entitled to any relief. Officer Gary Spell was an eyewitness to crimes and identified Defendant as the killer. (RTT. 973-99, 1092) The car that Defendant had been driving was recovered shortly after the crimes and Defendant's fingerprints were found inside it. (RTT. 1023-25, 1048-50, 1088-91) Defendant's fingerprints were also found on Officer Pena's car. (RTT. 1047-48, 1091) Defendant also gave a detailed confession to having killed Officer Pena and shot Officer Spell. (RTT. 1094-1105, 1124-82) During its closing argument, the State did not mention the fact the gun was found and determined to be the murder weapon. (RTT. 1278-1306) As such, any error in the admission of the gun was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Thus, the failure to raise this issue did not affect the outcome of the appeal, and appellate counsel cannot be deemed ineffective for failing to raise it. *Strickland*.

The claim should be denied.

CONCLUSION

For the foregoing reasons, Defendant's petition for writ of habeas corpus should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE** was furnished by U.S. mail to **TODD G. SCHER,** Chief Assistant CCRC-SOUTH, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, this ____ day of February, 2002.

SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

SANDRA S. JAGGARD
Assistant Attorney General