IN THE SUPREME COURT OF FLORIDA
CASE NO. 65785

ERNEST FITZPATRICK, JR.,

Petitioner,

v.

LOUIE L. WAINWRIGHT,
SECRETARY, DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Ernest Fitzpatrick, Jr., by his undersigned counsel, pursuant to Rules 9.030(a)(3) and 9.100, Florida Rules of Appellate Procedure, petitions this Court to issue its writ of habeas corpus.

Petitioner alleges that he was accorded ineffective assistance of counsel at the appellate level, on his direct appeal to this Court from his convictions and sentence of death; accordingly, he alleges that he was sentenced to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under the statutory and case law of the State of Florida.

In support of such petition, in accordance with Rule 9.100(e), Florida Rules of Appellate Procedure, Petitioner states as follows:

I.

JURISDICTION

This is an original action under Rule 9.100(a), Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to Rule 9.030(a)(3) thereof, and Article V, § 3(b)(9) of the Florida Constitution.

As described more fully below, Petitioner was denied the effective assistance of appellate counsel in proceedings before this Court at the time of his direct appeal. Counsel failed to raise or adequately address issues which, if raised and properly argued, would have required (1) the reversal of

Petitioner's convictions and death sentence, and (2) a new trial and sentencing hearing.

Since the ineffective assistance of counsel allegations stem from acts or omissions before this Court, this Court has jurisdiction to hear Petitioner's habeas corpus petition. Arango v. State, 437 So. 2d 1099 (Fla. 1983); Buford v. Wainwright, 428 So. 2d 1389 (Fla. 1983), cert. denied, 104 S. Ct. 372 (1983); Knight v. State, 394 So. 2d 997, 999 (Fla. 1981).

If the Court finds that Petitioner's appellate counsel was ineffective, it can and should thereafter consider, on the merits, the appellate issues which should have been raised earlier. Florida law has consistently recognized that the appropriate remedy, where the appellate right has been thwarted due to the omissions or ineffectiveness of appellate counsel, is a new review of the issues raised by the Petitioner. State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Futch v. State, 420 So. 2d 905 (Fla. 3d DCA 1982); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974).

The proper means of securing such a belated appeal is a petition for a writ of habeas corpus, filed in the appellate court empowered to hear the direct appeal. See Baggett, supra, 229 So. 2d at 244; cf. Ross, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968).

Accordingly, the habeas corpus jurisdiction of this Court is properly invoked to review "all matters which should have been argued in the direct appeal," Ross v. State, supra, 287 So. 2d at 374-75, where such matters were originally overlooked or otherwise not adequately and effectively pursued by appellate counsel. See id. at 374; Kennedy v. State, 338 So. 2d 261, 262 (Fla. 4th DCA 1976); Davis, supra, 276 So. 2d at 849.

II. and III.

FACTS UPON WHICH PETITIONER RELIES AND THE LEGAL BASES FOR THE WRIT

A. The Procedural History

Petitioner Fitzpatrick was found guilty after a jury trial of first degree murder, two counts of attempted first degree murder, and three counts of kidnapping by the Circuit Court of the First Judicial Circuit, in and for Escambia County, on October 30, 1980. Appendix 1. (A.R. 841).[1] The trial judge, after a recommendation of death by the jury, imposed a death sentence for the crime of first degree murder, concurrent sentences of life imprisonment for each attempted murder, and concurrent sentences of 30 years imprisonment for each of the kidnapping offenses. See Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983)

On direct appeal to this Court, this Court affirmed the convictions, the separate kidnapping sentences and the sentence of death, with Justices McDonald and Overton dissenting from the sentence of death. Id.

There have been no other proceedings in the instant case.

B. Facts Relevant To The Claims That Should Have Been, But Were Not Raised On Appeal, And The Legal Bases For The Writ

At the sentencing hearing, Petitioner produced evidence that he had a history of grandiose and eccentric behaviour, as well as more serious mental and emotional problems. Appendices 5a-h (A.R. 871-72, 887, 912-13, 929-30, 932-36, 940-43, 971, 987). His mother testified "that he had a mental problem", Appendix 5b (A.R. 887), and had received

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1/ In his Motion To Consolidate and Rely Upon Appellate Record, Petitioner has requested this Court to allow him to use the appellate record in the direct appeal of Petitioner's case, Supreme Court Case No. 60,097, for purposes of the instant Writ. For the convenience of the Court, Petitioner has also appended to his Writ Appendices which embody those parts of the appellate record upon which he relies and contain additional information. These documents will be referred to directly as Appendices. The appellate record will be referred to by the abbreviation A.R.

medication for this problem. Id. (A.R. 889). Miles Cooper, a licensed hypnotist, testified that Petitioner came to him with "anxieties about himself" and "guilt feelings about his childhood." Appendix 5c (A.R. 913). Dr. Lawrence Gilgun, a psychologist who had examined and treated Petitioner on several occasions, testified that Petitioner was "very grandiose", that he had suffered from "schizophrenia, latent type, when he was a juvenile", and that he was a "schizotypal personality" at the time of trial. Appendix 5g (A.R. 971). Dr. Gilgun also confirmed that Petitioner had been actively suicidal, had been to University Hospital in Pensacola for mental problems, had, at one time, been taking an "antipsychotic drug" called "stelazine", and, most importantly, that, in his opinion, Petitioner was under the influence of an extreme mental or emotional disturbance, a mitigating circumstance, see, § 921.141 (6)(b) Fla. Stats., at the time that the crimes for which Petitioner was convicted in the instant case were committed. Appendices 5d-h (A.R. 929-30, 932-36, 940-43, 971, 987).

Indeed, insanity is implicit when one's "plan" is to take a bus to a bus stop, take a hostage, walk him down an open highway to a bank, rob a bank and, for an escape "plan", wait for a bus. See generally, Fitzpatrick v. State, 437 So. 2d 1072 (Fla. 1983).

To avoid repetition, Petitioner herein combines discussion of additional relevant facts and legal claims.

1. The Test For Ineffective Assistance Of Counsel

The failure of Petitioner's appellate counsel to raise and effectively argue the necessary and critical issues on his direct appeal to this Court denied Petitioner his rights to a

full and meaningful direct appeal, and the effective assistance of appellate counsel -- guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, by Articles One and Five of the Florida Constitution, and by Florida statutory law. See Proffitt v. Florida, 428 U.S. 242, 253 (1976); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973); Art. V., § 3(b)(1), Fla. Const.; § 921.141, Fla. Stat. (1977).

To be effective, counsel must be "an active advocate," and must "support his client's appeal to the best of his ability." Anders v. California, 386 U.S. 738, 744 (1967). "The advocate's duty is to argue any point which may reasonably be argued . . . ." Wright v. State, 269 So. 2d 17, 18 (Fla. 2d DCA 1972). Thus, if appellate counsel fails to raise issues on direct appeal, the appellant is entitled to renewed appellate review if there existed "an arguable chance of success with respect to these contentions." Thor v. United States, 574 F.2d 215, 221 (5th Cir. 1978); accord High v. Rhay, 519 F.2d 109, 112 (9th Cir. 1975); Hooks v. Roberts, 480 F.2d 1196, 1197 (5th Cir. 1973), cert. denied, 414 U.S. 1163 (1974).

As noted above in the Jurisdictional Statement, Florida law requires that an appellant who is deprived of effective assistance by appellate counsel be granted belated appellate review. See, e.g., Ross v. State, supra, 287 So.2d at 375. The failure of former counsel for Petitioner to present the arguments presented herein, with respect to errors at the trial stage which require a reversal of Petitioner's convictions and death sentence, denied him effective assistance of counsel, and requires that the writ of habeas corpus issue.

In Knight v. State, 394 So. 2d 997 (Fla. 1981), this Court set forth a four-part test with respect to a claim of ineffective assistance of appellate counsel. First, a petitioner must specify the "omission or overt act upon which the claim of ineffective assistance of counsel is based." Second, he must show that "this specific omission or overt act

was a substantial and serious deficiency measurably below that of competent counsel." This Court recognized, however, that "in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Third, Knight provides that the petitioner must demonstrate that "this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Id. at 1001.

The fourth part of the Knight test which places a burden of rebuttal on the State need not be addressed at this time.[2]

As will be demonstrated below, Petitioner herein has satisfied the three parts of the Knight test imposed upon him, and accordingly has succeeded in establishing prima facie that he was denied the effective assistance of appellate counsel as guaranteed by the United States Constitution and the Constitution and laws of the State of Florida.

2. Specific Errors and Omissions Complained Of

Petitioner Fitzpatrick was denied effective assistance of counsel at the appellate level with respect to the following specific acts and omissions, which were not raised by appellate counsel:

a) violation of Maggard v. State, 399 So.2d 973 (Fla. 1981)

Facts

During Petitioner's trial, the State introduced in its

2. Assuming, arguendo, that the "ineffectiveness" standards developed by the United States Supreme Court in United States v. Cronic, ___ U.S.___, 104 S. Ct. 2039 (1984) and Strictland v. Washington, ___ U.S.___, 104 S. Ct. 2052 (1984) are applicable in the instant case, it does not appear to Petitioner that these decisions have modified the Knight rule; indeed, the decisions seem to adopt, and build upon the "ineffectiveness" standards announced by this Court in Knight.

case-in-chief during the penalty phase critically damaging evidence that Petitioner, as a juvenile, had "attempted an armed robbery and a bombing of a school when he was a minor."[3] Fitzpatrick v. State, supra, 437 So. 2d at 1078. In affirming Petitioner's convictions and sentences, this Court gave this evidence great weight, citing it as a basis for affirming the trial Court's refusal to find that Petitioner "had no significant history of prior criminal activity as an adult." Id.

Although defense counsel at trial apparently did not intend to claim that Petitioner had no significant history of criminal activity, a potential mitigating factor codified as § 921.141(6)(a) Fla. Stat. (1977), this evidence was introduced, over defense counsel's strong objection, as prospective rebuttal during the State's case-in-chief. In an effort to establish mitigating factors, codified as § 921.141(6)(b), (f), and (g),[4] defense counsel did state that he intended to introduce testimony of various psychologists and others who could supply considerable evidence of Petitioner's insanity, see dissenting opinions of Justices McDonald and Overton in Fitzpatrick v. State, supra, 437 So. 2d at 1079, and the State's failure, specifically the failures of the Department of Health and Rehabilitative services (and its juvenile services component), to treat this problem. Appendix 2a (A.R. 843-44). But, defense counsel insisted that "I want to stay away from inquiring about why he was in Juvenile Court", and he repeated this position several times, e.g.: "I don't feel like that we should let in the area of why he was in the system or what he was charged

3. But see discussion below at 33, n.24.

4. "(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance ....

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

with in the Juvenile System, and I would request the Court to instruct the prosecutor to stay away from that area". Id.

The State Attorney had three witnesses prepared to testify in his penalty phase case-in-chief. All three had testimony that was relevant only to the charge placed against Petitioner,and the adjudications of delinquency that occured when Petitioner was a juvenile. Petitioner had no adult record. Thus, the State Attorney persisted in his efforts to place this highly prejudicial testimony, see discussion below, before the judge and jury, with relevant colloquies as follows:

> MR. JOHNSON: Yes, Your Honor, I would like to respond. Under the current status of the law, the State may introduce affirmative evidence to negate any possible[5] mitigating circumstance, so the jury can not speculate as to whether that circumstance exists. This is a case that I handled that came out of Santa Rosa County, Messer versus State.[6] I don't have the Southern 2d Opinion, but I have their Opinion from the Florida Law Weekly. It was an April, 1979 opinion of the Florida Supreme Court. Appendix 2a (A.R. 844) (emphasis added).
>
> [The State Attorney then cites to and argues from Washington v. State, 362 So. 2d 658 (1978)]
>
> THE COURT: I think if the defendant presents any evidence to show that the defendant has no significant history of prior criminal activity, it might be admissible.
>
> Mr. MCATEE: That's what I think. We've got to show it then they have a right to rebut it.

5. It clearly is not the law that the possible existence of a mitigating circumstance justifies prospective rebuttal. Maggard v. State, 399 So. 2d 973 (Fla. 1981).

6. Petitioner has searched in vain for a reported decision of the Florida Supreme Court captioned Messer v. State, that stands for or even discusses the proposition asserted by the State Attorney. See, e.g., Messer v. State, 330 So. 2d 137 (1976), appeal after remand 384 So. 2d 644 (1980) and 403 So.2d 341 (1981), cert. denied 456 U.S. 984 (1982).

> MR. JOHNSON: Your Honor, under Messer v. State, the state can affirmatively introduce evidence to negate any mitigating circumstances, so the jury is not allowed to speculate whether that circumstance exists or not. Appendix 2a (A.R. 843-45).

The State Attorney then asserted that Petitioner has "been adjudicated[7] guilty of attempted robbery, four counts of aggravated assault, possession of an explosive device", Appendix 2b (A.R. 846) (emphasis added), and claimed that the State has a right to introduce this evidence because "the jury is going to be extremely misled if they are able to walk out of this room thinking this defendant's never been arrested". Id. The State Attorney adds: "so I want to start out by negatizing the fact that he does not have a significant history of prior criminal activity." Appendix 2b (A.R. 847).

Shortly thereafter, the Court, over the continued objections of defense counsel, allowed the State to call its only three penalty-phase witnesses, all of whom were called to establish that, as a juvenile, Petitioner had engaged in delinquent conduct. Appendix 2c (A.R. 849). As it was presented, Petitioner's trial counsel make timely objections to all the testimony. Appendix 2c (A.R. 851, 859, 867).

Two factual conclusions can be drawn from the record in this

7. Petitioner was not adjudicated delinquent on this charge. Fitzpatrick v. State, supra, 437 So. 2d at 478.

case with respect to the evidence of juvenile arrest and adjudications. First, the State intentionally placed the evidence before the jury in its case-in-chief in the face of an apparent concession by the defense that it did not intend to rely upon §921.141(6)(a);[8] at a minimum, without regard to whether or not the defense intended to rely upon subsection (a).

Second, the evidence was extremely prejudicial. It indicated that Petitioner had been arrested for attempted armed robbery and that he had transported a home-made bomb to Beggs Vocational School for the purpose of taking hostages and ransoming Beggs staff members. Because it provided the State with asserted support for the notion that Petitioner was a dangerous armed robber and experienced kidnapper and extortionist,[9] it provided bases for the jury and the jury to reject all defendant's claimed mitigating circumstances in the instant case:

1. That he "was under the influence of extreme mental or emotional disturbance", § 921.141(6)(b) - one who is presented as an attempted armed robber, experienced hostage-taker and violent extortionist is very unlikely to convince a jury in a case involving similar allegations that he is extremely mentally or emotionally disturbed.

2. That "the capacity of the defendant to appreciate

8. Petitioner acknowledges that trial counsel's comments in this respect could have been more explicit, but a fair reading of what counsel said supports Petitioner's construction. Defense counsel's statement of intent to "stay away from this inquiring about why he was in Juvenile Court", Appendix 2a (A.R. 843), embodies a promise to "stay away" from the subsection (a) mitigating circumstances also, which is exactly what defense counsel did in closing argument. Appendix 2d (A.R.1165). This construction is bolstered by his reiteration that "I don't feel like that we" - presumably both he and the State Attorney - "should get in the area of why he was in the system or what he was charged with in the Juvenile System...". Appendix 2a (A.R. 843).

Alternatively, Petitioner contends that the legal and policy considerations that support the Maggard rule compel the conclusion that allowing prospective rebuttal is error whether or not defense counsel explicitly and clearly waived reliance on a particular mitigating circumstance with respect to which prospective rebuttal is offered. See discussion below at 12-13.

9. This is precisely what the State argued to the jury, claiming that Petitioner's juvenile record showed that "he was arrested when he took people into a hostage situation, four people, and had an explosive device trying to take hostages and trying to get

the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired", § 921.141 (6)(f) - again an attempted armed robber, experienced hostage-taker, and violent extortionist must surely appreciate the criminality associated with kidnapping, murder and alleged bank robbery;

3. That Petitioner's young age "at the time of the crime", § 921.141(6)(g), was a mitigating circumstance - it is emotional youth rather than chronological age (Petitioner was 20 years old at the time), that provides the best subsection (g) argument, see, Meeks v. State, 336 So. 2d 1142 (Fla. 1976); Neary v. State, 384 So.2d 881 (Fla. 1980), and the depiction of Petitioner as an experienced and hardened criminal defeated Petitioner's subsection (g) contention; and

4. That the Petitioner's good "character or record" can be considered in mitigation; - obviously, the above depiction of Petitioner defeated this contention.[10]

Legal Argument

This Court held in Maggard v. Florida, 399 So. 2d 973 (1981), that the State may not prospectively rebut the mitigating factor that the defendant has no significant history of prior criminal activity, codified as § 921.141(6)(a), when the defense disclaims any intent to rely upon this mitigating factor and makes timely objections to the State's

(fn. 9 cont'd.)
money at that time. He has been arrested for attempted armed robbery." Appendix 2e (A.R. 1141).

10. There was considerable evidence presented by the defense during the penalty-phase that the above picture of Petitioner is entirely inaccurate. See discussion p.3-3a; p.33, n.4. However, it was the evidence presented with respect to Petitioner's juvenile record that provided the State with the best countervailing arguments.

In addition, despite the fact that the jury was given a limiting instruction advising it not to consider the juvenile record of the Petitioner as an aggravating factor, Appendix 2f (A.R. 866), it simply is not reasonably likely that the instruction was effective. It occurred after the jury had already heard two of the three witnesses. The trial Court candidly acknowledged that the situation was "somewhat confusing". Id. And, most importantly, the prejudicial evidence was presented in the State's case-in-chief when the State was supposed to be presenting evidence of aggravating circumstances. Thus, it is

petitioner concedes there was mitigating evidence for the state to rebut

introduction of prospective rebuttal evidence. Id. at 977-978. This Court went on to rule that the error in admitting evidence to prospectively rebut a statutory mitigating factor in a capital sentencing hearing is "of such magnitude as to require a new sentencing hearing before the jury and court." Id. at977.

On remand, the trial court was directed that:

> the jury should not be advised of the defendant's waiver. In instructing the jury, the court should exclude the waived mitigating circumstance from the list of mitigating circumstances read to the jury, and neither the state nor the defendant should be allowed to argue to the jury the existence or non-existence of such mitigating circumstance.
> Id. at 978.

Thus, Maggard implicitly held that the admission of evidence during the State's case-in-chief to rebut a statutory mitigating factor that is intended "for the defendant's benefit" (to be used at the option and discretion of the defense), is inherently harmful error. Moreover, whether or not prospective rebuttal of a subsection (a) mitigating circumstance is always harmful error, it clearly was in the instant case given the extraordinary similarities, noted above, between the facts upon which Petitioner's juvenile arrest and adjudication were predicated and the facts underlying the convictions in the instant case.[11]

fn. 10 cont'd.)
entirely likely that the jury relied on Petitioner's juvenile record to establish one or more aggravating circumstance. See, e.g., § 921.141(5)(b).

11. See, discussion above at 9-10.

Thus, the erroneous admission of evidence to prospectively negate a mitigating factor during Petitioner's capital sentencing hearing is squarely controlled by the principles of Maggard, supra.

Assuming, arguendo, that defense counsel did not expressly waive the right to rely upon mitigating factor subsection (a), several considerations support the conclusion that the Maggard principle should still obtain. First, the text of § 921.141 clearly envisions that: 1) the State will be required to prove aggravating circumstances first, see, subsections (2)(a), (3)(a); 2) the State will be limited to proving only the specifically enumerated aggravating factors; and 3) these procedural protections are intended for the benefit of the defendant. Maggard v. State, supra, 399 So. 2d at 978. Thus, the first canon of statutory construction - that legislation should be construed to advance its manifest intent, see, e.g., City of St. Petersburg v. Siebold, 48 So.2d 291, 293 (Fla. 1950), compels the construction of § 921.141 suggested herein by Petitioner. A contrary interpretation - that the State, absent an express defense waiver of reliance on the subsection (a) circumstance, could routinely introduce evidence of a defendant's prior criminal activity would deny the clear strategic advantage offered by the text of § 921.141 to defendants who wish to wait and see what evidence of aggravating circumstances is presented by the State before they decide whether a subsection (a) mitigating circumstance should be asserted. Such a construction would convert the subsection (a) mitigating factor into a prosecution weapon, as was done in the instant case.

Second, if the State were allowed to routinely introduce evidence of a defendant's prior criminal activity in its sentencing case-in-chief, the now-exclusive list of aggravating circumstances would be made open-ended given the broad construction given by this Court to the term "criminal activity". See, e.g., Simmons v. State, 419 So.2d 1316 (Fla. 1982). This would defeat not only the

manifest general intent of § 921.141(5), but also the specific intent of § 921.141(5)(b), which limits prosecution case-in-chief evidence to specified felonies. Provence v. State, 337 So. 2d 783 (Fla. 1976). See also, State v. Silhan, 275 S.E. 2d 450 (N.C. 1981) (construing a death penalty statute similar to Florida's to limit the state's case-in-chief proof to the enumerated aggravating factors); State v. Taylor, 283 S.E. 2d 761 (S.C. 1981); State v. Brown, 293 S.E.2d 569 (N.C. 1982). In addition, an interpretation of § 921.141 that would routinely allow the state to introduce evidence of criminal activity in its case-in-chief would eliminate vital limits on jury discretion and inevitably raise constitutional questions. Furman v. Georgia, 446 U.S. 426 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Godfrey v. Georgia, 446 U.S. 420 (1980). Therefore, such a statutory interpretation should be avoided where reasonably possible. See, City of St. Petersburg v. Siebold, 48 So. 2d 291, 294 (Fla. 1950).

Finally, the construction of § 921.141 suggested by Petitioner, which Petitioner contends is mandated by the plain meaning of § 921.141, also imposes no burden upon the state; it remains free to introduce rebuttal evidence if the defense presents subsection (a) evidence, which it must do to establish that circumstance. See, e.g., Maggard v. State, supra.

For all these reasons, Petitioner contends that the Maggard principle should apply whether or not the defense has expressly waived the right to assert a subsection (a) argument.

b) Failure to Argue that Pervasive and Prejudicial Publicity Denied Defendant his Due Process Right to a Fair Trial

Fundamental to the criminal justice system is the unfettered right of the accused to an impartial trial. Indeed, when adverse pretrial publicity becomes so pervasive and extensive as to make it impossible to find a jury which is free of prejudice, bias and preconceived opinions, the trial must be removed to a more sterile locale. As this Court has properly observed, "when a defendant's life is at stake, it is not requiring too much that the accused be tried in an atmosphere undisturbed by . . . a wave of public passion." Manning v. State, 378 So. 2d 274, 278 (Fla. 1980).

Facts

The actions taken by Petitioner's trial lawyer clearly demonstrated his deep and, as it developed, his well-founded concern about the extraordinary public attention given to Petitioner's case. First, Petitioner's trial lawyer filed a Motion to Limit Pre-Trial Publicity, Appendix 3a (A.R. 1230) (which was denied), noting that:

> "This case has received an extreme amount of newspaper and television coverage and any further media coverage will further deny the Defendant the right to a fair and impartial trial."

Second, trial counsel filed a Motion for Change of Venue, Appendix 3b (A.R. 1238-9) (which was denied), in which he alleged:

> 1. The Defendant, Ernest Fitzpatrick, Jr., is a black male accused of fatally wounding a white Escambia County Deputy Sheriff on April 30, 1980.
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> 2. The Deputy Sheriff lay in a coma at Baptist Hospital for approximately one week before succumbing to the wounds.
>
> 3. After the shooting the local newspapers and television stations carried news articles and daily reports of the shooting and progress of the deputy's medical progress.
>
> 4. First Federal Savings and Loan Association and local banks started a drive to collect

> funds for the family of the Deputy. Local banks established collection boxes in their lobbies.
>
> 5. The Public Defender for Escambia County declined representation of the Defendant based on friendship of the Public Defender's staff with the deceased.
>
> 6. The State Attorney's office circulated a memo to the office staffs of the Clerk of the Circuit Court, the State Attorney's office and the Public Defender's office to obtain funds for the deceased family.
>
> 7. A local golf tournament was held to benefit the deceased's family.
>
> 8. The Defendant has been harrassed and threatened by deputies at the Escambia County Jail.
>
> 9. An atmosphere has been created in Escambia County by the excessive publicity, fund raising campaigns, and hostility toward the accused that the Defendant cannot receive a fair and impartial trial in Escambia County because of the undue prejudice and sympathy for the victim.

Third, Petitioner's trial lawyer filed a Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire,[12] noting, in part, that "[e]motionally charged and prejudicial publicity appeared in local papers describing the acts with which defendant was charged." Appendix 3d (A.R. 1240).

Fourth, trial counsel filed a Motion to Increase The Number of Peremptory Challenges Which The Defense May Exercise, Appendix 3e (A.R. 1242), again noting that "[t]here has been a large amount of prejudicial publicity in this case through the locally distributed media" and, as a result, "there exist widely held preconceptions within Escambia County that the defendant is guilty of the alleged crime."[13]

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12. This Motion was granted in part and denied in part - some venire jurors were voir-dired individually, and others were not. See discussion below at 17, n. 15. Jurors were not sequestered during voir dire. Appendix 3c (A.R. 583).

13. Affidavits and copies of newspaper articles were produced in support of the above motions. Appendix 3f (A.R. 1245, 1248, 1261-1269).

In light of these pretrial motions and the pervasive pretrial publicity before and during Petitioner's trial, appellate counsel's failure to call to this Court's attention the extent to which a fair and impartial trial was impossible in Pensacola -- indeed, his failure to raise the publicity issue at all -- amply illustrates Petitioner's contention that he was denied the effective assistance of appellate counsel. The effect of such neglect was to deprive Petitioner of the ability to demonstrate to this Court that his presumed innocence was lost before the trial commenced.

The fact that the pretrial publicity pervaded Pensacola is best demonstrated by the jury selection process. The record revealed that all 75 possible jurors were aware of the incident because they had been exposed to pretrial publicity. Appendix 3g (A.R. 69).[14] And, the comments of a number of venire jurors, e.g., venire juror Rushing, indicate the effect this pretrial knowledge had on the jurors. When asked what she knew about the case, venire juror Rushing initially admitted that she knew a "little" because:

> My son and his wife were a friend of the family... They were so very fond of the [Heist] children. Their children were involved with some of the activities as his children were, and I know that they have hurt, of course, and bitter when this happened. (Sic). Appendix 3h1(A.R. 432-33).

14. This fact alone evidences the extent to which media coverage impinged upon Petitioner's right to an unbiased fact-finding process, and provides compelling evidence that many of the veniremen harbored preconceived notions as to guilt. As this Court has stated, pretrial knowledge "cannot be erased from the mind as chalk is erased from a blackboard. . . . It is difficult for any person to admit that he is incapable of being able to judge fairly and impartially." Singer v. State, 102 So. 2d 7, n. 24 (1959). See also Murphy v. Florida, 421 U.S. 794, 800 (1975) ("the juror's assurances that he is equal to this task [of rendering an impartial verdict] cannot be dispositive of the accused's rights.").

When asked whether she had discussed the case with her son, she answered:

> A little, not too much. Because I didn't know the family you know. Of course, they were awful hurt about it. He just told me what a fine man he [Heist] was and the children and the wife's so great, but talked not too much with me about it, no. Id.

When pressed on what facts she knew about the case, she answered: "this defendant over here was the one that...I was told had shot and killed the deputy." Id.

Further colloquy between the defense attorney and venire juror Rushing was as follows:

> Q. Do you feel like though the defendant is required to prove his innocence to you?
>
> A. That's right. I think he should have the opportunity to prove that he's innocent.
>
> Q. Well, do you think he's required to prove his innocence, in other words, must he come up and prove he didn't do this act to you, put on evidence and everything?
>
> A. Well, yes, I think he should prove to me that he didn't do it, because - from what I have read in the papers and what I was told that he did do this, so... [15]

Most importantly, it is clear from an examination of the pretrial voir dire of the trial jurors who actually sat in Petitioner's case that the pretrial publicity was both pervasive and prejudicial. Trial juror Roselli, for example, indicated that "I heard most of what I got from news on the radio, T.V." Appendix 3h4(A.R. 211, 212, 217). During his voir dire, juror Roselli stated that "where there is smoke there is fire", and

15. Over defense counsel's pre-trial and trial objections, Appendix 3h2 (A.R. 1240 and 255), a number of venire jurors were voir-dired in pairs. Accordingly, venire juror Rushing's voir dire was overheard by a trial juror, juror Rathel, who, in turn, indicated her pre-trial knowledge of the case. Appendix3h3 (A.R. 436).

said "there is something back in my mind that says that it would not only be the fact that you've [the State Attorney] got to prove to me he's guilty; but they have to prove to me he's innocent." Id.[16]

A second trial juror, juror Smallwood, acknowledged not only that he had heard about the case, but also that he had been personally involved in the well-publicized events following deputy sheriff Heist's death. He had personally contributed to the "Doug Heist Memorial Fund." Appendix 3h5 (A.R. 290), which had been established, supported and publicized by the community's civil leaders, including the Mutual Federal Savings and Loan Association, the First Navy Bank, other area banks and lending institutions, the Beulah Baptist Church, the Escambia County Friends of Law Enforcement, and many other local businesses and civic groups. Appendices 3h17-19, 23, 27.

A third juror, trial juror Barton, while minimizing what she had heard or read about Petitioner's case, was exceptionally frank about the impact this pre-trial knowledge would have on her, stating "it's going on around us", and "I think I would be, you know, telling a lie if I said I wouldn't be influenced, because good or bad, you know, I would have to be influenced one way or the other." Appendix 3h63[17] (A.R. 520-22).

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16. Many of the jurors, including juror Roselli, after consistently leading questions from the State Attorney, conceded that they could be, or would try to be impartial. But, it is clear that, as a matter of law, assertions of impartiality do not guarantee a fair trial where the pretrial publicity was as pervasive and prejudicial as it was in the instant case. See, Singer v. State, 102 So. 2d 7, n. 24 (1959); Murphy v. Florida, 421 U.S. 794, 800 (1975); Irvin v. Dowd, 366 U.S. 717 (1961).

17. Juror Barton's concession in this respect is consistent with the legal presumption, see discussion below, of prejudice that arises from pervasive pretrial publicity like that in the instant case.

A fourth juror, trial juror Vick, demonstrated in her voir dire that she had learned much about the case through the media, Appendix 3h64 (A.R. 479-80), which was particularly prejudicial since she had met deputy sheriff Heist briefly and "knew the Heist family" when she taught deputy sheriff Heist's son, "a nice young man", whom she "liked". Id.

And, a fifth trial juror, juror Selvidge, summarized what she had heard about the case from a co-worker who told her "everybody in town's heard about the shooting" of "the most famous police officer in Pensacola". Appendix 3h65 (A.R. 265).[18]

It is clear from these colloquies that pretrial publicity pervaded Pensacola City and Escambia County. That this occurred is not surprising when one considers that Pensacola has a population of only 59,563 and the main Pensacola newspaper, which publishes a morning paper (the Pensacola Journal) and an evening paper (the Pensacola News), has a Monday - Saturday circulation in the morning of about 11,000 and in the evening of about 52,000, with a circulation on Sunday, 69,000, that is larger than the city's population.[19] Appendix 3h73. And a very popular deputy sheriff, described to one trial juror as "the most famous police officer in Pensacola," Appendix 3h65 (A.R. 265), had been killed, leaving behind a popular wife and five children. See, Appendices 3h11, 15, 17-18, 23-26.

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18. For additional voir dire about the pre-trial knowledge of Petitioner's case by trial jurors, see, e.g., Appendices 3h14-16. (A.R. 233, 276, 453).

19. The best possible evidence - the voir dire testimony of the venire and trial jurors - also demonstrates that the extent of T.V. and radio coverage was also extraordinary. See, e.g., Appendices 3h69-72 (A.R. 172, 250, 497, 156-58).

Pictures of deputy sheriff Heist and his understandably grief-stricken wife and children were local front-page news. See, Appendices 3h24, 26, 27-28. The articles about the shooting were extended, in part, because deputy sheriff Heist was hospitalized for a week or so before he died; local front-page space was devoted to a hospital vigil that attended his hospitalization. Appendices 3h14, 15, 17, 19.

A "Doug Heist Fund" was established before Heist died, and it was publicized in numerous articles, with an accompanying listing of the business, civic, law-enforcement, church and other local groups that had established the fund. See above discussion.

These articles also noted that there had been a "collection" taken at the "Judicial Center," which houses the Court in which Petitioner was tried. Appendix 3h19. Indeed, a solicitation for funds was sent " to the office staff of the Clerk of the Circuit Court, the State Attorney's Office and the Public Defender's Office." Appendix 3b (A.R. 1238).

It was also front-page news when the local Public Defender's office disqualified itself because the Public Defender, who is the stepson of the sheriff, was also a friend of both Heist and the other deputy sheriff involved in the incident which led to Petitioner's arrest. Appendices 3h14, 15-17. Although the "conflict of interest" motion that was filed by the Public Defender and granted by the Court undoubtedly was not intended to prejudice Petitioner, it had the inevitable effect of so doing when the local paper ran headlines like "Behr Asks Off Shooting Case." Id. This prejudice, presumed guilt suggested by the prominent news play given the Public Defender's refusal to defend Petitioner, was aggravated when, in his first comments to the venire jury panel after the prosecution had addressed the jury, the private attorney appointed by the Court to represent Petitioner introduced himself to the jurors by saying "whenever I am confronted with a situation of...representing a

defendant, I feel like the straight man of a comic routine" since "all of my lines have been taken". Appendix 3i (A.R. 91).

When deputy sheriff Heist died, an extraordinary funeral was held, with more front-page news and pictures. Appendices 3h24-27. The press claimed that the funeral was "the largest in the county's history," and the funeral procession "stretched for miles." Id.

These articles noted that "Lawmen came from across the Florida panhandle and included representatives from the Mobile City Police, Alabama Highway Patrol, U.S. Customs, U.S.Park Rangers, security police, Pensacola Police, Florida Highway Patrol, U.S. Navy, Volunteer Firefighters, Okaloosa County lawmen, Gulf Breeze police, Santa Rosa County sheriff's representatives" and others. Id.

Seriously aggravating the considerable damage done to Petitioner's case by the pretrial publicity devoted exclusively to the events which led to Petitioner's convictions was the media attention given to the shootings, coincidentally close in time, of two other Pensacola deputy sheriffs (one of whom died) and a third law enforcement officer, who also died. Appendices 3h30-33. Articles about these shootings and the funeral services that were held for these officers, as well as memorial services held for all the slain officers, kept the Heist name and shooting in the public mind and fanned the fumes of public anger. Id.

Indeed, one of the four law-enforcement officers who was shot, an Escambia deputy sheriff like Heist, was shot on October 19, 1980, with attendant front-page publicity that also noted Heist's death. Appendix 3h33. This occurred eight days before Petitioner's trial began on October 27th, and there were some jurors who confused Heist's shooting and the October 19th shooting.

Most importantly, the above news articles, which presented Petitioner as "an unemployed dish-washer" or a maximum security prisoner, e.g., Appendices 3h20, 29, also contained

detailed and prejudicial allegations about critical aspects of the crime itself, including allegations about Petitioner's state of mind and the extent to which he had formed a well-conceived plan that included kidnapping and bank robbery. As noted above, one of Petitioner's arguments at trial was that the tragic events of April 29, 1980 were not the consequence of a serious and reality-based criminal plan, but were, instead, the product of disoriented, schizophrenic ideation. See discussion above at 3-3a. Consequently, the absence, vel non, of a well-formulated plan and Petitioner's state of mind were critical factual issues. Continually in the press were assertions by Pensacola law enforcement officers that Petitioner had confessed (Appendix 3h6.), "indicated he intended to rob a nearby bank" (id), "planned to take people hostage, bring them to a nearby bank and rob it" (Appendix 3h9), had a juvenile record (Appendix 3h13) (evidence that Petitioner contends herein should not have been provided the jury even at trial), and "entered the firm with the intention of taking hostages for a planned bank robbery". (Appendix 3h35). And, critical psychological reports about Petitioner's mental state were described in some detail while the unsequestered venire jury was involved in voir dire. Appendix 3h37, 38.

In sum, widespread publicity depicting the slain deputy as a "fallen hero" (Appendix 3h24), exposing his grieving widow and children to consistent public view, and describing alleged details of the incident was followed, within six months, by Petitioner's trial by jurors who acknowledged that they were deeply aware of all the media attention. This evidence, especially the individual colloquies between counsel and individual trial jurors who tried and sentenced Petitioner and recommended that he be executed, demonstrates that, in fact, pretrial publicity poisoned Petitioner's trial, in effect stripping him of his presumption of innocence.

However, Petitioner need not have persuaded this Court

on appeal that pretrial publicity actually prejudiced him in order to have prevailed. Adverse pretrial publicity can create a presumption of prejudice that requires reversal of a conviction and sentence. See discussion immediately below.

LEGAL ARGUMENT

As the Supreme Court pointed out in Murphy v. Florida, 421 U.S. 794, 798-99 (1975), it is the "totality of circumstances" test that is applicable to determine whether prejudice to one's fair trial right from pretrial publicity may be presumed.[20] See also, Sheppard v. Maxwell, 384 U.S. 333, 352 (1966); Estes v. Texas, 381 U.S. 532, 542-43 (1965); Pamplin v. Mason, 364 F.2d 1, 5 (5th Cir. 1966) ("Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.")

In several cases all reported before Petitioner's initial appeal before this Court, the Florida courts have adopted this test. E.g., Jackson v. State, 359 So. 2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102 (1979); McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Kelley v. State, 212 So. 2d 27 (Fla. 2d DCA 1968). More specifically, the test, as stated by this Court, requires that a "determination must be made as to whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and

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20. While Patton v. Yount, ___ U.S. ___, 104 S. Ct. 2885 (1984), a decision predicated on notions of federalism and decided four years after Petitioner's trial, may have refined the standard of review when a federal court reviews a state prisoner's contention that he has been denied a fair trial by a state court, id. at n. 7, it does not reverse the holding in Irvin v. Dowd, 366 U.S. 717 (1961) that adverse pretrial publicity can create a presumption of prejudice that warrants the conclusion that a defendant was denied a fair trial.

accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom." Manning v. State, supra, 378 So. 2d, at 276.[21]

While exhaustive comparison with prior decisions is, in and of itself, not dispositive of the merits of Petitioner's case, such a comparison should have suggested to the appellate counsel the standard to be employed and the likelihood of success on appeal.

Indeed, this Court, in Manning v. State, 378 So. 2d 274 (Fla. 1980), performed exactly this task, finding that the defendant was entitled to a new trial in a changed venue. Manning did not make new law, but simply applied the well-established standard, using as a backdrop prior opinions all decided well in advance of Petitioner's appeal. See Parker v. North Carolina, 397 U.S. 790, 797-98 (1970); Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977); Meeks v. State, 382 So. 2d 673 (Fla. 1980), aff'd on later appeal, 418 So. 2d 987 (Fla. 1982), cert. denied, 103 S. Ct. 799 (1983).

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21. Petitioner's appellate counsel should also have directed this Court to Mayola v. State of Alabama, 623 F.2d 992 (5th Cir. 1980). In Mayola, the court stated that "where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, '[jury] prejudice is presumed and there is no further duty to establish bias'" Id. at 997. Pretrial publicity in Pensacola was so pervasive that the standard established in Mayola was clearly met and Petitioner had no further duty to establish bias.

The Manning opinion isolated, among others, two critical circumstances that mandated remanding the case for a new trial: (1) there was extensive knowledge by the prospective jury of the alleged crimes through news media accounts and community discussion; and (2) the identity of the victims evoked sympathy and strong emotions among the members of the community. Both of these circumstances are present in the instant case. Of additional significance here is the fact that the incident occurred in a relatively small city where the local newspaper, whose Sunday circulation exceeded Pensacola's total population, devoted substantial copy to the incident.

Finally, Petitioner reiterates that assertions of impartiality by jurors do not, as a legal matter, guarantee an impartial trial. Indeed, every juror in Irvin v. Dowd, 366 U.S. 717 (1961) indicated that he could render an impartial verdict during a voir dire procedure which took four weeks to complete. Id. at 720, 724. Nevertheless, the Supreme Court concluded:

> Where one's life is at stake -- and accounting for the frailties of human nature -- we can only say that in light of the circumstances here the finding of impartiality does not meet constitutional standards.

A trial contaminated by extensive pretrial publicity represents an impermissible violation of a defendant's due process rights under the Sixth and Fourteenth Amendments and the Florida Constitution. E.g., Manning v. State, 378 So. 2d 274 (Fla. 1980); Murphy v. Florida, 421 U.S. 794 (1975); Estes v. Texas, 381 U.S. 532 (1965); Singer v. State, 109 So. 2d 7 (Fla. 1959).

Indeed, it is difficult to conceive of an issue that more fundamentally goes to the foundation of a case. As this Court has noted, a finding that the verdict was rendered by an impassioned and biased jury undermines both the finding of guilt and the jury recommendation of death, requiring a remand for a new trial:

> Although the evidence against the defendant in the present case is quite strong, it is possible that another jury uninfluenced by the passion existing in Columbia County at the time of this trial might have reached a different verdict. Because this record reflects a strong community sentiment, intensified by pervasive pretrial publicity which may have improperly influenced this jury's verdict and the recommendation of death, we determine it necessary to remand this case for a new trial in a location other than Columbia County.

Manning v. State, supra, 378 So. 2d at 278.

C. The Introduction And Prejudicial Use At Trial Of Petitioner's Juvenile Record Violated Florida Law And The United States Constitution

Facts

Section II-III(b)(2)(a) above contains most of the facts that also are relevant to the instant legal argument. In addition to what is noted there, Petitioner adds that Petitioner's juvenile history was incorporated in the pre-sentence investigation that was given to the trial judge prior to sentencing. Appendix 4a.. For the reasons set forth above at 9-10, Petitioner reiterates that there is little doubt about the prejudicial effect of Petitioner's juvenile history upon the sentencing decision.

Legal Argument

Petitioner notes at the outset of this argument that this Court stated in both the appeal of the instant case, Fitzpatrick v. State, 437 So. 2d 1072, 1078 (Fla. 1983), and in Quince v. State, 414 So. 2d 185 (1982), that juvenile records may be admitted as evidence in capital sentencing to negate the mitigating factor that defendant has no significant prior criminal history (§ 921.141(6)(a)) when the defendant specifically seeks to rely on subsection (a) and "when the circumstances warrant." Id. at 188. However, in neither case did the appellant raise, nor did this Court resolve the argument set forth immediately below, an argument that provides a basis independent of the above Maggard argument for invalidating Petitioner's death sentence.

The admission of Petitioner's juvenile history and its use at sentencing violated the unambiguous mandates of § 39.10(4) Fla. Stats. and § 39.12(6) Fla. Stats..

Section 39.10(4) Fla. Stats. provides:

> An adjudication of a court that a child is a dependent or delinquent child or a child in need of supervision shall not be deemed a conviction, nor shall the child be deemed to have been found

> guilty or to be a criminal by reason of that adjudication, nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction or disqualify or prejudice the child in any civil service application or appointment. (Emphasis added).

Section 39.12(6) Fla. Stats. provides that:

> No court record of proceedings under this chapter shall be admissible in evidence in any other civil or criminal proceeding, except that:
>
> (a) Orders transferring a child for trial as an adult shall be admissible in evidence in the court in which he is tried, but shall create no presumption as to the guilt of the child; nor shall the same be read to, or commented upon in the presence of, the jury in any trial.
>
> (b) Orders binding an adult over for trial on a criminal charge, made by the judge as a committing magistrate, shall be admissible in evidence in the court to which the adult is bound over.
>
> (c) Records of proceedings under this chapter forming a part of the record on appeal shall be used in the appellate court in the manner hereinafter provided.
>
> (d) Records necessary therefor shall be admissible in evidence in any case in which a person is being tried upon a charge of having committed perjury. (Emphasis Added).

Section 921.141(6)(a) Fla. Stats. provides that a mitigating circumstance shall be:

> (a) The defendant has no significant history of prior criminal activity. (Emphasis added).

The plain meaning of § 39.10(4) is that a child who has been adjudicated a delinquent child under § 39.10 is not to be deemed a criminal by reason of that adjudication or to have committed criminal acts. Thus, Petitioner contends that the plain meaning of § 39.10(4) bars the use of a defendant's juvenile history, at least under the circumstances of this case, see discussion below, in a capital sentencing proceeding for the purpose of proving "criminal activity".

The use of the word "criminal" in § 39.12(b) - expressly forbidding use of juvenile delinquency adjudication records -

in criminal proceedings - is similarly unambiguous. There can be no doubt that a capital sentencing proceeding is a critical part of a criminal proceeding as that phrase is used in § 39.12(6) Fla. Stats. See Gardner v. Florida, 430 U.S. 349 at 358: "[T]he sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel." (Emphasis added).

Accordingly, Petitioner contends that the trial court erred in admitting testimonial evidence at the sentencing hearing of a prior juvenile charge and juvenile adjudications. In addition, it was error to make Petitioner's juvenile history a part of the presentencing report.

Accepted canons of statutory construction support Petitioner's interpretation of the above Florida statutes. The primary canon of statutory construction is that the legislature is presumed to know the meaning of words, and that legislative intent is expressed, in the first instance, by the words it chooses to use. Thus, the conscious legislative choice to use an identical word - "criminal" - to define both the limits on the use of juvenile histories and the scope of evidence admissible to prove a § 921.141(6)(a) mitigating factor is entitled to considerable deference.

Judicial deference to manifest legislative intent also is particularly appropriate when identical words are contained in statutes governing related activities, like the juvenile justice and criminal justice systems. For example, in Goldstein v. Acme Concrete Corporation, 103 So.2d 202, 204 (Fla. 1958), the Court construed consistently the meaning of the terms "subcontractor" and "materialman" found in both the Workmen's Compensation Act and the mechanics' lien statutes. The Court reasoned that since both the Workmen's Compensation Act and mechanics' lien statutes governed aspects of construction projects, "the chapters are in pari materia and should, to the extent that an understanding of

one may aid in the interpretation of the other, be read and considered together." Similarly, words contained in the related juvenile justice and criminal justice legislation, which are in pari materia, should be construed consistently.

A second canon of statutory construction, that the Florida Legislature does not implicitly repeal its prior enactments, Littman v. Commercial Bank & Trust, Fla. App. 425 So. 2d 636 (1983), also is applicable. In Littman, the Court said:

> In the absence of a showing to the contrary, it is presumed that all laws are consistent with each other and that the legislature would not effect repeal of a statute without expressing an intention to do so. Id. at 638. (Citations omitted; emphasis added).

There is no indication in the language of § 921.141(6)(a) that even suggests that by enacting § 921.141(6)(a) the Florida Legislature, in 1977, intended to repeal or narrow the operation of §§ 39.10(4) and 39.12(6) by, in essence, implicitly adding an additional exception to the list of exceptions expressly set forth in § 39.12(6). Indeed, there is every reason to doubt that the same legislature that intended to give delinquent children immunity from civil disabilities also intended to allow a death penalty to be predicated, at least in part, on a juvenile history.

A third canon of statutory construction - "expressio unius est exclusio alterius" - dictates that the listing of five express exceptions to the non-disclosure rule in § 39.12(6) communicates a strong legislative intent to exclude a sixth, i.e., that juvenile histories are admissible to defeat a § 921.141(6)(a) mitigating circumstance. As the Court said in James v. Department of Corrections, 424 So. 2d 836 (Fla. App. 1983):

> Expressio unius est exclusio alterius is a general principle of

> construction which states that the mention of one theory implies the exclusion of another. Then, where a statute enumerates the things on which it is to operate, it is ordinarily construed as excluding from its operation all those not expressly mentioned. Id. at 827 [22]

A fourth canon of statutory construction, that this Court should attempt to harmonize the three Florida statutes set forth above, giving full force and effect to all if reasonably possible, see Littman v. Commercial Bank & Trust Co., supra, 425 So. 2d at 638, also is applicable here. If Petitioner's construction of these statutes were adopted by this Court:

(1) § 921.141 would be fully implemented. A defendant with no adult record, like Petitioner, could obtain the benefit of § 921.141(6)(a). The judge and jury would not be misled; the instruction defining subsection (a) would limit its scope, as Petitioner contends the legislature intended, to the existence or non-existence of adult criminal activity. A defendant who had no juvenile or adult record could assert that as part of his proof of a good "character or record", the "catch all" mitigating circumstance in death penalty cases compelled by Lockett v. Ohio, 438 U.S. 586 (1978). See Florida Standard Jury Instructions in Criminal Cases (1981 Edition) at 81. And, the State would remain free to use a defendant's juvenile history to generally impeach a defendant who asserted a good "character or record", and to specifically impeach a defendant who lied about his juvenile history.

(2) §§ 39.10(4) and 39.12(6) would be fully implemented.

22. Cf. Op. Atty. Gen. 065-51, (May 31, 1965) indicating that reports of probation officers and social workers which became part of records of juvenile court are privileged unless they fall within one of the enumerated exceptions to § 39.12(6).

The "quid pro quo" for the refusal to provide juveniles with the full criminal law due process protections that are afforded adults, see, e.g., McKeiver v. Pennsylvania, 403 U.S. 528 (1971); § 39.09 Fla. Stats. (relaxing the evidentiary and procedural rules applicable to juvenile court proceedings), is the promise that the consequence of juvenile system treatment will be the "concern", "sympathy", and"paternal attention" that "the juvenile court system contemplates". McKeiver v. Pennsylvania, supra, 403 U.S. at 550. The McKeiver Court was explicit about this promise of "paternal attention", not punishment, in return for the procedural informality, and with it diminished fact-finding reliability, that marks the juvenile justice system. Id. This "paternal" promise, which is the constitutionally requisite cornerstone of the juvenile system, id., is broken when juvenile histories such as Petitioner's are used to impose not just punishment, but the ultimate punishment. Petitioner contends that, in enacting §§ 39.10 and 39.12, the Florida Legislature intended to keep its promise to children.

Finally, Petitioner's suggested construction of the above statutes obviously is limited to the facts of his case. Specifically, Petitioner contends that a juvenile history should not be admissible: 1) in a death penalty sentencing proceeding;[23] 2) to disprove § 921.141(6)(a) and

23. While juvenile records may be included in presentence investigations in non-capital cases, Bell v. State, 365 So. 2d 463 (Fla. 1978), capital sentencing proceedings are distinguishable "because there is a qualitative difference between death and any other permissible form of punishment", and thus a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Zant v. Stephens, U.S. 102, S. Ct. 2733 (1983), quoting Woodson v. North Carolina, 429 U.S. at 305 (1976). Indeed in many respects, a capital sentencing proceeding is much more like the guilt phase of a trial, id., at which juvenile records may only be used to impeach. Jackson v. State, Fla. App., 336 So. 2d 633 (1976).

3) when the defendant has no adult criminal record.[24]

IV.

NATURE OF RELIEF SOUGHT

Petitioner seeks an order of this Court, in light of the indisputable constitutional and statutory violations set forth herein, as in Manning v. State, 378 So. 2d 274 (Fla. 1980); Dumas v. State, 350 So.2d 464 (Fla. 1977); Witherspoon v. Illinois, 391 U.S. 510 (1968); Davis v. Alaska, 415 U.S. 308 (1974), vacating the judgment and remanding the case for a new trial in a changed venue. Alternatively, Petitioner seeks an order of this Court, as in Gardner v. Florida, 430 U.S. 349 (1977):

(1) reversing the sentence of death now imposed upon him; and

(2) remanding this case to the trial court for a new jury trial as to sentence.

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24. Petitioner contends that, in fact as well as law, his juvenile history is consistent with true juvenile behavior. In this respect, Petitioner notes that the evidence of his juvenile history adduced at the sentencing hearing indicated that he carried a blank starter's gun into a convenience store during an incident that led to an arrest but no adjudication and, in a separate incident, attempted to "ransom" the staff of Beggs Vocational School so that he could "distribute" "money to some poor people whom he had seen on television," apparently citizens of Bangladesh. For an escape "plan," he was going to "hide under some steps." Appendix 4b (A.R. 943-44). Petitioner does not either ignore or minimize the potential danger posed by the fact that Petitioner had a machete and what was described as a home made bomb with him during this episode. But, while the risk of danger is a factor in determining whether behavior, in fact as well as law, is juvenile, Petitioner suggests that the other circumstances surrounding the two incidents mark them as more juvenile - indeed, very emotionally and intellectually childish - than adult.

Alternatively, Petitioner seeks an order of this Court, as in Ross v. State, 287 So. 2d 372 (Fla. 2d DCA 1982):

(1) granting Petitioner belated appellate review from the death sentence imposed by the trial court, and

(2) permitting Petitioner full briefing of the issues presented herein.

CONCLUSION

Obviously, this Court cannot search every record on appeal in every capital case for error. It is the responsibility of effective appellate counsel to present all issues of arguable merit to the appellate court. In this case, counsel failed to fulfill that responsibility. Where the points omitted or improperly and inadequately presented are meritorious -- such as those set forth herein -- and where the difference is between life and death, a case is suitable for judicial intervention.

The failure to move Petitioner's case from Escambia County, or at a minimum, allow Petitioner additional peremptory jury strikes, as he requested, denied Petitioner the opportunity for a fair trial in light of the pervasive and prejudicial pretrial publicity. And, the State's introduction in its sentencing case-in-chief of highly prejudicial evidence with respect to Petitioner's juvenile record denied Petitioner the fair opportunity promised by State law to demonstrate that at least three mitigating circumstances, codified as § 921.141(6)(b), (g), and (h), applied to him.

The failure of appellate counsel to properly identify and argue these errors in Petitioner's direct appeal deprived him of a meaningful direct appeal in contravention of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Petitioner therefore requests this Court to issue its writ of habeas corpus, and to direct that Petitioner receive a new trial; alternatively, that this Court allow full briefing of the issues presented herein, and grant Petitioner belated appellate review from his conviction and sentence.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA
CASE NO.

ERNEST FITZPATRICK, JR.,

Petitioner

vs.

LOUIE L. WAINWRIGHT,
SECRETARY, DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA

VERIFICATION

Michael A. Millemann, being duly sworn, deposes and says that the facts in the foregoing petition for a writ of habeas corpus are true and correct to the best of his knowledge and belief.

Michael A. Millemann

STATE OF MARYLAND

CITY OF BALTIMORE to wit:

I HEREBY CERTIFY, that on this 22 day of August, 1984, personally appeared before me, a Notary Public in and for the City and State aforesaid, Michael A. Millemann, and made oath in due form that the matters and facts contained herein are true and correct to the best of his knowledge and belief.

Notary Public
Baltimore County

My Commission Expires:
July 1, 1986