IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 67051

MARVIN FRANCOIS,

Petitioner,

v.

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

Respondent.

_____/

FAC - improper closing argument not raised.

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner, MARVIN FRANCOIS, by his undersigned counsel, pursuant to Rules 9.030(a)(3) and 9.100, Fla. R. App. P., petitions this Court to issue its Writ of Habeas Corpus.

Petitioner 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, for the reason that Petitioner was accorded ineffective assistance of counsel at the appellate level, on his direct appeal to this Court from his conviction and sentence of death.

In support of such Petition, and in accordance with Rule 9.100(e), Fla. R. App. P., Petitioner states as follows:

I. Jurisdiction

This is an original action under Rule 9.100(a), Fla. R. App. P. This Court has original jurisdiction pursuant to Rule 9.030(a)(3), and Article V, Section 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 the reversal or vacation of petitioner's death sentence.

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 (Fla. 1981).

If the Court finds that Petitioner's appellate counsel was ineffective, it can and should, consider, on the merits, the appellate issues which should have been raised earlier. Florida law has consistently recognized that the appropriate remedy, where an appellant's rights have 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); Futch v. State, 420 So.2d 905 (Fla. 3DCA 1982); Ross v. State, 287 So.2d 372, 374-75 (Fla. 2DCA 1973); Davis v. State, 276 So.2d 846, 849 (Fla. 2DCA 1973), Aff'd. 290 So.2d 30 (Fla. 1974).

The proper means of securing such a belated appeal is a Petition for Writ of Habeas Corpus, filed in the Appellate Court empowered to hear the direct appeal. Knight, supra, 394 So.2d at 999 (Fla. 1981); cf. Ross, 287 So.2d at 374-5.

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, 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. 4DCA 1976); Davis, 276 So.2d at 849.

II. Facts Upon Which Petitioner Relies

Procedural History

Petitioner, Marvin Francois, was convicted after jury trial of six counts of murder in the first degree, two counts of attempted first degree murder, and three counts of robbery, by the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, on April 22, 1978. (R. 1172-74). The court, after a jury recommendation of death, imposed the death sentences, two concurrent twenty year terms, and three concurrent life sentences. (R. 1279).

In accordance with statutory scheme, a direct appeal was taken to this Court, which affirmed the judgment of conviction, and the sentences of death in Francois v. State, 407 So.2d 855 (Fla. 1982). A Motion for rehearing was made, and denied. Id. the United States Supreme Court denied certiorari. Francois v. Florida, 458 U.S. 1122 (1982).

The Facts of the Crime

This court, in its opinion on direct appeal, set forth its factual conclusions as to the evidence presented at trial. Id. 887-88. As such, there is no need to restate the court's findings herein.

A massive amount of physical evidence was seized, none of which implicated Francois (R. 658). The evidence upon which the petitioner was convicted consisted exclusively of the testimony of three witnesses. These witnesses are Adolphus Archie, Theresa Rolle and Johnny Hall. By its own admission, the State had no physical evidence to link the petitioner with the crime. (R. 1086). As such, the credibility, vel non of the aforementioned witnesses was the principal issue in the trial of this case.

Adolphus Archie testified that he earned his living drawing unemployment checks, and taking people on shop lifting sprees and selling drugs. (R. 832, 935, 936, 948). Mr. Archie had prior experience in plea bargaining having had twelve prior guilty pleas, including this case and three others. (R. 932-34). Mr. Archie had been addicted to drugs and was a regular drug user. (R. 840, 939). In the case at bar, Mr. Archie was charged as a

co-defendant and in exchange for his testimony, was permitted to plead to second degree murder, for which he received a sentence of twenty years in state prison on each count concurrent. (R. 1-78, 922-23). Mr. Archie had previously spent time in prison. (R. 837). Further, Mr. Archie testified he did not like Marvin Francois, having previously had an altercation with him. (R. 718, 844-45).

Mr. Archie originally denied his own complicity in the crime, as well as that of Marvin Francois. (R. 685). He subsequently admitted knowledge of the incident and implicated Marvin Francois. (R. 685). However, he continued to deny his own involvement and the involvement of his lifelong friend, Beauford White. (R. 687, 976). Mr. Archie subsequently went to the police and requested the opportunity to take a polygraph examination. (R. 976). He failed this polygraph examination. (R. 976). (Mr. Archie is an admitted liar.) (R. 717, 976, 979). Eventually, Mr. Archie implicated Marvin Francois as one of his confederates.

Mr. Archie described Marvin Francois on the day of the crime as wearing a pair of dungarees and a pair of deck shoes. (R. 940). He described himself as wearing a pair of gray work pants with paint on them and a tee-shirt. (R. 940). He testified that Marvin Francois took his, Mr. Archie's, painters cap prior to entering Stocker's residence. (R. 873). Mr. Archie states that the petitioner never had a beard (R. 975-76). However, Mr. Archie had a little beard between his chin and his lip and he wore that beard at the time of the homicide. (R. 976). Archie and Marvin Francois look alike. (R. 976).

Johnny Hall testified that he is an ex-drug addict and was taking methadone. (R. 510-11). He testified that on the day of the incident he had had numerous beers. (R. 553). Pre-trial he identified the man who shot him and the other five individuals in one room as the tallest of the three suspects. Hall gave different descriptions as to the dress of the perpetrator,

stating that his shirt was gray, or white, or print. (R. 562-63). He stated that the perpetrator wore black or brown patent leather boots, black or gray pants and wore a jumper or a vest. (R. 561). The perpetrator had a little goatee and bulging eyes. (R. 563-565). Based on a conversation with Margaret Wooden at the hospital after Mr. Hall awakened from a coma, he concurred with her description of "Lucky", later determined to be John Ferguson, as the man who shot him. (R. 566-68, 578, 580). However, despite Mr. Hall's prior description of "Lucky" as the man who shot him, he picked out Marvin Francois during a lineup. (R. 580). The only opportunity Mr. Hall had to view his assailant was after being bound and while being dragged to the room where he was shot. (R. 530-31). Mr. Hall's recollection as to who was present at the lineup and how many times the lineup had to be run differed with the versions given by other witnesses to the lineup. (R. 58-59, 86, 97-99, 581-84).

Theresa Rolle testified that she had been Marvin Francois' girlfriend for about five years and that Marvin Francois was the father of her two children. (R. 802-03). At the time of the trial, she was pregnant with the Petitioner's third child. (R. 803). Ms. Rolle was around this time period having an argument with the petitioner stating that she did not want Mr. Francois to see the children because he was not providing any child support. (R. 803-04). She testified that in retaliation, the petitioner informed the police that she was wanted for outstanding traffic tickets. Ms. Rolle was subsequently arrested and taken to jail. (R. 804). She retaliated by going to Detective Derringer and telling Detective Derringer that Marvin Francois admitted to her that he was present during the homicides. (R. 805-06). Subsequently, she went voluntarily to the office of defense counsel and gave a sworn statement to the effect that Mr. Francois had nothing to do with the these homicides. (R. 811-12). Later, she was subpoenaed to the office of the State Attorney, and again, after steadfastly affirming her statement to

defense counsel, she finally stated that the Petitioner was involved in these homicides. (R. 814-15). She admitted at trial that her testimony was the fourth time that she had told a completely inconsistent story. (R. 822).

Given the obvious weakness of this case, the State Attorney, apparently, felt compelled to vouch for the truthfulness of his witnesses. (R. 1077-80, 1086-88). Additionally, the prosecutor, while trying to explain away the fact that no fingerprints of the Petitioner were found at the scene, stated that the defendants had wiped up their fingerprints. (R. 1086). There is absolutely no evidence in the record to support such activity.

During the sentencing phase, the prosecutor repeatedly resorted to a "golden rule" argument. (R. 1243-45). He asked the jury to "imagine what was going through their minds. Imagine what they thought, and this man did it." (R. 1243). Moreover, the prosecuting attorney resorted to name calling, referring to the defendant as an "animal". (R. 1246). Additionally, the prosecutor improperly sought to arouse the emotions of the jury, diverting them from the circumstances of the particular case, in an attempt to equate a death penalty recommendation to the war on crime. (R. 1245-47). The State Attorney argued that the Defendant "deserved the ultimate penalty, and for that the people, the people demand his life." He went on to argue that "if you think it is cruel and if you think it is inhumane, think about the victims. Think about what we are here for. Think about why we sit there in the mornings reading the paper over a cup of coffee and cluck our tongues every time we read about death and destruction at the hands of another human being and say, 'Oh, what a world, what a terrible world we live in,'" to which there was an objection by counsel for the defendant and motion for a sidebar which was denied. The prosecutor continued, informing the jury that they should not be "misled by your own personal feelings...." "Because somebody, sometime, somewhere, has got to say, 'No. Stop.' We have got to put a stop to it.

That is why you are here." (R. 1247). A motion for mistrial made after the arguments was denied. (R. 1279).

III. Nature of Relief Sought

The petitioner seeks an order of this court, in light of the indisputable constitutional and statutory violations set forth herein, as in Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983) Cert. den. 103 S.Ct. 3547 (1983); vacating the judgment and remanding the case for a new trial. Alternatively, the petitioner seeks an order of this court:

(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.

Alternatively, the petitioner seeks an order of this court, as in Ross, 287 So.2d 372:

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

(2) Permitting the petitioner a full briefing of the issues presented herein.

IV. Basis for the Writ

Constitutional and Statutory Rights Denied to the Petitioner, Francois

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 Amendment to the United States Constitution, and under Articles I and V of the Florida Constitution, and under Florida Statutory law. See: Proffitt, 428 U.S. at 253; State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Art. V., Sec. 3(b)(1), Fla. Const.; Sec. 921.141, Fla. Stat. (1977). The United States Supreme Court recently clarified the right, stating: "The promise of Douglas

that a criminal defendant has a right to counsel on appeal - like the promise of Gideon that a criminal defendant has a right to counsel at trial - would be a futile gesture unless it comprehended the right to the effective assistance of counsel." Evitts v. Lucey, 105 S.Ct. 830, 836-37 (1985).

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. 2DCA 1972). Counsel is required to brief all issues not "reasonably considered to be without merit." Francois v. Wainwright, 741 F.2d 1273 (11th Cir. 1985), citing, Alvord v. Wainwright, 725 F.2d 1202, 1291 (11th Cir. 1984). 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. den. 414 U.S. 1163 (1974).

As noted above in the jurisdictional statement, Florida law requires that an appellant who is deprived of effective assistance of appellate counsel be granted belated appellate review. See: Ross, 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 and sentencing stage, which if presented would have required a reversal of petitioner's death sentence, denied him effective assistance of counsel, and requires that the Writ of Habeas Corpus issue. See Evitts.

In Knight v. State, 394 So.2d 997 (Fla. 1981), this court set fourth 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 the 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 1101. See: Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052 (1984). The fourth part of the Knight test, which places a burden of rebuttal on the state, need not be addressed at this time.

As will be demonstrated below, the 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.

Specific Errors and Omissions Complained Of

The petitioner, Marvin Francois, was denied effective assistance of counsel at the appellate level with respect to appellate counsel's failure to present and argue the prosecutor's pervasive and prejudicial closing arguments at both the guilt and penalty phase which injected irrelevant, inflammatory and non-record matters in the recommendation of death in violation of the Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The Petitioner does not dispute that under Florida law, considerable latitude is permitted in arguments to the jury. Johnson v. State, 348 So.2d 646 (Fla. 3d DCA 1977). However, the propriety of argument and comment remains subject to the long-

standing general rule which prohibits the introduction of matters beyond the scope of the evidence and reasonable inferences therefrom. Peterson v. State, 293 So.2d 762 (Fla. 2DCA 1974); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. den. 369 U.S. 880, 372 U.S. 704. The responsibility for adhering to this rule is strictly enforced with respect to prosecuting attorneys in criminal cases, since their duty lies in a quest for justice rather than for convictions. Kirk v. State, 227 So.2d d40 (Fla. 4th DCA 1969). Accordingly, the prosecutor must "refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled." Tribune v. State, 106 So.2d 630, 633 (Fla. 2DCA 1958).

The effect of errors arising from improper argument can sometimes be cured by the court through an instruction to the jury. Johnson, 348 So.2d at 647. Judges have a duty to keep the argument of counsel within proper bounds and to see that justice is thereby duly administered. Pell v. State, 97 Fla. 650, 122 So. 110 (Fla. 1929); Henderson v. State, 94 Fla. 318, 113 So. 689 (Fla. 1927). Graham v. State, 72 Fla 510, 73 So. 594 (Fla. 1916); Carlile v. State, 129 Fla. 860, 176 So. 862 (Fla. 1937); Higginbotham v. State, 155 Fla. 274, 19 so.22d 829 (Fla. 1944); Gonzalez v. State, 97 So.2d 127 (Fla. 2DCA 1957). In Tribune, 106 So.2d at 633, the court succinctly stated the relevant rule:

> It is the duty of a trial judge carefully and zealously to protect an accused so that he shall receive a fair and impartial trial, from improper or harmful statements or conduct by a witness or by a prosecuting attorney during the course of a trial.

Moreover, reversal may be required where the comments of a prosecutor are improper and where the trial court fails "to exercise that general control over the trial needed to protect the accused from abuse or intimidation." Kirk, 227 So.2d at 43.

The general rule requires that a contemporaneous objection

to the improper argument be entered in order to predicate error thereon. State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978); Hood v. State, 287 So.2d 110 (Fla. 4DCA 1973). If a timely objection is not made, a reviewing court may be justified in concluding that the alleged improprieties in the argument were not highly prejudicial. Rogers v. State, 158 Fla. 582, 30 So.Wd 625 (Fla. 1947). Similarly, if corrective measures are not requested by counsel, the failure of the trial court to implement such measures, even in the face of a timely objection, may not generally constitute a basis upon which to bring error. White v. State, 348 So.2d 1170 (Fla. 3DCA 1977).

Nevertheless, when an improper remark of counsel before the jury is such that no retraction or rebuke can remove its prejudicial effect on the rights of the accused, it may constitute reversible error, despite the absence of objection in, or rebuke by, the trial court. Pait v. State, 112 So.2d 380, 388 (Fla. 1959). In capital cases, alleged errors which might be viewed as harmless under other circumstances, must be carefully scrutinized. Unless it can be determined from the record that the improper remarks by the prosecutor did not prejudice the accused, such remarks must be regarded as prejudicial and the judgment reversed. Pait, 112 So.2d at 385; Smith v. State, 273 So.2d 414 (Fla. 2DCA 1973).

Furthermore, the Florida Supreme Court is compelled by Florida Statute Sec. 921.141(4) (1984) to review the entire record in cases in which a sentence of death has been rendered. In Davis v. State, 461 So.2d 67 (Fla. 1984), despite the fact that the appellate lawyer for the defense states that he had made a tactical decision not to challenge the sentence of death, the Florida Supreme court went on to review the judgment and sentence on its own motion, pursuant to the statute. Similarly, in Armstrong v. State, 429 So.2d 287, 289 (Fla. 1983), an appeal from a denial of relief under Fla. R. Crim. P. 3.850, the court

held that it had reviewed both issues raised on direct appeal and those which "were considered and determined by [the Florida Supreme] Court on its own motion in discharge of its duty to review death sentences." Thus, the duty of the Florida Supreme Court to independently review a conviction and sentence of death cannot be waived by even an affirmative act of appellate counsel.

In the instant case, despite the fact that the closing argument of the State Attorney at the guilt and sentencing phases of trial went largely unobjected to, the contents of these arguments were so completely and pervasively improper as to utterly destroy the fundamental right of the defendant to a fair trial. The multifarious errors committed by the prosecution during the course of these arguments constitute compelling grounds for reversal of the judgment and vacation of the sentence.

The principle that a presumption of innocence follows a defendant through trial gives rise to the rule that any expression by the prosecuting attorney as to the guilt of the accused is highly improper. Reed v. State, 333 So.2d 524 (Fla. 1DCA 1976). Further, the state attorney has an affirmative duty to abstain from either language or "acts which would or might tend to affect the fairness or impartiality to which the accused is entitled." Tribune, 106 So.2d at 633. Grounds for reversal lie where the prosecuting attorney improperly invokes the passions and prejudices of the jury, or otherwise causes them to render a verdict on the basis of considerations beyond the scope of the evidence. Sanders v. State, 241 So.2d 430 (Fla. 3DCA 1970).

In the case at bar, during the guilt phase of the trial, the state attorney, on at least three separate occasions, vouched for the truthfulness of his witnesses. (R. 1077-88). Comments by a prosecutor alluding to or stating his personal beliefs regarding the veracity of state witnesses are unquestionably improper and inappropriate. Jones v. State, 449 So.2d 313 (Fla. 5DCA 1984).

This is especially true where the prosecutor is vouching for the testimony of primary state witnesses. See: Blackburn v. State, 447 So.2d 424 (Fla. 5DCA 1984). Moreover, the prosecutor referred to adverse testimony given by a state witness at a prior proceeding as a lie. (R. 1077-78). This statement was unquestionably improper. O'Callaghan v. State, 429 So.2d 691 (Fla. 1983). Further, and unlike the situation in O'Callaghan, this improper comment related to a central issue in the case, that is, the guilt or innocence of the defendant, and not some collateral matter.

It cannot be denied that the jury was thereby made aware of the personal opinion of the prosecutor as to the credibility of various witnesses. The prosecutor thereby injected irrelevant and unconstitutional considerations into the determination of guilt in the subsequent sentencing hearing. While there was no objection to this vouching and hence no rebuke or attempt at corrective instructions by the trial court, it remains doubtful that the sinister effect that this vouching created could have been eradicated by any rebuke, retraction or instruction. Where the death penalty has been imposed, unless the reviewing court can determine from the record that the improper conduct of the prosecutor did not prejudice the accused, the judgment must be reversed. Pait, 112 So.2d at 385-86.

Furthermore, the state attorney improperly suggested that counsel for the defense had purposely attempted to mislead the jury by employing an argument which the defense knew to be nothing more than a ruse. The prosecutor stated that "Mr. Diamond says, 'Where is the evidence?' The favored ploy for defense attorneys when they know there is no evidence, 'Where is the evidence? Where are the fingerprints?' Well they always say that - - when they do not have it.'" (R. 1086). Counsel for the defendant objected to such comment and moved that the jury be admonished. The motion was denied. (R. 1086).

These comments by the prosecutor went beyond the simple

admonition as to the credibility of the arguments presented by the defense. In fact, these comments had the effect of undermining the credibility of defense counsel. That such comments are highly improper is demonstrated by the case of Melton v. State, 402 So.2d 30 (Fla. 1DCA 1981), in which it was held that the remarks of the prosecutor in its closing argument to the jury, to the effect that defense attorneys will present any argument in order to thwart the jury in its use of common sense, were both highly improper and unethical.

The state attorney introduced into his final argument at the guilt phase of the trial non-record evidence. He stated to the jury that the defendants wiped up their fingerprints at the scene. (R. 1086). The rule is well established that counsel must confine its arguments to evidence in the record and that when he goes beyond that range, he takes the chance that he may thereby cause a reversal of favorable judgment. Frenette v. State, 158 Fla. 675, 29 So.2d 869 (Fla. 1947). The reason being is that the jury should not be exposed to alleged statements of fact outside the scope of the record. Pitts v. State, 333 So.2d 109 (Fla. 1DCA 1976). This non-record statement was injected into the prosecutor's argument in an attempt to minimize the fact that the state had absolutely no physical evidence linking the petitioner with the crime scene. Thus, this comment was not only error, but was highly prejudicial to the defendant. As it goes to the very foundation of the case and to the merits of the cause of action, thereby tainting the penalty phase of trial, this error mandates a new sentencing hearing before a jury.

In addition to the improprieties of the argument of the state attorney at the close of the guilt phase of the trial, a number of serious errors were committed by the prosecutor during his argument during the sentencing phase. These latter errors included remarks which were improper, prejudicial and inflammatory.

Reversible error may lie when the prosecution seeks to

elicit either the sympathy or prejudice of a jury to the detriment of the accused. Knight v. State, 316 So.2d 576 (Fla. 1DCA 1975). In the case at bar, the prosecutor repeatedly asked the jury to place themselves in the positions of the victims. (R. 1243-47). It goes without saying that by advancing the "golden rule argument", that is asking the jurors to place themselves in the position of the victim, the prosecutor violated the defendant's right to a fair trial by an impartial jury. Bullard v. State, 436 So.2d 962 (Fla. 3DCA 1983); Pet. Reh. Den. 446 So.2d 100 (Fla. 1984). In Edwards v. State, 428 So.2d 357 (Fla. 3DCA 1983), a prosecution for first degree murder, the conviction of the accused was reversed and the cause remanded for a new trial where the prosecutor in his closing argument appealed to the jury's sympathy. The court held that it is the responsibility of the prosecutor to seek a verdict based on evidence without indulging in appeals to sympathy, bias, passion or prejudice. Id. at 359.

The petitioner acknowledges that the general rule against inflammatory and abusive arguments by the state attorney is clear, that is, each case must be considered upon its own merits and with reference to the existing circumstances when the questionable statements were made. Darden v. State, 329 So.2d 287, 291 (Fla. 1976), cert. dismissed, 403 U.S. 704 (1977). However, the instant case does not involve an isolated appeal by the prosecutor for sympathy and revenge on behalf of the victim. See: Bush v. State, ___ So.2d ___, 9 FLW 503 (Fla. Dec. 7, 1984). In this case, the prosecutor repeatedly requested that the jury put themselves in the position of the victims. He went so far as to request the jury to "imagine what was going through their minds." (R. 1243).

These repeated references to the victims could effect no purpose other than to inflame the jury against the defendant and induce them to base their recommendation of punishment on irrelevant, unconstitutional and non-statutory circumstances

outside the scope of the evidence before the court. The mere application of instructions to the jurors to disregard these numerous improper remarks could not possibly eliminate the damage already done. Thus, the defendant was denied a fundamentally fair sentencing hearing, and the sentence of death must be vacated.

Additionally, the prosecutor erroneously invited the jurors to use the death penalty as some sort of solution to crime in the streets. He argued to the jury that "somebody, sometime, somewhere, has to say, 'No. Stop.' We've got to put a stop to it. That is why you are here." (R. 1247). This type of comment is clearly improper and had the effect of denying the defendant a fundamentally fair trial. Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983).

Admittedly, a strong appeal by a prosecutor to the jury to do its duty may sometimes by justified. Spencer v. State, 133 So.2d 729 (Fla. 1961). However, a prosecutor oversteps the bounds of propriety where, as here, he not only requests that the jury do their duty in rendering an advisory sentence of death, but argues that the defendant "deserves the ultimate penalty, and for that the people, the people demand his life." See: Carroll v. State, 140 Fla. 443, 191 So. 847 (Fla. 1939); Reed v. State, 333 So.2d 524 (Fla. 1DCA 1976).

It also goes without saying that it is improper for the state attorney to apply offensive epitaphs to a criminal defendant. Glassman v. State, 377 So.2d 208 (Fla. 3DCA 1979); Bullard v. State, 436 So.2d 962 (Fla. 3DCA 1983). The state attorney referred to the defendant as an "animal". (R. 1246). Trials are the last place to parade "punitive or vindictive exhibitions of temperament." Stewart v. State, 51 So.2d 494, 495 (Fla. 1951). To do so impinges upon the defendant's fundamental rights to a fair trial.

As a final point, the state attorney improperly sought to restrict the jury from feeling sympathetic towards the defendant.

The state attorney argued that the jury should "not be misled by [their] own personal feelings...." (R. 1247). Additionally, he stated that "if you think it [electrocution] is cruel, and if you think it is inhumane, think about the victims" to which counsel for the defendant objected. (R. 1245). It is axiomatic that nonstatutory mitigating circumstances are admissible, Jackson v. State, 438 So.2d 4 (Fla. 1983), and that jury sympathy can be a compelling circumstance. This argument by the state attorney had the effect of inflaming the jury impermissibly restricting consideration by the jury of sympathy as a mitigating factor. As this restriction served to deprive the defendant of a fundamentally fair sentencing hearing, this sentence of death must be vacated.

Taken as a whole, the multifarious errors committed by the state attorney during his argument at both the guilt and penalty phase of the trial were so pervasively improper as to deny the defendant his fundamental right to a fair trial. Trial counsel raised an explicit objection to at least two of the improper arguments. However, these improper arguments of the state attorney constituted fundamental error, which have merited reversal even in the absence of contemporaneous objection. Clark v. State, 363 So.2d 331 (Fla. 1978). As such, appellate counsel's failure to raise these issues on appeal denied petitioner the effective assistance of counsel and requires vacation of the sentence of death and remand for a new trial, or, in the alternative, a new sentencing hearing.

Moreover, appellate counsel failed to raise and argue trial counsel's timely objection to the state attorney's improper comments. Trial counsel, after one of the prosecuting attorney's most serious improper comments, one which combined prejudicial "golden rule", war on crime and anti-sympathy arguments, objected and moved for a side bar. The trial judge denied the motion. (R. 1245).

The general rule is well settled, to preserve improper

prosecutorial argument for appeal trial counsel must object and make a motion for mistrial no later than the conclusion of the prosecutor's closing argument. State v. Cumbie, 380 So.2d 1031 (Fla. 1980). The rationale for this rule is simple, the final decision as to whether to seek a mistrial is a matter of trial strategy, and must be left to the judgment of trial counsel. Clark v. State, 363 So.2d 331, 335 (Fla. 1978). By seeking a mistrial defense counsel calls the court's attention to the matter and provides the court with an opportunity to take appropriate action. State v. Jones, 204 So.2d 515, 518 (Fla. 1967). It is not, therefore, necessary that defense counsel use the term "motion for mistrial", all he must do is apprise the court of the matter and seek an opportunity to present argument thereon. See: Thomas v. State, 419 So.2d 634, 635 (Fla. 1982). If the trial court denies defense counsel such an opportunity the objection is preserved for appeal, since defense counsel must accede to the trial court's directions. Id. 635-36.

In the instant case trial counsel properly objected to the aforementioned improper argument. Trial counsel was then denied an opportunity to approach the bench. By so doing, the trial judge prohibited defense counsel from seeking curative instructions or arguing points in support of mistrial. See: Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). Having preserved the objection to these unquestionably improper and inflammatory comments, appellate counsel was derelict in failing to raise or argue this objection on appeal.

It is settled law that prosecutorial comments which are so abusive and inflammatory as to influence the jury to reach a more severe verdict of guilt than would have been otherwise done deprive the defendant of a fair trial. Darden v. State, 329 So.2d 287 (Fla. 1976); cert. den. 430 U.S. 704 (1977); Breedlove v. State, 413 So.2d 1 (Fla. 1982); cert. den. 459 U.S. 882 (1982). It goes without saying that advancing a "golden rule" argument the prosecutor violates a defendant's right to a

fair trial. Bullard v. State, 436 So.2d 962 (Fla. 3DCA 1983). It is also beyond question that prosecutorial comments to a jury asking them to assist in the "war against crime" by sending a message to criminals are grossly improper. Boatwright v. State, 452 So.2d 666, 1667 (Fla. 4DCA, 1984). The purpose of this type of comment is to divert the jury from the individual case and induce the jury to consider extraneous matters by inflaming their passions and prejudicies. Id. 667.

By injecting these highly prejudicial comments into the sentencing phase of the trial, the state attorney has invited vacation of the death sentence and resentencing unless it can be established, beyond a reasonable doubt, that the aforementioned misconduct did not contribute to the sentence imposed. Chapman v. California, 386 U.S. 18, 24 (1967); State v. Murray, 443 So.2d 955 (Fla. 1984). It cannot be so established. The jury's function in sentencing is to represent the judgment of the community. Odom v. State, 403 So.2d 936 (Fla. 1981). Its recommendation is, therefore, entitled to great weight. Webb v. State, 433 So.2d 496 (Fla. 1983). The effect of the prosecutor's misconduct was to impermissibly inject into the jury's determination the arbitrary factors of passion and prejudice. Hance v. Zant, 696 F.2d 940, 951 (11th Cir. 1983); cert. den. 103 S.Ct. 3547 (1983); See Trawick v. State, ___ F.L.W. ___ (Fla. May 16, 1985). This misconduct goes well beyond merely casting doubt on whether the jury's verdict was affected, in fact this misconduct constitutes fundamental error in that it denied the petitioner a fundamentally fair sentencing hearing. Tucker v. Zant, 724 F.2d 882, 890 (11th Cir. 1984); Tucker v. Francis, 723 F.2d 1504, 1508 (11th Cir. 1984), Brooks v. Francis, 716 F.2d 780, 789 (11th cir. 1983); Hance, 696 F.2d at 95.

Accordingly, appellate counsel's failure to raise this issue on appeal denied the petitioner the effective assistance of counsel and requires vacation of his sentence of death and

remand for a new sentencing hearing.

Conclusion

Obviously, this court cannot search the record on every appeal in a capital case in an effort to find error. It is the responsibility of effective appellate counsel to present to the Court all issues of merit. In this case, counsel failed to fulfill that responsibility. Where the points omitted are of indisputable merit, such as those set forth herein, and where a sentence of death has been imposed, the court should not hesitate to intervene.

What has occurred in the petitioner's case was, we submit, fundamental error at both the guilt and sentencing stage of the proceeding. The prosecutor's arguments to the jury were pervasively and unquestionably improper and this impropriety worked a substantial prejudice to the defendant.

Accordingly, the failure of appellate counsel to properly identify and argue these errors in the 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.

The petitioner therefore requests that this court issue its Writ of Habeas Corpus, directing that the petitioner receive a new trial or sentencing hearing or, in the alternative, that the court will have full briefing of the issues presented herein, and grant the petitioner belated appellate review from his conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ~~hand to~~ leaving a copy at Supreme Court Clerk's office, per request of MP Calvin Fox, Office of the Attorney General, Miami, Florida, this 21ST day ~~of~~ May, 1985.

ALTON G. PITTS