IN THE SUPREME COURT OF FLORIDA

Case No. _____

THOMAS DEWEY POPE,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State of
Florida,

Respondent.

ORIGINAL PETITION FOR
WRIT OF HABEAS CORPUS

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ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Thomas Dewey Pope, by his undersigned attorneys, and 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.

Following a trial ridden with defects of constitutional and fundamental proportion, petitioner was convicted and sentenced to die by the Circuit Court for Broward County. Petitioner's appellate counsel failed to raise any of these fundamental errors on petitioner's direct appeal to this Court. Accordingly, this Court affirmed the conviction and death sentence without the benefit or consideration of any argument as to these crucial errors. See Pope v. State, 441 So.2d 1073 (Fla. 1983). As a result of the ineffectiveness of his appellate counsel, petitioner is presently being held in the custody of respondent unlawfully and in violation of his fundamental constitutional rights. This Court's writ is therefore required.

In support of this petition, and 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 jurisdiction pursuant to Rule 9.030(a)(3), Florida Rules of Appellate Procedure, and Article V, §3(b)(9) of the Florida Constitution.

Petitioner was denied the effective assistance of appellate counsel in his direct appeal to this Court from the conviction and sentence of death. On that appeal, counsel failed to raise issues which, if raised and properly argued, would have required (1) the reversal of petitioner's conviction and death sentence, and (2) a new trial and sentencing hearing. Since petitioner's claim of ineffective assistance of counsel stems from acts or omissions before this Court, this Court has jurisdiction to entertain petitioner's habeas corpus petition. Arango v. State, 437 So.2d 1099, 1101 (Fla. 1983); Knight v. State, 394 So.2d 997, 999 (Fla. 1981).

II.

FACTS UPON WHICH PETITIONER RELIES

On March 25, 1981, petitioner was indicted for the murders of Caesar DiRusso, Albert Doranz, and Kristine Walters.

[R. 1157].[1/] Petitioner's trial began on February 16, 1982, with Broward County Circuit Judge Arthur Franza presiding. Petitioner was represented at trial by Scott Eber, a specially-appointed public defender, who had been substituted into the case in October 1981, just a few months before trial. [R. 1208]. For over a week, the jury heard testimony which implicated petitioner in the drug-related deaths of the two male victims and the subsequent death of the girlfriend of one of the victims. [R. 241-941].

On February 25, 1982, the jury returned a verdict of guilty of first-degree murder as to all three counts. [R. 1093; 1095-96]. Immediately after the Circuit Court convicted petitioner, the jury reconvened to render its advisory sentence. [R. 1096]. The prosecutor reviewed the specified aggravating factors and argued their applicability to each of the three counts. [R. 1102-1111]. In so doing, the prosecutor weighed the factors among the three victims and repeatedly argued that they applied most heavily in the case of the female victim. [See, e.g. R. 1108]. The jury recommended that petitioner receive the life sentence for the murders of the two male victims

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1/ The record citations in this petition are to the record on petitioner's direct appeal. All emphasis in this petition is supplied unless otherwise noted.

but recommended the death penalty by a majority of nine for the death of the female victim. [R. 1128].

On April 7, 1982, the court followed the jury's recommendation and imposed a sentence of life imprisonment on the first two counts and a sentence of death on the remaining count. [R. 1146; 1153-54]. The court based its sentence, at least in part, on the pre-sentencing investigation report which neither petitioner nor his counsel had seen until three hours before sentencing. [R. 1132-33].

Following sentencing, new counsel, Michael Gelety, was appointed to represent petitioner on his direct appeal to this Court. On that appeal, this Court affirmed the convictions and sentence of death. Pope v. State, 441 So.2d 1073 (Fla. 1983). Although a motion for rehearing was made and denied, id., appellate counsel did not seek certiorari review in the United States Supreme Court. No further appeals have been taken or are pending on behalf of petitioner.[2/]

2/ On September 17, 1984, counsel filed a Motion for New Trial under Fla. R. Crim. P. 3.850 in the circuit court. That motion is presently pending.

III.

NATURE OF RELIEF SOUGHT

In light of the dispositive points regarding fundamental constitutional and statutory violations which are set forth herein, petitioner seeks an order of this Court vacating the judgment and remanding the case for a new trial. See Davis v. Alaska, 415 U.S. 308 (1974); Witherspoon v. Illinois, 391 U.S. 510 (1968); Dumas v. State, 350 So.2d 464 (Fla. 1977).

Alternatively, since the sentencing phase of trial was constitutionally defective, petitioner seeks an order of this Court reversing the sentence of death now imposed upon him and remanding the case to the trial court for a new jury trial as to sentencing. Gardner v. Florida, 430 U.S. 349 (1977).

Finally, and again alternatively, petitioner seeks an order of this Court granting him belated appellate review from the sentence of death and permitting him the opportunity to fully brief the issues presented herein. This relief is appropriate under Ross v. State, 287 So.2d 372 (Fla. 2d DCA 1973).

IV.

BASES FOR THE WRIT

The right to a full and meaningful direct appeal, and to the effective assistance of counsel for purposes of that appeal, is fully guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Articles I and V of the Florida Constitution, and Florida statutory law. See Evitts v. Lucey, ___ U.S. ___, 105 S.Ct. 830 (1985); Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973); Fla. Const. Art. V., § 3(b)(1); Fla. Stat. § 921.1414 (1983). The failure of petitioner's appellate counsel to raise the critical issues now presented in this petition denied petitioner those constitutional rights.

In Knight v. State, 394 So.2d 997 (Fla. 1981), this Court set forth the relevant test to apply to a claim of ineffective assistance of appellate counsel:

1) Petitioner must show that a specific omission or overt act of counsel "was a substantial and serious deficiency measurably below that of competent counsel."[3/]

3/ 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." Id. at 1001.

2) 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.

When the Knight factors are applied here, it becomes clear that petitioner was denied the effective assistance of appellate counsel. Egregious errors occurred at petitioner's trial which deprived him of his constitutional right to a fair trial by an impartial jury and which likely affected the outcome of the trial. None of these errors were brought to this Court's attention by petitioner's appellate counsel on petitioner's direct appeal.

Florida law has consistently recognized that the writ must issue, and the Court must make a new review of the issues raised, where the right to appeal has been thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appellate counsel. See, e.g., McCrae v. Wainwright, 439 So.2d 768 (Fla. 1983); State v. Wooden, 246 So.2d 755 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969). Accordingly, this Court can and should consider, on the merits, the issues which should have been raised by petitioner's counsel earlier on appeal.

V.

ARGUMENT

POINT ONE

Both the judge and the prosecutor made prejudicial remarks to the jury which, taken as a whole, deprived the petitioner of a fair and impartial jury consideration of his guilt or innocence.

Every defendant in a criminal case is guaranteed the right to be tried by a fair and impartial jury of his peers according to the law as determined by the trial court and the evidence as presented in court. This right is especially critical in a death case. The guarantee that the jury will consider only the law as instructed and the evidence as presented at trial is precisely what distinguishes our system of justice from a lynch mob.

Petitioner was deprived of this fundamental right as a result of repeated improper comments made by the judge and the prosecutor throughout the trial. In particular, the jury could easily have concluded from the court's comments that it was free to disregard the legal instructions given to it and to base its verdict on an instinctive feeling of "right and wrong" rather than on the hard evidence before it. At the very least, the comments which were made throughout trial created

the serious potential of prejudicing the jury against petitioner, who should have instead been afforded the constitutional right to be considered innocent until proven by the evidence to be guilty.

A. Improper comments by the judge

The prejudicial comments made by the trial court during petitioner's trial fall roughly into two basic categories: a) those which undermined in the jury's eyes the importance of the instructions of law to be given by the court and which encouraged the jury to return a verdict based on matters outside that law and the evidence as presented; and b) those which insinuated against petitioner and his counsel and, directly or indirectly, influenced the jury to find petitioner guilty and sentence him to death. While these comments were made by the court at a variety of stages of trial, each of the comments should be considered to have the same effect as a formal instruction by the court. See, e.g., Raulerson v. State, 102 So.2d 281, 286 (Fla. 1958).

The law has always held a magnifying glass to the comments of the presiding judge. The reason is obvious: the judge occupies such a "dominant position" in the eyes of the jury "that his remarks or comments, especially as they relate

to the proceedings before him, overshadow those of the litigants, witnesses and other court officers." Robinson v. State, 161 So.2d 578, 579 (Fla. 3d DCA 1964). See also Beckham v. State, 209 So.2d 687, 688 (Fla. 2d DCA 1968) (judge's "exalted position" encourages jury to give his comments more emphasis).

As a result of that "exalted position," the law places a very low threshold on the type of judicial comment which may be found to deprive a defendant of his fundamental right to trial by an impartial jury. Any comment which "is capable, directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view [the judge] takes of the case, or that intimates his opinion as to the weight, character, or credibility of any evidence adduced . . . deprives the accused of his right to trial by jury, and is erroneous." Lester v. State, 37 Fla. 382, 20 So. 232, 234 (1896). See also Diecidue v. State, 131 So.2d 7, 12 (Fla. 1961); Gans v. State, 134 So.2d 257 (Fla. 3d DCA 1961).

In short, if there is even a lingering doubt that an accused may have been prejudiced by a remark of the trial judge, a new trial must be granted. Diecidue, supra at 12. As the court stated in Robinson, supra:

> We do not say that the trial judge's comment in this case amounted to any preference, or even an indication of such, but it could have been so interpreted, and

> on that possibility we must reverse for a new trial. Where there is simply a doubt, as here, that an accused has been prejudiced by a remark of the court, we must grant him a new trial.

161 So.2d at 579.

Such a possibility of prejudice clearly existed here. Indeed, when the comments of the trial court are considered -- especially in their cumulative effect upon the jury -- it becomes apparent that petitioner's right to a fair trial was dramatically impaired.

1). Comments which undermined the importance of the instructions as to the law and encouraged the jury to return a verdict based on matters outside the record.

From the very outset of the trial, the trial court denigrated the importance of the instructions setting forth the legal framework within which the jury was required to consider the evidence. For instance, as early as voir dire, the trial court declared that:

> We force feed you some law which takes about forty-five minutes and then we ask you to come up and make some decision and after you realize how easy it is to determine the credibility of witnesses and how easy to understand the law, although it may be legal jargon when you first hear it, it is because you cut away all that shaft and you get right to the bottom line and you get there with your common sense. You all know what is right and what is wrong and you would be

surprised, you hit the nail 99.9 times right on the head, you do, and it is surprising how good you people of Broward County are at it. [R. 16-17].

Certainly the trial judge's statement that "you cut away all that shaft" -- referring to the instructions on the law that he would be "forced" to give the jury -- could have easily been considered by the jury to be a direct invitation to disregard those instructions.

Incredibly, the trial court even apologized during the voir dire for having to ask the jury if it could render a verdict based on the evidence and the law:

THE COURT: Can you render a fair and impartial verdict based on the evidence in this cause and the law as I instruct you the law is?

MR. BOOTH: Yes.

THE COURT: I'm sorry, I have to ask you that question, but it is a legal mandate. [R. 180].

The clear implication of that apology was that the trial court did not think it important whether or not the jury could render its verdict on the basis of the law and the evidence.

When the time came to give the jury instructions as to the law to be applied to the evidence before it, the trial

court once again conveyed the clear impression to the jury that it was free to disregard those instructions:

> (As to jury instructions): Now, you may think some of this does not apply, and it may not. However, by law, I am charged to read it to you. [R. 1053].

Indeed, the judge even implied to the jury that some of the law's requirements did not make sense. For instance, in defining "justifiable force," the court commented that "the law says it twice. I don't know why." [R. 1057].

At the same time that the Court was deprecating the importance of the legal instructions given to the jury, it was also encouraging the jury to enter a verdict based, not upon the evidence and the law, but on its collective conscience and common sense. Expressing his conviction that the jury would intuitively know "right" from "wrong" [R. 17], the trial judge advised the jury: "[T]his week you are the conscience of the county. You represent a million, one hundred thousand people out there." [R. 15].

The prejudice resulting from the court's direction to the jury to decide the case based on a common-sense notion of "right or wrong" and to act as the "conscience of the county" in reaching its verdict is patent. The effect on the jury was exacerbated by the fact that it had already been told that it

was free to "cut away all that shaft" - the "shaft" being the "legal jargon" and "law" that the court was "forced to feed" the jury - and instead "get right to the bottom line" by using their "common sense."[4/] Those comments, taken in their entirety, stripped petitioner of a fundamental protection and right to a fair trial based upon the evidence and the law. Polk v. State, 179 So.2d 236 (Fla. 2d DCA 1965).

Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967), is directly on point. There, the defendant was indicted for first-degree murder. At trial the judge commented to the jury in much the same manner as the trial court did here:

> That is, that you presume the defendant to be innocent, and you are going to seek the truth--verdict--that is what verdict means, the truth; that you are going to seek the verdict based on the evidence that comes before you in the courtroom, the testimony and any other evidence that might be admitted by the Court . . . . [A]s you sit there right now, you have only one desire, and that is to seek the truth based on the evidence, and if at any time any one of you has a feeling that you cannot do this, you have an obligation to make that known to the Court.

4/ The harmful effect of the court's remarks was accentuated and reinforced throughout trial by the prosecutor's repeated requests to the jury to use their "common sense." See R. 76, 90, 97, 99, 108, 120, 130, 158, 175-56, 961.

After hearing this and similar remarks, the jury returned a verdict of guilty.

The Second District Court of Appeals reversed and remanded for a new trial, relying in part on the error of that judicial comment. As to that comment, the court held:

> Jurors are required to consider all the evidence in a case and from it, and from the law as charged them by the Court, arrive at a verdict. A verdict is the determination of the jurors after applying their findings of fact to the law given in charge by the court. The latter statement of the court lessens the importance of the instructions of the court in the jury deliberations.

The court went on to state:

> Furthermore, such a limited explanation of the verdict could result in a juror voting to convict a defendant because he feels that the defendant did, in truth, commit the offense, even though his guilt may not be proven to the exclusion of every reasonable doubt.

Id. at 462-463.

Telling the jurors in Gibbs to seek "the truth" is certainly less damaging than the judge telling the jurors here to "cut away the shaft" of the law and use their "conscience"

and their "common sense" to arrive at the correct verdict.[5/] Moreover, unlike Gibbs, here the trial court did not even temper his admonition to the jury to act as the county's "conscience" with a contemporaneous reminder that the verdict was to be based upon the evidence before the jury. Quite to the contrary, the court only compounded the effect of the prejudicial error by declaring to the jury that "no one . . . has a right to violate the rules we all share," [R. 1075], clearly implying that common sense showed petitioner was one who had "violated the rules."

The point is -- the jury is not to decide whether petitioner lives or dies on the basis of their private and individual notions of right or wrong or on the basis of what the mass of people in this county believe is right or wrong. They are to arrive at their verdict on the basis of the evidence and the law -- that and nothing else. Any comment by the court which suggests the contrary is fundamental error.

For instance, in Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984), the court reversed a conviction on the

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5/ In addition, here the prosecutor did what the court condemned in Gibbs: he encouraged the jury to simply reach "the truth." For instance, in voir dire, the prosecutor asked one juror:

> Do you understand that a criminal case is just designed to try and determine and unveil the truth? [R. 130].

basis of improper comment by the prosecutor. In closing, the prosecutor argued:

> I'm asking you to do your job today, here in this courtroom and send these folks a message we're not gonna put up with this kind of stuff . . . This is our country, this is our nation, it's time to send 'em - send criminals a message we're not gonna tolerate it any more . . . .

Id. at 667. The court held this statement to be improper since it "diverts the jury's attention from the task at hand and worse, prompts the jury to consider matters extraneous to the evidence." Id.

Other Florida decisions have held that this type of comment requires reversal and a new trial. See Hines v. State, 425 So.2d 589, 591 (Fla. 3d DCA 1982) ("call to the jury to not only determine the guilt or innocence of the accused based on the evidence presented but to send a message to the criminal community . . . is so egregious that reversal is compelled"); Chavez v. State, 215 So.2d 750, 750 (Fla. 2d DCA 1968) (remark centering around "this is your community" deprived accused of fundamental right to a fair trial).

In a very recent decision, the Fifth Circuit Court of Appeals likewise held that such an emphasis on the jury's representation of the community and its role as "the conscience of the community" impermissibly distracted the jury from its

duty to decide the case solely on the evidence and law.[6/] In Westbrook v. General Tire and Rubber Co., 754 F.2d 1233 (5th Cir. 1985), a products liability action against a tire manufacturer, the plaintiff's attorney told the jury in closing: "You're going to be the conscience of the community with this verdict." Id. at 1238. The Fifth Circuit reversed the jury award of damages for the plaintiff, finding that it resulted from this "prejudicial influence of improper argument." Id. at 1241. The court specifically condemned the "conscience of the community" argument because it "is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial." Id. at 1238.

Obviously, the impact of such a comment is even more prejudicial in a capital case such as this where a man is being

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6/ In United States v. Kopituk, 690 F.2d 1289, 1342-43 (11th Cir. 1982), cert. denied, 461 U.S. 928 (1983), the court stated that appeals to the jury to act as the conscience of the community were impermissible if designed to inflame the jury. That strict standard does not appear to be applied in Florida. In any event, the judge's admonitions here that "no one has the right to violate the law," and his appeal to the jury to act as the "conscience of the community" and to use its "common sense" to determine "what is right and what is wrong" -- coupled with the continuing invitation to disregard the law and the evidence presented at trial -- could only have inflamed the jury in considering petitioner's guilt or innocence of these three murders.

tried for the brutal deaths of three persons. Urging jurors to convict a criminal defendant based on their "conscience" may persuade the jurors to believe that, by convicting the defendant, they will protect community values, preserve civil order, or deter future law-breaking. In short, they may conclude that they will be assisting in the solution of pressing social problems. Manifestly, however, the amelioration of society's woes is far too heavy a burden for the petitioner to bear.[7/]

In this case, the court's comments are all the more prejudicial in view of the fact that, throughout the trial, the trial judge made comments which, as shown in the next section, tended to indicate that he personally believed that petitioner was guilty. Taken as a whole, the court's comments violated the strict neutrality and objectivity to which petitioner was constitutionally entitled, and instead intimated the court's belief that it would be easy for the jury to return a verdict of guilty.

7/ See e.g., Brown v. Estelle, 468 F. Supp. 42, 46 (N.D. Tex. 1978), aff'd, 591 F.2d 1207 (5th Cir. 1979) (prosecutor's argument to jury that "you have a right to voice your opinion in this community -- that's why you're here today" was reversible error.)

2). Comments which tended to indicate the judge's view as to the guilt of the accused or otherwise insinuated against the petitioner and/or his counsel.

One of the very first things the court told the jury was that "[i]t is easy for us as professionals to make decisions in this kind of case . . . but the Constitution says that if a person wants a jury of his peers, he has that right by the Constitution . . . ." [R. 16]. The clear implication of this remark was that it would be easy for the judge to make a decision as to petitioner's guilt or innocence.[8/] It also suggested that petitioner's demand for a jury trial was a deliberate effort to avoid having his guilt or innocence determined by a "professional" such as the trial judge.

The trial court also declared that the jurors know "what is right and what is wrong," which could only give the jury the impression that something wrong had occurred here:

> This week you are the conscience of the County . . . You all know what is right and what is wrong . . . . [R. 15, 17].

8/ Indeed, the comment goes well beyond implying just that the judge could easily make a decision here. It also implied that other "professionals," i.e., the police officers who arrested the petitioner and the prosecuting attorney who brought his case to trial, had already rendered their professional opinion against petitioner. See infra pp. 34-36.

At another point in the trial, the court emphasized that Americans "have agreed to a Constitution and to live by the law. No one of us has a right to violate the rules we all share." [R. 1075].

Such comments pervaded petitioner's trial for the gruesome killings of three persons and destroyed the impartial atmosphere and presumption of innocence to which petitioner was entitled. Rather, with such comments, the judge closed his own case against petitioner -- petitioner was one of those who had "violate[d] the rules."

In Hubbard v. State, 37 Fla. 156, 20 So. 235 (Fla. 1896), this Court carved in stone the fundamental principle of judicial neutrality:

> The utmost care should always be used by the trial judge, especially in cases where human life is involved, not to let any expression fall, either by questions or otherwise, that is capable of being interpreted by the jury as an index of what he thinks of the prisoner, his counsel, or his case.

Id. at 236.

Since that decision, this Court has time and again reversed convictions where absolute neutrality of the judge was found lacking. In Williams v. State, 143 So.2d 484 (Fla.

1962), for example, this Court eloquently explained the reason for demanding nothing less than strict neutrality of the trial judge:

> We cannonize the courthouse as the temple of justice. [I]t is the only place we know where the rich and poor, the good and the vicious, the rake and the rascal . . . may enter its portal with the assurance that they may controvert their differences in calm and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner. . . . The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or break under stress. . . .[H]e should not lean to the prosecution or defense lest it appear that his neutrality is departing from center. The judge's neutrality should be such that even the defendant will feel that his trial was fair. In the trial of a capital case the judge's attitude or demeanor may speak louder than his words; in fact it may speak so loud that the jury cannot hear what he says.

Id. at 488.

Here, the trial judge's comments spoke loud and clear to the jury, particularly in view of his opening announcement that this was an "easy" type of case for a "professional" such as the judge to decide. Certainly his comments could have led the jury to believe that the judge considered petitioner to be guilty -- to be one of those who "violate[d] the rules we all share." This was not a slight departure from the center of neutrality. It constituted the lack of any neutrality at all.

In Seward v. State, 59 So.2d 529 (Fla. 1952), this Court held that it was reversible error for the trial judge to comment at trial that "You don't have the right to kill people for narcotic addiction," since the comment implied that the defendant had done the killing. Id. at 531. So too, here, it was prejudicial for the trial judge to imply that petitioner was one who had "violated the rules."

The resulting prejudice was exacerbated by the trial judge's repeated injection of himself into the trial in such a manner as to unnecessarily disparage defense counsel and his case. The court continually interrupted defense counsel's voir dire, repeatedly implying that defense counsel was asking improper or inept questions, while it seldom did so with respect to any questioning by the prosecutor:

> Scott, let me explain. I don't think she understands. [R. 133].
>
> Why don't you rephrase the question. . . . [R. 135].
>
> Mr. Eber, if you phrase your question like this . . . I think you will get probably a better answer. [R. 137].
>
> That word insist gets you in trouble. Why don't we rephrase it? [R. 164].
>
> Rather than have Mr. Eber ask you the question, I will ask you. [R. 149].
>
> Counsel, it is best to proceed forward in these kind of situations. So why don't you? [R. 380].

The court not only implied that defense counsel's questioning was inept, but it also exhibited an attitude of exasperation in response to defense counsel's requests for time to prepare for his examination:

> Allright Ladies and Gentlemen, the defense counsel would rather not begin cross examination of the witness; and to extend him every possible courtesy and due process, I'm going to accede to that request. In the interim, however, we are not going to be wasting time, because if we did, I wouldn't allow it.

[R. 642]. The court's grudging acquiescence to petitioner's request in order to "extend him every possible courtesy and due process" could only reflect detrimentally upon petitioner in the jury's eyes.

The court's repeated injections could only have induced the jury to conclude that the prosecutor was "good" and the petitioner "bad." This has been held to be so improper as to deprive the defendant of his right to a fair trial. See, e.g., Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980) (defense counsel's conduct should not be visited upon the defendant to the extent that his fundamental right to a fair trial is abridged); Keane v. State, 357 So.2d 457 (Fla. 4th DCA 1978) (numerous gratuitous comments and interjections by the trial judge during the course of trial deprived defendant of a fair trial).

In Pollard v. State, 444 So.2d 561 (Fla. 2d DCA 1984), the trial court continually interrupted appellant's voir dire, but never did so during the state's voir dire. The appellate court found reversible error, holding as follows:

> The appellant contends that the trial court thwarted his ability to conduct the varied examination that was essential to select a fair and impartial jury. These cited instances and others throughout the record disclose that the trial judge interjected himself too far into the case with a result '. . . so prejudicial to the defendant as to deprive him of a fair and impartial jury consideration of his guilt or innocence.' Rockett v. State, 262 So.2d 242, 243 (Fla. 2d DCA 1972).

Id. at 562.

By encouraging the jury -- implicitly or explicitly -- to act as the "county's conscience," to decide the case on private notions of right and wrong instead of strictly on the evidence presented at trial and the law as instructed, by suggesting -- through innuendo or otherwise -- that petitioner was guilty as charged, and by interjecting himself into petitioner's case, the trial judge deprived petitioner of a trial by a fair and impartial jury.

B. Improper comments by the prosecutor

The judge was not the only person whose comments improperly permeated the trial. The prosecutor made an

overwhelming number of prejudicial comments which were especially detrimental to petitioner: 1) those emphasizing petitioner's expressed preference for the death penalty even though petitioner had voiced that preference out of the jury's presence; 2) comments upon petitioner's allegedly "carefree" attitude as he listened to certain evidence against him; 3) references to the evidence upon which the grand jury returned its indictment; and 4) expressions of the prosecutor's personal belief in the case and in the credibility of the state's star witness.

Taken cumulatively, and especially in conjunction with the trial court's comments, the prosecutor's remarks blatantly violated petitioner's right to a fair and impartial determination by the jury on the basis of its evaluation of the evidence before it.

1). Reference to petitioner's expressed preference for the death penalty.

After the verdicts were read and prior to sentencing, the court asked petitioner if he had anything he wanted to say. Petitioner replied:

> "I know I'm not trying to take your job, that is not what I want and is not necessarily what you are going to give me; but I would rather have the death sentence than the twenty-five years in prison." [R. 1098-99].

As the record makes abundantly clear, this exchange occurred outside the presence of the jury and was not sworn evidence. [R. 1098].

Nevertheless, during the prosecutor's argument to the jury in the sentencing phase, the prosecutor gratuitously advised the jury that "Mr. Pope has announced that he would rather receive a death penalty than life imprisonment." [R. 1110-1111]. Although he then went on to say that the jury should not base its recommendations on that fact, the very fact that the prosecutor placed petitioner's expressed preference before the jury created the real danger that it would influence the jury's decision-making process. [R. 1110-1111]. Manifestly, it is easier for a jury to recommend death for someone who has expressed a preference for death than for someone who steadfastly wants to live.

There can be no question but that the prosecutor's argument to the jury on the basis of petitioner's sworn statement outside the jury's presence was improper. It is fundamental that the prosecutor may only argue to the jury as to the evidence presented, during both the guilt phase and the penalty phase. See, e.g., Meade v. State, 431 So.2d 1031, 1032 (Fla. 4th DCA 1983). Petitioner's expressed preference for the death penalty was not evidence proved at trial, and it was improperly brought to the attention of the jury.

In Pennington v. State, 345 S.W.2d 527 (Tex. Crim. App. 1961), a closing argument that went beyond the record was held to be reversible error. There the prosecutor argued to the jury that "[t]he people of Nueces County expect you to put this man away." Id. at 528. After conviction, the defendant appealed on the ground that such argument "was implying public opinion or community wishes" and "was injecting a new and harmful fact" into the jury's consideration." Id. The appellate court reversed, stating:

> It was certainly proper for counsel to insist upon the conviction of appellant on the ground that the evidence, in his judgment, authorized it; but, when he departed from the record and insisted that the people of [the county] desired such conviction he was placing before the jury a fact not in evidence, one which, if true, ought not to be considered by the jury in determining the guilt of a party on trial.

Id., quoting Woolly v. State, 93 Tex. Cr. R. 384, 247 S.W. 865 (Tex. Crim. App. 1923).

Likewise, in Peysen v. State, 124 S.W.2d 137 (Texas Crim. App. 1939), the prosecutor made the following argument to the jury:

> You said you had no scruples about inflicting the death penalty in a proper case and I tell you the people of Matagorda and Jackson Counties are expecting you to do your duty

> in this case and assess the defendant's punishment at death.

Id. at 138. The appellate court reversed, stating:

> The jury should decide cases, not upon what the public expected them to do, but solely upon the weight and credibility of the evidence adduced upon the trial. . . . The argument complained of was a departure from the record and an unsworn statement upon the part of the prosecuting attorney of what the people of Jackson and Matagorda Counties expected. It placed before the jury a fact not in evidence.

Id. at 138-39.

If it is reversible error to inform the jury that an amorphous mass of unnamed citizens desire the death penalty, how much more prejudicial it is to inform the jury that the accused himself desires death.

Petitioner had every right to inform the judge of his preference for death. And he had every right to refrain from voicing such a preference before the jury. The judge listened and watched as petitioner uttered his statement and, as an experienced jurist, could assess the words' import -- those stemming from a firm conviction or perhaps merely from a man full of despair. The judge also heard and could evaluate the petitioner's comment in its proper context: petitioner's statement was made in conjunction with his expressed recognition

that it was the trial court's job to independently make that determination.

On the other hand, the jury heard those words out of the context in which they were made; in addition, it heard the statement only from the mouth of a successful prosecutor and advocate, not from petitioner himself. It could not, therefore, evaluate the proper import of the words or assess the petitioner's demeanor at the time the words were spoken.

Fundamentally, the petitioner deserves to have another jury -- one which has not been told of his alleged preference for death -- make its recommendation as to life or death.[9/]

2). Reference to petitioner's demeanor while sitting at counsel table.

In his closing argument, the prosecutor made the following statement regarding petitioner's alleged conduct while listening to the testimony of the state's star witness against him:

9/ Because this fundamental error occurred at the sentencing phase, a new sentencing hearing before a newly impaneled jury should be ordered. See, e.g., Maggard v. State, 399 So.2d 973, 978 (Fla. 1981).

> He talks about Susan Eckerd's grin. Well, you know, she says she was nervous; but, you know, I saw her grin, too. I thought that was unusual until I looked over here. I don't know if all of you saw it; but I saw it, that he was grinning from ear to ear. This is supposed to be a wrongful accused man, grinning from ear to ear? I don't know why the man grins from ear to ear. [R. 1049].

With this statement, the prosecutor made petitioner out, at best, to be without remorse over the brutal murders he allegedly committed or, at worst, to be a despicable villain receiving sadistic pleasure from hearing the evidence concerning those heinous crimes.

The statement itself shows why it was error: as the prosecutor conceded, the jury may not have itself observed petitioner's alleged demeanor at the time in question. Accordingly, this was not argument by the prosecutor regarding evidence received from the witness stand but was, rather, improper testimony by the prosecutor as to extrinsic matters which the prosecutor -- himself a partisan advocate -- perceived. It is clear that such comments upon the defendant's behavior off the witness stand are not relevant and constitute reversible error. United States v. Pearson, 748 F.2d 787 (11th Cir. 1984); United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973).

In Pearson, the prosecutor referred in her closing argument to the defendant's courtroom demeanor:

> Does it sound to you like he was afraid? You saw him sitting there in the trial. Did you see his leg going up and down? He is nervous . . . You saw how nervous he was sitting there. Do you think he is afraid?

746 F.2d at 796. The Eleventh Circuit found this argument to be error because "the defendant's behavior off the witness stand in this instance was not evidence subject to comment." Id. The court went on to emphasize that:

> [T]he 'sole purpose of closing argument is to assist the jury in analyzing, evaluating, and applying the evidence' . . . . Furthermore, it is the well-settled law of this circuit that 'a prosecutor may not seek to obtain a conviction by going beyond the evidence before the jury' . . . .

Id.

Likewise, in Wright, the court found the prosecutor's reference to the defendant's courtroom demeanor improper, holding that defendant's "courtroom behavior off the witness stand is [not] in any sense legally relevant to the question of his guilt or innocence of the crime charged." 489 F.2d at 1186.

In this case, the fact that petitioner may have been "grinning" while listening to the State's star witness was not evidence and had absolutely nothing to do with whether he was guilty of the crimes as charged. For the prosecutor to urge otherwise to the jury was completely improper. Indeed, this

Court has just recently reaffirmed the fundamental principle that the jury must decide the case on the evidence -- not on emotion. In Florida Patient's Compensation Fund v. Stetina, No. 64,237 (Fla. S.Ct. May 16, 1985), this Court stated:

> A juror is charged with the duty to weigh evidence and to find fact. The jury system should not function on emotion, but on logic. The introduction of this highly emotional, irrelevant document must have colored the jury's approach to the evidence. As such the admission of the document cannot have been harmmless error.

Here, the harmful effect of the prosecutor's emphasis upon petitioner's purportedly light-hearted demeanor at trial was compounded by another highly prejudicial remark made by the prosecutor in his sentencing argument when, in referring to the petitioner, he stated:

> There is no remorse. You haven't seen a grain of remorse. If there is ever going to be a tear in Tom Pope's eye, it is going to be for himself. [R. 1110].

Whether or not petitioner felt remorse for the victims or instead - as speculated by the prosecutor - only had tears for himself, is patently not a matter of evidence. Rather it is strictly an appeal to the jury's emotion.

The prosecutor's arguments are particularly prejudicial when considered in conjunction with this Court's holding on

appeal that it was improper for the trial court to consider petitioner's alleged lack of remorse in sentencing. Pope, 441 So.2d at 1078. Had this Court been advised of the prosecutor's comments regarding petitioner's light-hearted demeanor while listening to the testimony and his alleged lack of remorse as perceived by the prosecutor without the benefit of any evidence on the question one way or another, it is respectfully submitted this Court would have found reversible error resulting from the cumulative effect of those comments and the improper consideration of lack of remorse as an "aggravating factor" requiring death.

At the very least, those comments regarding petitioner's alleged laughter over his crimes and lack of remorse became prejudicial when coupled with all of the other judicial and prosecutorial comments set forth in this petition but not on the original appeal. The inevitable result of those comments was to prevent the impartial trial atmosphere to which petitioner was constitutionally entitled.

3). Reference to the strength of evidence presented to the grand jury.

In his closing, the prosecutor made the following argument concerning the testimony of the state's "star" witness:

> She answered the questions; but I have not mentioned her much because do we need Susan Eckerd's testimony in this case? You know, the grand jury didn't -- he was indicted on March 25th. [R. 973].

This argument to the jury was clearly prejudicial. First, in arguing the amount of evidence considered by the grand jury in returning the indictment against petitioner, the prosecutor put before the jury a matter not in evidence at trial. See, e.g., Florida Patient's Compensation Fund, supra.

Second, it implied to the jury that a higher entity -- the grand jury -- had already made the correct determination regarding the defendant's guilt or innocence, even without the benefit of the testimony of the state's primary witness at this trial. The prejudicial effect of the prosecutor's statements was all the more weighty in view of the court's previous pronouncement to the jury that the grand jury is "a pretty good court," and that it was easy for "professionals" to decide a case such as this. [R. 45].

The Eleventh Circuit found a similiar statement to be improper in Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984). There, the prosecutor stated to the jury:

> I've been here a number of years in the District Attorney's Office and I've tried a number of cases, many cases as a matter

> of fact, and the death penalty is seldom requested in Columbus, it's very infrequently requested. And since I've been here, it's been requested as a matter of fact, in the five years I've been here, something less than a dozen times. It's not very often that we come in here and ask you to bring in a verdict of a death sentence on an individual.

Id. at 889. The court found such argument objectionable because its effect is "to assure the jurors that someone with greater experience has already made the decision that the law imposes on them." Id. As the court put it, "The statement invites the jury to rely on the prosecutor's office's conclusion that the defendant is deserving of death rather than to make its own evaluation of the enormity of the defendant's crime." Id.

Numerous Florida decisions have held statements such as this to be reversible error. For instance, in Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), the prosecutor stated:

> Do you think they would bring this to you and have the State spend its time and money if there wasn't evidence that they wanted you to consider? So, there's common sense. Common sense has to be used here.

Id. at 1090. The court found this comment and others to constitute fundamental error because the comments "impermissibly suggest that the State of Florida feels that appellant was guilty and would not have wasted time and money prosecuting the case if she was not guilty." Id. See also Pait v. State, 112 So.2d

380 (Fla. 1959) (it was error to advise jury of the collective judgment of the State Attorney's staff regarding defendant's guilt or innocence); Price v. State, 267 So.2d 39 (Fla. 4th DCA 1972) (prosecutor's statement that the state had no reason to prosecute an innocent man deprived defendant of right to fair trial).

It was the jury's duty to determine petitioner's guilt or innocence based on the evidence presented at trial and the law as instructed, not on the fact that the grand jury had concluded he should be indicted based on even lesser evidence than this jury had before it. The weight of the evidence before the grand jury was neither relevant nor even evidence in the case, and the prosecutor's argument to the jury on that basis was prejudicial to petitioner's right to a trial based on the evidence before the jury.

4). Expression of the prosecutor's personal belief in the case and his vouching for the credibility of the state's star witness.

In his closing arguments to the jury in both the guilt and the sentencing phases, the prosecutor repeatedly affirmed his personal belief in the guilt of petitioner and his personal conviction that petitioner deserved the ultimate punishment of death:

I believed in the case I presented. [R. 1110].

I certainly believe that you have reached the correct verdict . . . There is not any doubt in my own mind that your verdicts were the correct ones. [R. 1103].

[T]hat aggravating circumstance I guarantee you, does apply to the murder of Christine Walters. [R. 1106].

I guarantee you that that death of Christine Walters was not done in any pretense or any justification. It was cold and calculated. Her death was atrocious and cruel. There is no remorse. You haven't seen a grain of remorse. If there is ever going to be a tear in Tom Pope's eye, it is going to be for himself. [R. 1110].

. . . I'm certainly familiar with the evidence over the last year and certainly familiar with Miss Susan Eckerd. I have met her on more than one occasion than when she was on the stand. [R. 1109].

With such assertions, the prosecutor undeniably committed two egregious errors: (1) he improperly injected into the case his personal belief of petitioner's guilt and the need for the death penalty; and (2) he improperly vouched for the credibility of the state's witnesses and evidence. Both actions constitute fundamental error requiring a new trial.

First, the prosecutor's own belief in his case has no place in a criminal trial. The United States Supreme Court just recently made this very clear. In United States v. Young, 53 U.S.L.W. 4159 (February 20, 1985), the Court held that

comments made by the prosecutor reflecting his personal view as to the weight of the evidence and the guilt of the accused were highly improper:

> Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly . . . the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that
>
> > "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."

Id. at 4161.[10/]

To the same effect is Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976), wherein the prosecutor "injected his personal belief into his argument" by stating:

> All that the state asks for in this case is fairness. The state doesn't prosecute someone because of their religion or their race or their nationality. We prosecute them because we believe they are guilty of crimes.

10/ In Young, the Court held that the improper comments were not fundamental error because they were, in essence, "invited" by remarks made by defense counsel. As the record here makes absolutely clear, none of the prosecutor's comments can be said to have been "invited" by defense counsel.

Id. at 525-26. The court found that this remark, among others, was so prejudicial as to deprive the defendant of his fundamental right to a fair trial. Id. at 526.

Likewise, in United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972), the prosecutor told the jury:

> The Government is prosecuting Clyde Lamerson in line with what Mr. Koerner [the defense attorney] says. And, Mr. Lamerson, had [he] not committed a crime, we would not be doing so. It's as simple as that.

Id. at 372. The court reversed the conviction, stating:

> Expressions of individual opinion of guilt are dubious at best . . . Appellant's trial was held and the jury impaneled to pass on his guilt or innocence . . . . The prosecutor may neither dispense with the presumption of innocence nor denigrate the function of the trial nor set as a thirteenth juror.

Id., quoting Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969).

What the prosecutor believed regarding the petitioner's guilt or innocence was irrelevant, and he should not have sought to act as a "thirteenth juror." All that was relevant was the evidence as presented and the law as instructed to the jury. The prosecutor's comments could only serve to distract the jury from its consideration of those factors. Indeed, the prosecutor's personal "guarantees" to the jury explicitly invited

it to rely on someone else's conclusions regarding petitioner's guilt rather than to independently weigh the trial evidence itself.

Second, the prosecutor seriously erred in endorsing the credibility of the state's star witness by describing his personal familiarity with the case and Miss Eckerd.[11/] In Lamerson, supra, the prosecutor made a similar argument which endorsed the credibility of the state's witness:

> And, I think officer McPherson and Agent Stymus [sic] showed sincerity. I firmly believe what they said is the truth. I know it is the truth, and I expect you do, too.

Id. at 372. The court held this to be reversible error, stating:

> When [the prosecutor] makes a statement which could be construed by the jury as implying that he has additional reasons for knowing that what one witness has said is true, which reasons are not known to the jury, such comment is no longer mere indiscretion but constitutes reversible error. Here, the prosecutor said: 'I know it is the truth,' the inference being that he had outside knowledge. Put simply, the prosecutor overstepped the bounds of propriety.

Id.

11/ The prosecutor also improperly vouched for the credibility of Dr. Garvin, the medical examiner called by the state:

> Dr. Garvin is an excellent person. He is an immensely qualified Doctor. He is a very candid person. [R. 1040].

Here the prosecutor equally overstepped the bounds of propriety when he referred to his familiarity with the evidence "over the last year" and with his familiarity with Ms. Eckerd through meetings other "than when she was on the stand." [R. 1109]. As in Lamerson, those comments imply a special knowledge of the facts which he obtained over a lengthy period of time outside of the trial itself. Certainly, the prosecutor's emphasis upon his long-term familiarity with the case and the state's star witness may well have led the jury to place undue credence in the prosecutor's unqualified "guarantee" of petitioner's guilt.

C. These judicial and prosecutorial comments constitute, in their cumulative effect, fundamental error mandating a new trial.

The judicial and prosecutorial comments outlined above cannot be viewed in isolation. Rather, the "cumulative effect and the combined weight of [the comments] should be considered with others to determine whether substantial rights of the [accused] have been affected." Pollard v. State, 444 So.2d 561, 562 (Fla. 2d DCA 1984). See also Cribbs v. State, 193 So.2d 460, 463 (Fla. 2d DCA 1967). When viewed as a whole, it is plain that the comments so infected petitioner's trial as to deprive him of his constitutional right to a fair and impartial jury consideration of his guilt or innocence based upon the evidence and the law.

Very few of these comments were objected to by petitioner's trial counsel. However, because the comments, taken together, constitute "fundamental error," they are properly reviewable notwithstanding the absence of an objection below. As this Court stated in Tyus v. Apalachicola Northern Railroad Co., 130 So.2d 580 (Fla. 1961):

> [I]f the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, a new trial should be awarded regardless of the want of objection.

Id. at 587. Accord Pait v. State, 112 So.2d 380, 385 (Fla. 1959) ("when an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as ground for reversal despite absence of an objection below"); Carr v. State, 136 So.2d 28 (Fla. 3d DCA 1962) (judge's reference to "abortion" was reversible error despite lack of objection); Hamilton v. State, 109 So.2d 422 (Fla. 3d DCA 1959) (judge's comments implying guilt of the accused were fundamental error and therefore reversible despite absence of objection below).

The court's words in Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984), seem especially applicable here:

> [I]f the improper comments rise to the level of fundamental error, then multiple objections are not necessary. . . . When the prosecutorial argument taken as a whole is "'of such a character that neither rebuke nor retraction may entirely destroy their sinister influence. . . a new trial should be granted, regardless of the lack of objection or exception.'"
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> * * *
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> We hold that the comments made during the State's closing argument were of such a prejudicial magnitude as to amount to fundamental error. As a result, appellant was denied a fair trial. In a close case . . . where the jury is walking a thin line between a verdict of guilt and innocence, the prosecutor cannot be allowed to push the jury to the side of guilt with improper comments such as these.

Id. at 1091.

In view of their overwhelming prejudicial effect as a cumulative matter, if not in isolation, these comments should have been raised as a ground for appeal by petitioner's appellate counsel. They were not. That failure certainly constitutes, under the first prong of the Knight standard, "a substantial and serious deficiency measurably below that of competent counsel. Appellate counsel's failure to raise these errors on direct appeal, notwithstanding the lack of objection below, is especially egregious in light of this Court's responsibility

here, as in all death cases, to determine independently whether a death sentence has been imposed in a constitutionally sound manner. Fla. Stat. §921.141(4); McCampbell v. State, 421 So.2d 1072, 1074 (Fla. 1982).

Moreover, had this Court been apprised of the cumulative errors on petitioner's direct appeal, the outcome of that appeal would have been different, thereby satisfying the second prong of the Knight test. Indeed, the errors set forth in this petition so infected the fairness and neutrality of petitioner's trial at every stage that, had they not been committed, the jury's verdict and recommended sentence would likely have been different. There is no better indication of this than the words of the prosecutor himself, who acknowledged the likelihood that the evidence as presented could have left doubt in the juror's minds:

> [Y]ou all know it was circumstantial evidence; and, that, no doubt, you would have been deliberating for whatever it was, the hours, I'm sure, some of you may have some type of doubt in your mind, as to possible doubts . . .

[R. 1103].

If the evidence - unpolluted by any prejudicial comments - is concededly insufficient to eliminate doubt in the mind of the jury as to the petitioner's guilt, then how much more

insufficient is that evidence when it is viewed in the slanted light cast upon it by the improper comments alleged here.

Certainly, the evidence against the petitioner was not so overwhelming as to justify ignoring the errors raised here. The cumulative effect of these errors mandates that the petitioner receive a new trial.

POINT TWO

Trial court failed to provide the petitioner with a copy of the pre-sentence investigation report within a reasonable time of sentencing.

Improper judicial and prosecutorial comments are not the only fundamental errors which impermissibly infected petitioner's trial below. The court's failure to provide petitioner or his counsel with adequate time to review the pre-sentence investigation report alone mandates a new sentencing hearing.

After the jury's advisory sentence, the court ordered a pre-sentence investigation report. [R. 1131]. The State's report was completed on April 7, 1982 -- the very morning of petitioner's sentencing. As a result, when petitioner appeared for sentencing at 10:00 a.m., neither he nor his counsel had been afforded an opportunity to review the pre-sentence

investigation report upon which the court, at least in part, premised its sentence. [R. 1132-33]. When this deficiency was brought to the court's attention, it ordered a recess until 1:00 p.m. -- allowing petitioner and his counsel less than three hours to review and discuss the report before sentencing.

Rule 3.713 of the Florida Rules of Criminal Procedure requires a trial judge to disclose to defendant all factual material contained in the pre-sentence investigation report within a "reasonable time prior to sentencing." That requirement was simply not met here. Instead, the court disclosed the State's pre-sentence investigation report to petitioner's counsel on the very day of his capital sentencing, and less than three hours before imposition of the sentence itself -- despite the fact that the report recommended death sentences not even requested by the Assistant State's Attorney at the sentencing hearing. [R. 1142, 1144].

This belated attempt to comply with the basic procedural protections regarding the use of pre-sentence investigation reports in death cases was completely insufficient. Gardner v. Florida, 430 U.S. 349 (1977); Barclay v. State, 362 So.2d 657, 658 (Fla. 1978); Fla. R. Crim. P. 3.713. Petitioner's rights upon the sentencing were prejudiced by the abbreviated time afforded his counsel to review, evaluate, and react to the matters set forth in the pre-sentence investigation report.

Neither logic nor reason suggests that a compressed period of time such as that afforded petitioner here is a reasonable time for an adequate proper review of the report prior to sentencing. Indeed, in Guglielmo v. State, 318 So.2d 526, 527 (Fla. 1st DCA 1975), the First District expressly stated that the disclosure to defendant of information contained in a pre-sentencing investigation report on the day of sentencing was not a "reasonable time prior to sentencing."[12/] See also Trickey v. State, 374 So.2d 363 (Fla. 1st DCA 1979). Notably, the First District made this finding even though the case was not a capital case. If receipt of the information contained

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12/ Unlike Guglielmo, there can be no claim that petitioner waived his constitutional right of reasonable access to this pre-sentencing report. Such a claim of waiver was advanced in Gardner and rejected out-of-hand by the Supreme Court, which noted that there was "no basis for presuming that defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision not to examine the full report." Gardner, 430 U.S. at 361. That is precisely the case here. Florida law is clear that a waiver is the "intentional relinquishment of a known right, or the voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right." Fireman's Fund Insurance Co. v. Vogel, 195 So.2d 20, 24 (Fla. 2d DCA 1967). Further, when a waiver is implied from a party's conduct, the acts or circumstances relied upon to show waiver must make out a clear case. Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263 (1945); Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932). There is no "clear case" of waiver here and no reason to presume that petitioner's counsel made a tactical decision not to afford himself and his client sufficient time to examine a pre-sentencing report of which he was admittedly "unhappy." [R. 1135].

in the pre-sentencing report the day of a non-capital sentencing hearing is not a "reasonable time prior to sentencing," certainly receipt of pre-sentence investigation report a mere three hours before being sentenced on three convictions of first-degree murder falls far below any permissible standard of reasonableness.

The trial court's failure to give petitioner a reasonable opportunity to review the pre-sentence investigation report and deny or explain its contents before imposing a sentence of death violates the Due Process Clause of the United States Constitution. In Gardner v. Florida, 430 U.S. 349 (1977), the United States Supreme Court vacated a death sentence imposed, in part, upon information contained in a pre-sentence investigation report which included confidential information not disclosed to defendant or his trial counsel. The Supreme Court vacated the death sentence, concluding that due process requires a trial court to provide a defendant with an opportunity to deny or explain all information contained in the report which might be considered in imposing the death sentence.

For this right of access to mean anything at all, the contents of a pre-sentence investigation report obviously must be disclosed to the defendant a reasonable time before

sentencing. Barclay v. State, 362 So.2d at 658. Nothing which even arguably approached a reasonable time was provided to petitioner here.

The brevity of the time allowed for review of this report is particularly egregious in light of numerous shortcomings of the pre-sentence investigation which were noted by petitioner's counsel. [R. 1135-38]. Though petitioner expressed his dismay over the pre-sentence investigation, he was permitted only the briefest of opportunities to review the report, scrutinize its content and prepare a rebuttal or explanation. The trial court's expedited sentencing process effectively eviscerated petitioner's constitutional right to explain the information contained his pre-sentencing report.

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or a motion." Gardner, 430 U.S. at 358. The trial court's brief recess to permit the superficial review of the State's pre-sentence investigation report is but a wink at the due process requirements of both Gardner and this Court's rules of criminal procedure. Each require the trial court to provide defendant with access to the pre-sentencing investigation report a reasonable time prior to sentencing. Because this opportunity

was conspicuously absent here, petitioner's death sentence must be set aside.

POINT THREE

The sentencing process improperly encouraged the jury to compare and weigh the circumstances surrounding the deaths of the three victims.

Throughout the trial, the jury was allowed -- even encouraged -- to assess petitioner's guilt or innocence on some value, some emotion, something other than the evidence as presented and the law as instructed. The final error which requires issuance of the writ here is no different: the jury was improperly encouraged by the sentencing process itself to go beyond the enumerated aggravating factors by which they are required to be controlled and instead to compare the circumstances surrounding the deaths of the three victims in arriving at its recommended sentence.

From the outset, the vast differences between the murders of Christine Walters and those of the two male victims was patently obvious. Not only did a greater number of aggravating circumstances apply to the murder of Christine Walters, but the evidence which supported each aggravating circumstance applicable to her death was much stronger than the evidence of those aggravating circumstances which arguably applied to

the killings of Doranz and DeRuso. As a result, the process itself naturally encouraged the jury to evaluate the character of each murder by the comparison of the killings themselves, not -- as they were required -- by solely weighing the aggravating and mitigating circumstances which applied to each individual death.

The prejudice of such an invitation is apparent: its ultimate and unavoidable result is to increase the likelihood that petitioner would receive a recommendation of death as to that victim whose death weighed "heaviest" on the scale -- a recommendation based on an evaluation of the crime not sanctioned by the strict guidelines of Florida's capital sentencing statute. Accordingly, fundamental fairness requires a separate sentencing hearing for Christine Walters and the male victims to avoid the improper weighing process which occurred in this case.[13/]

Because of the manner in which his argument to the jury on sentencing was structured, the prosecutor could not help but compare the heinousness of the circumstances surrounding

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13/ Petitioner does not claim that separate sentencing hearings would be required every time one is tried for the murder of more than one person; but, only when, as here, the greater disparate circumstances surrounding the victims' killings and the strength of the aggravating circumstances vary markedly from victim to victim.

the deaths of the two men with those surrounding the death of Christine Walters:

> The next one, the crime for the sentence to be committed was for the purpose or [sic] avoiding a lawful arrest or preventing an escape or custody. That does not apply to Mr. Doranz's or Mr. DeRuso's death. That does apply to Christine Walters' death. . . . He destroyed her just as you destroy a fingerprint or other piece of evidence; and that aggravating circumstance I guarantee you, does apply to the murder of Christine Walters. . . .
>
> Again, being reasonable and conscientious, we might have to hedge regarding Mr. Doranz and Mr. DeRuso; but that circumstance one hundred percent, applies to the death of Christine Walters. . . . [Y]ou are going to consider whether or not Mr. Pope deserves mercy; . . . This man did not show them any mercy . . . I don't know about the deaths of DeRuso and Doranz to sit here and really make an argument, a real strong one; but . . . I guarantee you that the death of Christine Walters was not done in any pretense or any justification. [R. 1105-06; 1108-09]

A sentencing procedure which invites -- indeed, cannot prevent -- the jury from utilizing a weighing process to characterize the quality of these murders based on a simple comparison of the three killings and not on the independent consideration of the statutory factors robs the sentencing phase of any semblance of reliability. Such an improper weighing could only be prejudicial to petitioner. If the jury has only

one of two recommendations to make, life or death, and the circumstances surrounding one of the three deaths is more egregious than the others and is, accordingly, highlighted by the prosecution, the jury is more likely to return a recommendation of death for the "worst" killing. Had the jury not been bombarded here, both subliminally and by outright prosecutorial design, with the constant comparisons of the circumstances surrounding each of the three killings, the jury would have been less likely to sentence petitioner to die for the death of Christine Walters.

Although the Florida jury's recommendation of life or death is only advisory, it is of critical importance. The dilution of that recommendation by the jury's consideration of circumstances and comparisons which rob the sentencing process of its reliability and fairness requires this Court to vacate petitioner's death sentence.

VI.

CONCLUSION

It is the responsibility of appellate counsel in a capital case to raise "any point which may reasonably be argued. . . ." Wright v. State, 269 So.2d 17, 18 (Fla. 2d DCA 1972).

Here, petitioner's appellate counsel failed to fulfill that preeminent responsibility. That failure was obviously prejudicial here where petitioner's very life is at stake.

This Court should have been made aware on petitioner's original appeal of the overwhelming prejudicial comments during both the guilt and the sentencing phases of petitioner's trial which stressed to the jury matters not in evidence at trial. It should have been told of the trial court's failure to provide the pre-sentence investigation report as prescribed by law. And it should have been informed of the prosecutor's improper weighing of circumstances in his argument on sentencing. None of these fundamental errors were brought to the Court's attention.

The failure of appellate counsel to properly identify and argue these errors on petitioner's direct appeal deprived petitioner of a meaningful 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 and/or new sentencing as appropriate or, alternatively, the opportunity to fully brief the issues

presented herein on a belated appellate review from his conviction and sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition was furnished by mail this 20th day of May, 1985 to the Honorable Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida, 32301.

_____
Attorney