IN THE SUPREME COURT OF FLORIDA

Case No. 67,054

THOMAS DEWEY POPE,

Petitioner,

vs.

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

Respondent.

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By [signature]
Chief Deputy Clerk

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Sylvia H. Walbolt
C. Timothy Corcoran, III
James A. Gresser
Alan F. Wagner
Deborah H. Ross
CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioner

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

Petitioner, in his original petition, brought to this Court's attention the numerous prejudicial and highly inflammatory remarks by both the judge and the prosecutor which deprived him of a fair trial but which appellate counsel had failed to raise on petitioner's direct appeal. The State's only response is that none of those comments, considered individually, amounted to fundamental error. The critical point, however, is that the comments, when viewed in the context of the entire trial, rendered the proceedings constitutionally infirm.

Petitioner argued in his supplement dealing with Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), that, just as in Caldwell, the jury here was made to feel that its role in sentencing was inconsequential and that this denigration of the jury's role amounted to constitutional error. Again, appellate counsel failed to raise this vitally important defect on appeal. The State simply urges that the jury was accurately instructed concerning the advisory nature of its sentencing role under Florida law. That argument, however, misses the whole point. Even assuming that neither the judge nor the prosecutor

[1] Citations to Petitioner's Original Petition for Writ of Habeas Corpus are by way of "[Petition at ___]" and to the supplemental petition as "[Supp. Pet. at ___]." Citations to the State's response are by "[Response at ___]." Citations to the record in the direct appeal are by "[R. at ___]." All emphasis here is supplied.

made affirmative misstatements of fact concerning the jury's legal role, the jury was not instructed in a way which encouraged it to view its role in sentencing with responsibility and solemnity as required under the law and as set forth in the standard jury instructions. In fact, the judge and prosecutor encouraged the jury to take its responsibility as lightly as it could, trivializing the jury's role.

Because appellate counsel failed to argue each of these constitutional infirmities on direct appeal, appellate counsel was ineffective. This Court, therefore, must grant its writ.

ARGUMENT

1. When the improper comments by the judge and prosecutor are viewed in the context of the entire trial, and not in isolation, it is clear that their cumulative effect deprived petitioner of any semblance of a fair trial.

The State spends the bulk of its response analyzing each improper comment individually and in isolation from the others. It thereby attempts to minimize the obviously harmful impact of these cumulative comments. The State calls this exercise placing the comments "in context." [Response at 7]. In actual fact, the comments can be put in their proper context only by viewing the comments in the context of the entire trial. When that is done,

the Court can clearly see the constitutionally repugnant and unfair trial about which appellate counsel failed to complain in petitioner's direct appeal.

The prejudicial comments made at the trial were not uttered in a vacuum. Rather, the judge's comments fed on one another, the prosecutor's comments came on the heels of and amplified those of the judge, and the comments of both at the sentencing phase followed an already infected guilt phase. As the comments were spoken, therefore, it was their "snowball effect," more than the content of any particular, individual comment, which deprived petitioner of his constitutional right to a fair trial.

Ignoring this reality of the situation, the State would have the Court totally neglect this cumulative effect. Indeed, the State spends the first seven full pages of its response by analyzing in isolation each improper comment [Response at 4-11], and then addresses the cumulative effect of those comments in but <u>one short paragraph</u>. [<u>Id</u>. at 11]. In doing so, the State misses both the thrust and the significance of petitioner's argument. Even if the comments, taken in isolation, do not amount to fundamental error, the same comments, when viewed -- as they must be -- in the context of the entire trial, rendered petitioner's capital trial fatally defective.

The State cites Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967), supposedly in support of its argument that none of the individual comments amounted to fundamental error. In point of fact, Gibbs does nothing but underscore the constitutional defect present here. While it is true that the court in Gibbs found that the particular comment at issue there did not constitute fundamental error, the Court expressly held that such comment "may be considered with other assignments of error in determining whether the substantial rights of the defendant have been injuriously affected." Id. at 463. The court then reversed the conviction below and remanded for a new trial.

One of the comments the State wants to place in individual "context" is the judge's statement that this is an easy case "for us as professionals" to decide. [Response at 7]. First, the additional portion of the record cited verbatim by the State does not at all weaken the implication of the comment that it would be easy for the judge to make a decision as to petitioner's guilt or innocence when the outcome is so obvious.

More importantly, when placed in its true context -- the context of the entire trial -- the prejudicial implication of the judge's remark is beyond doubt. By the end of the trial, the jury had been told that the grand jury -- "professionals" -- had indicted petitioner on less evidence than had been put before the jury [R. at 973]; that the jury was the "conscience of the county"

who should decide the case by its common sense notion of what is right and what is wrong [R. at 16-17]; and that "no one of us has a right to violate the rules" [R. at 1075]. After all this and more, the comment could only have meant to the jury: "This is an easy case. The professionals, like the prosecutor, grand jury, and _myself_, have already concluded that petitioner is guilty. You all know what's right and what's wrong, and what the petitioner did was _wrong_. Common sense can tell you that!" Even if there is a _possibility_ that the jury would have taken the comment in this way, petitioner deserves a new trial.

Several of the State's arguments concerning other individual comments demand a brief reply. First, the State argues that, because the judge's comment that "no one has a right to violate the rules" is a standard jury instruction, the comment was legally correct. [Response at 6]. Once again, the State ignores the context in which that comment was made. The standard jury instruction carries the proper implication that, in reaching its determination, the _jury_ should not deviate from the established rules regarding jury deliberations. That comment made here, however, coming at the tail-end of a trial filled with comments painting the petitioner as a guilty man, carried a much different implication and effect. It invited the jury to find petitioner guilty because _he_ was one of those who had "violated the rules we all share."

The State also attempts to minimize the prejudicial impact of the judge's invitation to the jury to use its "common sense" by arguing that the standard instructions include the jury's use of common sense. [Response at 5]. The standard instruction allows the jury to use its common sense to decide whether particular witnesses or pieces of evidence are credible. But that was not the comment made here. Here, the judge encouraged the jury to reach an ultimate result as to petitioner's guilt or innocence on the basis of its common sense, impliedly outside what the evidence would or would not show.

Petitioner does not take issue with the jury being told to evaluate the credibility of witnesses by the use of common sense. This comment was unfair and constitutionally infirm, however, when it directed the jury to use its common sense -- in the abstract, unconnected with the evidence -- to reach a verdict on petitioner's guilt or innocence.

Finally, the State repeatedly contends that the judge corrected any "misimpressions" he may have left with the jury by following these prejudicial comments with a reading of standard jury instructions. [Response at 4-5; 5; 8]. For instance, the State deems it significant that, after the jury was praised for having the ability to cut away the "shaft" of the law and get to the "bottom line" of the case by using its common sense notion of right and wrong, the judge thereafter instructed it to base its

decision on the evidence and the law as instructed.[2] [Response at 5]. The inescapable fact remains, however, that the gratuitous comments of the judge and prosecutor coming <u>both before and after this instruction</u> so poisoned the entire trial that the instruction itself could not have cured the prejudice already created.

This is particularly the case when one considers that the judge's comments were made spontaneously. Of course, this Court may take judicial notice of the fact that a standard instruction, when <u>read</u> by the presiding judge, is likely to leave a much smaller impact upon the jury than a spontaneous comment spoken by the judge with inflection during a face-to-face conversation with the jury. This is the case regardless of whether the instruction is read in a monotone.[3]

As to the prosecutor's offending comments, even the State affirmatively acknowledges that they <u>were improper</u>. [Response at 11]. By its own words, the State "cannot condone" these remarks. [<u>Id</u>.]. The State then argues, however, that, inasmuch as

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[2] At several points the State emphasizes that some of the improper comments were made to the <u>prospective</u> jurors. It does not matter that the comments were made before the jury was sworn. The controlling fact is they were made to jurors who eventually heard petitioner's case.

[3] The record here, of course, does not disclose whether these instructions were read in a monotone. It is fair to say, however, that most jury instructions are read in that fashion, at least as compared to the inflection used in conversation.

"prosecutorial error alone does not warrant automatic reversal," and since the evidence against petitioner was "overwhelming," the comments do not support a new trial. [Response at 10].

In brushing aside the legal effect of what it concedes to be improper, the State quotes from Murray v. State, 443 So.2d 955 (Fla. 1984). The State, however, fails to quote the rest of the sentence in Murray, which directly speaks to this case:

> [P]rosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless.

Id. at 956. Here, as shown in petitioner's original and supplemental petitions, the errors represented by the prosecutor's comments were so basic to a fair trial that they cannot be treated as harmless.

The State's further assertions that the evidence against petitioner was "overwhelming" is belied by the record and the comments of the prosecutor himself. It is true that this Court on appeal found sufficient evidence to sustain the convictions. Pope v. State, 441 So.2d 1073, 1076 (Fla. 1983). But a finding of sufficiency of evidence does not mean that the evidence of guilt was overwhelming so that no error could ever be considered

prejudicial to petitioner -- particularly error which was not pointed out to, or considered by, the Court on direct appeal when the Court originally found the evidence to be sufficient.

Moreover, the fact that the evidence of guilt was not "overwhelming" in this case is best demonstrated by the statement of the prosecutor at trial, who explicitly acknowledged that his case could have left doubt in the jurors' minds. [R. 1103].

Conspicuously absent from the State's response is any substantive discussion of the comments by the prosecutor concerning petitioner's expressed preference for the death penalty [Petition at 26-30], petitioner's demeanor while sitting at counsel table [Id. at 30-34], the strength of the evidence presented to the grand jury [Id. at 34-37], and the prosecutor's expression of personal belief in the case and his witnesses. [Id. at 37-42]. As shown in the original petition, each of these comments represents an error so basic to a fair trial that each should not -- indeed cannot -- be deemed as anything but fundamental and harmful error. The fact that the State does not even attempt to address them, beyond arguing, in one paragraph, that prosecutorial error alone does not warrant reversal, certainly concedes as much.

The State also suggests that petitioner's appellate counsel simply made the "tactical decision" not to challenge the issues raised by petitioner here. [Response at 3]. There is absolutely no reason to believe that he made any such "tactical decision" at all. To the contrary, in view of the prejudicial nature of these comments, a fairer inference from the omission would be that petitioner's appellate counsel simply failed to recognize the errors. As this Court has recently held, this failure constitutes ineffective assistance under the standard set forth in Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985). See Wilson v. Wainwright, 10 F.L.W. 390 (Fla. S. Ct. August 15, 1985).

Because the judicial and prosecutorial comments made at petitioner's trial taken as a whole rose to a level of fundamental unfairness, those comments should have been brought to this Court's attention by appellate counsel on petitioner's direct appeal. That failure caused prejudicial impact on petitioner by compromising the appellate process to such a degree as to cast doubt upon the correctness of the outcome of such appeal.

2. The Court's failure to provide petitioner with the pre-sentence investigation report within a reasonable time of sentencing requires a new sentencing hearing.

The state argues that the trial court "freely" allowed defense counsel to rebut and supplement the matters contained in the pre-sentence investigation report. [Response at 12]. The

opportunity given to petitioner may have been "free," but it certainly wasn't meaningful -- inasmuch as defense counsel had merely three hours to review the report.

The State further argues that Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), does not apply because here there was no confidential portion of the PSI which was withheld from petitioner. Yet, Gardner stands for the fundamental proposition that a criminal defendant has a right of access -- meaningful access -- to his PSI report. Here, that right was deprived petitioner because he had no meaningful opportunity to review any portion of the PSI report. That is an even worse case than presented in Garner, and it should have been raised in the direct appeal.

3. By encouraging the jury to weigh the deaths of the victims in recommending life or death for petitioner as to each, the prosecutor injected a strong element of unreliability into the sentencing process.

Without in any way addressing the substance of petitioner's claim as to this improper weighing, the State argues that, since the propriety of imposing of the death penalty for the murder of Ms. Walters was litigated on direct appeal, "rereview of this issue is wholly unwarranted." [Response at 14].

Nowhere in his direct appeal, however, was petitioner's argument on this point even raised, much less resolved. Yet, as shown in the original petition, its importance on appeal was enormous. The failure to raise it constitutes the very ineffectiveness which, when coupled with its merit, requires the granting of the writ here.

4. <u>The presiding judge went far beyond merely instructing the jury of the advisory nature of its sentencing role as described in the standard jury instructions. He minimized and trivialized that role to the point where the jury was implicitly encouraged to recommend death for petitioner.</u>

Petitioner urged in his supplemental petition that the jury's role was trivialized to an unconstitutional level under the United States Supreme Court's recent <u>Caldwell</u> decision. In response, the State would have this Court believe that all the judge and prosecutor did here was "accurately define the respective statutory responsibilities of judge and jury . . . with the giving of standard jury instructions." [Response at 16]. A simple comparison of the comments of the judge and prosecutor with the standard instructions to which the State points shows that this is just not so.

The standard jury instruction is this:

> The punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years. Final decision as to what punishment shall be imposed rests solely with the judge of this Court; however, the law

> requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

Fla. Std. Jury Instr. (Crim.), p. 77. This standard instruction accurately portrays the advisory nature of the jury's role in sentencing without minimizing or demeaning the significance of that role.

In stark contrast to this standard instruction, the actual comments of the court and prosecutor did not accurately describe the jury's role in a manner which encouraged the jury to accept and view that role as the most solemn responsibility it would ever be called upon to assume. To the contrary, the court and prosecutor made the jury's role out to be of little, if any, consequence by repeating over and over that the jury only gave a recommendation for which the jury had no responsibility.

> THE COURT: Ladies and gentleman, the state is going to ask for the death penalty in this case. What you recommend is only a recommendation that I consider. You do not have the final say, the court does. So, remember that the court has the final determination in whether or not, if you find him guilty, and whatever you recommend, I can overrule it and do as I think the facts warrant. Do you understand? [R. 29].

And again:

> THE COURT: The point is, it is a two-step procedure. First, you have to rule on whether or not the defendant is guilty or innocent. If he is guilty, then all you do is make a

> recommendation. Then the rest is up to me. I make the decision, not you. Can you live with that? [R. 147].

And again:

> THE COURT: I will now inform you of the maximum and minimum penalties in this case. The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. I, alone, have that responsibility. Remember that. [R. 1072].

And again:

> THE PROSECUTOR: Your recommendation is not binding on the court. The court reserves the right to overrule whatever your recommendation is. So, if you all understand that and this case, as in every case, the jury never impose punishment, never dictates a punishment. At most, the jury recommends a punishment, and it is up to the court. Does anyone have any problems in understanding that? In a few states, the jury determines the sentence, but not in Florida. [R. 81].

And finally:

> THE PROSECUTOR: Just once again, I tell you, if that is even the jury's recommendation the final decision is up to the court. It is never your final decision. [R.105].

In short, the judge and prosecutor did not simply tell the jury that its role was advisory. Instead, by repeating again and again that someone else had the responsibility, they told the jury its role was almost a nullity. Contrary to the State's assertions, therefore, these comments are in every way comparable to the comments held to be fundamental error in Caldwell.

Despite the State's implication to the contrary, petitioner is not arguing that the standard instructions or the statutory scheme themselves are improper. Not at all -- petitioner would have welcomed the giving of the standard instructions outlined above. But petitioner did not get that. Instead, he got instructions infected with statements and implications which did nothing but undermine the assurance that the jury would take its role with the seriousness that the law and Constitution demand.

The State further seeks to exonerate appellate counsel's failure to raise this important issue by contending that the issue could not have been raised at all on appeal because trial counsel's "failure to object to or challenge the [standard] jury instructions regarding the role of the jury in capital sentencing, renders the issue non-reviewable." [Response at 14]. Again, the State misses the thrust of this argument. Petitioner is not challenging the standard instructions given to the jury, as were the appellants in the cases cited by the State. Instead, he is challenging the gratuitous comments which completely denigrated the jury's role as properly described in the standard instructions. These amounted to fundamental error which could have -- and should have -- been raised by appellate counsel despite the absence of an objection at trial.

Finally, the State completely ignores here, as it did in the previous discussion of improper comments, the reality of the trial and the context within which this denigrating of the jury's role took place. The demeaning of the jury's role did not take place on a clean slate. By the time sentencing came along, the jury had already been led to believe that the "professionals," the presiding judge included, had decided petitioner was guilty as charged. If the jury's role was <u>only</u> a recommendation which meant almost nothing, as it was repeatedly told, then there would be no reason for the jury to go against the "prevailing thought" of the "professionals" that petitioner was guilty.

All of this should have been raised in the direct appeal. Appellate counsel was ineffective when he failed to do so. In these circumstances, the Court must grant its writ of habeas corpus.

CONCLUSION

For the reasons stated above and in his original and supplemental petitions, petitioner 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,

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, P.A.
One Harbour Place
Post Office Box 3239
Tampa, Florida 33601
(813) 223-7000
Attorneys for Petitioner

By Deborah Harden Ross for
Sylvia H. Walbolt

By Deborah H. Ross for
C. Timothy Corcoran, III

By Deborah H. Ross for
James A. Gresser

By Deborah H. Ross for
Alan F. Wagner

By Deborah H. Ross
Deborah H. Ross

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail, this 10th day of September, 1985, to Sarah B. Mayer, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

Deborah H. Ross

Attorney