IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 68262

LARRY E. MANN,

Petitioner,

V.

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

Respondent.

_____/

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

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E/H/C
failure to
raise issues

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Larry Eugene Mann, 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 of Pinellas 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. As a result of the ineffectiveness of his appellate counsel contrary to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, 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, Stat. 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.

NATURE OF RELIEF SOUGHT

In light of the dispositive 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).

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).

III.

GROUNDS UPON WHICH PETITIONER RELIES

Appellate counsel unreasonably failed to raise as error the following substantial issues:

I.

THE PROSECUTOR'S CLOSING ARGUMENTS AND RELATED STATEMENTS AT BOTH GUILT AND PENALTY PHASE INJECTED IRRELEVANT, NONRECORD, PERSONAL, INFLAMMATORY, AND UNCONSTITUTIONAL MATTERS INTO THE RECOMMENDATION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The facts upon which this claim is based are as follows:

The prosecutor made numerous arguments that were improper, prejudicial and inflammatory and arguments based on non-statutory

and unconstitutional aggravating circumstances during closing at the penalty phase of trial, including the following:

1. Reference to matters outside the record such as to an incident allegedly committed by petitioner when he was a juvenile. The prosecutor stated "We know there was an incident back in 1969 involving a seven year old girl. Where is she today, I know not, but she is a twenty year old person living somewhere in the country. And I imagine if we had the records and the resources, we could go back and find her. We could give you the name of that victim. Let's just call her Jane Doe." (Tr. 2430).

a. The prosecutor stated "Dr. Fireman indicated in his testimony that he talked about other criminal episodes with the petitioner that we don't know about." (Tr. 2435). That is absolutely false. Dr. Fireman in fact denied discussing any other criminal episodes with the petitioner. The court transcript shows the following:

> Q: Are the manifestations of his pedophilic tendencies confined to 1969, 1973 and this case, as far as you know?
> A: Okay. In answer to your question, of course, it occurred to me... to find out if there are other victims or other experiences of similar behavior, and I have, in fact, wanted very much to explore that. But the time constraints have not permitted me to do that.

(Tr. 2404).

2. Reference to evidence that was inadmissible and admittedly inflammatory. The prosecutor stated, when arguing that the crime was heinous, atrocious and cruel, "We did not show you everything that was available. We can only show you those items that were permitted into evidence, those items which were found to be more relevant than inflammatory." (Tr. 2430-31).

3. Reference to evidence and crimes not charged in the indictment. The prosecutor argued that Mann had attempted to sexually assault the victim, contrary to the evidence. Mann was not charged in any way with any sex crime. Thorough examination of the victim, petitioner's clothes and vehicle showed no evidence of assault. Quite the contrary, the evidence showed, and the court found, that the petitioner killed the victim in a fit of

suicidal rage, no matter what the original intent may have been. The prosecutor misstated the evidence and argued a crime that petitioner was not charged with. "And, I think given the testimony you have heard in this case and the way this man is with children, that his intentions were to sexually molest her. ...I can't show you a picture of Elisa Vera Nelson. Elisa Vera Nelson was gone at that time."

4. The prosecutor improperly argued that the crime was committed by Mann in order to avoid arrest, when there was absolutely no evidence to support the contention. The prosecutor stated, "It is apparent that the reason Elisa Vera Nelson was a victim, was because she witnessed or could have been the person that identified him as her abductor had she lived . . . <u>It is the state's contention that this murder was committed so that there would be no witnesses to the act that this man committed</u>." (Tr. 2430). Even the trial court did not consider this as an aggravating factor, yet the jury very well may have.

5. The prosecutor demeaned the testimony of the Doctor and intentionally misled the jury by improper remarks such as that the testimony was "absurd." The prosecutor further stated "Dr. Fireman went on to say and describe the young girl, and this was even more offensive, ..., that he lashed out against, quote, 'the provoking individual.'" (Tr. 2433).

6. The prosecutor improperly argued that this crime was cold, calculated and premeditated, when all evidence was to the contrary. There was no evidence of premeditation, cold or calculated. The Florida Supreme Court threw out cold, calculated and premeditated and the trial court did not reconsider it as a factor. The prosecutor, in arguing this factor, misled the jury as to the fact by distorting the testimony of the Doctor as to the suicidal episode he was undergoing; a suicidal episode that was in motion, long before Mr. Mann even saw or knew the victim. The prosecutor stated, "He had decided to commit suicide before he committed the offense, but was interrupted by the victim. Elisa Vera Nelson was murdered because she interrupted the plans

of the petitioner. Is that moral or legal justification. It's absurd." (Tr. 2433). Dr. Fireman was not posing justification for the crime. He was giving a medical opinion. This medical opinion was undenied and unrefuted by the State and the only way the State could attack this evidence was to demean the Doctor's opinion.

7. The prosecutor in the case at bar improperly argued and inflamed the jury with statements to future murders and victims. He stated "the evidence is so overwhelming that this man is a murder waiting to happen. There is another murder wrapped up in this man right now and maybe more." (Tr. 2436).

"And by your recommendation, you're going to tell the judge that you as the conscience of this community, you're going to tell him whether or not you are willing to take the risk that at some point in the future this man might be put out in the streets and then be given the opportunity to find out if that murder will occur." (Tr. 2436). "We don't know, if this man is ever eligible for parole, or who the next victim will be in 26 years possibly." (Tr. 2430). "...if he is alive, he will have access to other human beings; and if he is within reach of a human being, the next time the time bomb goes off and he has this uncontrollable urge, is there any doubt in your mind as to what the result will be? We don't have any effective way of dealing with this Defendant other than to say that we have had enough; you have been given enough opportunities." (Tr. 2437-8).

8. The prosecutor improperly argued and inflamed the jury advising them that they should base their decision on nonrecord, irrelevant, and improper and unlawful considerations, and that they act as the "conscience of this community". (Tr. 2436). "This community cannot afford for this man to remain alive." (Tr. 2435).

9. The prosecutor inflamed the jury by repeated reference to victim's family and petitioner's family as victims also. (Tr. 2432, 2438, 2439, 2245).

10. The prosecutor inflamed the jury by making reference to nonrecord and false matters concerning the penal system and condemned the system for letting petitioner out. (Tr. 2437) "What you have seen in the courtroom is but one notable failure of the system. When the judge sentenced Larry Mann to nine years in prison in the State of Mississippi for what he did, he expected Larry Mann to be kept for nine years away from society. Had the bureaucrats kept him for that period of time, had the law of the State of Mississippi required that he be kept for that period of time, we would not be here today. The state of the law today is that if he receives the death penalty, if he receives life imprisonment, he must serve twenty-five years without parole. But you and I do not control the destiny of the future course of the law. I am not asking you to speculate that. I am simply asking you to consider that". (Tr. 2437)

11. The prosecutor mislead the jury and diminished the jury's responsibility and made reference to nonrecord matters when he said the Judge will do the sentencing if the jury gave him a chance and that the Judge would have more evidence at his disposal in the future. (Tr. 2439)

12. The prosecutor's remarks to the jury that Mr. Mann would not be capable of treatment, that "the next time the time bomb goes off and he has this uncontrollable urge, is there any doubt in your mind as to what the result will be. We don't have any effective way of dealing with this petitioner other than to say that we have had enough; you have been given enough opportunities", (Tr. 2438), was sufficient to negate any pleas for mercy, especially when the State had previously presented evidence as to the petitioner's lack of remorse. (Tr. 2375-7) The witness, a police officer from Mississippi, testified only with regard to Mr. Mann's lack of remorse. Additionally, this was lack of remorse testimony to a crime committed eight years previously in 1973. In essence, Mr. Mann's mental illness is being employed in aggravation and to negate remorse.

The prosecutor, in his closing argument, pointed to petitioner and stated, "How would you describe him during the course of what can only be described as emotionally heartrending testimony the first day of trial? Did his expression change? Was he moved by emotion at all? Or did he appear to be cold and calculated? You look at him, and he shows no emotion at all; but we know his propensity for violence". (Tr. 2271)

Lack of remorse became an overriding issue in this case and the prosecutor's comments were such that a seasoned lawyer, now a Circuit Judge, felt compelled to take the stand at penalty phase to explain that the petitioner was heavily medicated. That such comments by prosecutor infected the proceedings, were inflamatory and rose to the level of Fifth and Fourteenth Amendment violations should not be doubted.

13. The implication that the petitioner should have produced evidence of a "ghost killer" by reminding the jury the defense had discovery and "knew where this case was going" (Tr. 2238-9);

14. The nonrecord assertion that Donna Mann is a "victim of the petitioner" (Tr. 2245);

15. The attack on defense counsel's cross examination of a witness and vouching for the truthfulness of the witness's testimony by saying "not everybody can be a Philadelphia lawyer", and that defense counsel "use[d] semantic gymnastics to twist up a guy whose expertise, who's here to honestly testify", and that "he isn't a lawyer. Okay? He doesn't go around making speeches for a living." (Tr. 2254);

16. Falsely stating the defense was "afraid to talk to you head on about" the "ghost murderer theory" of the case;

17. The prosecutor's false and repeated reference to the pubic hair being found in the truck as evidence of sexual misconduct, when the testimony revealed the pubic hair would indicate absolutely nothing of the sort (Tr. 2263-4);

18. His comment that "Mr. Doherty didn't like" and "didn't want to hear" evidence to which the trial court previously

sustained an objection, (Tr. 2267, 2113), interfering with Mr. Mann's right to have improper evidence excluded and to be represented by counsel;

19. The improper comment by the state on defense counsel's cross examination of the fingerprint examiner by saying that "she played with him a little", (Tr. 2269), and interfering with the petitioner's right to effective counsel by suggesting counsel's cross was somehow improper by saying, "Now, you can point and you can go after somebody's technical competence; but when by cross-examination, by innuendo, throughout the case you say they are falsifying testimony or evidence, that's a different story" (Tr. 2270);

20. The prosecutor's inflammatory and extra-record "golden rule" argument that "It's a horror story for anybody. It's a horror story for anybody who is or has ever been or thinks about being a parent, because it is that nightmare come true, the things we warn our children about, the meeting of the stranger, unknown and dreaded by us, thankfully not met by most of our children. We can't describe it. When you warn your children to stay away from strangers, not to talk to strangers, how do you describe what this stranger might look like? . . ." (Tr. 2271);

21. The prosecutor's reference to the demeanor of the petitioner while sitting at the defense table as evidence of his guilt, in violation of his Fifth amendment privilege against self incrimination and to have the charges based on evidence in the record. The prosecutor urged the jury to consider whether his emotion changed during testimony, or whether he appeared "to be cold and calculated". "You look at him, and he shows no emotion at all". (Tr. 2271). The petitioner did not testify at trial;

22. Commenting on the petitioner's exercise of his right to a jury trial (Tr. 2272-3);

23. Misleading the jury as to its role in the sentencing process by saying the matter rests ultimately with the Court, but not telling the jury their recommendation was entitled to be given great weight, (Tr. 2271-2), both at closing and voir dire

(Tr. 1216, 1217, 1218-19, 1319, 1363, 2361);

24. The arguments set forth above were improper, in some cases unconstitutional, highly inflammatory and rendered the trial fundamentally unfair. Objection to the arguments would have resulted in a curative instruction to the jury, reversal on appeal, or both, and since the evidence in the case was circumstantial and weak, the failure to object is a deficiency reasonably likely to have affected the outcome of the trial.

In the instant case the prosecutorial misconduct constitutes fundamental error and petitioner was denied a fair hearing. Comments which infect the sentencing process are to be severly scrutinized. The current test is whether "the comments had no significant impact on the jury's recommendation or the sentence imposed." Additionally, the question must be asked whether there was fundamental error to preclude the necessity of interposing an objection. State v. Gumbie, 380 So.2d 1031 (Fla. 1980); James v. State, 429 So.2d 1363 (1st Dist. 1983).See Davis v. State, 461 So.2d 67 (Fla. 1984), relying on Clark v. State, 363 So.2d 331 (Fla. 1978). Clark cites Wainwright v. Sykes, 97 S.Ct. 2497. Both of these cases deal specifically with waiver of Miranda claims. See Peterson v. State, 376 So.2d 1230 (4th D.C.A. 1979). Neither case rises to the level of the Chapman v. California, 87 S.Ct 824 (1967) requirement demanded by the Eighth and Fourteenth Amendments. Chapman is the standard under which the Florida Courts proceed.

In Clark, the Florida Supreme Court held that "'fundamental error' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case..." relying on Chapman and stating:

> "The Supreme Court of the United States, in Chapman v. California, supra, declined to adopt a rule that the constitutional error of comment on silence should automatically require reversal of a conviction, as petitioners therein urged. The Supreme Court announced that the test to be applied in determining whether a federal constitutional error can be held harmless is whether the Court finds the error to be harmless beyond a reasonable doubt."

Clark, 363 So.2d at 333-34. (It would appear in Florida that with or without objection the Chapman rule applies to prosecutorial misconduct. Ryan v. State, 457 So.2d 1084 (4th Dist. 1984). Compare Clark with Teffeteller v. State, 439 So.2d 840 (Fla. 1983).)

Fundamental error is present in the instant case.

In Pait v. State, 112 So.2d 380, 385 (Fla. 1959) the Florida Supreme Court stated: "However, 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 can eradicate its evil influence, then it may be considered as ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge. Cooper v. State, 186 So. 230; McCall v. State, 168 So. 38; Simmons v. State, 190 So. 756; Carlile v. State, 176 So. 862; Singer v. State, 109 So.2d 7 (Fla. 1959); Grant v. State, 194 So.2d 612 (Fla. 1967); Meade v. State, 431 So.2d 1031 (4th Dist. 1983); Peterson v. State, 376 So.2d 1230 (4th Dist. 1979); Knight v. State, 316 So.2d 576 (1st Dist. 1975); Wilson v. State, 294 So.2d 327 (Fla. 1974). See also, United States v. Garza, 608 F.2d 659, 666 (5th Cir. 1979):

> "Furthermore, while defense counsel could and, indeed, should have objected to the first instances of improper comment by the prosecutor, at some point the transgressions of this prosecutor cumulated so greatly as to be incurable; then objection to these extremely prejudicial comments would serve only to focus the jury's attention on them.[7] In addition, as this Court observed in overturning a conviction because of improper prosecutorial comment, despite a corrective instruction, once such statements are made, the damage is hard to undo: "Otherwise stated, on 'cannot unring a bell'; 'after the trust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'" Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962). Finally, this Court has several times recognized in similar contexts the necessity for holding such comments as were made here to be "plain error." See, e. g., United States v. Corona, 551 F.2d at 1388 n. 2; Ginsberg v.United States, 257 F.2d 950, 955 (5th Cir. 1958)."

We now apply the foregoing standard to the record in the case at bar. The prosecutor improperly argued and inflamed the

jury with statements to future murders and victims. He stated: "the evidence is so overwhelming that this man is a murder waiting to happen. There is another murder wrapped up in this man right now and maybe more." (Tr. 2436).

"And by your recommendation, you're going to tell the judge that you as the conscience of this community, you're going to tell him whether or not you are willing to take the risk that at some point in the future this man might be put out in the streets and then be given the opportunity to find out if that murder will occur." (Tr. 2436). "We don't know, if this man is ever eligible for parole, or who the next victim will be in 2 years possibly." (Tr. 2430). "...if he is alive, he will have access to other human beings; and if he is within reach of a human being, the next time the time bomb goes off and he has this uncontrollable urge, is there any doubt in your mind as to what the result will be? We don't have any effective way of dealing with this Defendant other than to say that we have had enough; you have been given enough oportunities." (Tr. 2437-8).

There are a number of Florida cases that specifically condemn the reference to a petitioner as one who will kill again if the jury does not recommend death. In Grant v. State, 194 So.2d 612 (Fla. 1967) the Supreme Court stated that remarks to the nature of "If you do not electrocute this defendant, this man may come back here and kill all of you" were clearly and obviously made "for the purpose of influencing the jury to impose the death penalty," and were so prejudicial as to warrant reversal. 194 So.2d at 615. The Court specifically noted, as a basis for its finding, the negative effect such remarks would have on a recommendation of mercy by the jury. Such remarks are "unwarranted, prejudicial and could well have been the reason why the penalty in those cases was death instead of life imprisonment." 194 So.2d at 615, citing Pait v. State, 112 So.2d 380 (Fla. 1959) and Singer v. State, 189 So.2d 7 (Fla. 1959).

In Teffeteller v. State, 439 So.2d 840 (Fla. 1983) the prosecutor urged the jury to recommend that petitioner receive the death penalty or else he would be paroled in twenty-five years and would kill again. The Florida Supreme Court stated, "This is yet another example of inexcusable prosecutorial overkill, resulting in a sentencing retrial before a jury. . . The remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty. The intended message to the jury was clear; unless the jury recommended the death penalty, the petitioner, in due course, will be released from prison and will kill again. . . There is no place in our system of jurisprudence for this argument. See Grant v. State, 194 So.2d 612 (Fla. 1967); Norris v. State, 429 So.2d 688 (Fla. 1983) Singer v. State, 109 So.2d 7 (Fla. 1959); Williams v. State, 68 So.2d 583 (Fla. 1953); Stewart v. State, 51 So.2d 494 (Fla. 1951); Sims v. State, 371 So.2d 211 (3rd Dist. 1979)" (The Court noted that these cases antedated the adoption of the tripartite capital sentencing procedure so that now, rather than requiring a reversal of the conviction the new procedure merely requires a reversal of the sentence and a remand for a new sentencing trial only) Teffeteller, 439 So.2d at 845.

Numerous other courts have also held that these highly prejudicial and inflammatory remarks severly prejudice the petitioner. Meade v. State, 431 So.2d 1031 (4th D.C.A. 1983); Rahmings v. State, 425 So.2d 1217 (2nd D.C.A. 1983) ("In any event, the comment created the impression that if the jury acquitted the defendant, she would subsequently commit a murder. . . . We hold that the offending statement was so prejudicial at to deprive the petitioner of a fair trial."); Sims v. State, 371 So.2d 212 (3rd D.C.A. 1979); Gomez v. State, 415 So.2d 822 (3rd D.C.A. 1982); Harris v. State, 414 So.2d 557, 558 (3rd D.C.A. 1982) ("In line with numerous decisions of the appellate courts of this state, we conclude that the prosecutor's remarks in this case were so prejudicial to the rights of the appellant as to deprive him of his fundamental right to a fair trial.") There is

little doubt but that these cases require a reversal when the prosecutor repeatedly employs such comments, since they clearly amount to fundamental error.

The harm is additionally great when viewed in the context of its effect on the question of mercy. A main issue involved in capital sentencing cases, in the context of prosecutorial comments of a prejudicial nature, is whether the jury was improperly prejudiced in its consideration of a recommendation of mercy.

"It is not for us to determine whether the defendant should have received a recommendation of mercy, that is solely for the jury to decide. But we are required in the case before us to determine whether the trial was so conducted as to prejudice the petitioner in the jury's consideration of such a recommendation." Singer v. State, 109 So.2d 7, 27 (Fla. 1959).

The sentencing phase presents a distinct and different situation than the guilt phase. "Even if the state proves the existence of statutory aggravating circumstances by conclusive evidence, the jury is instructed that they may recommend mercy" Hance v. Zant, 696 F.2d 940 (11th Cir. 1983).

An error that might be viewed as harmless under some circumstances may assume proportions of utmost importance when equated to the prossibility of a mercy recommendation in a capital case. In such cases, unless the appellate court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused the judgment must be reversed. Smith v. State, 273 So.2d 414 (2d Dist. 1973); Pait v. State, 112 So.2d 380 (Fla. 1959).

Standing alone, the comments and argument of the prosecutor regarding future killings by the petitioner, especially in light of the absence of any showing other than the petitioner acted out of mental illness in a suicidal episode, were sufficiently prejudicial to render the sentencing hearing fundamentally unfair. Indeed, the testimony as to Mr. Mann's mental illness

was undenied and unrefuted by the State except through improper remarks.

Viewing these inflammatory statements with respect to their impact and effect on the jury in context with other circumstances appearing in the record, leaves little doubt that the sentencing hearing was indeed fundamentally unfair in that the jury's ability to consider mercy was severly handicapped. McMillian v. State, 409 So.2d 197 (3d D.C.A. 1982). In addition to the improper remarks, in and of themselves inflamatory, concerning future killings, the state effectively negated any opportunity for mercy by making lack of remorse a central theme, not only during guilt/innocence but during the penalty phase, thus affecting the fundamental fairness two fold.

The prosecutor's remarks to the jury that Mann would not be capable of treatment that "the next time the bomb goes off and he has this uncontrollable urge, is there any doubt in your mind as to what the result will be. We don't have any effective way of dealing with this petitioner other than to say that we have had enough; you have been given enough opportunities" (Tr. 2438), was sufficient to negate any pleas for mercy, especially when the State had presented testimony as to the petitioner's lack of remorse (Tr. 2375-77). The witness, a police officer from Mississippi, testified only with regard to Mann's lack of remorse. Further, this was lack of remorse testimony to a crime committed eight years previously in 1973.

The prosecutor, in his closing argument, pointed to petitioner and stated "How would you describe him during the course of what can only be described as emotionally heartrending testimony the first day of trial? Did his expression change? Was he moved by emotion at all? Or did he appear to be cold and calculated? You look at him, and he shows no emotion at all; but we know his propensity for violence" (Tr. 2271).

Lack of remorse became an overriding issue in this case and the prosecutor's comments were such that a seasoned lawyer, now a circuit judge, felt compelled to take the stand at penalty phase

to explain that the petitioner was heavily medicated. That such comments by prosecutor and testimony of the witness infected the proceedings, were inflammatory and rose to the level of Fifth and Fourteenth Amendment violations should not be doubted.

A prosecutor's showing of lack of remorse is so prejudicial and potentially violative of petitioner's due process rights that the Florida Supreme Court determined that lack of remorse should have no place in the consideration of aggravating factors. Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983). The court stated:

> We have held that lack of remorse is not an aggravating factor in and of itself. McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). Its use as additional evidence of an especially heinous, atrocious or cruel manner of killing only when the facts of the crime support the finding of that aggravating factor without reference to remorse is, at best, redundant and unnecessary. Unfortunately, remorse is an active emotion and its absence, therefore, can be measured or inferred only from negative evidence. This invites the sort of mistake which occurred in the case now before us--inferring lack of remorse from the exercise of constitutional rights. This sort of mistake may, in an extreme case, raise a question as to whether the defendant has been denied some measure of due process, thus mandating a remand for reconsideration of the sentence. For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." (emphasis added)

See also Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Gorham v. State, 454 So. 2d 556 (Fla. 1984); Mischler v. State, 458 So. 2d 37 (4th DCA 1984).

Aggravating circumstances must be limited to those provided by statute. Neither the failure of petitioner to acknowledge his guilt nor to demonstrate remorse is a valid statutory aggravating circumstance. McCampbell v. State, 421 So.2d 1072 (Fla. 1982).

Even under the prior interpretation where the lack of remorse was allowed to enhance an aggravating circumstance (especially heinous, atrocious or cruel) the testimony and comments in the instant case were totally improper and inflammatory for two

distinct reasons and would not have been allowed under those rulings previous to Pope. Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Stano v. State, 460 So. 2d 890 (Fla. 1984); Gorham v. State, 454 So. 2d 556 (Fla. 1984).

First, the evidence of lack of remorse, by way of testimony of a police officer from Mississippi, went, allegedly to petitioners' state of mind, and not to enhance a specific aggravating circumstance. The record reflects the state's explanation:

> MR. HART: The state would call Lieutenant Judson Brooks.
>
> MS. SCHAEFFER: May we approach the bench, please.
>
> (THEREUPON, a side-bar conference was held at the bench outside the hearing of the jury.)
>
> MS. SCHAEFFER: May I inquire of the State of the purpose of this witness being called?
>
> MR. HART: As to the Defendant's reaction as to when he was arrested. I think it will go to the psychiatric testimony in terms of the man's emotional status and condition.
>
> THE COURT: Okay. I think it's relevant. (THEREUPON, the following proceedings were had in open court.) (Tr. 2374)

At this point there had been no psychiatric testimony and the state did not put any psychiatric testimony in evidence. Additionally, lack of remorse, or emotional status eight years previous to this trial was at the very least irrelevant and at the most, incompetent. It did not deal with lack of remorse at the present time. Second, the testimony itself added nothing to a determination of lack of remorse in that there is no covert showing of lack of remorse, only an indication that by failing to show remorse the petitioner was totally lacking in it. The testimony was irrelevant and inflammatory. The record reflects:

> Q. When you read that warrant to him, were you looking at him?
>
> A. Yes, sir.
>
> Q. Did he display any remorse at that time?
>
> A. No, sir.
>
> Q. Did he display any sorrow?

A. No, sir.

Q. Subsequent to that, did you drive back to Passagoula, Mississippi, with him in your presence?

A. Yes, sir.

Q. During that entire time period, did the man show any emotion at all?

A. In reference to the charges, no. The only emotion he ever showed was an occasion in Daytona Beach when we stopped for dinner, and he became emotionally upset because I would not let him have beer with his meals.

Q. That's the only time he ever showed emotion, when you wouldn't let him drink beer with his dinner?

A. That's correct.

Q. That was after he was arrested on the charges you just read?

A. Yes.

MR. HART: No other questions.

(Tr. 2377-78).

What this testimony inferred to the jury was that if a petitioner failed to show remorse upon his arrest, or failed to exhibit remorse at any time prior to trial then that petitioner was totally lacking in remorse and deserved no mercy. Such testimony is inflammatory and cuts to the heart of fundamental fairness and due process. There was never any showing that the petitioner gained pleasure from his actions in 1973 or in 1980. To infer that no emotional outburst is the equivalent to having no remorse is to require the petitioner in every case to take the stand and there exhibit remorse. This is exactly why the Pope court related that lack of remorse has no place in the sentencing proceeding, under any circumstance.

What made this testimony even more inflammatory and more egregious was the comment of the prosecutor:

> You sat through this entire trial as many other juries have in cases that I have tried; and I have watched you look at the Defendant. How would you describe him during the course of what can only be described as emotionally heartrendering testimony the first day of this trial? Did his expression change? Was he moved by emotion at all? Or did he appear to be cold and calculated? You look at him,

> and he shows no emotion at all; but we know his propensity for violence. We know what he did to himself. We know that something triggered him twice on November fourth, 1980. We don't what it is, and we don't know why it happened. But we do know that it hasn't moved and that it's still there with him.

(Tr. 2271-72).

In addition to the fact that a showing of lack of remorse in the instance was inappropriate and prejudicial and was purposely inflammatory in order to negate a recommendation of mercy the remarks went to the prosecution's personal opinion and not to matters of evidence. Whether or not the petitioner felt remorse for the victim, as speculated by the prosecutor, is patently not a matter of evidence. Rather it is strictly an appeal to the jury's emotion. McMillian v. United States, 363 F.2d 165 (5th Cir. 1966); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983).

The jury may not, contrary to the prosecutor's remarks, have observed the petitioner's demeanor at the time in question. Yet now the jury would have an opinion or impression of the petitioner supplied by the state. This was no argument by the prosecutor regarding evidence received from the witness stand, but was, rather improper testimony and personal opinion by the prosecutor as to extrinsic matters which the prosecutor perceived. See United States v. Garza, 608 F.2d 659 (5th Cir. 1979); Bass v. Sullivan, 550 F.2d 229 (5th Cir. 1977); McMillian v. United States, 363 F.2d 165 (5th Cir. 1966); Meade v. State, 431 So. 2d 1031 (4th DCA 1983); Ryan v. State, 457 So. 2d 1084 (4th DCA 1984). (The prosecutor's statements were tantamount to a comment on the petitioner's failure to testify. Shepard v. State, 436 So. 2d 232 (3d DCA 1983)).

It is clear that such comments upon the petitioner's behavior off the witness stand are not relevant, violate the Fifth Amendment 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 petitioner'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 petitioner'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 petitioner's courtroom demeanor improper, holding that petitioner'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 was not showing emotion while listening to the state's witness was not evidence and had absolutely nothing to do with whether he was remorseful. 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 harmless error.

It has been argued that because the petitioner's guilt is so great and convincing the jury would not have returned a recommendation of mercy, irrespective of the damaging statements, and that therefore the error becomes immaterial. Goddard v.

State, 196 So. 596 (Fla. 1940). That is simply not the situation in the instant case, since all of the evidence used in aggravaation was improper.

In Raulerson v. State, 102 So.2d 281, 286 (Fla. 1958) the Florida Supreme Court dealt with the effect of improper statement of the trial court on the question of the jury's recommendation of mercy for the petitioners:

> "* * * And how are we to determine what effect it [the improper statement] had on the conclusion of the jury. Assuming for the moment the State's argument that the proof of guilt was 'clearly established' we cannot agree with the State's contention that 'there is no reason to believe that any verdict other than that of guilty as charged could possibly have been arrived at.' (Italics supplied) In this statement the possibility that a recommendation of mercy might be included in the verdict is ignored. * * * Who is there to gainsay that but for the questioned remark seven jurors would have recommended mercy? Not we. The difference, to the appellants, would have been the one between life and death. Even when a recommendation of mercy is incorporation in the verdict, the defendant must have been proved 'guilty beyond and to the exclusion of a reasonable doubt.' Davis v. State, Fla., 90 So.2d 629, 631. If the State's premise, that such was the degree of proof in this caser, is accepted, it does not lead to the conclusion that death should result."

Additional nonrecord matters, uncharged offenses, and improper misstatement of facts.

The prosecutor, in addition to placing before the jury prejudicial arguments concerning future crimes and lack of remorse, also inflamed the jury by making improper and prejudicial reference to nonrecord matters, uncharged and unsubstantiated offenses, and otherwise improperly misstated the facts to the jury.

In his argument to the jury, the prosecutor stated:

`Dr. Fireman indicated in his testimony that he talked about other criminal episodes with the petitioner that we don't know about" (Tr. 2435). That is absolutely false. Dr. Fireman in fact denied discussing any other criminal episodes with the petitioner. The court transcript shows the following:

> Q: Are the manifestations of his pedophiliac tendencies confined to 1969,

1973 and this case, as far as you know?

A: Okay. In answer to your question, of course, it occurred to me . . . [to] try to find out if there are other victims or other experiences of similar behaviour, and I have, in fact, wanted very much to explore that. But the time constraints have not permitted me to do that.

Not only did the prosecutor misstate the facts to infer that the petition committed additional crimes and had related such crimes to Dr. Fireman he argued that petitioner was involved in another nonrecord incident when he was a juvenile. The prosecutor stated: "We know there was an incident back in 1969 involving a seven-year-old girl. Where is she today, I know not, but she is a twenty-year-old person living somewhere in the country. And I imagine if we had the records and the resources, we could go back and find here. We could give you the name of that victim. Let's just call her Jane Doe." (Tr. 2430).

The prosecutor referred to evidence and crimes not charged in the indictment. The prosecutor argued that Mann had attempted to sexually assault the victim, contrary to the evidence. Mann was not charged in any way with any sex crime. Thorough examination of the victim, petitioner's clothes and vehicle showed no evidence of assault. Quite the contrary, the evidence showed, and the court found, that the petitioner killed the victim in a fit of suicide rage, no matter what the original intent may have been. The prosecutor misstated the evidence and argued a crime that petitioner was not charged with. "And, I think given the testimony you have heard in this case and the way this man is with children, that his intentions were to sexually molest her" (Tr. 2432).

There was no particular reference to non-record evidence that was inadmissible and admittedly inflammatory. The prosecutor stated, when arguing that the crime was heinous, atrocious and cruel, "We did not show you everything that was available. We can only show you those items that were permitted into evidence, those items which were found to be more relevant than inflammatory (Tr. 2430-31).

The prosecutor misled the jury and diminished the jury's responsibility and made reference to nonrecord matters when he said the Judge will do the sentencing if the jury gave him a chance and that the judge may have more evidence at his disposal in the future (Tr. 2439).

Florida law forbids all of this type of prosecutorial misconduct:

Unsubstantiated statements which concern references to other crimes committed by a petitioner are particularly condemned by the courts. Ryan v. State, 457 So. 2d 1084, 1090 (Fla. 4th DCA 1984). See also Glassman v. State, 377 So. 2d 208 (Fla. 3d DCA 1979). Cf. Chapman v. State, 417 So. 2d 1028, 1031 (Fla. 3d DCA 1982):

> The holding of Williams is now codified in the Florida Evidence Code as section 90.404(2), Florida Statutes (1979), and provides in subsection (a):
>
> > Similar fact evidence of other crimes, wrongs or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> In order to introduce evidence of another crime not only must the requirements of Section 90.404(2)(a) be satisfied, but the state must also prove by clear and convincing evidence the collateral crime and a connection between the defendant and that crime. State v. Norris, 168 So. 2d 541 (Fla. 1964). Citing to state v. Norris, the court in Dibble v. State, 347 So. 2d 1096 (Fla. 2d DCA 1977), reversed a conviction where there was no proof that the similar crime was committed by the person on trial. Accord Franklin v. State, 229 So. 2d 892 (Fla. 3d DCA 1970); Parnell v. State, 218 So. 2d 535 (Fla. 3d DCA 1969). The record in this case is devoid of evidence pointing to appellant as the perpetrator of another crime.

In the instant case there was no evidence of any criminal conduct on the part of petitioner save for the one prior proved up by the State by way of a copy of an indictment (on remand) and a copy of the judgment and sentence. Not only did the doctor testify that he knew of no other crimes committed by the petitioner, he specifically stated that he had not seen the

juvenile records of the petitioner. The petitioner was, in fact, never charged with the 1969 incident the prosecutor argued to the jury (Tr. 2397-2402). This testimony was objected to (Tr. 2397).

Any attempt to present or misstate the evidence or to influence the jury by a statement of facts not supported by the evidence should be rebuked by the trial court, "and, if by such misconduct a verdict was influenced, a new trial should be granted." Washington v. State, 98 So. 605 (Fla. 1923). The Florida Supreme Court emphasized the duty of the trial court to restrain and rebuke counsel when improper argument is raised. Stewart v. State, 51 So. 2d 494 (Fla. 1951). See also United States v. Warren, 550 F.2d 219 (5th Cir. 1977).

The jury's consideration in a case should be limited to those matters brought out in the evidence and summation should not be used to put before the jury facts not actually presented in evidence. United States v. Spanglet, 258 F.2d 338 (2d Cir. 1958); United States v. Martinez, 466 F.2d 679 (5th Cir. 1972).

The prosecutor in the instant case not only misstated the facts he implied that there were more crimes and gave the jury the impression that the judge would see that material if the jury would only vote for the death penalty. In this regard the statement was also false. McMillian v. United States, 363 F.2d 165 (5th Cir. 1966) (prosecutor cannot mislead the jury into believing that there is other evidence, unknown or unavailable to the jury). Further, it was a direct violation of fundamental fairness under Chapman and a direct violation of the standard required in Caldwell.

The prosecutor further misled the jury into believing a sexual crime was committed on the victim when there was no evidence of such. To inflame the jury even more the prosecutor stated to the jury when arguing a particular aggravating circumstance, "We did not show you everything that was available. We can only show you those items which were permitted into evidence, those items which were found to be more relevant than inflammatory" (Tr. 2430-31). By referring to material withheld

from the jury the prosecutor used the material anyway. By telling the jury that there is inflammatory material which exists but which was kept from them by some technicality of evidence is to testify to that material and play to the imagination of the jurors. The evidentiary rules are designed to keep this type of material out and the courts have ruled that the prosecutor cannot refer to matter not in evidence for that very reason. Here the prosecutor purposely referred to material that was inadmissible by his own admission and intentionally inflammed the jury by describing the material as inflammatory. It is precisely the type of argument posited by the prosecutor that puts the closing argument, and the related circumstances, onto a level that violates fundamental fairness under Clark and Caldwell. These statements cannot be said to have had no effect on the jury. They cannot be classified as harmless error.

The prosecutor demeaned the testimony of the doctor by improper remarks such as that the testimony was "absurd." The prosecutor further stated "Dr. Fireman went on to say and describe the young girl, and this was even more offensive, that he lashed out against, quote, `the provoking individual'" (Tr. 2433).

The prosecutor improperly argued that this crime was cold, calculated and premeditated, when all evidence was to the contrary. There was no evidence of premeditation, cold or calculated. The Florida Supreme Court threw out cold, calculated and premeditated and the trial court did not reconsider it as a factor. The prosecutor, in arguing this factor, misled the jury as to the fact by distorting the testimony of the doctor as to the suicidal episode he was undergoing; a suicidel episode that was in motion, long before Mr. Mann even saw or knew the victim. The prosecutor stated, "He had decided to commit suicide before he committed the offense, but was interrupted by the victim. Elisa Vera Nelson was murdreed because she interrupted the plans of the defendnat. Is that moral or legal justification? It's absurd" (Tr. 2433). Dr. Fireman was not posing justification for

the crime. He was giving a medical opinion.

A prosecutor may not express his personal opinions on the merits of the case or the credibility of witnesses. United States v. Garza, 608 F.2d 689 (5th Cir. 1979); United States v. Rodriguez, 585 F.2d 1234 (5th Cir. 1978); United States v. Norris, 568 F.2d 396 (5th Cir. 1978). See also Ryan v. State, 457 So. 2d 1084 (4th DCA 1984); Green v. State, 427 So. 2d 1036 (3d DCA 1983); Glassman v. State, 377 So. 2d 208 (3d DCA 1979); Roundtree v. State, 229 So.2d 281 (15th D.C.A. 1969); Coleman v. State, 215 So.2d 96 (4th D.C.A. 1968).

The prosecutor improperly argued that the crime was committed by Mann in order to avoid arrest, when there was absolutely no evidence to support the contention. The prosecutor stated, "It is apparent that the reason Elisa Vera Nelson was a victim, was because she witnessed or could have been the person that identified him as her abductor had she lived . . . It is the state's contention that this murder was committed so that there would be no witnesses to the act that this man committed" (Tr. 2430). Even the trial court did not consider this as an aggravating factor, yet the jury very well may have.

The prosecutor inflamed the jury by making reference to nonrecord and false matters concerning the penal system and condemned the system for letting petitioner out (Tr. 2437).

> What you have seen in the courtroom is but one notable failure of the system. When the judge sentenced Larry Mann to nine years in prison in the State of Mississippi for what he did, he expected Larry Mann to be kept for nine years away from society. Had the bureaucrats kept him for that period of time, had the law of the State of Mississippi required that he be kept for that period fo time, we would not be here today. The state of the law today is that if he receives the death penalty, if he receives life imprisonment, he must seve twenty-five eyars without parole. But you and I do not control the destiny of the future course of the law. I am not sking you to speculate that. I am simply asking you to consider that.

(Tr. 2437)

The prosecutor injected irrelevant and inflammatory matters into the adversary sentence proceedings by speculating as to the

possible subsequent release of the petitioner by a parole board under legal conditions which do not exist now. He is specifically telling the jury that the mandatory 25-year sentence is not really a guaranteed sentence and that the petitioner may get out sooner. He states to the jury the false and inaccurate statement that the Mississippi judge who sentenced the petitioner to nine years fully expected the petitioner to spend the full nine years in prison; that the law changed allowing the "bureaucrats" to let petitioner out early. He states that the system is responsible for the death of the victim because it broke down and allowed petitioner to be relesed contrary to the court's wishes. This is a false statement of fact and law. There was no evidence that the Mississippi judge thought that a 9-year sentence meant serving nine years. There was no evidence that Mississippi law required that petitioner or anyone else serve a full term, absent bad behavior, and there was absolutely no evidence that Mississippi law had changed or that Florida would contemplate such a change.

Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984), similarly involved a prosecutor who injected his personal opinions on the issue of the possible release of the defendnat by a parole and probation board and the potential adverse consequences arising therefrom if a life sentence alone were imposed. The court held that it was "improper to critically speculate on the future actions of a parole commission, which is an independent body in the criminal justice process," id. at 1508. In the instant case, as in the Tucker case, the argument of the prosecutor extended beyond a discussion of the crime committed into speculation about matters unrelated to the issue of whether the petitioner should be sentenced to death, and as a result, the petitioner was denied a fundamentally fair sentencing proceeding. See Teffeteller v. State, 439 So. 2d 840 (Fla. 1984); Norris v. State, 429 so.2d 688 (Fla. 1983); Grant v. State, 194 So. 2d 612 (Fla. 1967); Williams v. State, 68 So. 2d 583 (Fla. 1983).

To argue to the jury that Florida would change its mandatory 25-year sentence to something less, thus allowing the jury to believe he would return and kill again, as stated numerous times by the prosecutor was to so inflame the jury as to render the hearing fundamentally unfair.

The prosecutor in the case at bar improperly argued and inflamed the jury with statements to future murders and victims. He stated "the evidence is so overwhelming that this man is a murder waiting to happen. There is another murder wrapped up in this man right now and maybe more" (Tr. 2436).

"And by your recommendation, you're going to tell the judge that you as the conscience of this community, you're going to tell him whether or not you are willing to take the risk that at some point in the future this man might be put out in the streets and then be given the opportunity to find out if that murder will occur" (Tr. 2436). "We don't know, if this man is ever eligible for parole, or who the next victim will be in 2 years possibly" (Tr. 2430).

This type of argument is not only impermissible under the cases cited supra, but is impermissible in that it violates the "golden rule" of prosecutorial argument. See State v. Wheeler, 436 So. 2d 962 (Fla. 3d DCA 1983); Lucas v. State, 335 So. 2d 566 (1st DCA 1976).

The prosecutor inflamed the jury by repeated reference to the victim's family and the petitioner's family as victims also (Tr. 2432, 2438, 2439, 2245).

In Edwards v. State, 428 So. 2d 357, 359 (3d DCA 1983), the court stated:

> The prosecutor's argument was an improper appeal to the jury for sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused. It is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion or prejudice.

Harper v. State, 411 So. 2d 235 (3d DCA 1982).

> We have been confronted with a rash of such arguments . . . and the arguments have been

> condemned as unfair, intemperate and unethical. See Wiliams v. State, 425 so. 2d 591 (Fla. 3d DCA 1982); Hines v. State, 425 So. 2d 589 (Fla. 3d DCA 1982); Jackson v. State, 421 So. 2d 15 (Fla. 3d DCA 1982); Chapman v. State, 417 SO. 2D 1028 (Fla. 3d DCA 1982); Gomez v. State, 415 So. 2d 822 (Fla. 3d DCA 19); Harper v. State; McMillian v. State, 409 So. 2d 197 (Fla. 3d DCA 1982); see generally ABA Standards for Criminal Justice, 3-5.8 (1980).

Edwards, 428 So. 2d at 359. See also Knight v. State, 316 So. 2d 576 (1st DCA 1975); Breniser v. State, 267 So. 2d 23 (4th DCA 1972).

The petitioner is not unmindful of Bush v. State, No. 62,947 (Sup. Ct. Nov. 1984), and its analysis of Darden v. State, 329 So. 2d 287 (Fla. 1976). However, the comments in the instant case were extremely inflammatory and constituted prosecutorial abuse.

The prosecutor stated to the jury:

> I can't show you a picture of Elisa. This is not a picture of Elisa Vera Nelson. It's a picture of the body of Elisa Vera Nelson. Elisa Vera Nelson was gone at this time.
>
> Let's reconstruct possibly what she did with her life. You've seen her mother. You've seen the young girl's hair, long, blond. You might imagine, based on a couple of pictures you have seen, she was a fair-complected, light-skinned young girl who had just got her braces when she was on the way to school. Let's leave it at that.

(Tr. 2432)

> There are other victims in this case, the parents of Elisa Vera Nelson who have never had the opportunity to stand in front of anyone and ask to have their daughter's life spared.

(Tr. 2439).

The appeal here to the sympathies of the jurors, compounded by the numerous other improper statements and arguments cumulatively make for a situation where the court would have abused its discretion in failing to grant a mistrial. The "line was clearly drawn to far" as stated in Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), and noted by the Bush court. Teffeteller was noted earlier in this pleading in reference to the comments by the prosecutor concerning "future killing."

Teffeteller determined that failure to grant a motion for mistrial or give a customary instruction was a clear abuse of discretion (citing Paramore v. State, 229 So. 2d 855 (Fla. 1969)) in that case. The court reasoned that an appellate court will not overturn the exercise of the discretion of a trial court in controlling comments of counsel unless the appellate court can determine form the record that the conduct or improper remarks of the prosecutor did not prejudice the accused.

> We cannot determine that the needless and inflammatory comments did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase.

Teffeteller, 439 So. 2d at 845.

> The remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty. The intended message to the jury was clear: unless the jury recommended the death penalty, the defendant in due course, will be relesed from prison and will kill again.

Id.

Petitioner has already demonstrated that the prosecutor more than once stated that petitioner would get out and kill again. Coupled with those statements eliciting sympathy for the family of the victim the combined other improper prosecutorial comments set forth above would absolutely insure that the jury would recommend death. The totality of all of the comments and other prosecutorial misconduct clearly caused the penalty hearing to be fundamentally unfair.

II.

THE INVOLUNTARY REMOVAL OF THE DEFENDANT FROM THE JURY VIEW AND FROM THE TAKING OF TESTIMONY IN HIS CAPITAL TRIAL VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.180.

After the Court granted the state's motion for a jury view in this case, on March 17, 1981, the jury was taken to various scenes related to the killing. [Tr. 378]. Defense counsel for Mr. Mann objected to the jury view [Tr. 1175 and 1601]; however,

defense counsel told the court Mr. Mann was waiving his presence at the jury view. [Tr. 1174]. The petitioner did not personally waive his right to be present at the view and did not acknowledge the waiver in open court. The waiver took place in chambers with only counsel present without the presence of the petitioner [Tr. 1174].

During the conference in which the jury view was discussed the court specifically noted that "the detective that will be testifying will simply point out the various areas and what that area pertains to and not give any further testimony of any kind." (Tr. 1174). The prosecutor qualified this specifically with the exception to location, to have the detective "point out where the tire plaster casts were made, where the glasses were found, the position of the body, and that sort of thing." The court responded: "but no testimony beyond that." (Tr. 1175).

Testimony at the jury view went beyond that explained to Mr. Mann when any testimony at all was taken, because Mr. Mann was told the jury was only going to look at the scene. Testimony also went beyond what the attorneys were assured of prior to the view, when the prosecutor elicited a number of questions relating to the condition of the area, and permitted the detective to go into a narrative about the search. The court overruled counsel's objection at the scene to the taking of the testimony. (Tr. 1604, 1609, 1610).

Mr. Mann would not have waived his right to be present at the taking of any testimony, and did not in fact waive such rights, and affirmatively states in this motion that he did wish to be present at the taking of any testimony in his capital case. The taking of testimony outside Mr. Mann's presence occurred during a critical stage of the case. The convictions and sentences would have been vacated had this issue been timely raised. Francis v. State, 493 So.2d 1175 (Fla. 1982); Hall v. Wainwright, 733 F.2d 788 (11th Cir. 1984); Proffitt v. Wainwright, 685 F.2d 1277 (11th Cir. 1982). In Amazon v. State, No. 64,117 (Fla. order rendered Dec. 11, 1984) (copy attached),

this Court ordered on evidentiary hearing "to determine whether appellant knowingly and intelligently waived his right to be present at the jury view of the crime scene. The Court is concerned regarding the adequacy of notice and advice by defense counsel, and also the scope of authority Amazon gave his counsel to waive his presence." Such an inquiry is likewise necessary here.

The conviction and sentence of death, having been obtained through the taking of testimony in the presence of the jury without Mr. Mann's presence, therefore violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Florida Rule of Criminal Procedure 3.180. Mr. Mann is entitled to an evidentiary hearing, after which his convictions and sentences should be vacated and this cause set for retrial.

III.

THE INVOLUNTARY PRECLUSION OF THE DEFENDANT FROM PRESENCE AT THE JURY VIEW AND TAKING OF TESTIMONY IN HIS CAPITAL TRIAL HAS VIOLATED HIS RIGHT TO A FAIR TRIAL, TO BE FREE FROM CRUEL OR UNUSUAL PUNISHMENT, AND TO DUE PROCESS OF LAW AS GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, THE FLORIDA CONSTITUTION AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.180, BECAUSE A DEFENDANT CAN NOT WAIVE HIS RIGHT TO BE PRESENT DURING ANY CRITICAL STAGE OF THE CAPITAL TRIAL.

The petitioner hereby reincorporates and realleges all allegations contained in the preceeding ground.

Mr. Mann had an absolute right to be present at all critical stages of his capital trial, when the jury was present and testimony was being taken. He did not waive that right, did not intend to waive that right, and in fact, under the United States Constitution, such a right is not waivable in the capital trial. The taking of testimony before the jury in Mr. Mann's absence as described in the preceding ground occurred during a critical stage of trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The removal of the petitioner during testimony at his capital trial without an express record waiver was fundamental error. In

Francis v. State, 493 So.2d 1175 (Fla. 1982), the Florida Supreme Court reversed a capital conviction when a petitioner was not permitted to be present during the exercise of peremptory challenges. Relying both on Fla.R.Crim.P. 3.180 and the Fourteenth Amendment, the Court found petitioners have a constitutional right to be present during jury challenges as well as a right created by Florida Rule of Criminal Procedure 3.180(e)(4). Such a right must be knowingly and intelligently waived on the record before the petitioner can be removed from the courtroom. Reversing the conviction in Francis, the Court held:

> Francis was not questioned as to his understanding of his right to be present during his counsel's exercise of his peremptory challenges. The record does not affirmatively demonstrate that Francis knowingly waived this right or that he acquiesced in his counsel's actions after counsel and judge returned to the courtroom upon selecting a jury. His silence, when his counsel and others retired to the jury room or when they returned after the selection process did not constitute a waiver of his right. The State has failed to show that Francis made a knowing and intelligent waiver of his right to be present. See Schneckloth v. Bustemonte, 412 U.S. 218, 83 S.Ct 2041, 36 L.Ed.2d 854 (1973); Johnson v. Zabst, 304 U.S. 458, 58 S.Ct 1019, 82 L.Ed. 1461 (1938).

Francis, 413 So.2d at 1178.

Francis is one of a long line of cases which hold a petitioner has a Sixth and Fourteenth Amendment right to be present any critical stage of trial. Illinois v.Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1984); Hall v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). See also, Amazon v. State, No. 64,117 (Fla. 1984). It is beyond question that the taking of testimony during a capital trial is a critical stage. Fla.R.Crim.P. 3.180 (c)(4) defines such a proceeding as a critical stage, providing:

> Presence of Defendant. In all prosecutions for crime the defendant shall be present:
>
> (5) At all proceedings before the Court when the jury is present;
>
> (7) At any view by the jury;

This issue is cognizable in a motion for post conviction relief because it involves a denial of a fundamental constitutional right. Illinois v. Allen, 387 U.S. 337, 338 (1970); Proffitt, 686 F.2d 1260 n.49; Walker v. State, 284 So.2d 415 (2d DCA 1972) (resentencing petitioner without his presence constituted fundamental error); Cole v. State, 181 So.2d n.698 (3d DCA 1966).

Like Francis, there is no express record waiver in this case of petitioner's right to be present; there is only the bare statement of petitioner's counsel. Waiver of a fundamental constitutional right will not be presumed from a silent record. Lewis v. United States, 146 U.S. 1011 (1897). Cf. Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436 (1966). The petitioner here was absent during the testimony of a critical witness. There is no evidence of misconduct which would justify removal. Henry v. State, 94 Fla. 783, 144 So. 523 (1927). This case is not like State v. Melendez, 244 So.2d 137 (Fla. 1971), where the petitioner freely and knowingly waived any objection after his absence from the courtroom, and subsequently acquiesced and ratified his counsel's selection of a jury during that absence. It is extremely doubtful in any event that principles of "acquiescence" and "ratification" even apply to a circumstance such as this in which testimony is taken in the petitioner's absence.

A petitioner has an absolute right to, and must be present at all stages of a capital trial, especially when the jury is present, at a jury view, and when testimony is being taken. Francis v. State, 413 So.2d 1175 (Fla. 1982); Proffitt v. Wainwright, 685 F.2d 1277 (11th Cir. 1982); Fla.R.Crim.P. 3.180. The Florida Supreme Court has on several occasions reserved deciding whether a petitioner in a capital case can ever waive his right to be present in a capital trial. Herzog v. State, 438 So.2d 1372, 1376 (Fla. 1983); Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982). In Fails v. State, 60 Fla. 8, 53 So. 612 (1910) the Court held that a petitioner has a right to, and must

be present during a capital trial.

The Court in Cole v. State, 181 So.2d 698 (3d Dis. 1966) noted that whether counsel, with leave of court, may waive the appearance of the petitioner in a capital case has not been decided in Florida. The court further noted that there were cases that held in effect that a petitioner may waive his presence in a noncapital case, but the waiver must be personally made. In order for a waiver to be binding on a petitioner it must be made in his presence or by his express authority or be subsequently acquiesced in by him. The Court held that "if the appellant's right to be present was waived without his knowledge and consent or acquiescence it would be such a denial of appellant's rights under the laws of Florida as to render the judgment vulnerable to collateral attack." Cole, 185 So.2d at 701.

> "In State v. Melendez, which involved a trial for a noncapital offense, we addressed counsel's waiver of petitioner's presence during the jury selection process and said that where a petitioner has counsel, constructive knowledge of the proceedings may be imputed to defendant but that this doctrine only applied to those cases in which upon defendant's reappearance at his trial, he acquiesces or ratifies the action taken by his counsel during his absence. In Melendez, we explained that upon Melendez's reappearance, the trial judge carefully questioned him as to his knowledge and understanding of his right to be present, and he freely ratified the actions of his counsel in selecting the jury."

Francis v. State, 413 So.2d 1175 (Fla. 1982).

The Eleventh Circuit has repeatedly held the petitioner's right to be present at a capital trial is so fundamental that it cannot be waived. Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984). In Hall the state contended that Hall was not absent during any critical stages of the trial; therefore, his absence did not violate any of his rights. The Eleventh Circuit stated:

> We are concerned about two matters: (1) the circumstances surrounding Hall's absence during the trial court's discussion with the jury concerning items of evidence during the jury's deliberations, and (2) the effect of our recent holding that a defendant may not waive his presence in a capital case announced in Proffitt v. Wainwright, 685 F.2d

> 1227, 2156-58 (11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698. Precedent in this circuit suggests that Hall's absence during discussions with the jury may constitute error. United States v. Benavides, 549 F.2d 392 (5th Cir. 1977). We read Proffitt to hold that a defendant may not waive his presence at any critical stage of his trial.

The Eleventh Circuit Court has also held that "Until the Court expressly overrules its decisions in Diaz and Hopt, however, we are bound by the rules established in those cases that a capital petitioner's right to presence is nonwaivable. The Court did indicate that if there were to be a departure from that rule it would be predicated on the knowing-and-voluntary-consent requirement established in the noncapital context through the Illinois v. Allen, 90 S.Ct 1057 (1970) and Johnson v. Zerbst, 58 S.Ct 1019 (1938) (which established the standard) cases.

Petitioner is aware that the Florida Supreme Court has recently ruled on the issue of voluntary waiver of a petitioner's presence in a capital case in Johnson v. Wainwright 463 So.2d 207 (Fla. 1985). The Johnson court specifically distinguished Francis from Johnson by stating that Johnson voluntarily excluded himself from the courtroom without voicing an objection while in the presence of his attorney who was making the request in the open courtroom. The Court rightly pointed out that in Francis the proceeding took place in the absence of the petitioner and without his express consent.

In the instant case the defense attorneys waived the petitioner's right to be present at the jury view during an in-chambers conference without the petitioner being present. There is no record waiver by the petitioner, no acquience, nor any ratification in open court. The judge did not question him as to his knowledge and understanding of his right to be present as in Melendez. If there was a waiver, as counsel states, it clearly was not a proper or knowledgable one.

More important however, the waiver, if there was one, did not go to the taking of testimony at the jury view. That there was to be no testimony was expressly stated on the record by both

counsel and the Court. There can be no knowing and intelligent waiver where the petitioner, and counsel, were led to believe that no testimony was to be taken. This constitutes an involuntary removal from courtroom proceedings at a critical stage; the taking of testimony. There was never any waiver of this right. Indeed, there were two objections made by defense counsel during the jury view specifically with regard to the taking of testimony. There was no waiver for the taking of testimony when no testimony was to be taken.

(There is a question of whether the petitioner could have made a knowing and intelligent waiver in any case, since as his counsel testified, the petitioner was fully medicated.)

There is another critical distinction to be made between Johnson and the instant case. In Johnson the court held that Johnson was different from Francis because Johnson was voluntarily absent so that testimony might be taken on his behalf - for his benefit. Johnson, 463 So.2d at 211. In the case at bar the jury view was definitely not taken in the interest of the petitioner.

The case of Middleton v. State, 465 So.2d 1218 (Fla. 1985), as well as Johnson pose one additional issue and that is whether there is a procedural bar to raising this claim in a 3.850 motion, both Middleton and Johnson state that this type of claim is not cognizable by means of a motion under rule 3.850. Both these cases are 1985 decisions. In 1980 the standing authority in Florida was set forth in Cole v. State, supra. As noted, the Cole court stated that of an appeallant's rights to be present was waived without his knowledge and consent or acquiescence it would be such a denial of appellant's rights under the laws of Florida to render the judgment vulnerable to collateral attack.

Appellate counsel would have relied on Cole and planned for that issue to be pursued on 3.850 motion rather than direct appeal. If not, counsel would have been considered ineffective for failing to raise this critical and fundamental point on direct appeal as noted by the Eleventh Circuit in Johnson v.

Wainwright, No. 85-3057 (11th Cir. Dec. 2, 1985).

In Johnson the Eleventh Circuit discussed whether Johnson had avoided the procedural bar by demonstrating both cause for and prejudice from his failure to preserve the claim for collateral review. The court stated that petitioner had a persuasive argument, that he had good cause for his failure to comply with the Florida rule requiring a contempareous objection at trial. "It would be anomalous, however, to apply the rule to bar habeas corpus review where the constitutional inquiry relates to the petitioner's, as opposed to his lawyer's, failure to exercise his rights knowingly. We cannot fault the petitioner for failing to assert an objection when his attorney - the individual on whom he depended to preserve his rights - arranged for him to be removed from the courtroom. The same cannot be said, however, of petitioner's failure to assert the claim which represented by new counsel on direct appeal."

It would be unjust to charge petitioner herein with failure to pursue this claim on direct appeal when the standing law in Florida allowed, or, in fact, required, collateral attack. Since there were in fact objections made to the testimony taken during the jury view the Court would have to consider that appellate counsel was totally ineffective if the court were to hold that petitioner could not seek collateral review of the claim. By Eleventh Circuit standards, Johnson had a valid claim (not nearly as strong as petitioner herein) and by their reckoning appellate counsel should have pressed the claim. This would constitute ineffective assistance of appellate counsel.

There is, however, additional authority to conclude that reliance on Cole in 1981 was not only reasonable, but proper. In Capers v. State, No. 85-166 3d D.C.A.opin.filed Nov. 20, 1985, the trial court denied petitioner's motion for post conviction relief holding that a claim that petitioners were denied the right to be present during a critical stage of the trial proceeding could not be raised in a post conviction attack on the judgment of conviction. The Third District reversed and remanded. The

Capers court was not unmindful of Johnson and Middleton, but made it clear that prior to these cases it was relying strictly on Cole. The court stated "In the earlier appeals from the convictions we declined to consider the 'involuntary-absence-from-the-courtroom' claim because it had not been presented to the trial court. (The only way to raise the claim was through a 3.850 motion.) We instead specifically invited appellant to present the question by a motion for post conviction relief."

The earlier disposition of the issue constitutes the law of this case, "...and is unaffected by subsequent Supreme Court decisions." It should be noted that Johnson and Middleton did not expressly overrule Cole.

In its earlier decision, Capers v. State, 433 So.2d 1323 (3rd D.C.A. 1983) the Third District stated:

> Fourth, the court will not consider an issue never presented to the trial court, ie, Whether defense counsel's waiver of defendant's presence during the exercise of peremtory challenges was with the defendant's consent . . . Appellant may challenge the voluntariness of the waiver by a motion for post-conviction relief. See Johnson v. State, 267 So.2d. 114 (2nd Dist. 1972) (where defendant raised for the first time on appeal questions which Florida Rule of Criminal Procedure 3.850 required to be first submitted to trial court, judgment of conviction would be affirmed without prejudice to defendant's right to seek post-conviction relief).

Capers, 433 So.2d at 1324.

There is no doubt but that petitioner and appellate counsel believed that the appropriate and only procedure was to proceed under Florida Rule of Criminal Procedure 3.850. Petitioner has had no opportunity to do this until the present time since Florida has only just recently provided counsel for petitioners under sentence of death by creating the Florida Department of Capital Collateral Representative. This is petitioner's first 3.850 motion.

IV.

PREJUDICIAL REMARKS OF THE PROSECUTOR WERE SO IMPROPER THAT THEY CONSTITUTE VIOLATIONS OF DEFENDANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Improper prosecutorial remarks can constitute reversible error when such remarks may have prejudiced and influenced the jury into finding the petitioner guilty. Gent v. State, 194 So.2d 612 (Fla. 1967). Resorting to personal attacks on defense counsel is an improper trial tactic which can poison the minds of the jury. Peterson v. State, 376 So.2d 1230 (4th D.C.A. 1979); Ryan v. State, 457 So.2d 1084 (4th D.C.A. 1984). In Ryan the court held that such comments were of such a prejudicial magnitude as to amount to fundamental error. (In Ryan the prosecutor referred to counsel as being from another county.)

In the instant case the prosecutor maligned not only defense counsel, but impugned and misstated defense counsels' presentation of the defense. In a soliloquey in open courtroom concerning a fingerprint card demonstration the following took place:

> MS. SCHAEFFER: At this time, I would move to strike it. He said the card was good. What has that got to do with Mr. Meissner's being able --
> MR. MEISSNER: It demonstrates the way the card was taken, the way the print was taken.
> THE COURT: It's demonstrative evidence.
> MS. SCHAEFFER: Is it in evidence so we can use it?
> THE COURT: No
> MR. MEISSNER: You want my card in evidence?
> MS. SCHAEFFER: Do you want to put it in? Mark it as an exhibit.
> THE COURT: We can memorialize your fingerprint.
> MR. MEISSNER: We have found the ghost murderer.
> MR. DOHERTY: I move to strike that. May we approach the bench?
> (THEREUPON, a side-bar conference was held at the bench outside the hearing of the jury.)
> THE COURT: I didn't hear the last remark.
> MR. DOHERTY: The remark was, "We found the ghost murderer."
> MR. MEISSNER: That was made in the vein of humor, and the people that hear it took it in the vein of humor and not seriously. She wants my fingerprint in evidence. She's going to take the --
> MR. DOHERTY: I move for a mistrial. The basis is, there is no room in first degree murder cases, where you're putting somebody's

> life on the line, seeking the death penalty, to make humorous remarks to the jury.
>
> (Tr. 379-2010-11)

A remark, admittedly made as a joke, that the "ghost killer" has been found sends a message to the jury that the defense is perpetrating a hoax or fraud on the jury or at the very least can not be serious in carrying out their duties and responsibilities. Such remarks are grossly improper and inflammatory. Defense counsel not only objected, but moved for a mistrial. Adams v. State, 192 So.2d 762 (Fla. 1966); Carter v. State, 356 So.2d 67 (1st D.C.A. 1978); Reed v. State, 333 So.2d 524 (1st D.C.A. 1976); Peterson v. State, 376 So.2d 1230 (4th D.C.A. 1979). In Jackson v. State, 421 So.2d 15 (3rd D.C.A. 1982) the Third District reversed a conviction based on improper prosecutorial comments: "While the prejudicial effect of these remarks might have been dissipated if, as required, the trial judge had emphatically rebuked the state attorney and affirmatively instructed the jury that the comments must be totally disregarded, Deas v. State, 161 So.2d 729 (Fla. 1935), he neglected to do so and in the case of the 'used car salesman' remark which was worst of all, actually overruled the objection" Jackson, 421 So.2d at 16.

In the case at bar the judge not only overruled the objection, but did not emphatically rebuke the prosecutor or instruct the jury to disregard the comments. "In these circumstances, we must conclude that the petitioner's fundamental right to a fair trial may be upheld only by ordering a new one." Oglesby v. State, 23 So.2d 558 (Fla. 1945); Ruiz v. State, 395 So.2d 566 (3rd D.C.A. 1981); Jackson, 421 So.2d at 16. Had appellate counsel sought proper review of this claim the petitioner would, in all probability, have obtained a new trial untainted by prejudicial comment. The claim was properly preserved by counsel's objection and motion for new trial. It was pure ineffective assistance of appellate counsel that precluded this claim from proper appellate review.

V.

THE REPEATED REFERENCES OF THE PROSECUTION TO THE FINDING OF PUBIC HAIR IN THE TRUCK OF THE DEFENDANT WERE IRREVELANT, HIGHLY INFLAMMATORY, AND AMOUNTED TO A SIDE TRIAL ON AN UNCHARGED OFFENSE OF SEXUAL BATTERY, THEREBY RENDERING THE PROCEEDING FUNAMENTALLY UNFAIR AND VIOLATING THE RIGHT OF THE DEFENDANT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981), stands for the proposition that the Fourteenth Amendment right of a petitioner to a fair trial is violated where the court permits the introduction of evidence of crimes, wrongs, or acts irrelevant to the crime with which a petitioner is actually charged. That case involved a petitioner who appealed the denial of a motion calling for the severance of his trial on one count of first degree murder and another count of unlawful possession of a firearm. The petitioner claimed that at the trial, the prosecution successfully introduced evidence of a prior conviction for counterfeiting which, though relevant to the charge of unlawful possession of a firearm, was wholly irrelevant to the murder charge.

The evidence of this prior conviction was so prejudicial, the petitioner contended, that his right to a fundamentally fair trial was impaired. The Fifth Circuit Court of Appeals agreed:

> While it is true that the counterfeiting conviction was material to the firearm count, it was totally irrelevant to the murder charge and the only purpose it served was to show bad character and propensity to commit a crime. .... [T]his prejudice rose to such a level as to make the petitioner's trial fundamentally unfair and in violation of the fourteenth amendment.

658 F.2d 337, 341.

It is well established that an accused may not be convicted of a crime for which he has not been charged. United States v. Pazssint, 703 F.2d 420 (9th Cir. 1983); [United States v. Harrelson, 754 F.2d 1153 (5th Cir. 1985)]. Yet where a trial court has allowed the jury to hear evidence and argument concerning other crimes, wrongs, or acts with which the petitioner has not been charged, even though such evidence and argument are

irrelevant to the crime with which the petitioner has not been charged, even though such evidence and argument are irrelevant to the crime with which the petitioner has actually been charged, the jury may be improperly allowed to convict the petitioner of the crime with which he is charged on the basis of the irrelevant evidence of other crimes, wrongs, or bad acts.

In the instant case, the prosecution tendered one witness as an expert in the field of microscopic analysis, as it relates to hair comparisons. (Tr. 2093). The expert indicated that one set of vacuum sweepings from the truck of the petitioner contained pubic hair which he identified as perhaps coming from the petitioner. (Tr. 2106). However, the expert acknowledged that there was nothing unusual about finding pubic hair in the truck of the petitioner, since it is common to find pubic hair in vehicles. (Tr. 2119).

Despite this testimony by the prosecution's own expert witness that the presence of pubic hair in the truck of the petitioner could not be considered of particular significance, the prosecution made repeated reference to the pubic hair in the course of direct examination. (Tr. 2109, 2120). Each reference to the pubic hair by the prosecutor was met with an objection by counsel for the petitioner. A motion for mistrial and for a cautionary instruction was also made, but was not granted by the trial court. (Tr. 2130, 2132).

In a side-bar conference, the prosecution implied that the references to the pubic hair could be employed by the jury to establish a motive for the murder. (Tr. 2132). The defense, however, noted that there had been no allegation of sexual assault or sexual misconduct, and that the evidence concerning the pubic hair was therefore not only irrelevant, but highly prejudicial and inflammatory. (Tr. 2131).

Still, the prosecution did not even limit its reference to the pubic hair to the evidentiary stage of the trial. It also emphasized presence of the pubic hair in its closing argument to the jury, stating,

> Now, I'm not going to insult anybody's intelligence, and this is a very difficult situation to argue. But we do have testimony that there was pubic hair, pubic hair from the defendant found in the truck. And I think you are susceptibile of making any conclusions about how a male will lose pubic hair driving a truck as I am and what the likelihood is of that, one that would not be crushed, by the way, and hadn't been stepped on.

(Tr. 2263-2264). The obvious insinuation being forwarded is that the petitioner committed or attempted to commit a sexual battery or a sexual assault on the victim, and that this was a possible motive for the murder. Yet the petitioner, as his counsel pointed out to the court, was not charged with a sexual battery or sexual misconduct of any kind. Furthermore, there was no evidence in any part of the record that the victim had been sexually battered or that the murder was committed for, or as a result of the desire for, sexual gratification.

Even assuming that the references to the pubic hair by the prosecutor at both the evidentiary and closing stages of trial were admissible, the jury was given no guidance through any instruction on the limited manner in which such evidence could be used, because the trial court failed to grant the request of the defense counsel for such an instruction. In addition to being wholly irrelevant, the evidence was highly inflammatory and damaging because the jury was apt to misconstrue its importance in the absence of a cautionary instruction from the court. As a result, the petitioner was tried on an uncharged offense, and the jury verdict, infected by the repeated references of the prosecution to the pubic hair, was affected at both the guilt and penalty phases of trial. The sentence of death should therefore be vacated, and the conviction reversed.

VI.

THE IDENTIFICATION TESTIMONY BY THE MOTHER OF THE VICTIM WAS CUMULATIVE AND UNNECESSARY IN VIEW OF THE STIPULATION OF THAT TESTIMONY BY THE DEFENSE COUNSEL, AND TOGETHER WITH HER DISPLAY OF EMOTION, INJECTED IRRELEVANT AND INFLAMMATORY MATTERS INTO THE DETERMINATION OF GUILT AND THE RECOMMENDATION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; THE FAILURE OF APPELLATE COUNSEL TO RAISE THIS ISSUE ON APPEAL VIOLATED THE SIXTH AMENDMENT RIGHT OF THE DEFENDANT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Under Florida law, "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." S. 90.403, Florida Statutes (1985). As early as 1949, the Florida Supreme Court noted that:

> . . .if the introduction of the evidence tends in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence--if it tends to obscure rather than illuminate the true issues before the jury--then such evidence should be excluded.

Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949).

A principal objective behind the rule lies in the protection of the fundamental right of a petitioner to a fair and impartial hearing. Where relevant but cumulative evidence would unduly arouse the prejudice, hostility, or sympathy of the jury, its admission may result in a constitutional violation.

Such a result becomes especially likely in a case involving a charge of first degree murder, where the family of the alleged victim is permitted to testify concerning matters for which other competent witnesses are available. In Welty v. State, 402 So.2d 1159 (Fla. 1981), the Florida Supreme Court held that a member of the family of the deceased victim could not testify in a murder prosecution for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such an identification. The Court went on to note that "[t]he basis for this rule is to assure the petitioner as dispassionate a trial as

possible to prevent interjection of matters not germane to the issue of guilt." 402 So.2d 1159, 1162.

In the instant case, counsel for the petitioner offered to stipulate to testimony by the mother of the victim concerning both the identification of certain items of real evidence and events which occurred on the date of the murder, for the purpose of preventing the inflammation of the jury. (Tr. 303, 1170, 1471). Although the testimony of the mother of the victim added nothing to that to which the defense had already stipulated, this cumulative testimony was admitted by the trial court. The trial court noted that in testifying, the mother of the victim became emotional in the presence of the jury, fighting back tears and speaking with an occasional crack in her voice. (Tr. 1736).

Upon admission of the testimony, counsel for the petitioner made a timely objection, which the trial court overruled. (Tr. 1483). After the testimony had been given, the defense perfected the record by reiterating its objection, which was also overruled. (Tr. 1486).

The testimony of the mother of the victim was cumulative and unnecessary in view of the stipulation by the defense. The only effect of such testimony could be to arouse the passion and prejudice of the jury, and cause it to base its determination of guilt, and its subsequent advisory sentence of death, upon irrelevant and inflammatory matters in violation of the fundamental right of the petitioner to a fair hearing. Reasonably effective appellate counsel would have raised this issue on appeal, and had it been raised, it would have affected the outcome of the case at bar. For this reason, the sentence of death should be vacated, and the conviction of murder reversed.

VII.

BECAUSE THE UNUSUAL AND PSYCHOLOGICALLY SUGGESTIVE VOIR DIRE PROCESS TO WHICH THE VENIRE IS EXPOSED IN THE SELECTION OF A DEATH-QUALIFIED JURY FOR A CAPITAL TRIAL RESULTS IN A JURY WHICH IS PRONE TO CONVICT, THE FOURTEENTH AMENDMENT RIGHT TO THE DEFENDANT TO BE TRIED BY AN IMPARTIAL JURY OF HIS PEERS WAS VIOLATED.

In the trial of a capital offense, a juror may not be excluded for cause where his views concerning capital punishment would not prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Adams v. Texas, 448 U.S. 38, 65 L.Ed. 2d 581, 100 S.Ct. 2521. However, it has been held that the state may insist that jurors will consider and decide the facts impartially and will conscientiously apply the law as charged by the court, and therefore, in the promotion of its legitimate interest, the state may bar from jury service those whose beliefs would lead them to ignore the law or violate their oaths. 448 U.S. 38.

The state is not alone in its interest in an impartial jury. A criminal petitioner is entitled to impartiality under the Sixth and Fourteenth Amendments to the United States Constitution. See Glasser v. United States, 315 U.S. 60; Irvin v. Dowd, 366 U.S. 717; Turner v. Louisiana, 379 U.S. 466; Witherspoon v. Illinios, 391 U.S. 510. Where a jury, as an inherent result of the voir dire process, is less than neutral with respect to its ability to determine innocence or guilt, the issue becomes how to achieve an appropriate balance between the interests of the individual and those of the state.

A process of voir dire may be found constitutionally impermissible where it inherently results in the selection of a jury which is less than impartial to the petitioner. In Witherspoon v. Illinois, 391 U.S. 510, the United States Supreme Court held that by excluding for cause members of the venire who "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction . . . [t]he State of Illinios . . . stacked the deck against the petitioner" in its process of voir dire, 391 U.S. 510, 522-523,

producing a jury which was inherently more prone to impose the death penalty than it would have been in the absence of such a process. Citing its decision in Fay v. New York, 332 U.S. 261, 294, the Court noted "that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" 391 U.S. 510, 521.

While Witherspoon confined itself to the issue of the impact of the voir dire process on the ability of the jury to make an impartial determination as to a sentence of life or death, the Court indicated that a voir dire process aimed at securing a death-qualified jury could likewise be challenged on the basis of its biasing effect on the ability of the jury to render an impartial determination of innocence or guilt. 391 U.S. 520 n.18. The Court characterized the problem as "whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence . . ." 391 U.S. 520 n.18.

This issue is now before the United States Supreme Court and was recently argued in Lockhart v. McCree, 54 U.S.L.W. 3223 (U.S. , 1985), affirmed, Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) [hereinafter referred to as Grigsby]. An opinion in that case has not yet been rendered. In Grigsby, the United States Court of Appeals for the Eighth Circuit held that the Sixth Amendment right of a petitioner to a jury representing a cross-section of the given community is violated by a jury selection process in which venire persons who hold absolute scruples against the death penalty are excluded for cause, because such a process results in a jury which is inherently prone to convict the petitioner. 758 F.2d 226, 229. In so holding, that court indicated that the interest of the individual in a completely fair determination of innocence or guilt outweighed the interest of the state in submitting the penalty issue to a jury capable of imposing capital punishment. As the district court in Grigsby had put it,

> [b]y focusing on the penalty before the trial actually begins the key participants, the judge, the prosecutor and the defense counsel convey the impression that they all believe the defendant is guilty, that the 'real' issue is the appropriate penalty and that the defendant really deserves the death penalty.

Grigsby v. Mabry, 569 F.Supp. 1273, 1303 (E.D. Ark. 1984).

Though the Eighth Circuit did not specifically discuss the problem in the context of the Fourteenth Amendment, it is clear that the Sixth Amendment right to a jury representative of the community arises in conjunction with the Fourteenth Amendment right to impartiality. This intimate relationship between the Sixth and Fourteenth Amendments was noted by the Eighth Circuit in a quote which it drew from Witherspoon: "But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." Witherspoon, 391 U.S. 510, 518 [emphasis added]. Thus, whenever the cross-sectional requirement of the Sixth Amendment appears, it comes within the ambit of the impartiality requirement of the Fourteenth Amendment.

The Fourteenth Amendment right to impartiality, however, may be violated even in the absence of a violation of the Sixth Amendment right to cross-sectional representation. In the instant case, although the jury was not, as in Grigsby, rendered conviction prone by the exclusion for cause of venire persons with absolute scruples against the death penalty, it was rendered prone to conviction by the very process of death-qualification.

One of the many studies of the death-qualification process cited by the Eighth Circuit in Grigsby was that by Professor Craig Haney of the University of California-Santa Cruz. The study found that

> [d]eath qualification may bias capital juries not only because it alters the composition of the group 'qualified' to sit, but also because it exposes them to an unusual and suggestive legal process. Subjects were randomly assigned to one of two conditions in which they were exposed to standard criminal voir dire that either included death qualification or did not. Subjects who were exposed to death qualification were

> significantly more conviction prone, more likely to believe that other trial participants thought the defendant was guilty, were more likely to sentence him to death, and believed that the law disapproves of death penalty opposition. Several psychological features of the death-qualification process are suggested to account for the biasing effects.

Haney, "On the Selection of Capital Juries - The Biasing Effects of the Death-Qualification Process," Law and Human Behavior, Vol. 8, Nos. 1/2 at 121, 1984.

In Grigsby, it was held that no actual prejudice need by shown by a petitioner where "the integrity of the entire jury system" becomes infected through "a systematic challenge for cause." 758 F.2d 226, 243. Similarly, since the Haney study indicates that the very process of death-qualification affects the integrity of the enntire jury system, no actual prejudice need be shown by the petitioner in the instant case in order that he may secure relief from his sentence of death.

The Haney study, however, presents a dilemma in the trial of capital cases. On the one hand, the study suggests that by questioning members of the venire as to their attitudes and beliefs concerning capital punishment, the resulting jury is prone to convict the petitioner. On the other hand, by refusing to allow the State the opportunity to question potential jurors even as to whether their beliefs concerning capital punishment would impair their ability to render an impartial decision as to the innocence or guilt of the petitioner, the legitimate interest of the state in presenting its case to a jury which will decide the facts impartially may be undermined.

Both the interest of the petitioner and that of the State could be maintained by simply asking each member of the venire whether he could make an impartial decision as to the innocence or guilt of the petitioner. If the response were in the negative, that juror could be excused without further inquiry. The process of death-qualification for purposes of the penalty phase of the trial would then be carried out only if a verdict of guilty were

rendered, thereby eliminating entirely the prejudicial effect of the death-qualification process.

In the alternative, the juror answering in the negative could be sequestered for individual interrogation, which would at least serve to dilute the biasing effect of the death-qualification process. This latter approach was mandated for all capital trials by the Supreme Court of California in Hovey v. Superior Court of Alameda County, 616 F.2d 1301 (Cal. 1980), which extensively quoted the Haney study. Explaining its decision, the court stated,

> Of course, this court cannot insure that a rule of sequestered voir dire in capital cases will alleviate all the untoward effects of the current procedures . . .
>
> * * *
>
> Nonetheless, sequestered voir dire will minimize each juror's exposure to the death-qualifying voir dire of others. It will thereby minimize the deleterious of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity, and integrity of the jury to which society has entrusted the ultimate responsibility for life and death.

616 P.2d 1301, 1354-1355.

The latter procedure, then, would at least provide a capital petitioner with some degree of protection from the process of death-qualification. At the same time, the legitimate interest of the State in presenting its case to an impartial forum would be protected, as the presence of persons whose scruples against the death penalty would preclude an impartial finding as to innocence or guilt would be made known.

In the instant case, counsel for the petitioner moved for individual voir dire of the jury, requesting that the trial court either adopt the findings of the Hovey court or, in the alternative, provide to the petitioner funds with which to conduct studies equivalent to those cited in the Hovey decision. The motion was denied. (Tr. 107-109, 153-154, 192, 1116-1123). Had the motion for individual voir dire of the jurors been granted, the biasing effects of the death-qualification process would have

been significantly diminished, and the rights of both the State and the petitioner to an impartial hearing under the Fourteenth Amendment adequately protected. For this reason, the sentence of death should be vacated, and the judgment against the petitioner reversed.

The Haney study suggests a number of ways in which the psychologically suggestive process of death-qualifying juries results in bias against the petitioner. One such way involves

> ...excusing from jury participation those persons who express disqualifying death penalty attitudes. To jurors, such disqualification likely represents an expression of disapproval on the part of the judge and the law toward death penalty opposition...Disqualification ...helps to convince jurors that the judge and the prosecutor-those people responsible for the exclusion-personally favor the death penalty. Jurors who wish to please these authority figures may choose to do so by advocating the death penalty in deliberations. Moreover, some jurors may infer from this lesson of disqualification that the law disfavors any form of "timidity," and prefers hard line stands and the expressed willingness to readily consider imposing any punishment, however severe.

Haney at 130.

In the case at bar, one of the first persons called from the venire for voir dire was Bruce D. Lee, M.D., a cardiologist. [Tr. 1203]. When the subject of the death penalty was broached by the prosecution, it was Dr. Lee who first responded.

> MR. MEISSNER: This case, as you know by now, involves the charge of murder on the first degree. Murder in the first degree can be a capital offense in the State of Florida. It is an offense for which the Court may impose the death penalty...
>
> [W]ould the fact that this case may result in the Court imposing the death penalty raise such a problem with you that you do not feel that you should convict if the evidence was there to convict?
>
> DR. LEE: I may have --
>
> MR. MEISSNER: Dr. Lee, you feel you have a problem?
>
> DR. LEE: I have got a mixed bag of worms on this one. I have spent my life trying to do it the other way around, and it's a little difficult for you to reverse yourself.

> MR. MEISSNER: I understand that a physician's function is to save lives. But if the facts and the evidence established to your satisfaction beyond a reasonable doubt --
>
> DR. LEE: If it could lead to the death sentence, I think I would have difficulty.
>
> MR. MEISSNER: Would you have difficulty of finding him guilty of the charge?
>
> DR. LEE: Yes, I might very well.

[Tr. 1210-1211] [emphasis added].

This exchange was followed by a side-bar conference out of the hearing of the jury. [Tr. 1211]. Then the Court addressed Dr. Lee:

> THE COURT: Doctor Lee, I think the ultimate question is, would you ever under any circumstance inflict the death penalty despite what the evidence might disclose?

[Tr. 1213] [emphasis added]. Before Dr. Lee could respond, another side-bar conference was held, after which the Court again addressed Dr. Lee:

> THE COURT: Will you, under no circumstance, be able to return a verdict of guilty despite what the evidence might disclose if you knew that the death penalty might be inflicted?
>
> DR.LEE: ...[E]ven though I feel very much that capital punishment is -- I just have very, very mixed feelings about this...

(Tr. 1213).

Once again, a side-bar conference was held. [Tr. 1213]. Afterward, the prosecution proceeded to explain the bifurcated trial system applicable to death penalty cases, noting that while the jurors would decide the issue of guilt or innocence, they would only make a non-binding recommendation to the judge regarding sentencing. (Tr. 1214-1216). The prosecution then questioned Dr. Lee again:

> MR. MEISSNER: You still think you would have difficulty rendering a guilty verdict regardless of the evidence?
>
> DR. LEE: If there was an outside chance that there might be capital punishment --
>
> MS. SCHAEFFER: We would have the Witherspoon problem.
>
> MR. MEISSNER: Yes, we may have.

THE COURT: Doctor, you may be excused.

[Tr. 1216-1217] [emphasis added].

Throughout this exchange, the focus of the entire courtroom lay with Dr. Lee and his "problem" with the death penalty. The members of the venire heard the prosecution and the Court drill Dr. Lee with questions about his apparent "difficulty". The questions were repeatedly punctuated with "regardless of the evidence?", as if in disapproval of anyone who would maintain such vehement scruples about the death penalty as to place them over the equation of innocence or guilt. Between sets of questions were three secretive conferences among the judge and the attorneys, magnifying for the members of the venire the apparent concern of the Court over death penalty opposition. Furthermore, as long as Dr. Lee expressed mixed feelings about the death penalty issue, he was met with further questions by the prosecution and by the Court. As soon as he became firm in his stance, however, the prosecution and the defense acknowledged his "problem," and the Court immediately dismissed him without explanation to the remaining members of the venire.

After Dr. Lee was excused, the prosecution continued to develop the death penalty issue:

> MR. MEISSNER:
> ...
>
> Do any of you have any feelings, as Doctor Lee did, do any of you feel as Doctor Lee did with regard to the imposition of the death penalty, that possibility?
> ...
>
> ...Do any of you have that problem? I need an assurance from each of you on this.

[Tr. 1218] [emphasis added]. The prosecution raised the issue of "difficulty" or "problems" with the death penalty again and again. [Tr. 1319, 1333, 1363, 1392, 1408, 1410]. Of course, no one among the venire would have wanted to suffer the same deprocation which Dr. Lee had received at the hands of the judge, the prosecution, and even the defense. The exchange between the Court and Dr. Lee only served as a demonstration that opposition to the death penalty is disfavored by the law, that it is a

"problem" which the Court will deal with by "excusing" anyone who asserts it.

Another important basis for the biasing effects of the death-qualification process lies with the timing of the inquiry in relation to the rest of the trial. The Haney study found that

> Jurors enter the courtroom in a state of some uncertainty about courtroom norms and the likelihood that the defendant is guilty. Of course, they know there is some likelihood of it, otherwise there would be no trial. But death-qualification resolves much of this initial uncertainty in a manner that appears prejudicial to the defendant. By requiring the attorneys and the judge to dwell on penalty at the very start of the trial, the death-qualification process implies a belief in the guilt of the defendant on the part of these major trial participants. If there was not a good chance that the defendant was guilty, jurors may reason, why would they spend so much time discussing his post-conviction fate? Of course, the jurors who draw this inference may not do so consciously. But death-qualification requires an initial discussion of penalty and penalty implies guilt.

Haney at 129.

In any capital case, the venire will be aware that the prosecution believes the petitioner to be guilty of the crime charged. In the instant case, this belief was most forcefully conveyed to the venire in the following remarks:

> MR. MEISSNER: ....
> ....
>
> ....This Defendant is charged with premeditated murder. That means that the Grand Jury of this county charged him with consciously planning for however long -- and the judge will instruct you on the law. It doesn't have to be weeks or months, but he premeditated the death of that child.
>
> He slit her throat, crushed her skull. Premeditated, he thought about it. He did it.

[Tr. 1322]. [emphasis added].

However, expressions as to the guilt of the petitioner were not limited to those of the prosecutor. The defense counsel made a plethora of remarks which, to the venire, would have been indicative of a belief in the guilt of the petitioner.

During the explanation by the prosecution of the bifurcated capital trial system, counsel for the petitioner entered an

objection to a comment by the prosecution as to what would occur should the jury find the petitioner "innocent":

> MS. SCHAEFFER: A brief objection at this point. I wish he would not refer to innocent. I think it's going to be guilty versus not guilty. I think there is a difference.

[Tr. 1215] [emphasis added]. This distinction was raised by the defense counsel a second time as well. [Tr. 1279]. The defense counsel went on to say that it would not prove the innocence of the petitioner. [Tr. 1373].

The objection and explanation as to the distinction between "innocent" and "not guilty" would have clearly suggested to the venire that the defense counsel felt that the petitioner was, indeed, guilty of the offense, but that the prosecution might simply be unable to prove it. Furthermore, the declaration by the defense that it would not prove the innocence of the petitioner evinced for the venire an apparent belief on the part of the defense counsel that the petitioner was not innocent, and therefore, the defense counsel could not prove that he was innocent. The jury would be left with the impression that the defense counsel was courting legal technicalities, and with concern that such legal technicalities would unjustly set a murderer free.

Repeatedly, the defense counsel indicated that while the petitioner might actually be guilty of the crime, the law does not require that the petitioner prove his innocence. [Tr. 1247, 1253-1255]. At the same time, the defense counsel implied the belief that the petitioner was really guilty of the crime:

> MS. SCHAEFFER: ...So, again, bear in mind that we are here to save Mr. Mann's life, and we want to know and it is important to know whether or not you can be fair.

[Tr. 1250] [emphasis added].

> MS. SCHAEFFER: ...So, I have got to talk to you now in case we can't show a reasonable doubt and in case you convict Mr. Mann of murder one.
>
> ....
>
> But by the fact that I'm talking about this to you, don't think that's what we expect you

to do. Do you all understand that?

[Tr. 1274] [emphasis added].

> MS. SCHAEFFER: ...I don't like standing here talking about life versus death, because I hope we don't get to that stage.

[Tr. 1381] [emphasis added].

These remarks undoubtedly created a belief in the minds of the venire that the defense counsel thought the petitioner to be guilty of the crime. After all, the defense counsel would probably not be concerned about trying to "save" the life of the petitioner unless the life of the petitioner were really in jeopardy, and his life would not really be in jeopardy if the petitioner were innocent. Furthermore, the admonition to the venire not to think that the defense counsel expected the petitioner to be convicted just because it was focusing attention on the death penalty would hardly act to correct the impression in the minds of the venire that this was, indeed, exactly what the defense counsel expected to happen, even though it was hoped that the trial would not "get to that stage."

All of these remarks by the defense counsel had an appreciable effect on the venire, as borne out by the comments made and questions posed to the defense counsel. One woman, for example, stated, "Well, I think you people should come forward and prove his innocence" [Tr. 1245]. Another person expressed the belief that if the petitioner were found not guilty, he would still be punished for having committed the crime.

> MS. SCHAEFFER: That's where I objected. It's not guilt or innocence. It's whether it is guilty or not guilty, either innocent or not proved beyond every reasonable doubt.
>
> MR. GORDON: Excuse me. Let me rephrase it. Guilty or not guilty.
>
> MS. SCHAEFFER: Right.
>
> MR. GORDON: Then you go into a second phase in which we must take into consideration as to the penalty imposed for that -- I'm going to get myself fouled up with the legalities -- guilty or not guilty. And then we're going to say, the punishment if it's guilty it's such and such, and another type if it's not guilty.
>
> MS. SCHAEFFER: No.

[Tr. 1279-80]. [emphasis added]. These comments seem to indicate that a number of members of the venire perceived the defense counsel as believing the petitioner was not innocent, and that the defense counsel was merely trying to exploit a technical facet of the law to gain the release of the guilty party. They would also indicate that the venire may have been led to believe that there really was no longer an issue as to innocence or guilt, but only as to what punishment the petitioner would receive.

One member of the venire was evidently so poisoned by the death-qualification process that he was ready to convict the petitioner without hearing any evidence:

> MS. SCHAEFFER: If you have a reasonable doubt, you could return a verdict of not guilty?
>
> MR. COOPER: I don't think so. I don't think I would have a reasonable doubt.
>
> MS. SCHAEFFER: You haven't heard anything yet
>
> MR. COOPER: No, I haven't heard anything about the case except that the man has been indicted by the Grand Jury.
>
> ...
>
> MS. SCHAEFFER: ...That wouldn't be fair, would it?
>
> MR. COOPER: No, but I don't know anything about the case. I haven't read anything about the case, except what I got here today.

[Tr. 1386-87] [emphasis added].

The psychologically suggestive process of death-qualifying members of the venire thus became inextricably linked to with the selection of a conviction prone jury. For this reason, the sentence of death should be vacated, and the conviction reversed.

VIII.

IN MAKING ITS DETERMINATION THAT THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE FINDING OF THE TRIAL COURT THAT THE OFFENSE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER, THE FLORIDA SUPREME COURT, AS AN APPELLATE COURT, CONCURRENTLY FOUND THAT THE DEFENDANT LACKED THE PREMEDITATION PREREQUISITE TO THE APPLICATION OF THE DEATH PENALTY WITHIN THE STRICTURES OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Under Florida Law, a petitioner may be convicted of first degree murder even though he neither killed nor possessed a premeditated design to kill. Adams v. State, 341 So.2d 765 (Fla. 1976). Such a petitioner, however, may not be sentenced to death. In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1981), the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the execution of a petitioner in the absence of proof that he intended to kill. The Court held:

> [I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

The critical finding of intent must, in general, be made by the jury after receiving carefully guided instructions focusing on the issue. In the absence of such a finding by the jury or the trial judge, a state court may only uphold a sentence of death without ordering a new sentencing hearing where it can make the finding of premeditation itself on the basis of the trial record. Cabana, Supt. v. Bullock, No. 84-1236 (U.S. Jan. 22, 1986).

In the instant case, both the defense and the prosecution argued a theory of felony murder to the jury. Yet the jury verdict form did not differentiate between premeditation and felony murder, indicating only murder in the first degree. As a result, it becomes impossible to determine whether the jury found the petitioner possessed of a design to kill, or whether they

relied on imputed intent for their finding of guilt.

At the penalty phase of the trial, the court found the presence of a number of aggravating factors in support of its imposition of a sentence of death. One of these aggravating factors was that the crime was committed in a cold, calculated, and premeditated manner.

On appeal to the Florida Supreme Court, it was held that there was insufficient evidence in the record to support at least two of the aggravating circumstances upon which the trial court had relied in imposing the sentence of death. Among those aggravating circumstances which the trial court had improperly found was the cold, calculated, and premeditated nature of the offense. The case was remanded to the trial court for a new sentencing hearing.

On remand, the trial court again found a number of aggravating circumstances and imposed a sentence of death. At this second sentencing hearing, however, the trial judge failed to find that the crime was committed in a cold, calculated, and premeditated manner.

The finding by the Florida Supreme Court that the record on appeal contained insufficient evidence on its face to indicate that the crime was committed in a cold, calculated, and premeditated manner, coupled with the failure of the trial judge to find on resentencing that the crime was committed in a cold, calculated, and premeditated manner, indicates that the element of premeditation is lacking in case at bar, and that the conviction of the petitioner was based upon the felony murder theory presented to the jury at trial. At the very least, there remains substantial uncertainty as to whether premeditation was found. For this reason, the sentence of death should be vacated.

IX.

WHERE APPELLATE COUNSEL DID NOT RAISE AS AN ISSUE ON APPEAL THE FAILURE OF THE TRIAL COURT TO GIVE CERTAIN CRITICAL INISTRUCTIONS PERTAINING TO THE ADVISORY SENTENCE OF THE JURY AND THE MITIGATING CIRCUMSTANCES WHICH IT MAY CONSIDER IN RENDERING THAT RECOMMENDATION, THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct 2954 (1979), the United States Surpeme Court held that in a capital case,

> the Eighth and Fourteenth Amendments require that the sentencer ...not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. ...The nonavailability of corrective or modifying mechanisms with respect to an executed sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

438 U.S. 586, 602-602. Similarly, in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct 2978, the Supreme Court stated that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment ...requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." 428 U.S. 280, 304 [emphasis added]. The failure of a trial court to fully appraise a jury of the extent to which it may properly consider mitigating circumstances in recommending a sentence of death, and to the importance of its recommendation, violates the Eighth Amendment precepts laid down in Lockett and Woodson, since this would effectively inhibit the required "consideration of the character and record of the individual offender and the circumstances of the particular offense."

In the instant case, the trial court denied a number of the jury instructions requested by the defense. These instructions, mandated under Lockett and Woodson, pertained to the great weight accorded the advisory opinion of the jury (Tr. 363), to the applicability of the death penalty exclusively to the most

aggravated and mitigated of cases (Tr. 365), and to the constitutionality of a recommendation of mercy [Tr. 368].

In Caldwell v. Mississippi, 472 U.S. ____, 86 L.Ed.2d 231, 105 S.Ct 2633 (1985), the United States Supreme Court held that the Eighth Amendment creates a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. This heightened need for reliability was violated where the prosecutor, in his closing argument to the jury at the penalty phasee of a capital trial, suggested that the responsibility for determining the appropriateness of a death sentence rested not with the jury, but with the Mississippi Supreme Court, which would review the case on automatic appeal.

Under Florida law, the advisory sentence of the jury is to be accorded great weight by the trial judge in imposing sentence upon a capital petitioner. Tedder v. State, 322 So.2d 908 (Fla. 1975); Stone v. State, 378 So.2d 765 (Fla. 1980). In the case at bar, although the defense requested it, the jury was not instructed as to the significance of its sentencing recommendation. In fact, several times throughout the selection of the jury, the venire was told by the prosecution that the decision as to sentencing was up to the trial judge alone. (Tr. 1218-19, 1319, 1363). No mention was made of the great weight which the judge is required to give the jury sentencing recommendation, thereby diminishing in the eyes of the jurors their importance in the sentencing process.

> Again, that decision rests up here with Judge Federico. You will have the opportunity after you have heard everything there is to hear to make a recommendation to him. But it is not legally on your shoulders, though. It is not your ultimate decision. You act in that regard in an advisory capacity only.

(Tr. 1218-19).

Even the trial judge portrayed the role of the jury in the sentencing process as insignificant, just prior to, and again at the close of, the penalty phase. (Tr. 2361, 2353-4). The judge told the jurors, "The final decision as to what punishment shall be imposed rests solely with the judge of this court." (Tr.

2361). Although the judge proceeded to inform the jury of its duty to render an advisory sentence, he failed to inform the jurors prior to the rendering of their advisory sentence that the law requires that the recommendation of the jury be accorded great weight by the judge in determining the appropriate sentence.

The effect of this failure to inform the jury of the significance of its advisory sentence was to violate the level of reliability mandated under Caldwell. By suggesting to tthe jury that its recommendation was largely irrelevant to the sentencing process, the jury was led to believe that an improper recommendation could be "corrected" by the trial judge. This intrinsically offends the Eighth Amendment prohibition against arbitrariness in capital sentencing, and therefore, it should have been presented by counsel on appeal.

Under State v. Dixon, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court held that the death penalty is intended for only the most aggravated and indefensible of cases. In the case at bar, an instruction to the jury addressing this limitation on the imposition of the death penalty was requested by the defense, but was improperly denied by the trial court. (Tr. 365).

In Parker v. State, 456 So.2d 436 (Fla. 1984), the principle was forwarded that where requested jury instructions are encompassed within standard jury instructions which are properly given to a jury, the denial by the trial court of the requested instructions will not constituted reversible error. Presumably, the trial court would be in error where the requested instructions are necessary and proper but are not encompassed within the standard jury instructions. In the instant case, however, the proposed instruction, while proper, is not encompassed by the standard jury instructions applicable to the penalty phase of a capital trial. This error should have been addressed by appellate counsel.

Counsel for the defense also requested a jury instruction relating to the constitutionality of a recommendation of mercy by

the jury, which was improperly denied by the trial court. (Tr. 368). Instructions regarding the capicity of the jury to recommend mercy to the court have long been held valid in Florida. See, e.g., Troupe v. State, 130 So.2d 91 (Fla. 1961).

The opinion of United States Supreme Court in Lockett indicated that in a capital trial, the jury in rendering its advisory may consider everything presented by the petitioner in mitigation of his sentence. This would presumably include recommendations as to mercy, which were recognized by the Florida Supreme Court in Dixon to be an option still available to jurors in capital cases. The Court in Dixon said, "The fact that the petitioner has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation." 283 So.2d 1, 8 [emphasis added]. This is another way of saying that a jury recommendation of mercy may still be used to preclude a sentence of death for a capital crime.

In spite of the validity of the application of mercy by jurors in the sentencing phase of capital trials, no mention of mercy is made within the standard jury instructions for the penalty phase of capital trials. The Parker case indicates that the judge erred in failing to provide this recommendation to the jury as requested by counsel for the petitioner. The issue was not, however, raised on appeal.

In the instant case, none of the critical foregoing issues were raised on appeal. Reasonably effective appellate counsel would have raised these issues which, more likely than not, would have affected the outcome of the case. As the petitioner was deprived of his Sixth Amendment right to effective appellate counsel, the sentence of death should be vacated, and the case remanded for a new appeal.

X.

THE DEATH SENTENCE IS BASED ON THE UNCONSTITUTIONAL AS APPLIED USE OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Larry Mann is a paranoid psychotic. (R. 2386). He was, in fact, in the middle of a suicidal episode when the crime occurred. The crime was indeed an act of self-destructive rage. (R. 2388).

Counsel for Mann put on no defense, thus, there was no issue of insanity put before the jury. At penalty phase, for the first time, evidence of Mann's mental illness was brought out by the third witness called, Dr. Alfred Fireman, a psychiatrist employed by the county. He was the only doctor to testify.

When called to the stand the court and the jury were thoroughly unprepared to hear testimony of such strength, when heretofore there was no indication of mental illness. The thrust of the defense had been an attack on the sufficiency of the evidence.

Dr. Fireman testified as follows:

"I believe that what crystallized out in my visit with Larry mann last night and what was sort of suspected by me...was the fact that not only in this case, but in so many other cases where one projects upon a victim a set of internal feelings and fears and affects and motives that are in no way realistically present in the victim. That is to say, if one has a frightening or horrendous feeling of, let's say, uncontrollable human sexuality, be it homosexuality or pedophilic sexuality. ...<u>that is such a horrendously antisocial thrust of energy, that the two basic mechanisms to put it to rest is, one, to end your own life; or, two, in a paranoid psychosis, strike out against the person who discovers those feelings in you.</u>" (Tr. 2386).

Dr. Fireman further states: "I believe that the suicide intent, the track to suicide was set in advance--or the suicide attempt obviously was not consummated, and was set in advance of the crime...And the paranoid feelings, the depressed feelings that oftentimes rage against the self also can be converted by

the most minimal of stimulation to an expressed rage. That is to say, we have in many instances, where people were interrupted, in the medical psychiatric literature, where a person was on a suicide errand, that is interrupted by an innocent lay person; and as a consequence of that stress that that person is stopping them from their own suicide, a homicide ensues." (Tr. 2387).

There was already a build-up of self-destructive rage, that when the build-up of self-destructive rage, the homicide against the self, which is what suicide is, of course, when that build-up of self-destructive rage was wed . . . to the reawakening of those pedophilic instincts that he had previously been wrestling with, that it climaxed in a psychotic crime." (Tr. 2387-88).

Dr. Fireman states that petitioner's mental illness was the critical factor in the cause of and chain of events surrounding the crime and that the crime was a product of that mental illness, although not adequate to the defense of not guilty by reason of insanity. He testified, however, to the fact that Mann was not able to conform his conduct to the requirements of the law, and was under extreme emotional distress, the two mental mitigating factors under FS 941.121. (Tr. 2390).

Dr. Fireman goes on to state "I am suggesting to the Court and the jury that it is, in fact, an unexplainable crime... I believe the explosion of destructive energy to block the knowledge all too frequently converts to a homicide of the provoking individual who is essentially innocent, and that's what paranoid psychosis is all about." (Tr. 2403).

There was no rebuttal to this testimony. Mr. Mann had, at the time of the murder, an undenied and unrefuted paranoid psychosis. Additionally, while the jury was allowed to intimate that the abduction was for sexual purposes, Mann being shown to be a pedophile at penalty phase, (the reason he had suicidal rages against himself) there was no sexual act committed on the victim. There was no sign of violation, no sign of semen in, or on, any part of the victim, no torn clothes. What happened seems clear in light of Dr. Fireman's testimony: "...if one has a

frightening or horrendous feeling of such a horrendously antisocial thrust of energy, that the two basic mechanisms to put it to rest is, one, to end your own life; or, two, in a paranoid psychosis, strike out against the person who discovers those feelings in you. "It climaxed in a psychotic crime."

Larry Mann could not control his actions. When faced with the horror of what was driving him his suicidal rage transferred to the victim. He was already in that state of mind days before he even knew the victim. Shortly thereafter he tried to take his own life, and almost succeeded. There is no issue regarding the validity of petitioner's suicide attempt. The State's witnesses testified to that. It was done in the same violent rage that resulted in the death of the girl. Yet, all the testimony shows the petitioner not to be a violent person, except when under a psychotic attack. The mental illness created and caused the violence, the self hatred, and the murder.

The Florida Supreme Court has consistently reversed death sentences because of undenied and unrefuted paranoid psychosis.

In Jones v. State, 332 So.2d 615 (Fla. 1976) the court determined that the appellant there "had a paranoid psychosis which was undenied and unrefuted, the degree of which no one can fully know. The testimony makes it clear that appellant suffered a paranoid psychosis to such an extent that the full degree of his mental capacities at the time of the murder is not fully known, but it is reasonable to assume that this mental illness contributed to his strange behavior." Jones, 332 So.2d at 619. In vacating the sentence of death the court noted that extreme emotional conditions of petitioners in murder cases can be the basis for mitigating punishment. Indeed, the Florida Supreme Court has, in many instances reduced death sentences imposed by a trial court to life imprisonment where the jury has recommended a life sentence on the basis of evidence of a mental disturbance. See Mines v. State, 390 So.2d 332, 335 (Fla. 1980) ("The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. The

evidence clearly established that appellant had a substantial mental condition at the time of the offense") Accord, Burch v. State, 343 So.2d 831 (Fla. 1977).

Under the provisions of section 921.141(6), Florida Statutes (1975), there are two mitigating circumstances relating to a petitioner's mental condition which should be considered before the imposition of a death sentence: "(b) The capital felony was committed while the petitioner was under the influence of extreme mental or emotional disturbance"; and "(f) The capacity of the petitioner to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

The statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse. Miller v. State, 373 So.2d 882, 888 (Fla. 1979). Larry Mann is the first petitioner in Florida to be sentenced to death for a murder that was causally related to his mental illness.

For the Florida courts to arbitrarily exclude individuals who are mentally ill from the protection of the mitigating circumstance provision of 921.141 F.S., individuals who otherwise would receive life sentences, and to subject them to that class of individuals subject to the aggravating circumstance of especially heinous, atrocious or cruel raises grave constitutional questions as to efficacy of Florida's sentencing structure. An arbitrary decision of this nature violates a petitioner's rights under the due process clause and the Eighth Amendment.

When mental illness is the direct causation of the murder and the petitioner is subjected to the aggravating circumstance of heinous, atrocious or cruel, two iniquities arise. One, the petitioner is actually punished for his mental illness in that the

court views the physical evidence of the specific acts employed in the murder as if done voluntarily; that is with deliberation, satisfaction or enjoyment, when in fact the acts are typically random, unrehearsed, unplanned and uncontrolled. To this is added the court's perspective of the victim's suffering, again unrelated with the state of mind of one affected with mental illness.

Second, failing to take into serious consideration the causal relationship of the mental illness to the murder places this petitioner in the same class of petitioners who more appropriately fit the class for which the aggravating circumstance was tailored. It is clear that the especially heinous, atrocious, or cruel aggravating circumstance was not tailored for the mentally ill. Quite the contrary, the legislature tailored two mitigating circumstances for this class of people.

In Florida it is now possible to have a murder aggravated by mental illness alone, when a court decides not to give weight to unrefuted and undenied paranoid psychosis. This flies in the face of Zant v. Stephens, 103 S.Ct 2733 (1983) and Godfrey v. Georgia, 446 U.S. 420 (1980) because the aggravating circumstance of especially heinous, atrocious or cruel as it is applied in Florida in this case does not genuinely narrow the cases of persons eligible for the death penalty since that class includes two distinct groups of people; those who intentionally committed the specific acts and Mr. Mann, who acted out of compulsion and without control, afflicted with mental illness.

Failure to consider unrefuted and undenied mental illness as statutory mitigating circumstances, especially in light of evidence that the mental illness was causally connected to the murder arbitrarily subjects the petitioner to the aggravating circumstances of especially heinous, atrocious or cruel, thus rather than narrowing the class of persons eligible for death the class that is indiscriminately opened to those whose uncontrollable acts unfortunately resulted in a murder, the

description of which becomes the determining factor rather than the state of mind of the petitioner.

Previous to this case, killings that were the direct product of an emotional rage or mental illness were not especially heinous, atrocious or cruel.

It is clear that the case at bar should fit within the latter category of cases. The weapon used to strike the victim was a discarded lamp post with a concrete base; the kind used on walkways to homes. The site of the attack was a grove used often to dump unwanted items. The post had been there for at least a year, according to testimony of people familiar with the site. The post, according to their testimony had actually sunk into the ground. It was hardly the item one would ordinarily contemplate as a weapon. The pole was torn out of the ground and the girl was struck with one blow. An uncontrollable rage, a compulsion to strike out, transformed Larry Mann into a person who could pull that pole out of the ground and strike the girl, and with one blow, kill her. This killing was the direct result of mental illness, nothing more. It was not premeditated, nor was it intended to be heinous, atrocious or cruel. The murder was the result of an uncontrollable suicidal act of rage. Such homicides give the appearance of being done in a heinous, atrocious or cruel manner when such is definitely not always the case. There was no enjoyment derived from this act, as witnessed by the suicide attempt by the petitioner himself.

Dr. Fireman and defense counsel discussed whether Mann's insanity would fit under McNaughten. There was doubt as to this. However, there was no doubt that Mann would qualify as insane under other jurisdictions. (R. 2389). Here the State objected to the testimony as not being relevant and the objection was sustained. (R. 2390). The jury was precluded from hearing testimony from Dr. Fireman as to the petitioner's insanity. The testimony of the doctor as to petitioner's insanity under other tests was precluded at penalty phase. That testimony was extremely important and should have been allowed in under Lockett

v. Ohio, 438 U.S. 586 (1979). This was not an opinion as to insanity at trial, but at penalty phase.

Mann was considered insane by the one doctor who examined him, and it is clear from the testimony that the doctor considered him insane under the rules of other jurisdictions. Indeed, the Florida Supreme Court was concerned as to the court's understanding of the Dr.'s testimony. (The Florida Supreme Court in fact threw out cold, calculated and premeditated.)

On March 26, 1981 Judge Federico, the trial court judge, wrote his findings concerning aggravating and mitigating circumstances in support of the death penalty. Among his findings are the following:

> "3. This capital felony was especially heinous, atrocious and cruel. Dr. Corcoran, the medical examiner, testified that the victim, a ten (10) year old girl, sustained a 3 1/4" cut on the right side of her neck and a 4 1/2" cut on the left side of her neck which cuts produced great pain and severe bleeding and that the victim would have remained conscious for at least several minutes before elapsing into unconsciousness due to loss of blood. Thereafter, death was produced as the result of a massive skull fracture caused by blunt trauma striking heavily against the skull. The murder weapon was a long steel pipe encased in cement and the cement base was used to produce the skull fracture. In the Doctor's opinion, Elisa was alive at the time she sustained the skull fracture.
> 4. Based upon the facts elicited and the manner in which death was inflicted, it is apparent this homicide was committed in a cold and premeditated manner without any pretense of moral or legal justification. This was the senseless and brutal killing of an innocent ten year old child without provocation or cause of any kind."

Additionally, the court found that the petitioner had a prior felony and that the murder occurred during a kidnapping.

The court then found the following as the sole mitigating circumstance:

> "The only mitigating circumstance apparent to the Court which is based solely upon the opinion of Dr. Alfred Fireman, a local psychiatrist, is that the petitioner suffered from psychotic depression and paranoid feelings of rage against himself because of strong pedophilic urges."

The Court made no determination as to whether this

constituted a statutory mitigating circumstance or not, or whether the court even considered it in mitigation since the court stated that is was the only circumstance apparent. On appeal to the Florida Supreme Court, Mann v. State, 420 So.2d 578 (Fla. 1982) (MANN I) the court took particular note of the judge's findings:

> 6,7] Another area of concern is the trial judge's attention to Mann's evidence in mitigation. This is particularly significant because it relates to the properly found aggravating circumstance of the crime being especially heinous, atrocious, and cruel. There is frequently a significant connection between the grossness of a homicide and the perpetrator's mental condition. A psychiatrist testified that Mann's mental condition was of such a nature that he was under the influence of extreme mental or emotional disturbance when he committed this atrocity and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. 921.141(6)(b),(f). Although this witness was cross-examined, his opinions were neither rebutted nor contradicted by another witness. The trial judge's reference to the testimony is:
>
> > The only mitigating circumstance apparent to the Court which is based solely upon the opinion of Dr. Alfred Fireman, a local psychiatrist, is that the defendant suffered from psychotic depression and paranoid feelings of rage against himself because of strong pedophilic urges.
>
> From this we are unable to discern if the trial judge found that the mental mitigating circumstances did not exist. If so it appears that he misconstrued the doctor's testimony. On the other hand, he may have found them to exist and weighed them against the proper aggravating circumstances. We, however, cannot tell which occurred. The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found; this case does not meet that test.
> [8] We also find that the trial court improperly found the homicide to have been committed in a cold, calculated, premeditated manner. S 921.141(5)(i). The state's evidence failed to support finding this aggravating circumstance. See Jent v. State, 408 2o.2d 1024 (Fla. 1981).

It is obvious from a reading of the opinion that the court was concerned whether the trial court had found evidence of

mental illness to be a mitigating factor. It specifically noted, as its main concern, the possible causal connection of the murder to the mental illness.

On remand, the court specifically found that petitioner was suffering from an emotional illness.

The Court stated:

"The Court specifically finds that there is only one mitigating circumstance present in this case which is that the petitioner suffered from psychotic depression and feelings of rage against himself because of strong pedophilic urges.

The Court has given due consideration to the three (3) aggravating circumstances and the one (1) mitigating circumstance set forth above and finds that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty is the appropriate sentence in this case."

The court did not reconsider as an aggravating circumstance that the crime was committed in a cold, calculating and premeditated fashion. What the court found as aggravating circumstances was that the petitioner had a prior felony (burglary), that the murder occurred during the kidnapping, and that the murder was heinous, atrocious or cruel.

The court again did not delineate whether the mental mitigating circumstance was statutory or not.

The primary purpose of requiring the trial judge to put his findings in writing is to permit a meaningful review by the appellate court so that it may determine that the trial judge viewed the issue of life or death within the framework of the rules provided by statute. Holmes v. State, 374 So.2d 944 (Fla. 1979). Here Dr. Fireman testified that Mann's mental capacity was substantially impaired and that he was under the influence of an extreme mental or emotional disturbance. (R. 2388-2389). Those statements were unrebutted and unchallenged by any state witness. This case, therefore, is distinguishable from Thompson v. State, 389 So.2d 197 (Fla. 1980), and in Lucas v. State, 376 So.2d 1179 (Fla. 1979) where there was rebuttal evidence and the

issue was one of who to believe. That is a weight issue. In the instant case, weight is not the issue because there is nothing to weigh. The only evidence the court had to consider on Mann's mental and emotional stability was Fireman's unrebutted testimony.

On appeal, the Florida Supreme Court affirmed the sentence, Mann v. State, 453 So.2d 784 (Fla. 1984): MANN II.

> In aggravation the trial court also again found the murder to have been committed during the course of a kidnapping and to have been especially heinous, atrocious, and cruel. He found that the three established aggravating circumstances outweighed the single mitigating circumstance and again sentenced Mann to death. Compare Adams v. State, 412 So.2d 850 (Fla. 1982) (eight-year-old girl strangled, mitigating circumstances of emotional disturbance outweighed by aggravating circumstances).

In Mann II the Florida Supreme Court, for the first time, allowed the weighing process to be used in a case where mental illness was found to be a mitigating circumstance causally related to the murder. This is the first time the Florida Supreme Court has allowed the aggravating circumstance, especially heinous, atrocious or cruel, to be weighed against a mental illness. Typically in these cases the aggravating circumstances are a product of the illness and to allow them to be used in aggravation of the murder is to use the petitioner's mental illness itself to aggravate the murder in order to sentence the petitioner to death. This notion was strictly forbidden by the United States Supreme court in Zant v. Stevens, 103 S.Ct. 2733, 2747 (1983). It has heretofore been forbidden in Florida as well. Indeed the Zant court cited Miller v. Florida (sic), 373 So.2d 882, 885-886 (Fla. 1979) as a case in point since Florida courts simply had not heretofore allowed this to happen.

By citing Adams to support their decision in Mann II "(Compare Adams v. State (mitigating circumstances of emotional disturbance outweighed by aggravating circumstances)" (emphasis added)) the court employed convoluted reasoning for applying a weighing test in Mann II. In Adams the court specifically found

that there was no causal relationship between the emotional or mental disturbance of the petitioner and the crime he committed:

> There is little, or no, causal relationship between defendant's marital problems and an eight-year-old little girl. There was no testimony that defendant had suffered from mental illness in the past. An expert witness testifying for the defense said that, in his opinion, the defendant knew the difference between right and wrong on the date of the commission of the offense. The trial court did not err in failing to find that the capacity of defendant to conform his conduct to requirements of law was substantially impaired as a result of his marital distress.

Adams, 412 So.2d 854.

The court did not find, as the Mann II court implied that mitigating circumstances of mental disturbance were outweighed by aggravating circumstances. The court found that the mitigating circumstance was inapplicable in the case - not being causally related to the murder. A further distinction between Adams and Mann is that in Mann the doctor specifically testified to two statutory mitigating factors and both went unrebutted and undenied. Indeed, the State argued Mann's mental illness in closing at penalty phase: "How does the system effectively deal with the pathological killer. I don't know." (R-2437). "[I]f he is alive, he will have access to other human beings; and if he is within reach of a human being, the next time the time bomb goes off and he has this uncontrollable urge, is there any doubt in your mind as to what the result will be?" (R-2437-38). The prosecutor in the case at bar improperly argued and inflamed the jury with statements to future murders and victims. He stated "the evidence is so overwhelming that this man is a murder waiting to happen. There is another murder wrapped up in this man right now and maybe more." (R. 2436). "And by your recommendation, your're going to tell the judge that you as the conscience of this community, you're going to tell him whether or not you are willing to take the risk that at some point in the future this man might be put out in the streets and then be given the opportunity to find out if that murder will occur." (R.

2436). "We don't know, if this man is ever eligible for parole, or whop the next victim will be in 26 years possibly." (R. 2430). This is a classic case of mental illness being used to aggravate the crime, both by the State and by the court.

In the instant case, as noted earlier in this pleading, the doctor testified that the crime was directly caused by Mann's illness. The crimes would not have occurred but for the illness. (R-2390-2403). Mann was emotionally disabled and could not conform his behavior to the requirements of the law (R-2390). The doctor left no doubt but that the crime was a product of the mental illness. The court accepted this diagnosis, this undenied and unrefuted diagnosis of paranoid psychosis with pedophilic rage, and made a finding that this was a mitigating circumstance.

The issue now is whether the court had the right under existing Florida law to weigh aggravating circumstances against this mental illness, particularly especially heinous, atrocious or cruel, or whether the Florida courts have arbitrarily excluded Mann from that class of individuals exempt from consideration of death sentences because their mental illness was causally related to the murder they committed, thereby calling into question the integrity of Florida's capital sentencing statute.

There is no case in Florida where a petitioner has been sentenced to death or has been executed where the murder committed by that petitioner was causally related to that petitioner's mental illness. Larry Mann is the first.

The Florida Supreme Court has only <u>twice</u> mentioned the possibility of weighing the aggravating factor of especially heinous, atrocious or cruel against <u>evidence</u> of mental or emotional distress. It has never said that aggravating factors could be weighed against a <u>finding</u> of mental illness that was causally related to the crime.

In the first case, <u>Ferguson v. State</u>, 417 So.2d 631, 638 (Fla. 1982) the court stated

> Evidence of mental or emotional distress does not necessarily outweigh a heinous, atrocious or cruel crime. <u>Foster v. State</u>, 369 So.2d 928 (Fla), <u>cert. denied</u>, 444 U.S. 885, 100

> S.Ct. 178, 62 L.Ed.2d 116 (1979). However, in our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.

The Ferguson court was in fact remanding the case because the trial court had failed to properly consider mental illness after it had determined the issue of insanity.

> Apparently the judge applied the wrong standard in determining the presence or absence of the two mitigating circumstances related to emotional disturbance, so we have no alternative but to return this case to the trial judge for resentencing.
> From the record it is clear that the trial court properly concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition.
> The sentencing judge here, just as in Mines, misconceived the standard to be applied in assessing the existence of mitigating factors (b) and (f). From reading his sentencing order we can draw no other conclusion but that the judge applied the test for insanity.

In citing Foster for the proposition that "evidence of mental or emotional distress does not necessarily outweigh an especially heinous, atrocious or cruel crime," Ferguson, 417 So.2d 638, the court again misinterpreted its own decision, as it did with Adams. In Foster the trial court found, after testimony of a psychiatrist, that there were no mitigating circumstances, and no mental illness. There was no weighing of mental mitigating circumstances because there were none.

> Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar) and found that there were no mitigating circumstances sufficient to overcome the heinous nature of the homicide. The defendant committed the homicide in an effort to fulfill his intentions and complete his desire, i.e., "ripping the victim off."

Foster, 369 So.2d at 931. There was a specific finding, after psychiatric testimony and reports were considered,

that the evidence did not substantiate the claim of mental mitigating circumstances. This case does not stand for the proposition that a finding of mental illness can be offset by aggravating circumstances, particalarly especially heinous, atrocious or cruel.

The second, and only other case besides Ferguson, to stand for the proposition that mitigating circumstances of emotional disturbance can be outweighed by aggravating circumstances is Mann II. Mann thus becomes the first petitioner found whose mental illness caused the crime to have aggravating factors employed to set off that finding. Adams and Foster speak only of evidence of mental mitigating factors, not a specific finding that clearly shows a causal relationship.

A review of cases before the Supreme Court of Florida where there was evidence of mental illness underscores the issue. Sirici v. State, 399 So.2d 964 (Fla. 1981) (trial court found no mental mitigating factors); Daugherty v. State, 419 So.2d 1067 (Fla. 1982) (trial court found that petitioner was not under the influence of extreme mental or emotional disturbance); Martin v. State, 420 So.2d 583 (Fla. 1982) (court found no mental mitigating circumstances); King v. State, 436 So.2d 50 (Fla. 1983) (trial court found no mental mitigating circumstances); Michael v. State, 437 So.2d 138 (Fla. 1983) (mental mitigating held not to apply by trial court); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983) (testimony mental) considered and rejected; Mason v. State, 438 So.2d 374 (Fla. 1983) (trial court found no mental mitigating circumstance); Johnson v. State, 442 So.2d 185 (Fla. 1983) (trial court found petitioner was able to conform his conduct - no finding of any mental illness); Stano v. State, 460 So.2d 890 (Fla. 1984) (courts found no mental mitigating circumstances).

It is the position of the Florida courts that on the one hand mental illness which is shown to be the causal connection to a murder is not, by its very nature, especially heinous, atrocious or cruel and on the other hand it has now held that

evidence of mental or emotional illness does not necessarily outweigh an especially heinous, atrocious or cruel crime. It is petitioner's position that the Florida court's application of the especially heinous, atrocious or cruel aggravating circumstance is arbitrary and fails to satisfy the mandates of the United States Constitution and the cases decided thereunder.

The Florida Supreme Court has ruled that killings that are the direct product of an emotional rage or mental illness are not especially heinous, atrocious, or cruel. Huckaby v. State, 343 So.2d 29 (Fla. 1977); Halliwell v. State, 323 So.2d 557 (Fla. 1975). See also Holmes v. State, 429 So.2d 297 (Fla. 1983); State v. Dixon, 238 So.2d 1 (Fla. 1973). Murderers under the sway of passion or illness are presumably unable to enjoy the sufferings of others and though the method of killing is shocking, it is nevertheless not especially heinous, atrocious, or cruel because the mental or emotional turmoil causes the murder, not the petitioner.

The Florida Supreme Court has held that a death sentence is inappropriate, based on the aggravating circumstance of heinous, atrocious, or cruel, for someone whose crime is a result of his mental illness. Miller v. State, 373 So.2d 882 (Fla. 1977); Huckaby v. State, 343 So.2d 29 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976). See also Mines v. State, supra. In Huckaby, the court analyzed why such evidence of mental illness outweighs the aggravating circumstances in a case to justify a life sentence as follows:

> There was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired. These findings constitute two mitigating circumstances which should have been weighed in determining his sentence. It is our view,

> moreover, that these mitigating circumstances outweigh the aggravating circumstances in this case although the circumstances on each side are equal in number.
>
> * * *
>
> Our decision here is based on the causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of Huckaby's family were exposed, were the direct consequence of his mental illness, so far as the record reveals.
>
> * * *
>
> The sentence of death is vacated, however, and this case is remanded to the circuit court with directions to enter a sentence of life imprisonment on the sixth count.

Huckaby v. State, 343 So.2d 29, 33, 34 (Fla. 1977).

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), despite a jury recommendation of death, the Florida Supreme Court found that Kampff's continued brooding over his divorce and his three day drunk prior to the murder of his ex-wife was sufficient to not only find that "the capital felony was committed while the petitioner was under the influence of extreme mental or emotional disturbance," but to reduce his sentence to life in prison.

It is important to reiterate here that Miller v. State, supra, was cited in Zant v. Stevens, supra and for that reason quote the Miller court:

> It appears likely that at least one of the aggravating circumstances proven at the sentencing hearing, the heinous nature of the offense, resulted from the defendant's mental illness. This court has previously recognized in other capital cases that those mitigating circumstances involved in the present case may be sufficient to outweigh the aggravating circumstances involved even in an atrocious crime. Huckaby v. State, 343 So.2d 29 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976); Swan v. State, 322 So.2d 485 (Fla. 1975). In Huckaby, this court recognized that, although there was insufficient proof of legal insanity, the evidence showed Huckaby's mental illness was a motivating factor in the commission of the crime for which he was convicted. There, this court reversed the trial court's imposition of the death penalty and held that the mitigating circumstances outweighed the aggravating circumstances.

The reasoning in Huckaby, as well as Miller, Jones, and Kampff, also applies in this case. Evidence of Mann's mental illness and its causal relationship with the crime was unrebutted. The psychiatrist testified that Mann was under the influence of an extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R. 2383-2389) This constituted two statutory mitigating circumstances. S921.141(6)(b), (f), Fla.Stat. All of the aggravating circumstances found by the trial court were outweighed by this evidence because all of the aggravating circumstances in this case were causally related to petitioner's mental illness, including his prior felony.

Nevertheless, in the instant case the Florida courts saw fit to ignore the mental mitigating circumstances and uphold the death sentence employing the aggravating circumstance of heinous, atrocious or cruel.

The arbitrary and capricious manner in which the heinous, atrocious and cruel provision of Florida's capital sentencing statute, Fla.Stat. S 921.121(5)(h) (1983) was applied to petitioner in the instant case violates the Eighth and Fourteenth Amendments to the United States Constitution.

Florida and Georgia were the first two states to pass death penalty statutes following the decision of the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972). The facial constitutionality of these two statutes was decided in 1976 by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 255 (1976). The Court held that "on their face these [new] procedures seem to satisfy the concern of Furman." Gregg, 428 U.S. at 198. Both statutes contained, in addition to listed aggravating circumstances which referred to objectively ascertainable facts, e.g., whether the crime was committed for pecuniary gain, whether the petitioner was previously convicted of a felony, a catch-all aggravating circumstance. Subsection (b)(7) of the Georgia statute

authorized a death sentence if the jury found that the crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim Ga. Code Ann. S 17-10-30(b)(7) (1973). Florida's statute authorized the death penalty if the crime was "especially heinous, atrocious or cruel." Supra.

The catch-all provisions were directly in issue in both cases. In Gregg v. Georgia, the Court stressed the "limited grant of certiorari" and emphasized it was reviewing the "'vagueness' and overbreadth' of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments because it is incapable of imposing a capital punishment other than by arbitrariness of caprice." The Court noted that Georgia's counterpart to Florida's (5)(h) circumstance could be construed to include "any murder involving depravity of mind or an aggravated battery." It also observed, however, that the statutory language "need not be construed this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Similarly, the Court in Proffitt v. Florida held that the (5)(h) circumstance "must be considered as [it has] been construed by the Supreme Court of Florida." Thus, the Court's initial approval of the Georgia and Florida statutes was tentative, contingent upon the state courts' adopting construction narrowing the broad language.

The Supreme Court revisited Georgia's catch-all aggravating circumstance in Godfrey v. Georgia, 446 U.S. 420 (1980) and found that the Georgia Supreme Court had adopted such a broad and vague construction of the Section (b) (7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution. The Court stated, referring to the wording of the statute, 'There is nothing in these few words standing alone, that implies any inherent restraint on the arbitrariness and capricious inflection of the death sentence. A

person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman". . . In fact, the jury's interpretation of S (b)(7) can only be suspect of sheer speculation," Godfrey v. Georgia, 446 U.S. at 428, 29.

The Court went on to state:

> "The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance."

Although the Georgia courts had in fact placed a sufficiently narrowing gloss on the statute to bring it within the ambit of constitutional acceptance, that gloss was not applied to Godfrey's case. The Court was concerned "whether the Georgia Supreme Court had kept faith with its own expressed standards in reviewing Godfrey's sentence of death." Burger v. Zant, 718 F.2d 979, 981 (11th Cir. 1983).

The instant case is directly analogous to Godfrey. Here the prosecutor argued, and the jury and court considered, especially heinous, atrocious or cruel as an aggravating circumstance, not withstanding the fact that the crime was causally connected, and a direct result of, the petitioner's mental illness. This is especially offensive when the standing law was that heinous, atrocious or cruel as an aggravating circumstance could not be applied when there was unrefuted and undenied evidence of mental illness and such mental illness was the direct cause of the murder. The Supreme Court in Godfrey stated, the "case was in no way cured by the affirmance of" the sentence. Likewise in Mann II, the affirmance does not correct the error even when there is a total independent review of the death sentence. In Mann II the review fell far short of the court's requirement. "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."

Godfrey, 446 U.S. at 433. In the instant case there is no way to distinguish Mann from those numerous cases where the Florida Supreme Court has held that a petitioner, whose crime of murder is causally related to his mental illness, or a direct result thereof, will not be sentenced to death nor will that petitioner be subject to aggravating circumstances which are the direct result of that mental illness. In the instant case, in affirming the imposition of death the Florida Supreme Court has adopted such a broad and vague construction of the 921.141(5)(h) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution as enunciated by Godfrey v. Georgia.

The United States Supreme court has spoken once to the issue of aggravating circumstances in the case of a petitioner whose crime was the result of mental illness. In Zant v. Stephens, 103 S.Ct. 2733 (1983) the Court made clear that to avoid the constitutional flaw identified in Furman, "aggravating circumstances the State must genuinely narrow the class of persons eligible for the death penalty." Stevens, 103 S.Ct. 2742-43. In Stephens the respondant contended his death sentence was impaired because the judge instructed the jury with regard to an invalid statutory aggravating circumstance. The Court made a distinction as to what invalid meant, "In analyzing the Constitution it is essential to keep in mind the sense in which that aggravating circumstance is invalid. It is not invalid because it authorizes a jury to draw adverse inferences from conduct that is constitutionally protected. Georgia has not, for example, sought to characterize the . . . expression of unpopular political views . . ., as an aggravating factor. Nor has Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliations of the petitioner, . . . or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the petitioner's mental illness. Cf. Miller v. State, 373

So.2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside" Stephens, 103 S.Ct. at 2747. In the instant case there can be no question but that petitioner has been sentenced to death by the State of Florida in violation of the Fourteenth Amendment as delineated in Zant v. Stephens. Mann's mental illness was the direct cause of the murder and this mental illness was the basis for applying aggravating circumstances in order to justify a sentence of death. The aggravating factors applied against Mann were the direct result of mental illness. This is undenied and unrefuted. The evidence and testimony is uncontroverted. Mann has had this mental illness at least since 1969. The heinous, atrocious or cruel provision of Florida's capital sentencing statute allows the state to execute individuals whose mental illness was the cause of their criminal acts. Provisions such as this do not narrow the class, but merely allow for capricious and arbitrary sentencing as has occurred in this case. As the Stephens case stated, "Due process of law would require that the jury's decision to impose death be set aside." The mandate of the Eighth Amendment must surely apply here as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Michael Kotler, Assistant Attorney General, Office of the Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, FL 33602 this 31st day of July, 1986.

Attorney