IN THE SUPREME COURT OF FLORIDA

LARRY EUGENE MANN, :

Appellant, :

vs. : Case No. 75,952

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE

On November 18, 1980 a Pinellas County grand jury returned a two-count indictment against Appellant, Larry Eugene Mann. (R3-4) The first count charged Appellant with the premeditated murder of Elisa Vera Nelson by striking her on and about the head with a blunt object and/or cutting her with a sharp object. (R3) Count two alleged that Appellant kidnapped Elisa Vera Nelson. (R3) Both offenses allegedly occurred on November 4, 1980. (R3) Appellant was found guilty of both offenses after a jury trial, and on March 26, 1981 he was sentenced to die in the electric chair for the murder, and to serve a consecutive prison sentence of 99 years for kidnapping. (R5-6) The court reserved jurisdiction over one-third of the sentence for kidnapping. (R6)

Appellant appealed his convictions and sentences to this Court, which affirmed the convictions, but vacated Appellant's death sentence, and remanded to the trial court for a new sentencing proceeding without a jury. Mann v. State, 420 So.2d 578 (Fla. 1982).

Appellant was again sentenced to death, and his sentence was affirmed by this Court in Mann v. State, 453 So.2d 784 (Fla. 1984).

Appellant subsequently attempted to obtain collateral relief in Florida state courts, but was unsuccessful. Mann v. State, 482 So.2d 1360 (Fla. 1986).

However, in 1988 the United States Court of Appeals for the Eleventh Circuit held Appellant entitled to resentencing because comments made by the prosecutor at Appellant's trial misled or at

least confused the jury as to the nature of its sentencing responsibility under Florida law in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988).

Appellant's new sentencing phase was held on January 29 - February 6, 1990, with the Honorable James R. Case presiding. (R778-2093) After receiving evidence from both the State and the defense, the jury returned a recommendation by a vote of nine to three that Appellant be sentenced to death. (R511,2088)

A sentencing hearing was held before Judge Case on March 2, 1990, at which the court sentenced Appellant to death. (R2095-2141) The court did not orally state what he had found in aggravation and mitigation, but had already prepared his written sentencing order, copies of which he distributed to counsel for the State and counsel for the defense. (R2139-2140)

In his written findings in support of the death penalty, the court found the following aggravating circumstances to have been established: (1) Appellant had a prior conviction for a violent felony, a burglary that occurred in Mississippi in 1973. (R671-672) (2) The instant homicide occurred while Appellant was engaged in committing a kidnapping. (R672) (3) The instant homicide was especially heinous, atrocious, or cruel. (R672-673)

The court specifically rejected two statutory mitigating circumstances: that the capital felony was committed while Appellant was under the influence of an extreme mental or emotional disturbance, and that Appellant's capacity to appreciate the criminality

of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R673-676) However, the court did find nonstatutory mitigation in Appellant's "psychotic depression and feelings of rage against himself because of strong pedophilic urges" (R676), and further found "reasonably convincing evidence" to support the following nonstatutory mitigating circumstances: (1) Appellant had been an exemplary inmate during his incarceration on Death Row since 1981. (2) Appellant had a long history of alcohol and drug dependency. (3) Appellant had demonstrated great remorse for his crime. (4) Appellant had developed and cultivated his artistic talents. (5) Appellant had maintained a relationship with his family and friends despite his incarceration. (676-677) The court concluded that these circumstances were "unremarkable," and in no way outweighed the aggravating circumstances found to exist. (R677)

Appellant was adjudged to be insolvent, and the public defender's office was appointed to represent him on appeal. (R706)

Appellant timely filed his notice of appeal to this Court on March 30, 1990. (R705)

STATEMENT OF THE FACTS

I. State's Case

Elisa Nelson was 10 years old and attended Palm Harbor Middle School, which was seven or eight blocks from her home. (R1158-1159) On November 4, 1980 Elisa had a dental appointment to have braces put on her teeth, and so she went to school late after her visit to the dentist. (R1159) Elisa left home for school on her bicycle between 10:15 and 10:30. (R1160) She had an excuse note her mother had written for her to explain her tardiness. (R432,1160-1162)

Elisa Nelson was seen riding her bicycle on Nebraska Avenue toward 15th Street, the street on which her school was located, at around 10:30 that morning. (R1159,1171)

Around 4:00 on the afternoon of November 4, 1980, Wendy Nelson called the Pinellas County Sheriff's Office and reported her daughter missing. (R1174) A deputy was dispatched to take a report, following which a search was begun. (R1174-1175)

Elisa's bicycle was found that day, lying on its side in a ditch or ravine area a little bit north of the middle school. (R1176-1177) The search continued around the area where the bicycle was found until midnight, when it was called off. (R1181-1182)

The search began again the next morning, and Elisa's body was found around 8:00 or 9:00 lying face down in a wooded area next to an orange grove. (R1182-1183,1186-1187) She was fully clothed except for her sneakers, which were off to the side of the body.

(R1276-1277) Her jeans were closed. (R1278) There were several areas of blood within a few feet of her head, which was in a shallow depression. (R1188-1193,1203,1277-1278,1282) Her left arm was behind her back, and there was a piece of vine around it. (R447, 1201,1277,1298-1302) The cause of her death was a skull fracture, inflicted by some type of blunt object. (R1276,1279,1290) There was a lamp post or pole with concrete on the bottom of it about six feet from the body that weighed 45 to 50 pounds, had blood on it of the same type as Elisa Nelson's blood, and was consistent with having inflicted the injury Elisa suffered. (R1194-1196,1277-1278, 1283,1290) Hairs consistent with Elisa's hairs were found on the pole, and on concrete chips recovered at the scene. (R1249-1252, 1312-1314) It would have taken a great deal of force, similar to an auto accident, to have caused the injury to the skull. (R1290-1291) The associate medical examiner, Dr. Corcoran, opined that Elisa was still alive and breathing at the time her skull was crushed. (R1291) In addition to the skull fracture, there were five wounds to the neck that would have been inflicted with a sharp instrument, and which Dr. Corcoran believed were inflicted first. (R1276-1277,1279-1280,1284-1290,1292,1295) These included a cut on the left side of the neck that was about four and one half inches long, and a cut on the right side of the neck that was about three and one quarter inches long. (R1276-1277) These would have cut the external jugular veins and gone into the muscle, but not to any significant distance. (R1279-1280) The other three wounds to the neck consisted of two smaller cuts and a tiny puncture wound.

(R1280) If left untreated, the wounds to the neck probably would have ultimately resulted in death; they may or may not have actually contributed to Elisa's death. (R1290,1296) One would remain conscious for a matter of minutes up to roughly half an hour after receiving the wounds to the neck, however, the blunt trauma to the head would have caused immediate unconsciousness. (R1289,1295) Elisa also had a recent bruise on her chin, which would have been caused while she was still alive, and which was consistent either with a blow or a hand over the mouth. (R1279-1281,1284-1285) Finally, there were four bruises on each of her legs, all of them less than an inch in diameter, some of which were recent, and some of which were several days old. (R1287-1288,1293-1294)

On November 8, 1980 deputies of the Pinellas County Sheriff's Office received a radio call to go to Appellant's residence in Dunedin, where they were given a note by Appellant's wife, Donna, that she had found under a shirt on the front seat of Appellant's pickup truck. (R463,1185-1186,1220-1221,1225) It was the note Wendy Nelson had written for her daughter to take to school on November 4. (R1161-1162,1221) The investigation intensified at that point. (R1221-1222) The sheriff's deputies proceeded to Mease Hospital to question Appellant, who was being treated there as a result of his attempted suicide on November 4, but "there was no statements given." (R1221-1222,1235-1236)[1] The deputies also

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[1] After Manuel Pondakos, who had been employed by the Pinellas County Sheriff's Office and investigated the Elisa Nelson case, testified that Appellant gave no statements when he was questioned at Mease Hospital, defense counsel objected and moved (continued...)

secured a search warrant for the Mann residence and Appellant's truck. (R1221-1222) Appellant was arrested on the basis of probable cause on November 10. (R1230-1231)

Two fingerprints found on Elisa Nelson's bicycle were identified as matching Appellant's known prints. (R1252,1258-1260)

A hair found in vacuum sweepings taken from the floor of Appellant's truck and hair from auto floor insulation removed from Appellant's garage matched the hair of Elisa Nelson. (R1248-1249, 1314-1315)

Tires on Appellant's truck were similar to tire impressions the sheriff's deputies found in the area where Elisa Nelson's body was found. (R1205,1229)

Foam rubber seized at Appellant's house was similar to foam secured from Elisa's body. (R1229-1230)

In addition to evidence pertaining to the Elisa Nelson homicide, over defense objections, the State put into evidence documents showing that Appellant was convicted of burglary with the intent to commit unlawful carnal intercourse in Mississippi in 1974, as well as testimony from the victim of that incident. (R480-482,1324-1346,1393,1394)

Deborah Johnson testified that on October 3, 1973 she was "[a]round 20" and was living in Pascagoula, Mississippi when a man pushed his way into her apartment, threw her across the room, and

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[1](...continued)
for a mistrial due to the violation of Appellant's constitutional right to remain silent. (R1241-1243) The court denied the motion. (R1243)

forced her to perform an oral sex act on him. (R1333-1344) She identified Appellant in court as that man. (R1343)

II. Appellant's Case

Appellant was 36 years old at the time of his penalty retrial. (R1403) He had an average childhood growing up in Mississippi with his two brothers, David, who was 42 at the time of Appellant's new penalty trial, and Charles, who was 38. (R1403-1405,1423,1447-1449,1467,1469) Their father taught the boys to play ball and took them fishing. (R1405,1450,1470)

Appellant was an average student, but he was in a school band and had musical talent and played a lot of instruments, including the saxophone, guitar, and organ. (R1410,1456,1554) He also had artistic talent. (R1418-1420,1456,1551-1554,1735-1736)

On December 19, 1969, when Appellant was 16, his father died of cancer, and Appellant took it "very hard." (R1406-1408,1452, 1472) He was very sad about it, because he loved his daddy. (R1408,1628) Appellant did not have any other father figure or male leadership in the house after his dad died. (R1408-1409) He left school and started drinking. (R1409,1453,1473,1480) He was working "pretty regular" drilling wells. (R1409)

Appellant joined the Air Force, where he completed high school. (R1411,1728)

After his discharge, Appellant married a woman named Ruth, with whom he had a son, Larry Allen. (R1411-1412) Appellant and Ruth divorced while Appellant was serving his sentence on the burglary charge, which caused Appellant to feel "very hurt." (R1414-

1415) Appellant was no longer able to have a relationship with his son because Ruth would not permit it. (R1413-1414)

After Appellant served his burglary sentence, he married a woman named Donna, with whom he had a daughter, Sarah, who was eight years old at the time of Appellant's new penalty phase. (R1415-1416) Appellant's daughter loved him. (R1416,1455,1551) She visited with him and kept in touch by mail and telephone. (R1416,1547-1548)

Donna Mann met Appellant in Vicksburg, Mississippi. (R1531-1532) After their marriage, Appellant was working full-time, and going to school full-time at a junior college in the evenings after work. (R1532-1533) They moved to Florida in March, 1989, when Donna, who was a certified nurse midwife, was offered a better job position in Clearwater. (R1530,1534) Appellant found a job as a well driller. (R1534) Appellant did not like his job, and he was frustrated because he was having problems with his ex-wife and could not visit his son. (R1535-1536) He was very emotional and would cry over his situation. (R1536) At first, Appellant did not drink, but gradually began drinking a lot. (R1417,1536-1537,1729) Sometime he would skip work to go to a bar. (R1537) He would sometimes stay out all night and come home intoxicated. (R1538) In the weeks before the homicide, Appellant was very depressed, very frustrated; he would cry a lot. (R1538) He made comments regarding suicide, although he did not actually threaten to kill himself. (R1538,1552)

On the morning of the homicide Appellant had been out all night. (R1539) He came home between 4:00 and 5:00 a.m. (R1539-1540) He was so intoxicated that he could not find the bathroom, and urinated in a waste basket. (R1540) When Donna left for work that morning, Appellant was having coffee with a neighbor. (R1540-1541) About 3:00 that afternoon, Donna learned from one of the doctors she worked with that Appellant had attempted suicide. (R1541) He was brought into the emergency room at Mease Hospital with extensive and severe lacerations to his right and left forearms, and a puncture wound to his neck. (R1396-1398,1542) He had lost a significant amount of blood and was in shock. (R1398) It took quite awhile for the emergency room physician and his assistant to suture the wounds, following which Appellant was admitted to the hospital. (R1399-1402) The doctor did not notice any odor of alcohol or evidence of intoxication. (R1402)

In the days after the suicide attempt, Appellant was very disoriented. (R1542) He did not know where he was or what he was doing. (R1542)

Donna found the note written by Elisa Nelson's mother when she went in Appellant's truck to get his glasses at Appellant's request. (R1542-1543) Appellant never blamed Donna for turning the note over to the authorities. (R1545)

Appellant initially told Donna he did not commit the crime in question, but he had since accepted responsibility for the homicide. (R1564,1571-1572) At first Donna was not certain whether Appellant was sorry for his actions, but when she visited him in

February, 1986 after his first death warrant had been signed, she was convinced that he was remorseful. (R1555, 1564-1565,1570-1571) He said he would do anything he could to change the situation. (R1555) [Several other witnesses in addition to Donna Mann testified concerning Appellant's remorse and the fact that he had accepted responsibility for what he had done. (R1457,1499,1574-1576,1586-1587,1632,1723-1724,1727-1728,1730,1736)]

Since going to prison for the instant offense, Appellant had developed diabetes, for which he was taking oral medication. (R1563)

Appellant spent most of his time in prison studying religion and the Bible and was very interested in being involved in a prison ministry.(R1421,1457,1478-1479,1486-1490,1576-1577,1586-1587,1632-1633,1723-1726,1792-1796) He had taught himself Greek so that he could read the Bible in that language. (R1486-1489,1577,1586,1722) Appellant also continued to do artwork while incarcerated. (R1419-1420,1551-1552) He had a spotless prison record, and no interest in getting out. (R1585-1586,1588,1632,1634-1635,1798,1802,1817-1818)

Both of Appellant's brothers had been diagnosed with kidney cancer, and Appellant had offered to donate one of his kidneys to his brothers. (R1457,1460-1462,1475-1478)

Dr. Joyce Carbonell, a clinical psychologist, met with Appellant on August 8, 1989 at Florida State Prison, and again on September 2, 1989 at the Pinellas County Jail. (R1610) The first meeting involved an interview lasting about an hour and a half.

(R1611-1612) The second meeting lasted for seven to eight hours and included personality and IQ tests, as well as neuropsychological testing, due to Appellant's history of serious alcohol and substance abuse and head injury. (R1612,1614) The testing revealed that Appellant was functioning in the average range of intelligence. (R1621) He did not appear to be brain-damaged. (R1614)

Dr. Carbonell diagnosed Appellant as being a "polysubstance abuser." (R1623) He had been abusing drugs and alcohol since he was 12 or 13, and was "pretty much alcoholic" at the time of the offense. (R1623-1624,1682,1700) Appellant was also diagnosed as a pedophile, that is, someone who has sexual urges toward children. (R1624) He was attempting to deal with his pedophilia within the prison setting. (R1633-1634) Dr. Carbonell specifically ruled out diagnoses of antisocial personality disorder and passive-aggressive personality disorder. (R1625-1627)

Appellant was under the influence of extreme mental or emotional disturbance when he killed Elisa Nelson, in Dr. Carbonell's opinion, and his capacity to conform his conduct to the requirements of law was impaired. (R1628,1630-1631) He was having pedophilic urges at that time and was intoxicated. (R1630-1631, 1690-1691,1702-1706,1709-1710)

III. State's Rebuttal

Dr. William Whalen, a psychologist, had not spoken with Appellant, but had examined Dr. Carbonell's deposition and various other materials pertaining to this case. (R1832-1833,1839) He agreed that Appellant was a pedophile, and also diagnosed Appellant as

having an antisocial personality structure and a passive-aggressive personality structure, as well as meeting the criteria for substance abuse, perhaps substance dependence. (R1834-1837,1843-1844,1859-1860) Dr. Whalen agreed that Appellant was under the influence of emotional or mental disturbance at the time of the homicide, but did not consider it "extreme." (R1848,1874-1878) He did not think Appellant was incapable of conforming his conduct to the requirements of law. (R1848)

Fred Daniels was living across the street from Appellant in November, 1980. (R1896-1897) Around 8:45 or 9:00 on the morning of November 4, he went to the Mann residence and sat drinking coffee with Appellant for about 15 minutes. (R1897-1899) Daniels saw no evidence that Appellant was under the influence of alcoholic beverages at that time. (R1900-1902,1905) Appellant did not appear to be overly tired, depressed, despondent, or nervous. (R1901-1902) Daniels was not aware of Appellant's drinking habits. (R1905)

Pamela Givens, who knew Donna and Larry Mann, testified that she went to the Mann residence on the evening of November 4, 1980 to help a friend clean up the blood from Appellant's suicide attempt so that Donna would not have to face that when she came home. (R1906-1907) Givens later had contact with Donna at the emergency room at Mease Hospital and asked her if there was any reason to suspect that Appellant would have tried to commit suicide. (R1908) Donna said there was not; she had spoken with Appellant a couple of times that morning and he sounded fine. (R1908) Donna had spoken with Appellant again at noontime, and he sounded

fine, except that he muttered something about cleaning his tires or fixing his tires. (R1908) Donna thought that sounded funny because she did not think there was anything wrong with his tires. (R1908-1909)

SUMMARY OF THE ARGUMENT

The testimony of State witness Manuel Pondakos that he and another deputy went to the hospital to question Appellant, but that "there was no statements given" was not responsive to defense counsel's question, and was clearly an impermissible comment on Appellant's invocation of his right to remain silent, which right applies equally at the guilt and penalty phases of a capital trial. The error in admitting the testimony was not harmless, as it may have eviscerated Appellant's argument that he had accepted responsibility for the offense and was genuinely remorseful, in the eyes of the jury which recommended that Appellant die in the electric chair.

The prosecutor's inflammatory penalty phase argument to the jury, during which he characterized Appellant as "a child molester and a pervert," injected an improper nonstatutory aggravating circumstance into the proceedings, and unduly denigrated Appellant's efforts to present a legitimate statutory mitigating circumstance (extreme mental or emotional disturbance) to the jury. The nine to three penalty verdict was thereby tainted, and the resulting death sentence cannot stand.

The trial court in effect directed a verdict against Appellant as to one of the aggravating circumstances by instructing the jury that the crime of burglary with the intent to commit unnatural carnal intercourse was a felony involving the use or threat of violence to another person. The jurors should have been permitted to make up their own minds whether Appellant's Mississippi conviction

constituted an aggravating factor pursuant to section 921.141(5)(b) of the Florida Statutes.

The court's improper instruction to the jury on the section 921.141(5)(d) aggravating circumstance injected a highly inflammatory element into the deliberations. The indictment did not allege that Appellant forcibly, secretly or by threat confined, abducted or imprisoned Elisa Nelson against her will with the intent to facilitate the commission of a lewd and lascivious or indecent assault on a child under the age of 14, and there was no proof to support the giving of this instruction.

The judge who sentenced Appellant to death had reviewed a large number of letters urging the court to sentence Appellant to the ultimate penalty, some of which contained highly emotional and inflammatory language. This type of material could not be considered in the sentencing process without violating the Eighth Amendment. Furthermore, it was improper for the court to examine these letters ex parte, with no notice to Appellant. Counsel for Appellant did not know of the letters prior to the sentencing hearing of March 2, 1990, and was not afforded any meaningful opportunity to address their contents.

The court's findings regarding the death sentence are not sufficiently clear because of the inconsistent manner in which the court treated the factor of Appellant's remorse. Although in his written findings the court appeared to agree with the defense argument that Appellant had demonstrated great remorse, the court's oral remarks at the sentencing hearing suggested that he did not

believe Appellant's remorse to be genuine. This ambiguity in the court's findings renders Appellant's death sentence unconstitutionally unreliable.

One of the two written judgements for murder filed herein must be stricken. There was only one homicide. Appellant's first murder conviction has never been overturned. The later-filed judgment for murder is extraneous.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL AFTER ONE OF THE STATE'S WITNESSES TESTIFIED CONCERNING APPELLANT'S INVOCATION OF HIS RIGHT TO REMAIN SILENT.

Manuel Pondakos, who investigated Elisa Nelson's disappearance in November, 1980 as a deputy with the Pinellas County Sheriff's Office, was the third witness to testify for the State at Appellant's penalty trial. (R1173-1244) On direct examination Pondakos testified that after receiving from Donna Mann the excuse note Wendy Nelson had written for her daughter, Pondakos and Detective Newmann "rode to Mease Hospital." (R1221-1222) On cross-examination defense counsel sought to clarify why Pondakos went to Mease Hospital after obtaining the note. He asked, "And the reason for proceeding to Mease Hospital is because that's where Mr. Mann was?" (R1236) Pondakos answered, "Yes. After we received this note, both myself and Detective Newmann went to Mease Hospital while we left the officers at the Mann residence. We went to question Mr. Mann and, of course, there was no statements given." (R1236) Appellant thereafter objected and moved for a mistrial because the witness had commented on Appellant's right to remain silent. (R1241-1243) The court denied the motion for mistrial. (R1243) Appellant renewed his motion when the State rested (R1395) and when the defense rested (R1822), to no avail.

The right to remain silent and not to be compelled to be a witness against oneself is enshrined in both the Florida and United States Constitutions. Art. I, §9, Fla.Const.; Amend. V, U.S. Const. It applies with equal vigor at both the guilt and penalty phases of a capital trial. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991). It is improper for the State to comment on the defendant's invocation of his right to remain silent, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), and comments volunteered by a witness which are fairly susceptible of being construed by the jury to refer to the defendant's right to remain silent are error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); State v. Kinchen, 490 So.2d 21 (Fla. 1985); David v. State, 369 So.2d 943 (Fla. 1979); Clark v. State, 363 So.2d 331 (Fla. 1978). Here there is no need to resort to any lengthy analysis concerning what the jury may have understood Pondakos to mean by his testimony. Pondakos said that they went to question Appellant and no statements were made. There could hardly be a more obvious remark on Appellant's invocation of his right not to incriminate himself.

Pondakos' testimony was spontaneous. Defense counsel's question did not call for the answer he gave, and the answer was not responsive to the question. Clearly, defense counsel was not attempting to elicit anything about the interrogation of Appellant, but was trying to bring out the fact that Appellant was in the hospital because he had attempted suicide, as shown by his next

question to Pondakos, which was: "And the reason that he [Appellant] was at Mease Hospital was because of the fact that he attempted suicide on the 4th, correct?" (R1236)

Given the error in Pondakos' testimony, the next question that must be addressed is whether the error was harmless. DiGuilio; State v. Marshall, 476 So.2d 150 (Fla. 1985). The State bears the burden of proving beyond a reasonable doubt that the error did not contribute to the result. DiGuilio; Marshall. In this case, this burden cannot be met.

The fact that Appellant accepted full responsibility for his actions and was very remorseful formed the cornerstone of the defense presentation.[2] Several defense witnesses offered testimony pertaining to this issue. For example, Appellant's brother, Charles Mann, testified that Appellant had accepted what had happened to him and Charles believed he was sorry for what had happened. (R1457) Appellant's cousin, Steve Wambel, believed that Appellant was repentant. (R1499) Appellant's wife, Donna Mann, testified that about three years ago, when Appellant's first death warrant was signed, she learned that Appellant was truly sorry. (R1555) He expressed to her that he would do anything he could to change the situation. (R1555) At that time, Donna was convinced that Appellant was remorseful. (R1571) Although Appellant at first denied committing the crime, he had since accepted full responsibility for the homicide. (R1571-1572) Gail Anderson testified that

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[2] In his closing argument to the jury, the prosecutor referred to Appellant's remorse for the offense as the "high point in the Defense's case." (R2025)

Appellant had taken responsibility for himself and for what he had done. (R1575-1576) He felt great sadness and remorse over what had happened. (R1576) Billy Nolas stated that Appellant had "extreme remorse" and was "about as remorseful as anybody that [Nolas could] imagine." (R1586) Appellant had never denied the offense to Nolas, but had acknowledged his guilt and his responsibility. (R1587) Dr. Joyce Carbonell found Appellant to be "incredibly remorseful." (R1632) He was "probably the most remorseful person" she had evaluated. (R1632) Sister Loretta Pastva testified that Appellant had accepted full responsibility and begged forgiveness for his sins. (R1723-1724,1727-1728,1730,1736) In some of his letters to Sister Pastva, Appellant would begin to tell her the facts of the offense, but would be unable to continue because "[h]e was completely remorseful and repentful and regretful and overcome." (R1733-1734) And Dr. Melvin Biggs testified that Appellant was remorseful and repentant over the crime he committed, and if "there was any way possible that he could change it, he would do that." (R1803-1804) Defense counsel emphasized Appellant's "great remorse" during his closing argument to the jury (R2051-2053), and asked the court to specifically instruct the jury that they could consider as a mitigating circumstance that Appellant had "demonstrated great remorse for his conduct." (R1953)[3]

Pondakos' testimony that no statements were made when Appellant was questioned by the police may well have undercut the

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[3] Counsel also argued remorse to the court as a mitigating circumstance at Appellant's sentencing hearing. (R2114)

defense argument in the eyes of the jury. They may have felt that if Appellant were truly accepting of his responsibility for the offense and genuinely remorseful, he would have immediately confessed and said he was sorry, and that his belated attempt to establish this factor was merely an effort to avoid the electric chair.[4] For this reason the jury's receipt of Pondakos' improper testimony cannot be deemed harmless error. The error tainted the jury's death recommendation, thereby rendering unreliable the sentence of death based upon the tainted recommendation. Appellant's death sentence therefore offends not only the constitutional provisions guaranteeing the right to remain silent, but also the guarantees of due process of law and freedom from cruel and unusual punishments. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9 and 17, Fla. Const. The death sentence must be vacated.

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[4] The trial judge's comments at Appellant's sentencing hearing of March 2, 1990 demonstrate that he reached exactly this conclusion. The court stated that Appellant's "first impression of remorse. . . was realized from the time of the first death warrant was signed in this case[,]" and that Appellant's sorrow or remorse was not due to the death of Elisa Nelson, but rather to the situation in which Appellant found himself "as a result of his prior action." (R2138) (Please see Issue V in this brief.)

ISSUE II

THE COURT BELOW ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR'S CLOSING ARGUMENT, WHICH IMPROPERLY DENIGRATED APPELLANT'S PRESENTATION IN MITIGATION AND SUGGESTED THAT THE JURY CONSIDER A NONSTATUTORY AGGRAVATING CIRCUMSTANCE.

During his closing argument to Appellant's jury, the prosecutor below made the following remarks (R2013-2015):

> What are the mitigating circumstances that you will be instructed on? I told you there are two specific ones, and then there is a third generalized category. I will talk about the specific ones and the evidence as it relates to those and then -- and then we will go into the third.
>
> Number one, the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> Well, consider for a second what the meaning of this is. Certainly the murder of a ten year old girl in this brutal fashion is clear evidence that this man is a disturbed person. But the real issue here is the mental or emotional nature as opposed to criminal nature and the extremity to which it exists.
>
> What is the evidence upon which the Defense wants you to rely in existence of this mitigating circumstance? Well, we had long at last the testimony of Dr. Carbonell, the fourth expert retained by the Defense to testify, that ten years later, she came in and gave him some test and she was able to determine earlier that this -- extreme mental or emotional disturbance.
>
> I think if you look at her testimony and analyze her credibility, it was apparent as many of the Defense witnesses did, they looked at Larry Mann with blinders. They saw only what they wanted to see. They ignored the inconsistencies, and they ignored his history. And they accepted at face value his inconsistent statements, denials and lies.
>
> She was evasive in answering questions. Not a single yes or no answer that I recall in

> an hour and a half of testimony. But in the final analysis, what has been shown to mitigate this crime of a psychological nature, and this is really, I suggest to you, almost appalling that it's offered in mitigation.
>
> The primary diagnosis upon which she relies is the Defendant is a pedophile. The fact that that has a name does not diminish or change what that is. She is arguing and suggesting to you on the witness stand because this man is a child molester and a pervert, that his actions are somehow more excusable than a person that is not a child molester and a pervert.
>
> Now, consider that for a second. This is actually the best she can do --

Thereupon defense counsel interposed an objection, which the court overruled. (R2015-2016)[5] The prosecutor then continued the same line of argument, remarking immediately after the objection was overruled: "As I was saying, the best Dr. Carbonell can do to justify the mitigating circumstances, this man is a child molester." (R2016)

As defense counsel pointed out to the trial court, although the prosecutor couched his argument in terms of rebutting a mitigating circumstance proposed by the defense, he was actually resorting to inflammatory name-calling in an attempt to convince the jury that Appellant should be sentenced to death because of his status as a "child molester and a pervert." This argument did not relate to any of the aggravating circumstances enumerated in section 921.141(5) of the Florida Statutes, which are the only aggravating factors the jury and court may consider. State v. Dixon,

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[5] Defense counsel raised the impropriety in the prosecutor's closing argument again at the sentencing hearing on March 2, 1990. (R2125-2127)

283 So.2d 1 (Fla. 1973); Elledge v. State, 346 So.2d 998 (Fla. 1977). The State thus improperly injected a nonstatutory aggravating circumstance into the proceedings.

The prosector's argument was also improper because of the manner in which he denigrated Appellant's expert psychological testimony as it related to the statutory mitigating circumstance of extreme mental or emotional disturbance, particularly when he said that Dr. Carbonell's testimony was "actually the best she can do --" In Garron v. State, 528 So.2d 353 (Fla. 1988) this Court found error in the assistant state attorney's attempts to discredit the insanity defense as a legal defense to the charge of murder during his cross-examination of court-appointed psychiatrists and during closing argument. The Florida Legislature has deemed the fact that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance to be a legitimate mitigating factor for the jury and the court to consider. § 921.141(6)(b), Fla. Stat. (1989). The prosecutor's effort to belittle this mitigating circumstance and Dr. Carbonell's testimony relevant thereto was similar to the error committed in Garron.

In Teffeteller v. State, 439 So.2d 840 (Fla. 1983) this Court noted that in death penalty cases, the only safe rule is that the sentence must be reversed unless this Court can determine from the record that the improper remarks of the prosecutor did not prejudice the accused.[6] Here, as in Teffeteller, this Court "cannot

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[6] But see Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase." 439 So.2d at 845. The argument of the prosecutor below misled the jury in its consideration of the aggravating and mitigating circumstances, tainting the nine to three death recommendation. Appellant's death sentence, predicated as it is in part on the tainted penalty recommendation, is unreliable, and cannot stand without violating constitutional principles of due process of law and subjecting Appellant to cruel and unusual punishment. Art. I, §§ 9, 17, and 22, Fla. Const.; Amends. VIII and XIV, U.S. Const. Appellant's sentence of death must be vacated and this cause remanded to the lower court for a new penalty proceeding before a new jury.

ISSUE III

THE INSTRUCTIONS THE TRIAL COURT GAVE APPELLANT'S JURY ON THE AGGRAVATING CIRCUMSTANCES FOUND IN SECTIONS 921.141(5)(b) AND 921.141(5)-(d) OF THE FLORIDA STATUTES WERE IMPROPER. THE INSTRUCTION ON PRIOR CONVICTION OF A VIOLENT FELONY DIRECTED A VERDICT AGAINST APPELLANT, AND THE INSTRUCTION ON COMMITTED DURING A KIDNAPPING DID NOT CONFORM TO THE ALLEGATIONS OR THE PROOF.

A. Prior Violent Felony

Counsel for Appellant argued to the court below that the jury should not be permitted to consider Appellant's Mississippi burglary conviction in aggravation for several reasons, including that it was "not properly a conviction for a prior violent crime as our statute requires . . ." (R1328) However, the court overruled all of Appellant's objections (R1324-1330) and ultimately submitted the aggravator in question to the jury upon the following instruction (R2072):

> 1. The Defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.
>
> The crime of burglary with the intent to commit unnatural carnal intercourse is a felony involving the use or threat of violence to another person.

The State bears the burden of proving every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980); see also In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The above instruction unconstitutionally relieved the State of its burden.

Burglary is not, per se, a crime of violence such that it will qualify as an aggravating circumstance under section 921.141(5)(b) of the Florida Statutes; it may or may not be such a crime, depending upon the facts. Johnson v. State, 465 So.2d 499 (Fla. 1985); Mann v. State, 420 So.2d 578 (Fla. 1982). Nor does the fact that the burglary was committed "with the intent to commit unnatural carnal intercourse" automatically qualify the offense as a violent one; the intent may not have been consummated, or the "unnatural carnal intercourse" may have occurred with no force being threatened or applied. For the court below to have ruled that the burglary in question was a crime of violence as a matter of law thus was improper. The instruction he gave invaded the province of the jury and put the defense in an untenable position vis a vis the aggravating circumstances.

Jury instructions which shift the burden of persuasion from the State to the defendant violate constitutional principles of due process of law. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Wilhelm v. State, 568 So.2d 1 (Fla. 1990). The instruction given by the court below went even further. It did not merely shift the burden to the defense to show that the Mississippi burglary was not a felony involving violence, it affirmatively removed this issue from the jury's consideration altogether by informing them that this burglary was a felony involving the use or threat of violence to another person. In Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 177 (6th Cir. 1986) the

court noted that "when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless." Similarly in United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988) the court stated that

> not only does the harmless-error doctrine not apply when the error consists in directing a verdict against a criminal defendant, [citation omitted]; it also does not apply when the judge directs a partial verdict against the defendant by telling the jury that one element of the crime -- such as guilty knowledge in this case -- has been proved beyond a reasonable doubt, so the jury needn't worry its collective head over that one. [Citations omitted.]

Finally, in Johnson, this Court itself wrote:

> ...[S]imply to instruct the jury at the sentencing phase of a capital felony trial that burglary is a felony involving the use or threat of violence for purposes of applying the aggravating circumstance in section 921.141(5)(b), without making clear that this depends on the facts of the burglary is error.

465 So.2d at 505.

If Appellant's jury was going to be permitted to consider the Mississippi burglary conviction at all, then the jury should have been given proper instructions which would have allowed it to decide whether this conviction qualified as an aggravating circumstance under section 921.141(5)(b).

B. Committed During A Kidnapping

Appellant's jury was permitted to consider as an aggravating circumstance that the homicide of Elisa Nelson was committed while Appellant was engaged in kidnapping her, pursuant to section

921.141(5)(d) of the Florida Statutes. This factor was submitted upon the following jury instruction, after defense objections to the underlined portion thereof were overruled (R1941-1943,2072-2073):

> 2. The crime for which the Defendant is to be sentenced was committed while he was engaged in or an accomplice in the commission or an attempt to commit or flight after committing or attempting to commit the crime of kidnapping.
>
> In order to establish kidnapping, the State must prove the following three elements beyond a reasonable doubt.
>
> (1) Larry Eugene Mann forcibly, secretly or by threat confined, abducted or imprisoned Elisa Nelson against her will.
>
> (2) That Larry Eugene Mann had no lawful authority.
>
> (3) Larry Eugene Mann acted with intent to inflict bodily harm upon or to terrorize the victim <u>or facilitate the commission of a lewd and lascivious or indecent assault on a child under the age of 14</u>.
>
> Confinement of a child under the age of 13 is against her will if such confinement is without the consent of her parent or legal guardian.
>
> In order to establish that the Defendant attempted to commit the crime of kidnapping, the State must prove the following beyond a reasonable doubt.
>
> (1) Larry Eugene Mann did some act toward committing the crime of kidnapping that went beyond just thinking or talking about it.
>
> (2) He would have committed the crime except that he failed.
>
> It is not an attempt to commit kidnapping if the Defendant abandoned his attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of his criminal purpose.

The emphasized portion of this instruction was improper because it did not conform to either the allegations or the proof.

"Kidnapping" is defined in section 787.01(1)(a) of the Florida Statutes as

> forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority with intent to:
>
> 1. Hold for ransom or reward or as a shield or hostage.
>
> 2. Commit or facilitate commission of any felony.
>
> 3. Inflict bodily harm upon or to terrorize the victim or another person.
>
> 4. Interfere with the performance of any governmental or political function.

The kidnapping statute is a specific intent statute. State v. Graham, 468 So.2d 270 (Fla. 2d DCA 1985). It provides four alternative kinds of criminal intent which may beget a kidnapping charge. Justus v. State, 438 So.2d 358 (Fla. 1983). In the instant case the indictment alleged that Appellant intended to commit or facilitate the commission of the felony of murder, or intended to inflict bodily harm upon or to terrorize Elisa Nelson; there was no mention whatsoever of any intent to facilitate the commission of a lewd and lascivious or indecent assault. (R3) Although the grand jury presumably could have returned an indictment alleging alternative types of intent (i.e., intent to commit or facilitate the felony of murder or intent to facilitate the commission of a lewd and lascivious or indecent assault), Florida Rule of Criminal Procedure 3.140(k)(5), the grand jury did not do so. While it may not have been necessary for the State to charge Appellant with the kidnapping in order for it to be considered in aggravation, Ruffin v. State, 397 So.2d 277 (Fla. 1981), where this crime was charged, the State should have been confined to prove the

offense as specifically alleged in the indictment it sought. See, for example, Davis v. State, 16 F.L.W. S 479 (Fla. July 3, 1991)(where defendant was improperly charged and convicted under one section of the sexual battery statute, he could not be convicted under a different section where the accusatory pleadings did not cover all elements of the latter section).[7]

Furthermore, as defense counsel below argued (R1941-1943), apart from the fact that Appellant had been diagnosed as a pedophile, there was no evidence to support the giving of the instruction in question. Except for her shoes, Elisa Nelson was found fully clothed. (R1276-1277) Her jeans were closed. (R1278) The testimony of the associate medical examiner who conducted the autopsy on Elisa Nelson did not contain any hint that any liberties of a sexual nature were taken or attempted. (R1273-1303) The mere fact that Appellant may have been subject to pedophilic urges was

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[7] It is worth noting that at Appellant's original trial in 1981, the jury was instructed consistently with the indictment, as follows (Record on Appeal in Appeal Number 60,569, page 2313):

> In Count II of the indictment, the Defendant, Larry Eugene Mann, is charged with the crime of kidnapping in that on the fourth day of November, 1980, in the County of Pinellas, Sate of Florida, he did without lawful authority, forcibly, secretly, or by threat, kidnap, confine, abduct or imprison Elisa Vera Nelson, with the intent to commit or facilitate the commission of a felony, to-wit: Murder, or with the intent to inflict bodily harm upon, or terrorize the person of, Elisa Vera Nelson. This charge includes the lesser charge of attempted kidnapping, false imprisonment.

not enough, without more, to show that he was acting upon those urges in this particular instance.

The instruction the court gave was prejudicial because it suggested to the jury that there was some evidence of a sexual motive when in fact there was not. This highly inflammatory issue was clearly on the jurors' minds as they deliberated, as shown by the first two questions they submitted to the court (R510,2081):

> 1. Was there any proof of natural or unnatural sexual intercourse with Elisa Nelson?
> 2. Was there any proof of a sexual encounter by the autopsy of Elisa Nelson?[8]

The improper instruction thus injected into the jury's deliberations an element unsupported by the proof and inconsistent with the allegation contained in the indictment.

C. Conclusion

The erroneous jury instructions rendered the nine to three death recommendation returned by Appellant's jury unreliable. The resulting death sentence violates the provisions of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as well as the provisions of Article I, Sections 9, 16, 17 and 22 of the Constitution of the State of Florida, and cannot be permitted to stand.

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[8] The court answered these questions by telling the jurors that they would have to rely on their "collective recollection with respect to the testimony and the evidence." (R2085-2086)

ISSUE IV

THE COURT BELOW ERRED IN REFUSING TO RECUSE HIMSELF AT APPELLANT'S SENTENCING AFTER APPELLANT LEARNED THAT THE COURT HAD REVIEWED EX PARTE A NUMBER OF LETTERS FROM MEMBERS OF THE COMMUNITY URGING THAT APPELLANT BE SENTENCED TO DEATH.

The record contains over 100 letters written by members of the community to Judge Case with regard to the sentence Appellant should receive. (R536-669)[9] The overwhelming majority urged the court to sentence Appellant to death.[10] One letter, from a childhood friend of Elisa Nelson, referred to the "cruel and unhumane [sic]" acts committed by Appellant. (R548) Another referred to the "brutal and heinous" crime committed by Appellant, and the need to "protect our children." (R553) Another letter referred to Appellant as "one sick puppy," and asked Judge Case if he would not want Appellant in the electric chair if it was his child or grandchild who had been killed. (R555) A "personal friend" of the Nelson family wrote to urge death for Appellant to insure "the safety of many innocent 10 year old children." (R572) Some letters asked that Appellant be sentenced to death with no appeals. (R561,573) Elisa Nelson's grandparents wrote to "highly

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[9] During jury selection it was learned that Elisa Nelson's father had sent fliers or letters to companies he did business with asking their support during the resentencing proceedings for Appellant. (R827-828,868,949-952,1087-1094) Many of the letters to Judge Case were written on the letterhead stationery of various firms.

[10] The court received additional letters after Appellant's sentencing hearing (R683-704,711-712), but Appellant has not considered those letters as part of this issue.

recommend the death sentence" for Appellant so that he would "never get his hands on another innocent little girl." (R611) A "very close friend of the Nelsons" suggested that when Judge Case sentenced Appellant to death, he should say, "May you burn in Hell" instead of "May God have mercy on your soul." (R633)

The subject of the letters was addressed at Appellant's sentencing hearing on March 2, 1990. The court said that he had "reviewed" all of the letters,[11] but had "not studied them." (R2098) When defense counsel raised the impropriety of considering victim impact evidence in passing sentence, the court stated (R2099):

> The Court will make it perfectly clear, then, at this point, that whatever conclusions the Court has reached in this matter, was reached independent of any correspondence that I have received from either position; either from the family or from victims or friends of the victims.

Defense counsel also noted that he had not seen the letters and was not aware that there were any letters from any of the victim's family or friends. (R2099-2100) Counsel asked for "an opportunity to view those letters." (R2099) The court said, "You're welcome to look at them at this point in time. We'll sit here and wait while you glance through them." (R2100)

Defense counsel thereafter asked the court not to sentence Appellant, but to have another judge appointed to do so, citing

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[11] The court also said, inconsistently, that he had "read nothing from the victim's family." (R2102)

Grossman v. State, 525 So.2d 833 (Fla. 1988)]. (R2102-2103) The court refused to step aside for sentencing. (R2103)

As counsel for Appellant noted, the letters in question contained statements similar to the victim impact statements condemned by the Supreme Court of the United States in Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) as violative of the Eighth Amendment. Some of the material contained in the letters was highly emotional and inflammatory, as can be seen in part by the excerpts discussed above. Although the Supreme Court recently had occasion to revisit and partially overrule Booth in Payne v. Tennessee, 49 CrL 2325 (No 90-5721, June 27, 1991), the Court made it clear that it was not disturbing that part of Booth which held that admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment (49 CrL at 2330, footnote 2; concurring opinion of Justice O'Connor, 49 CrL at 2331; concurring opinion of Justice Scalia, 49 CrL at 2332, footnote 1) which is the type of information the court below received in the letters. Although the court below indicated that he had reached his conclusions "independent of" the correspondence he received, it is not clear that the letters played no part at all in the process by which the court arrived at the conclusion that Appellant should be sentenced to death.

Furthermore, the court's ex parte consideration of material outside of the evidence presented at Appellant's penalty phase violated the principles of Gardner v. Florida, 430 U.S. 349, 97

S.Ct. 1197, 51 L.Ed.2d 393 (1977) and denied Appellant due process, the right to confront adverse witnesses, and the right to effective representation of counsel guaranteed by Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The holding of Garnder was as follows:

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

430 U.S. at 362.

This Court discussed Gardner in Porter v. State, 400 So.2d 5,7 (Fla. 1987):

> In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the United States Supreme Court reminded us that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. Gardner held that using portions of a presentence investigation report without notice to the defendant and without an accompanying opportunity afforded to the defendant to rebut or challenge the report denied due process. That ruling should extend to a deposition or any other information considered by the court in the sentencing process which is not presented in open court. Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.

See also Harvard v. State, 375 So.2d 833 (Fla. 1978); Funchess v. State, 367 So.2d 1007 (Fla. 1979).

Appellant had no opportunity to meet the contents of the letters the court reviewed. The letters were in Judge Case's

office (R2099-2100) not filed until March 2, 1990 (536-669, Index to Volumes Five and Six), the very day of Appellant's sentencing, and defense counsel was not aware of them prior to that time. (R2099-2100) The fact that the court was willing to give defense counsel a few moments to "glance through" the correspondence while the other court personnel cooled their heels is of no moment. Surely the constitutional guarantees discussed herein require a more meaningful opportunity to examine, analyze, and address material the court has reviewed prior to sentencing. Furthermore, the court had already prepared his sentencing order prior to the March 2 hearing. (R2139-2140) It was too late then for counsel to make any remarks that might have swayed the court. Counsel should have been apprised of the letters and given a chance to make appropriate objections, comments, etc. before the court made his decision as to what sentence Appellant would receive.

The process by which the court below sentenced Appellant to death did not comport with the relevant constitutional principles discussed herein. The sentence must be vacated.

ISSUE V

THE FINDINGS OF THE COURT BELOW AS TO APPELLANT'S SENTENCE OF DEATH ARE NOT SUFFICIENTLY CLEAR BECAUSE OF THE INCONSISTENT MANNER IN WHICH THE COURT TREATED THE SUBJECT OF APPELLANT'S REMORSE.

The findings the sentencing court makes pursuant to his responsibility under section 921.141(3) of the Florida Statutes must be sufficient to provide the appellant the opportunity for meaningful review of his sentence by this Court. See Cave v. State, 445 So.2d 341 (Fla. 1984); Thompson v. State, 328 So.2d 1 (Fla. 1976). In fact, "[t]he trial judge's findings in regard to the sentence of death must be of unmistakable clarity" so that this Court "can properly review them and not speculate as to what he found . . ." Mann v. State, 420 So.2d 578, 581 (Fla. 1982). The findings of the court below do not fulfill these requirements.

In the court's written findings as to aggravating and mitigating circumstances, the court stated that there was "reasonably convincing evidence to support" Appellant's "great remorse for his crime" as a nonstatutory mitigating circumstance. (R676-677) While this would appear to be a straightforward finding of remorse as a mitigator, such a conclusion is called into question by the court's remarks at the sentencing hearing of March 2, 1990. After listening to the arguments of counsel for the State and counsel for the defense, the court said (R2138):

> It is tempting for the Court to editorialize a bit on the circumstances and facts that bring us back from ten years ago, although I will resist that at this time.

> Suffice it to say, that the Court has had the opportunity of listening to the testimony of the witnesses and has had the opportunity of reviewing and observing the evidence that has been admitted in this case. And it's clear to this Court that Larry Eugene Mann's first impression of remorse, if you will, was realized from the time of the first death warrant was signed in this case. It seems to be consistent with the testimony of all the witnesses that were put on on behalf of the defendant. His sorrow or this remorse, I would tend to agree with the State's position, that it is not due to the death of Elisa Nelson, that it simply or rather the situation that he finds himself in as a result of his prior action.

Immediately after uttering the above remarks, the court sentenced Appellant to death. (R2139)

The above-quoted comments suggest that the court did not view Appellant's remorse as genuine and render ambiguous, at best, the court's written finding of great remorse.

Also implicated here is the sentencing judge's duty of articulating the mitigating circumstances he considered "so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death." Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980). See also Campbell v. State, 571 So.2d 415 (Fla. 1990). Although the court obviously considered the matter of Appellant's remorse, it is not clear how he considered it, that is, whether he actually found in mitigation that Appellant had demonstrated genuine remorse. If the court's remarks at sentencing are construed as his use of Appellant's lack of genuine remorse in aggravation, this was a clearly improper factor which was not entitled to any part in the sentencing weighing process. Colina v.

State, 570 So.2d 929 (Fla. 1990); Robinson v. State, 520 So.2d 1 (Fla. 1988); Patterson v. State, 513 So.2d 1257 (Fla. 1987); Pope v. State, 441 So.2d 1073 (Fla. 1983); see also Derrick v. State, 16 F.L.W. S 467 (Fla. March 21, 1991).

The lack of clarity in the trial court's handling of the remorse factor renders Appellant's death sentence violative of the due process and cruel and unusual punishment clauses of the Florida and United States Constitutions. Amends. VIII, XIV, U.S. Const.; Art. I, §§ 9, 17, Fla. Const. His sentence must be vacated.

ISSUE VI

ONE OF THE TWO WRITTEN JUDGMENTS FILED HEREIN IS EXTRANEOUS AND MUST BE STRICKEN.

The record herein contains two written judgments for first degree murder, one dated January 14, 1983 (R18-19), and the other dated March 2, 1990. (R679-680),

There was only one homicide committed herein, and therefore only one judgment should have been filed against Appellant. See Houser v. State, 474 So.2d 1193 (Fla. 1985); Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981). Although Appellant's death sentence was vacated in Mann v. State, 420 So.2d 578 (Fla. 1982) and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), his conviction was left undisturbed. There was no reason to adjudicate Appellant guilty a second time for the Elisa Nelson homicide. The judgment dated March 2, 1990 is extraneous and must be stricken from the record.

CONCLUSION

Appellant, Larry Mann, prays this Honorable Court to vacate his sentence of death and grant him one of the following alternative forms of relief:

1. Imposition of a life sentence.
2. Remand for new penalty proceeding before a new jury.
3. Remand for resentencing by the court.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 31st day of July, 1991.

Respectfully submitted,

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