

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,885

LARRY E. MANN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Mr. Mann's motion for post-conviction relief which was brought pursuant to Fla. R. Crim. P. 3.850. The following symbols designate references to the record in this appeal: "OR" -- original record on direct appeal to this Court from Mr. Mann's 1981 trial and sentencing; "SS" -- record on appeal to this Court from Mr. Mann's 1990 penalty phase proceeding; "R" -- record on appeal to this Court from Mr. Mann's 3.850 motion ; "H" -- transcript from the February 26, 1998, huff hearing, which is a supplement to the record, but the pages were not sequentially numbered. All other citations are self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Mann has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Mann, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

On November 18, 1980, the grand jury of Pinellas County returned an indictment against Mr. Mann, charging him with the first degree murder and kidnapping of Elisa Nelson (S.S. Vol. I 3-4). Mr. Mann's first trial was held March 16-19, 1981. The jury found Mr. Mann guilty of first degree murder and kidnapping on March 19, 1981. On March 26, 1981, the trial court sentenced Mr. Mann to death, relying on the aggravating circumstances of prior violent felony, during the commission of a kidnapping, heinous, atrocious, or cruel, and cold, calculated, and premeditated (S.S. Vol. I 5-6).

On September 2, 1982, this Court affirmed the conviction but vacated Mr. Mann's death sentence and remanded Mr. Mann's case to the trial court for a new sentencing proceeding without a jury. Mann v. State, 420 So.2d 578, 581 (Fla. 1982).

On January 14, 1983, the trial court again sentenced Mr. Mann to death, and this Court affirmed that sentence in Mann v. State, 453 So.2d 784 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985).

On January 7, 1986, Governor Graham signed a death warrant, and Mr. Mann's execution was scheduled for February 4, 1986. This Court affirmed the trial court's summary denial of post conviction relief and denied Mr. Mann's habeas petition. Mann v. State, 482 So.2d 1360 (Fla. 1986).

On February 3, 1986, Federal District Court Judge Kovachevich granted Mr. Mann a stay of execution. The Eleventh Circuit then granted Mr. Mann a re-sentencing before a newly empaneled jury because the original jury, a co-sentencing entity, was improperly led to believe that the responsibility for determining the sentence rested with the trial court. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct. 1353 (1989).

Mr. Mann's re-sentencing was held before a newly empaneled jury from January 29, 1990, through February 6, 1990 (S.S. Vol. VII-XVI 778-2093). Mr. Mann's counsel adopted the investigation and preparation of prior counsel and used the testimony of Dr. Carbonel to prove the mental illness of "pedophilia" was a mitigating circumstance (S.S. Vol. XIV 16003-1710).

While in deliberations, the jury asked the court seven questions:

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?
3. Has Larry Mann or his attorneys applied for a new trial on the guilt phase?
4. What type of discharge did the Air Force give Larry Mann?
5. Was the seven year old girl that Mr. Mann fondled ever examined by a medical doctor for being raped?

6. Was Dr. Whalen admitted as an expert witness in his field?

7. What is the definition of the word “extreme” as used in reference to under the influence of extreme mental or emotional disturbance?

(S. S. Vol. XVI 2081-82). The court refused to answer questions one, two, three, four, and five, telling the jurors to rely on the evidence and testimony presented. In regard to question six, the court told the jurors that Dr. Whalen was given the same findings as Dr. Carbonel, Mr. Mann’s expert witness. The court responded to question seven by replying, “with respect to the definition of ‘extreme’ you are asking the Court to give you , you have to rely on your own common sense and training and background and experience which you bring with you as jurors concerning that issue.” (S.S. Vol. VI 670-677). The jury recommended a sentence of death (S.S. Vol. XVI 2088).

On March 2, 1990, Mr. Mann’s sentencing hearing was held before Judge James R. Case. Judge Case did not orally state his findings of aggravation and mitigation, but he distributed copies of his already prepared sentencing order, sentencing Mr. Mann to death (S.S. Vol. XVII 2139-2140). Judge Case found aggravating circumstances of prior violent felony for a 1974 burglary conviction, during the commission of a felony, and especially heinous, atrocious, or cruel (S.S. Vol. VI. 671-673). Judge Case rejected the statutory mitigating circumstances of extreme emotional disturbance and capacity to appreciate the criminality of his conduct (both evidenced by “pedophilia”) because he

believed counsel did not prove that Mr. Mann was intoxicated at the time of the murder (S.S. Vol. VI 673-676). Judge Case did find non-statutory mitigating circumstances because Mr. Mann suffered from psychotic depression and rage against himself due to strong pedophilic urges, but Judge Case found that those mitigators could not outweigh the aggravators because he believed counsel did not prove Mr. Mann was intoxicated at the time of the murder. (S.S. Vol. VI 676). Judge Case stated he found other non-statutory mitigators: exemplary inmate, long history of drug and alcohol dependency, great remorse (only after his first warrant was signed), developing and cultivating artistic talents, and maintaining relationships with friends and family during incarceration. However, Judge Case found those non-statutory mitigating factors to be “unremarkable”, and in no way sufficient to outweigh the aggravating circumstances (S.S. Vol. VI 676-677).

This Court affirmed his sentence on appeal in Mann v. State, 603 So.2d 1141 (Fla. 1992).

Mr. Mann filed an Amended Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend on July 7, 1997. On February 26, 1998, and July 16, 1998, the circuit court held hearings pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) (R. Vol. I 1-33, H. 1-49). On July 21, 1998, the circuit court denied Mr. Mann’s Motion to Vacate Judgments of Conviction and Sentence With

Special Request for Leave to Amend and for Evidentiary Hearing which presented three additional claims for relief and was filed on April 17, 1998. In an Order rendered on July 28, 1998, the court denied all but three of Mr. Mann's claims for relief (R. Vol. III 538-550). The court granted an evidentiary hearing to determine whether Mr. Mann's counsel was ineffective for introducing the condition of pedophilia as a mitigating circumstance (R. Vol. III 549).

The evidentiary hearing was held on December 1, 1998. The defense presented Brian Donerly, an attorney with extensive experience in defending capital cases, as an expert witness at the evidentiary hearing. (R. Vol. IV 597-602) Over the State's objection, Mr. Donerly was allowed to testify at this hearing. (R. Vol. IV 605) Donerly had reviewed the two previous penalty phase trials involving Mr. Mann's case, reports and depositions from Dr. Fireman and Dr. Carbonel, and various orders and opinions issued in Mann's case. (R. Vol. IV 605) Donerly concluded that the decision to put on pedophilia as a mitigation was below the standard in the community and also that there is a reasonable probability that this ineffective representation affected the outcome. (R. Vol. IV 605) Mr. Donerly based his conclusion on both the prosecutor's use of pedophilia in his closing argument and the additional prejudicial facts and testimony the pedophilia testimony brought into the trial (R. Vol. IV 605, 609-615). Donerly was relating this to the death penalty community in 1990 at the time of Mr. Mann's penalty

phase which is the subject of attack in this 3.850 motion. (R. Vol. IV 606) The death penalty community Donerly refers to were the people involved in the Life Over Death seminars and Public Defender's Association. (R. Vol. IV 607) Donerly thought that the consensus in the death penalty community in 1990 was that the mitigation of pedophilia would have been a major negative. (R. Vol. IV 606)

In 1990 it was fairly common to drop mental health testimony out of the penalty phase presentation if you had otherwise a reasonable second phase. (R. Vol. IV 609)

Mr. Donnerly stated:

“The defense made very little mention of it and mostly defensive and to the State he was red meat that was spread throughout the State's final argument. And it wasn't just Dr. Carbonel, but the various things that Dr. Carbonel opened up. The State's expert, the molestation of the seven-year-old when Mr. Mann was 16 also gave them a more interesting spin on the prior rape because of the victims. In that case the victim was of small stature and they were able to tie that into the obviously small stature of the victim in this case.”

(R. Vol. IV 615). Mr. Donnerly also concluded that Dr. Carbonel's testimony concerning Mr. Mann's alcoholism was the only valuable evidence she offered. However, Mr. Donnerly stated, the alcoholism testimony “wasn't worth everything else that came in with it. The long-term alcohol abuse could have come in through lay witnesses and you could have left all the psychological testimony at home and gotten

virtually, gotten what little benefit came from Dr. Carbonel's testimony without the pain that came with it" (R. Vol. IV 610)

Donerly said that defense counsel should not have put Dr. Carbonel on to testify at the penalty phase. (R. Vol. IV 611) Donerly indicated that the defense final argument touched very little on the pedophilia in contrast to the State's argument where that issue was the major focus. (R. Vol. IV 611-615) The State's final argument referred to Mann's deviant sexual desire, sexual perversion, and molestation of a six year old when Mann was 16, which otherwise would not have come in because it was not a formal conviction. (R. Vol. IV 612) The State's final argument went on to say it was appalling that the defense would suggest that "because this man is a child molester and pervert that his actions were somehow more excusable than the person who is not a child molester and pervert". (R. Vol. IV 612, 613) The State put on an expert witness who said that child molesters teach themselves to be sexually aroused by children. (R. Vol. IV 613) This testimony would not have been presented had defense counsel not called Dr. Carbonel. (R. Vol. IV 613) The State's argument went on to suggest that there are no disciplinary reports on death row only because there are no children there. (R. Vol. IV 613) Donerly presented this to show that the State, and not the defense, received the most benefit from Dr. Carbonel's testimony. (R. Vol. IV 614)

Donerly was of the opinion that putting on the pedophilia testimony substantially decreased Mr. Mann's chance of getting a life recommendation. (R. Vol. IV 615) This was evidenced by the questions the jury asked the court regarding sexual activity. (R. Vol. IV 615) In spite of this three jurors voted for life. Donerly indicated because of all these factors and the fact that Mr. Mann only needed three more votes for life, there was at least a reasonable probability of a different result if defense counsel had not used the tactic of presenting pedophilia evidence. (R. Vol. IV 615, 616)

Dr. Cabonel did not have to testify for defense counsel to present the mitigating alcohol addiction evidence because that could have been presented by friends and relatives. (R. Vol. IV 616) The State made the defense mitigation into one of its most potent aggravating circumstances. Without Dr. Carbonel's testimony, the state would have changed the focus of their argument. (R. Vol. IV 618) Donerly said he has never seen a case with as much mitigation regarding moral and intellectual blossoming in prison. (R. Vol. IV 619) While in prison Mr. Mann learned to read the New Testament in the original Greek and engaged in extensive correspondence with a bible study group. (R. Vol. IV 628-631) Nor has Donerly ever seen a case where the defense presented pedophilia as a mitigation circumstance. (R. Vol. IV 619)

On cross examination, the prosecutor asked Donerly if Dr. Carbonel had not testified, would the state be allowed to present testimony of sexual molestation being the

motive for the kidnapping. (R. Vol. IV 634) Donerly felt that if the State had been allowed to do that the case would have been reversed on appeal. (R. Vol. IV 634) Any attempt by the state to introduce sexual molestation evidence through Sister Pastva, to whom Mann wrote numerous letters would be objectionable under 403. (R. Vol. IV 638) Donerly could not say there is caselaw that would definitively say one way or the other that the State would not be able to present Mr. Mann's sexual motives into evidence. (R. Vol. IV 651) However, Donerly felt that 403 would have kept the pedophilia aspect out of evidence. (R. Vol. IV 652) Mr. Donerly was the only witness called by the defense. (R. Vol. IV 660)

The State called David Parry, who was Mr. Mann's defense attorney at the second sentencing phase. (R. Vol. IV 660, 661) At the time Mr. Parry represented Mr. Mann, he had been practicing law for six years. (R. Vol. IV 662) Parry became involved in capital cases in 1987 and started going to Life Over Death seminars. (R. Vol. IV 662) Mr. Mann's case was the sixth capital case on which Mr. Parry had worked. (R. Vol. IV 662) It was the third or fourth case where there was actually a penalty phase. (R. Vol. IV 663, 689) Parry thought this was his co-counsel's second penalty phase. (R. Vol. IV 689) At the time of the evidentiary hearing, Parry had done 12 to 14 penalty phases. (R. Vol. IV 664, 689) Mr. Mann is the only case that Mr. Parry has worked on that resulted in a death

sentence. (R. Vol. IV 664) Over objection, the trial court allowed Mr. Parry to testify as an expert in penalty phase litigation. (R. Vol. IV 665, 666)

Parry prepared for the penalty phase by reading the first trial and depositions, speaking to witnesses, reading the transcript of the Mississippi conviction, consulting with other attorneys and his other normal preparation. (R. Vol. IV 667, 668) Dr. Carbonel had been hired by CCR prior to the time Parry took over the case. (R. Vol. IV 671) Parry had not used many doctors that have already been used previously in a case for personal reasons. (R. Vol. IV 670) Though Parry was not familiar with Dr. Carbonel, Parry and Nora McClure, his co-counsel, decided to use Dr. Carbonel because they felt she was qualified and seemed to be very thorough. (R. Vol. IV 671) Parry said that putting on mental mitigation was a strategy decision. (R. Vol. IV 673) Parry was aware that prior examinations showed Mr. Mann did not have brain damage. (R. Vol. IV 674) Parry could have had someone else evaluate Mr. Mann, but failed to do so. (R. Vol. IV 694)

Parry guessed the possibility that the crime was sexually motivated would come out in this case, although he thought maybe certain things the court would not have let in. (R. Vol. IV 677) Parry was aware of the stigma of pedophilia at the time of the resentencing trial in 1990 and he knew that if Dr. Carbonel testified they would have to call Mr. Mann a pedophile. (R. Vol. IV 694) Parry indicated that he thought the state would not be allowed to take his mitigator of pedophilia and turn it around to be an

aggravator, but he guessed he was wrong about the law since that is what they did. (R. Vol. IV 695) Parry said there was not other evidence that could have been presented regarding the term pedophilia. (R. Vol. IV 696) Parry agreed that he could have filed a motion in limine to keep out any testimony regarding pedophilia had he not called Dr. Carbonel as a witness. (R. Vol. IV 697) Parry said he called Dr. Carbonel to present strong statutory mitigating factors and to explain why Mr. Mann acted the way he did in 1981. (R. Vol. IV 698)

Parry indicated that experienced capital lawyers would be split on whether mental mitigation should be presented to a jury. (R. Vol. IV 680) Parry presented alcohol abuse and remorse to the jury through the testimony of Dr. Carbonel. (R. Vol. IV 681) Parry said he tried to do the best job he could on Mr. Mann's case. (R. Vol. IV 683) Parry indicated that the witness from the prior violent felony was a very difficult witness to deal with and her testimony was devastating. (R. Vol. IV 685) Parry agreed that a main focus of the penalty phase was how much Mr. Mann had changed while he was in prison focusing on his religious conversion, artistic talents, teaching himself a new language and how he related to other inmates.. (R. Vol. IV 690, 691)

Judge Case found that Mr. Mann's re-sentencing counsel was effective. (R. Vol. III 539-40).

SUMMARY OF ARGUMENT

1. Mr. Mann proved at the evidentiary hearing that he received ineffective assistance of counsel at his 1990 penalty phase proceeding because counsel's decision to present evidence of pedophilia as a mitigating circumstance was ineffective assistance of counsel.

2. The Circuit Court erred by not granting an evidentiary hearing so Mr. Mann could prove counsel ineffectively failed to investigate and offer testimony of an expert in the field of the effects of substance abuse, counsel ineffectively failed to investigate the possibility of organic brain damage as a mitigating factor, counsel ineffectively failed to challenge the 1974 Mississippi conviction that was used as an aggravating factor, counsel ineffectively cross examined Fred Daniels, counsel ineffectively failed to document and preserve for appeal the prejudicial commotion caused by victim rights advocates during Mr. Mann's trial, counsel ineffectively failed to object to the prosecutor's improper and highly prejudicial appeals to the juror's fears, and counsel ineffectively failed to object to improper jury instructions.

3. The Circuit Court erred when it did not grant an evidentiary hearing so Mr. Mann could prove the prosecutor's misconduct and defense counsel's ineffective failure to object and move for a mistrial violated Mr. Mann's Sixth and Eighth Amendment Rights.

4. The prosecutor introduced non-statutory aggravating circumstances which the jury weighed when deciding whether Larry Mann should live or die. This resulted in fundamental error, and the trial court erred when it did not grant an evidentiary hearing so Mr. Mann could establish this.

5. Mr. Mann was denied a reliable sentencing because the trial court refused to find statutory mitigating circumstances which were established by the evidence. The trial court erred when it did not grant an evidentiary hearing on this issue.

6. The trial court erred when it did not grant an evidentiary hearing so Mr. Mann could establish that Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional.

7. The trial court erred when refused to grant an evidentiary hearing so Mr. Mann could establish Florida Statute 921.141(5) is unconstitutionally facially vague and overbroad because the jury did not receive proper guidance, and in fact received improper instructions.

8. Mr. Mann did not receive competent assistance because the mental health expert who examined Mr. Mann was not qualified to effectively diagnose his mental problems. The trial court refused to grant an evidentiary hearing on this issue, and this refusal was error.

9. The trial court erred in refusing to grant an evidentiary hearing so Mr. Mann could prove a state witness comment on Mr. Mann's exercise of his right to remain silent violated his Fifth and Fourteenth Amendment rights and Florida Constitution Article I, Section O rights.

10. The circuit court erred when it did not grant an evidentiary hearing so Mr. Mann could establish that the combination of procedural and substantive errors in Mr. Mann's 1990 penalty phase violated his rights to a fair trial under the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT I

THE CIRCUIT JUDGE ERRED IN FINDING THAT MR. MANN'S COUNSEL WAS EFFECTIVE UNDER SIXTH EIGHTH AND FOURTEENTH AMENDMENT STANDARDS. MR. MANN'S COUNSEL FAILED TO INDEPENDENTLY INVESTIGATE AND PREPARE MITIGATING FACTORS, AND INSTEAD, ADOPTED PRIOR COUNSEL'S STRATEGY AND TESTIMONY. OFFERING PEDOPHILIA AS A MITIGATING FACTOR TO JURORS WAS UNREASONABLE BECAUSE COUNSEL KNEW SUCH TESTIMONY WAS INEFFECTIVE IN MR. MANN'S FIRST SENTENCING, AND COUNSEL ANTICIPATED THAT THE STATE WOULD USE IT TO MR. MANN'S DISADVANTAGE.

In his Final Order Denying Amended Motion to Vacate Judgments Of Conviction And Sentence, Judge Case held:

Neither the defense attorneys performance in general nor their adoption of the strategy to present mental mitigation including pedophilia falls below the applicable standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's strategy was reasonably effective based on the totality of the circumstances. Songer.

Even if the first prong of the Strickland test had been met, there is no reasonable likelihood, in light of the aggravating factors proved by the state, that the result of the proceedings would have been different had the evidence been withheld from the jury. The prejudice requirement of the Strickland standard has not been met.

(R. Vol. III 539-40). This finding is clearly erroneous in light of the testimony presented at the evidentiary hearing.

The Sixth Amendment right to effective assistance of counsel ensures the adversarial process works to produce a just result. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970). To produce a just result, effective assistance requires an attorney to investigate all reasonable sources of evidence which may be helpful to the defense. Strickland, 466 U.S, at 691. Mr. Mann's counsel failed to provide effective assistance by relying on damaging expert testimony and strategy inherited from previous counsel, and not investigating alternative mitigating factors. Counsel's decision to offer expert testimony regarding pedophilia was especially prejudicial in Mr. Mann's case, because it allowed the prosecutor to argue otherwise inadmissible past act evidence as an

aggravating circumstance, and it falsely insinuated to the jury that Mr. Mann had sexually abused or raped Elisa Nelson.

1. Counsel's deficient performance denied Mr. Mann his Sixth Amendment right to effective assistance of counsel.

Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are essentially unchallengeable. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the defendant, counsel's failure is ineffective assistance. Strickland, 466 U.S. at 690-691. In Mr. Mann's case, counsel's decision to introduce the expert testimony on pedophilia cannot be characterized as strategy resulting from investigation of law and facts relevant to plausible options. Mr. Mann's counsel knew the probable results of offering pedophilia as a mitigating circumstance but unreasonably adopted the strategy of prior counsel without independent investigation of available mitigating factors of a less unsavory nature. This decision was deficient performance of counsel which resulted in an unjust result; Mr. Mann was sentenced to death.

The United States Supreme Court denied the state's petition for certiorari on March 6, 1989, and Mr. Mann's re-sentencing was held less than eleven months later. Mr. Mann's counsel, David Perry and Norma McClure, who had previously tried only three and two penalty phases respectively, received Mr. Mann's file from the Capital Collateral Representative. The CCR had already hired Dr. Carbonel for collateral

proceedings (R. Vol. IV 122). “[W]ithin the time constraints of preparing for a penalty phase and not a full trial,” counsel accessed Dr. Carbonel’s qualifications and, although counsel had the ability and time to have someone else evaluate Mr. Mann, counsel chose to use only Dr. Carbonel as an expert witness (R. Vol. IV 669, 671, 694). In the evidentiary hearing, Mr. Perry testified he chose to offer Dr. Carbonel’s testimony that Mr. Mann is a pedophile even though “there are certain things that I think perhaps the court might not have let in (without the testimony)” (R. Vol. IV 677). Mr. Perry stated he chose to offer the testimony, only in case some prejudicial information regarding Mr. Mann’s pedophilic tendencies was admitted, to “take a bad thing and perhaps treat it with an explanation, and, you know, that’s the way we chose to do it” (R. Vol. IV 677). Thus, Dr. Carbonel’s testimony was not strategy, it was simply making use of previously prepared and available expert witness testimony to “explain” the crime but not to mitigate the circumstances.

Counsel’s decision to use pedophilia as a mitigating factor was below the range of professionally competent assistance at the time the decision was made in 1990. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. This reliance on pedophilia is patently unreasonable in light of the first

penalty phase, because **counsel had reason to know that jurors considered pedophilia an aggravating circumstance** (O.R. Vol. XV 2388, 2400-04). Mr. Perry stated that he **anticipated the state would attempt to use the pedophilia as an aggravating factor**, but “felt and I guess I’m wrong about this, that the law was that you can’t take a mitigating factor and turn it into aggravating factors” (R. Vol. IV 695). Mr. Perry also stated that in 1990 he was aware of the stigma associated with being diagnosed as a pedophile (R. Vol. IV 694). Thus, when considering counsel’s decision to use pedophilia as a mitigating factor from both foresight and hindsight, the decision was unreasonable. Mr. Perry testified that he was aware of the stigma associated with pedophilia, anticipated the state would use the pedophilia as an aggravating factor, but “felt” the law would prevent this. Unfortunately, and devastatingly so for Mr. Mann, this feeling was incorrect.

Counsel did not research the law regarding the state’s use of a mitigating factor as an aggravating factor, nor did counsel ask Judge Case for a preliminary decision on the matter (R. Vol. IV 696-97). The law does indeed forbid the sentencer from technically considering non-enumerated factors as aggravating circumstances. Elledge v. State, 346 So.2d 998 (Fla. 1977). However, the law gives the prosecutor extremely wide latitude in closing argument and the prosecutor may essentially argue a mitigating factor as a non-statutory aggravating factor under the guise of negating evidence offered by the defendant.

See, e.g. Thomas v. State, 326 So.2d 413 (Fla. 1975); Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). Thus in 1990, there was no law forbidding the prosecutor's conduct which falls short of technically presenting pedophilia as an aggravating factor. However, this damaging evidence was presented only because counsel ineffectively opened the door. Had Mr. Perry provided effective assistance of counsel, his research would have revealed Thomas and Bertolotti, and he would have known that the prosecutor could argue this so called mitigation evidence as a non-statutory aggravator. Equipped with this knowledge, there is no way effective trial counsel would have opened the door to this non-statutory aggravating evidence. Counsel's negligence, combined with knowledge that the first sentencing jury did not consider pedophilia a mitigating factor, fell below the range of professionally competent assistance.

Counsel's decision to use pedophilia as a mitigating circumstance becomes more unreasonable in light of the other avenues of mitigating circumstances available to Mr. Mann. Counsel knew Mr. Mann had a long history of drug abuse. The record clearly states that Mr. Mann had used PCP and LSD regularly, and marijuana, cocaine, speed, barbiturates, and heroin (R. Vol. II 350, 333, O.R. Vol. XIII 2003, 20014-15). Counsel also knew Mr. Mann is an alcoholic, and that he started abusing alcohol when he was thirteen years old (R. Vol. II 257). Counsel had the time and resources to fully investigate and prepare these alternative mitigating circumstances, but instead,

ineffectively relied on Dr. Carbonel's testimony. As a result, these valid and non-damaging mitigating circumstances played only minor and undeveloped roles in Mr. Mann's penalty phase.

"Counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. 691. Under Florida law, evidence of brain damage is a mitigating circumstance. See, e.g., Foster v. State, 679 So.2d 747 (Fla. 1996); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Mitchell v. State, 595 So.2d 938 (Fla. 1992). Counsel knew Mr. Mann had a history of drug and alcohol abuse; drug and alcohol abuse may cause organic brain damage; organic brain damage which is not reflected in neuropsychological testing may be revealed by other testing including PET scans and CAT scans; and Mr. Mann had suffered from head injuries. Counsel also knew that Mr. Mann was hospitalized for approximately three days at Patrick Air Force Base for a "nervous condition" while "I was doing a lot of drugs at the time" (R. Vol. II 349). Dr. Carbonel did conduct neuropsychological testing and found no significant evidence of brain damage (R. Vol. II 248). However, Dr. Carbonel is not an expert the neurological effects of substance abuse, and counsel did not procure other neurological tests. Although counsel had the resources to hire an expert in the field of the effects of substance abuse, or to have neurological tests performed ("I could have had somebody look at him"), counsel

unreasonably relied on the previously prepared testimony of Dr. Carbonel (R. Vol. IV 694). Counsel was ineffective for not conducting a reasonable investigation of the neurological effects of years of substance abuse. Counsel's decision to present the pedophilia testimony as anticipatory rebuttal to the state's use of pedophilia as an aggravating factor was ineffective (R. Vol. IV 695). Counsel's decision not to investigate the neurological effects of substance abuse was unreasonable. Strickland, 466 U.S. at 691.

“Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance.” Hall v. Washington, 106 F.3d 742 (7th Cir. 1997). The Sixth Circuit has found ineffective assistance of counsel in a case similar to Mr. Mann's where psychological exams found no brain damage, but counsel had reason to know of possible brain damage and failed to investigate the issue further. Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). Similarly, the Ninth Circuit has found ineffective assistance of counsel for failure to adequately prepare mitigating circumstances even though a defense expert witness was called. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995). This was not a case in which alternative non-damaging mitigating circumstances could not be found or developed, or one in which counsel made

a reasoned decision not to present the circumstances for tactical or strategic reasons. The circumstances were not presented to the jury because counsel never took the time to develop them. Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995).

In a case with a child victim and absolutely no physical indication of sexual assault, no reasonable attorney would offer as mitigating circumstances that Mr. Mann was not only a convicted murderer, but also a pedophile who had acted upon his pedophilic tendencies in the past by abusing a seven year old girl, and that he probably intended to sexually abuse the victim before he cut her throat and crushed her skull with a concrete block. Counsel was aware of the stigma associated with pedophilia, the first sentencing jury's reaction to Mr. Mann's pedophilia, and anticipated that the state would take advantage of the testimony. Counsel was aware of the alternative mitigating factors of Mr. Mann's extended history of drug abuse and head trauma; counsel was not left with pedophilia as the only mitigating option. Counsel failed to investigate the alternative mitigation, and that failure was not reasonable given counsel's knowledge that the pedophilia testimony would likely adversely affect the jury. Thus, counsel's performance was ineffective. Strickland, 466 U.S. at 690-691.

2. Counsel's errors were so deficient they prejudiced the defense.

In a capital case, the test for determining whether counsel's deficient performance prejudiced the defendant is whether there is a reasonable probability that, absent the

errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695. A reasonable probability is one which undermines confidence in the outcome of the sentencing. Strickland, 466 U.S. at 694. Accordingly, the defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The expert testimony introduced Mr. Mann's previous pedophilic conduct which the prosecutor used to his utmost advantage as an aggravating circumstance. During his closing argument, the prosecutor made an overwhelming number of references to pedophilia which he could not have made had counsel not offered Dr. Carbonel's testimony (S.S. Vol. XVI 1997, 2003, 2004, 2006, 2008, 2014, 2016, 2019, 2024, 2030, 2032). Though there was no evidence besides Dr. Carbonel's testimony that Mr. Mann intended to sexually abuse the victim, the prosecutor started his closing argument stating, Larry Mann "kidnapped her and took her there for the purpose of satisfying his deviant sexual desire" (S.S. Vol. XVI 1997). The prosecutor continued, "[Elisa Nelson] was "taken to an isolated area to be kidnapped and sexually abused. . . . sexual molestation was unquestionably the motive for the kidnapping, the satisfaction of Larry Mann's perverted desires led to Elisa Nelson's kidnapping"(S.S. Vol. XVI 2003). In reference to that statement, the prosecutor continued, "[o]f all the types of kidnapping that might occur, what can be more significant, what should be given more weight than the

kidnapping of a vulnerable, isolated ten year old girl on her way to school. I think the evidence suggests to you that this aggravating circumstance is, indeed, established beyond a reasonable doubt” (S.S. Vol. XVI 2003-2004). He stated that Dr. Carbonel suggested that “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 (S.S. Vol. XVI 2014-15). The prosecutor continued, “ this man is a child molester. . . his fantasy lies about fantasizing about children, as Dr. Carbonel indicated to you that Larry Mann has done through the course of his life. He enhances and builds towards the commission of future crimes” (S.S. Vol. XVI 2016-17). Mr. Mann’s conduct was “conduct engaged in by a pedophile seeking to satisfy sexual desires” (S.S. Vol. XVI 2019). To rebut evidence of Mr. Mann’s post incarceration conduct, the prosecutor again referred to pedophilia, stating, “[a]nd the fact he hasn’t got into serious trouble since there are no children on death row that he can really physically abuse really doesn’t speak much about his character either ” (S.S. Vol. XVI 2024).

Without Dr. Carbonel’s testimony, Mr. Mann’s prior instance of sexual abuse of a minor (Mr. Mann admitted to Dr. Carbonel that he fondled a seven year old girl when he was sixteen years old) would not have be admissible because Mr. Mann was never formally convicted of that charge. The prosecutor could have relied only on the kidnapping and Mr. Mann’s Mississippi conviction of burglary with the intent to commit

unnatural carnal intercourse. However, the prosecutor's comments about pedophilia would have been irrelevant. Moreover, without Dr. Carbonel's testimony, there would have been no evidence of Mr. Mann's juvenile charge, and the prosecutor could not have referred to Mr. Mann as a "child molester" and a "pervert" (S.S. Vol. XVI 2003, 2014-15, 2016-17). Brian Donnerly, Mr. Mann's expert witness at the December 1, 1998, evidentiary hearing on Mr. Mann's Amended Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend, stated, "[t]he State ultimately made the defense mitigation into one of its most potent aggravating circumstances. And from the jury perspective, it would have changed the focus to the extent of the State's argument because the State would not have had a factual basis for that argument" (R. Vol. IV 618).

Mr. Donnerly stated that his "primary conclusion was that the decision to put on pedophilia as a mitigating circumstance was below the standard in the community and also that there is a reasonable probability that it affected the result" (R. Vol. IV 605). Mr. Donnerly based his conclusion on both the prosecutor's use of pedophilia in his closing argument and the additional prejudicial facts and testimony the pedophilia testimony brought into the trial (R. Vol. IV 605, 609-615). Mr. Donnerly stated:

"The defense made very little mention of it and mostly defensive and to the State he was red meat that was spread throughout the State's final argument. And it wasn't just Dr. Carbonel, but the various things that Dr. Carbonel opened up.

The State's expert, the molestation of the seven-year-old when Mr. Mann was 16 also gave them a more interesting spin on the prior rape because of the victims. In that case the victim was of small stature and they were able to tie that into the obviously small stature of the victim in this case."

(R. Vol. IV 615). Mr. Donnerly also concluded that Dr. Carbonel's testimony concerning Mr. Mann's alcoholism was the only valuable evidence she offered. However, Mr. Donnerly stated, the alcoholism testimony "wasn't worth everything else that came in with it. The long-term alcohol abuse could have come in through lay witnesses and you could have left all the psychological testimony at home and gotten virtually, gotten what little benefit came from Dr. Carbonel's testimony without the pain that came with it" (R. Vol. IV 610).

In addition to the prosecutor's closing argument, the pedophilia testimony allowed the State to present its own expert, Dr. Whalen, whose testimony was extremely prejudicial to Mr. Mann's sentence. Dr. Whalen testified, "[i]t's (pedophilia) a learned behavior. Individuals who have this type of sexual problem essentially teach themselves to be sexually aroused to children" (S.S. Vol. XV 1844). Dr. Whalen gave his opinion on the manner by which pedophiles teach themselves to be sexually aroused by children. "They fantasize about it. They practice it in their mind. They masturbate and have a sexual experience to the fantasy" (S.S. Vol. XV 1846). The cumulative result of Dr. Carbonel's and Dr. Whalen's testimony gave the jury the otherwise irrelevant information

that Mr. Mann molested a seven year old girl, Mr. Mann suffered from a mental disorder that caused him to kidnap the victim because he was impelled to sexually abuse her, and that pedophilia is, in Dr. Whalen's opinion, just a learned behavior that Mr. Mann taught himself by masturbating while fantasizing about children. The prejudicial effect of this otherwise irrelevant evidence is undeniable, and it is evident in the questions the jury submitted to the court.

During deliberations, the jury asked the court the following questions:

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?
3. Has Larry Mann or his attorneys applied for a new trial on the guilt phase?
4. What type of discharge did the Air Force give Larry Mann?
5. Was the seven year old girl that Mr. Mann fondled ever examined by a medical doctor for being raped?
6. Was Dr. Whalen admitted as an expert witness in his field?
7. What is the definition of the word "extreme" as used in reference to under the influence of extreme mental or emotional disturbance?

(S.S. Vol. XVI 2081-82). Four of the seven questions (1, 2, 5, and 6) concern facts which would not have reached the jury if the pedophilia testimony was not offered. Without the pedophilia testimony and the way it was used as an aggravating circumstance in the prosecutor's closing argument, the jury would have no reason to suspect that the victim was molested, because **there was absolutely no evidence of sexual activity** (S.S. Vol. X 1278). Thus, the jurors would not have considered whether the victim's autopsy showed evidence of a sexual encounter, or whether there was any evidence at all of natural or unnatural sexual intercourse. Judge Case refused to answer questions one and two, and did not explain that there was absolutely no evidence Mr. Mann sexually assaulted the victim before he killed her. Judge Case only instructed the jury to rely on the evidence produced at trial. If the jury mistakenly relied on the prosecutor's closing argument as evidence, the jury recommended a sentence of death, in part, because of a sexual assault of the victim that Mr. Mann did not commit. The fact that the jury asked whether the seven year old girl Mr. Mann fondled was examined for rape shows that the jury was giving a great deal of weight to the pedophilia testimony and the otherwise irrelevant evidence it brought in. The jury also asked whether Dr. Whalen was an expert in his field, suggesting that it was seriously considering Dr. Whalen's testimony that Mr. Mann taught himself to be a pedophile. Questions one, two, five, and

six prove that the jury was giving great weight to the evidence admitted solely because of the pedophilia testimony, and that the evidence played a large role in the deliberations.

The jury returned a nine to three verdict, sentencing Mr. Mann to death. Despite the damaging effects of the pedophilia testimony, three jurors felt the aggravating circumstances did not outweigh Mr. Mann's other mitigating circumstances. Had Mr. Mann's counsel not offered the pedophilia testimony and instead pursued the possibility Mr. Mann suffers brain damage from years of substance abuse and head trauma, counsel probably would have changed the outcome of the sentencing. Mr. Donnerly testified that he believed there was a reasonable probability Mr. Mann would have received a life sentence if the pedophilia testimony was not used (R. Vol. IV 615). Mr. Mann needed only three more votes for a life sentence.

“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. The circuit court clearly erred when it held “[n]either the defense attorneys performance in general nor their adoption of the strategy to present mental mitigation including pedophilia falls below the applicable standards of Strickland v. Washington.” Mr. Mann's counsel failed to independently investigate mitigating circumstances, and instead, offered the previously prepared pedophilia “strategy” even though counsel knew

it was ineffective in Mr. Mann's first sentencing, and counsel anticipated that the state would use it to Mr. Mann's disadvantage. Counsel's conduct fell far below an objective standard of reasonableness (R. Vol. IV 605). Strickland, 466 U.S. at 688. The prejudicial effect of counsel's ineffective performance is clear. The jury heard all of the otherwise irrelevant evidence resulting from the pedophilia testimony, and the questions the jury submitted to the court prove that the otherwise irrelevant evidence played a large role in the jury's deliberations. There is sufficient evidence to undermine the outcome of the sentencing. Strickland, 466 U.S. at 694.

The circuit court was also clearly erroneous when it held that "there is no reasonable likelihood, in light of the aggravating factors proved by the state, that the result of the proceedings would have been different had the evidence been withheld from the jury"(R. Vol. III 539-40). Had counsel investigated the effects of long term drug abuse or organic brain damage, counsel likely could have established the statutory mitigating factors that Mr. Mann was under the influence of an extreme mental or emotional disturbance at the time of the offense, and that Mr. Mann lacked the ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the offense. Fla. Stat. 921.141(6)(b), (f). See Rose v. State, 675 So.2d 567, 571 (Fla.1996). Had counsel taken the initiative to pursue this non-damaging mitigating evidence, the jury would have found these statutory mitigating circumstances, and there

is a reasonable probability that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695. Counsel’s trial “strategy” was extremely ineffective based on the totality of the circumstances, and the trial court erred in holding otherwise.

ARGUMENT II

THE CIRCUIT COURT JUDGE ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON THE REMAINING INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES IN MR. MANN’S 3.850 BRIEF.

Under rule 3.850, Mr. Mann is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific “facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant.” Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990).

When deciding whether counsel’s failure to investigate constitutes ineffective assistance of counsel, this Court must determine whether, “reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 691. “An attorney has a duty to conduct a reasonable investigation.” Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). “Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely

qualify as a mitigating factor, the failure to investigate will be ineffective assistance.” Hall v. Washington, 106 F.3d 742 (7th Cir. 1997). Thus, counsel’s failure to investigate the obvious and available mitigation in Mr. Mann’s case was ineffective assistance of counsel.

1. The circuit court erred in not granting an evidentiary hearing so that Mr. Mann could prove counsel’s failure to investigate Mr. Mann’s history of substance abuse as a mitigating factor constituted ineffective assistance of counsel.

The trial court erred when it held that Mr. Mann’s 3.850 claim that counsel was ineffective for failing to investigate and present evidence of Mr. Mann’s history of substance abuse through a substance abuse expert lacked merit (R. Vol. III 544). Though some lay witness testimony was offered and Dr. Carbonel did mention the long term substance abuse, Dr. Carbonel is not an expert on the long term effects of substance abuse, and that testimony fell far short of effective assistance.

This Court has held that failure to prepare and present evidence of chronic substance abuse can constitute ineffective assistance of counsel. Heiney v. State, 620 So.2d 171 (Fla. 1993); *See also*, People v. Wright, 488 N.E.2d 973 (Ill. 1986).

Mr. Mann’s counsel was aware of his of chronic substance abuse. Counsel knew Mr. Mann is an alcoholic, that he started abusing alcohol when he was thirteen years old, and that he was intoxicated the morning he killed the victim. (R. Vol. II 257, S.S. Vol. XIII 1540). Counsel also knew that Mr. Mann had used PCP, LSD, marijuana, speed,

barbiturates, heroin, and cocaine. (R. Vol. II 333, 350, O.R.Vol. XV 2406-7, Vol. XIII 2003, 20014-15). In addition to the regular use of a number of different drugs, the record clearly states that Mr. Mann was addicted to PCP (O.R. Vol. XV 2406). Counsel knew of the serious neurological effects that consistent PCP use can cause. In Mr. Mann’s first sentencing, Dr. Fireman testified:

There was a time in Larry Mann’s life when he was an addicted user of phenylsycladene (phonetic)[sic.] or angel dust, which, in my judgement, is the most self-destructive, notoriously potent hallucinogenic and psychogenic substance that we’re unhappily afforded, experienced with as physicians and psychiatrists. During his military tour in Cocoa Beach, there is evidence to suggest that he was in the throes of phenylsycladene psychosis for a substantial period of times [sic.]. The very taking of that chemical in the dosages he took it in is self-destructive. **The short and long term damage to the central nervous system is a suicide equivalent**, in my judgement, so I would want to focus on that event. . . .I’m telling you that **the persistent use of substances that are notoriously known to erode the conscious processes and diminish our ability to stop at red lights, to dive into waters that we can’t swim in and to otherwise take irrational chances**, drive motorcycles at breakneck speeds across highway intersections, yes, I believe it becomes a function of self-destruction to take the drugs which disinhibit you from life risk situations.

(O.R. Vol. XV 2406-7). In addition to counsel’s knowledge of the likely affects PCP use may have on all users, counsel had reason to believe that it actually had an effect on Mr. Mann’s nervous system. Counsel also knew that Mr. Mann was hospitalized for approximately three days at Patrick AirForce Base for a “nervous condition” while “I was

doing a lot of drugs at the time” (R. Vol. II 349). Although counsel knew of Mr. Mann’s long-term drug and alcohol abuse, the potential neurological effects those substances may cause, and that they likely did affect Mr. Mann for a short term, counsel failed to investigate the way it affected Mr. Mann permanently.

Counsel had the time and resources to investigate whether Mr. Mann was injured by the cumulative effects of long term alcohol and drug use, but instead retained Dr. Carbonel, who they inherited from the CCR (R. Vol. IV 694). Counsel unreasonably offered Dr. Carbonel’s expert testimony regarding the highly prejudicial pedophilia information, and did not hire an expert experienced in the effects of chronic substance abuse, even though this Court held that a defendant’s past drinking problems, among other things, were “collectively a significant mitigating factor”. Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Unrebutted evidence that the defendant’s “reasoning abilities were substantially impaired by his addiction to hard drugs” is “significantly compelling” mitigation. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

The prejudice resulting from counsel’s failure to investigate and present evidence regarding Mr. Mann’s extensive history of drug abuse and how it affected his state of mind on the morning of the incident is evident in Judge Case’s Findings In Support of the Death Penalty. Judge Case found, “Absent any credible evidence that the Defendant was intoxicated at the time of the murder, the Court finds that the Defendant’s pedophilia was

not a mental of [sic] emotional disturbance extreme enough to constitute a statutory mitigating circumstance.” (S.S. Vol. VI 675). Had counsel investigated the effects of years of drug abuse and consulted an expert neuropharmacologist who could explain how past drug abuse combined with the effects of alcohol the night before the incident could have affected Mr. Mann during the incident, the court could have likely found mental or emotional disturbance extreme enough to constitute a statutory mitigating circumstance. Despite the trial court’s finding that there was no credible evidence of intoxication at the time of the offense, this evidence would have been proper mitigation because this Court has held evidence that the defendant was “not under the influence of drugs or alcohol when committing the offenses is not the correct standard for determining whether long-term substance abuse is mitigating”. Mahn v. State, 714 So.2d 391, 401 (Fla. 1998). (R. Vol. III 544).

Counsel’s failure to investigate and present evidence of the effects of Mr. Mann’s 14 year record of substance abuse cannot be justified as a decision supported by reasonable professional judgment. Strickland, 466 U.S. at 691. Counsel knew of Mr. Mann’s drug history and should have known this Court considers long-term substance abuse a mitigating circumstance. Counsel was ineffective for not investigating and presenting this evidence. These facts are not conclusively rebutted by the record and demonstrate counsel’s deficient performance prejudiced Mr. Mann. Roberts v. State, 568

So.2d 1255, 1259 (Fla. 1990). The circuit court erred in not granting a new sentencing or, at least, an evidentiary hearing on this issue.

2. The circuit court erred in not granting an evidentiary hearing so that Mr. Mann could prove counsel's failure to investigate the possibility of brain damage as a mitigating factor constituted ineffective assistance of counsel.

Evidence of brain damage is a mitigating circumstance under Florida law. *See. e.g., Foster v. State*, 679 So.2d 747 (Fla. 1996); *Hildwin v. Dugger*, 654 So.2d 107 (Fla. 1995); *Mitchell v. State*, 595 So.2d 938 (Fla. 1992). Thus, failure to investigate and present evidence of brain damage can constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 691; *Middletown v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988).

Counsel was aware that Mr. Mann likely suffers from brain damage. Counsel knew that Mr. Mann's long term drug abuse likely caused brain damage, Mr. Mann was hospitalized for a "nervous condition", Mr. Mann has a long history of mental illness, and Mr. Mann suffered a head injury in a car accident (R. Vol. II 248, 349, F.S. Vol. XVI 2406-7). However, even though counsel had the resources to do so, counsel did not hire an expert to investigate Mr. Mann's brain injury. Nor did counsel procure available tests such as a PET scan or a CAT scan. Instead, counsel relied on Dr. Carbonel's psychological tests, even though Dr. Carbonel was not a qualified expert in the field of brain injury.

Although counsel was aware of the high probability that Mr. Mann has brain damage and that brain damage is a mitigating circumstance under Florida law, counsel did not investigate the brain damage. This absolute failure to investigate an obvious and available mitigating circumstance cannot be attributed to strategy and constitutes deficient performance. Because Dr. Carbonel is not an expert in the field of organic brain damage, the trial court erred when it adopted the state's contention that "the existence or [sic.] organic brain damage was eliminated by the testimony of experts". (R. Vol. III 543). The trial court erred when it did not grant an evidentiary hearing.

3. The circuit court erred in not granting an evidentiary hearing so that Mr. Mann could prove counsel's failure to challenge the Mississippi conviction which was used to support the previously convicted of another capital felony or a felony involving use or threat of violence to the person aggravator constituted ineffective assistance of counsel.

During the second penalty phase, the state called the victim of Mr. Mann's alleged 1973 burglary, Deborah Johnson, to testify in support of the previous felony aggravator. Her testimony was perhaps the most damaging presented. To challenge this conviction and testimony, counsel asked Mrs. Johnson only five questions, and allowed the state to present this aggravator virtually unchallenged. Counsel chose not to challenge the reliability of the Mississippi conviction even though Mr. Mann, while admitting this crime, maintained that he did not commit the Mississippi crime (R. Vol. II 272, 330).

Though counsel had the duty to investigate all possible defenses, counsel made no effort to investigate and present evidence of Mr. Mann's alibi or to cast doubt upon the quality of the Mississippi conviction from which the jury could find that aggravator lacking in weight. *See* Lockart v. State, 655 So.2d 69 (Fla. 1995); Sweet v. State, 624 So.2d 1138 (Fla. 1993); Slawson v. State, 619 So.2d 255 (Fla. 1993). Nor did counsel challenge the weight of this conviction by vigorously cross examining Ms. Johnson. Counsel did not ask her about the circumstances when she was raped: the lighting, how long she actually saw her attacker, whether he had a beard or made any attempt to disguise himself. Counsel also did not investigate the description Ms. Johnson gave to the police, the circumstances in which Mr. Mann was identified as her attacker, or trial prejudicial errors which were not resolved on appeal. During Mr. Mann's first penalty phase Ms. Johnson testified that she identified Mr. Mann from a yearbook photograph (O.R. Vol. XV 2372). Mr. Mann quit school in 1969, so the photograph was at least four years old. Ms. Johnson testified she described her attacker to the police as a man between twenty-five and thirty-five years old, but she identified Mr. Mann, who was twenty years old at the time, from a photograph taken when he was sixteen years old or younger (S.S. Vol. X 1345). Ms. Johnson also testified that she identified Mr. Mann in person for the first time in the courtroom after the proceedings against Mr. Mann had started (O.R. Vol. XV 2372). The surface circumstances of this identification are

inherently suspect, reasonable counsel would have investigated and challenged the integrity of the conviction. Mr. Mann admitted the Florida crime and volunteered information about his juvenile incident, there is no indication he was lying about not committing the 1973 burglary.

Given the special nature of the death penalty, “the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination,” counsel’s duty to investigate and prepare is heightened. California v. Ramos, 463 U.S. 992, 998-999 (1983). Because burglary is a facially non-violent felony, the state was allowed to provide testimony that the crime involved violence. Mann v. State, 453 So.2d 499 (Fla. 1994); Johnson v. State, 465 So.2d 499 (Fla. 1995). The violent nature of the burglary was not established by the record of the conviction, so the state had the burden of proving beyond a reasonable doubt that the violent unnatural carnal intercourse was violent. Williams v. State, 386 So.2d 538 (Fla. 1980). Counsel’s absolute failure to challenge the violence and the conviction and hence, the statutory aggravator, through Mr. Mann’s alibi or the quality of the conviction was deficient performance. Code v. Montgomery, 799 F.2d 1481, 1483-84 (11th Cir. 1986). Counsel’s failure to challenge this aggravator prejudiced the defense such that, without the error, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. Rose v. State, 675

So.2d 567, 571 (Fla. 1996). The trial court erred when it dismissed this claim offering as an explanation only that it “lacked merit” and in not granting an evidentiary hearing. (R. Vol. III 545).

4. The circuit court erred in not granting an evidentiary hearing so that Mr. Mann could prove counsel’s failure to effectively cross examine or challenge Fred Daniels constituted ineffective assistance of counsel.

Fred Daniels, Mr. Mann’s neighbor, testified that he did not perceive Mr. Mann to be intoxicated the morning of the crime. This testimony conflicted with Mrs. Mann’s; she testified Mr. Mann was so drunk at five o’clock that morning that he urinated in a waste basket (S.S. Vol. XIII 1540). Judge Case relied on Mr. Daniel’s testimony when he found there was no credible evidence that Mr. Mann was intoxicated at the time of the murder, and refused to find the statutory mitigating circumstance of extreme emotional disturbance. Thus, the prejudice resulting from counsel’s failure to effectively cross examine Mr. Daniels is clear. There is a reasonable possibility that, had counsel more effectively cross examined Mr. Daniels, Judge Case and the jury would have found Mr. Mann was intoxicated at the time of the crime and was extremely emotionally disturbed. The balance of aggravators and mitigators would have been different.

Through cross examination, counsel only established that Mr. Daniels did not know Mr. Mann’s drinking habits. Counsel did not inquire as to whether Mr. Daniels could distinguish Mr. Mann’s intoxicated and sober behavior. Counsel did not ask Mr.

Daniels whether he had ever talked to Mr. Mann knowing for certain that Mr. Mann was sober. Mr. Mann, a chronic alcoholic who was adept at functioning while drunk, could have been intoxicated every time he encountered Mr. Daniels. In fact, because Mr. Daniels stated Mr. Mann's speech was normal and he did not notice anything unusual about Mr. Mann's behavior, Mr. Mann likely could have been very drunk if Mr. Daniels never encountered Mr. Mann while he was sober. This evidence was critical to Mr. Mann's case, but counsel unreasonably and deficiently failed to investigate and cross examine Mr. Daniels. The trial court erred when it denied this claim, explaining only that it "lacked merit" (R. Vol. III 545). An evidentiary hearing is needed to further examine the extent of the prejudice.

- 5. The circuit court erred in not granting an evidentiary hearing so that Mr. Mann could establish counsel's failure to document and preserve for appeal the commotion during Mr. Mann's trial caused by the presence of a victim rights organization founded by Elisa Nelson's mother constituted ineffective assistance of counsel.**

During Mr. Mann's second penalty phase, the courtroom was inundated with members of the League Of Victims and Empathizers (LOVE), a victim's rights organization founded by Elisa Nelson's mother. Many of the LOVE advocates present at the trial were wearing name tags with the word "victim" on them. The Court was concerned that the LOVE advocates may approach the jurors (S.S. Vol. VII 815-16). Counsel failed to document the number of advocates, descriptions of the name tags, the

way the LOVE advocates behaved, and other information that would reveal the prejudicial effects of their presence. Defense counsel also failed to vigorously object to the presence of the LOVE advocates during the trial. It was unreasonable for counsel not to object and document the actions of these advocates who likely influenced the jury either directly or indirectly by their overwhelming and name tag wearing presence.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar¹, prevents Mr. Mann from interviewing the jurors to know the extent of LOVE's influence. Mr. Mann should have the ability to interview the jurors in this case but, because he is on death row, he must rely upon counsel provided by the State of Florida. This prevents Mr. Mann from interviewing the jurors, because the attorneys provided to Mr. Mann are prohibited from contacting the jurors in his case. Counsel knew of this rule and their failure to preserve this issue for the record prejudices Mr. Mann because there is no way to know the extent

¹The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states that

A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

of the prejudice. The trial court erred when it denied this claim, explaining only that it “lacked merit” (R. Vol III 545). An evidentiary hearing is needed to discover whatever possible about the influence of the LOVE advocates.

6. The circuit court erred in not granting an evidentiary hearing so that Mr. Mann could establish counsel ineffectively failed to object to the prosecutor’s improper appeals to the juror’s fears that if not sentenced to death, Mr. Mann would soon be paroled.

The prosecutor made inflammatory comments in his closing argument, telling the jury that if Mr. Mann was not sentenced to death, he will soon be released on parole.

Five years from now or ten years from now or fifteen years from now, if the specter of the death penalty is removed from this case, do you really believe, are you reasonably convinced that he will never, never go to a parole hearing? He will never seek to get out of prison?

(S.S. Vol. XVI 2027). These remarks are similar to those this Court found to be “another example of inexcusable prosecutorial overkill” in Teffeteller v. State, 439 So.2d 840, 845 (Fla. 1983). This argument, designed to initiate an unguided emotional response from the jury, is impermissible. Harris v. State, 438 So.2d 787 (Fla. 1983). This argument likely served as a non-statutory aggravator the jury considered when it rendered the death sentence. The jury likely believed the prosecutor and sentenced Mr. Mann to death as the only way to be certain Mr. Mann would never be released on parole. Miller v. State, 373 So.2d 882 (Fla. 1979). Defense Counsel did not object or move for a mistrial and was

therefore, ineffective. The trial court erred when it denied this claim, explaining only that it “lacked merit” (R. Vol. III 545).

7. The circuit court erred in not granting an evidentiary hearing so that Mr. Mann could establish counsel ineffectively failed to object to the improper jury instructions regarding the prior violent felony aggravating circumstance.

Trial counsel ineffectively failed to object to the improper jury instructions regarding the “prior violent felony” aggravating circumstance. The aggravator submitted to the jury was:

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.

(S.S. Vol XVI 2072). This instruction unconstitutionally relieved the State of its burden to prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386, So.2d 538 (Fla. 1980). Burglary is not a crime of violence that per se constitutes an aggravating circumstance under Florida Statute 921.141(5)(b). *See* Mann v. State, 453 So.2d 499 (Fla. 1994); Johnson v. State, 465 So.2d 499 (Fla. 1995). Nor does burglary with intent to commit “unnatural carnal intercourse” automatically qualify as a prior violent felony aggravator. The Mississippi statute under which Mr. Mann was convicted defined “unnatural carnal intercourse” as “the detestable and abominable crime against

nature”. Miss. Code Ann. §97-29-59 (1972). The Mississippi Supreme Court consistently equated “the detestable and abominable crime against nature” with common law sodomy (defined as “oral or anal copulation between humans or animals”. Black’s Law Dictionary 968 (6th ed. 1991)). State v. Mays, 329 So.2d (Miss. 1976); Taurasi v. State, 102 So.2d 120 (Miss. 1958); State v. Davis, 79 So.2d 452 (1955). In Mays, the Mississippi Supreme Court noted that the common law “crime against nature”, from which Mississippi’s “unnatural carnal intercourse” was derived, “broadly embraced sodomy, bestiality, buggery, fellatio, and cunnilingus within its terms”. Mays, 329 So.2d at 66. Indeed, all of the common law “crimes against nature”, with the exception of bestiality, are non-violent crimes when both parties consent. Therefore “unnatural carnal intercourse”, like burglary, is not a facially violent crime. Thus, the state had the burden of proving the burglary was violent because the violence is the fact that makes facially non-violent burglary with intent to commit unnatural carnal intercourse an aggravating factor. Williams v. State, 386 So.2d 538 (Fla. 1980). When the court gave this jury instruction, it improperly ruled as a matter of law that the burglary was a prior violent felony and affirmatively removed this entire issue from the jury. This unconstitutionally shifted the burden of persuasion from the state to Mr. Mann. Francis v. Franklin, 471 U.S. 307 (1985).

Counsel ineffectively failed to object to the instruction for these reasons and, because the issue was not preserved, this Court declined to consider it on appeal. Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992). The jury followed this unconstitutional instruction when it sentenced Mr. Mann to death. The trial court erred when it adopted the state's contention that this claim is legally insufficient because this Court found any error in the instruction to be harmless in Mann v. State, 603 So.2d 1141 (Fla. 1992) (R. Vol. III 544). When it gave this instruction, the court improperly ruled as a matter of law that the burglary was a prior violent felony and affirmatively removed this entire issue from the jury. “[W]hen 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.” United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988). The trial court erred in not granting an evidentiary hearing.

8. Conclusion

Counsel never attempted to meaningfully investigate mitigation and violated their duty to “conduct a reasonable investigation, including an investigation of the defendant’s background, for possible mitigating evidence”. Rose v. State, 675 So.2d 567, 572 (Fla. 1996), *quoting* Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995). Counsel had a duty to investigate the substantial mitigation available, namely, Mr. Mann’s 14 year history of substance abuse, possible organic brain damage, the questionable quality of the 1973

Mississippi conviction, Fred Daniel's knowledge of and experience with Mr. Mann while he was intoxicated, and the prejudicial influence exerted by the LOVE members at Mr. Mann's trial. This evidence was present and available in Mr. Mann's case, but counsel did not investigate or present it. Counsel's deficient performance becomes more egregious in light of the mitigation counsel presented. Without ever investigating the above options, counsel latched onto a strategy they believed to be ill conceived (R. Vol. IV 694-95). Rose, 675 So.2d at 572. This resulted in the irrelevant and prejudicial admission of Dr. Carbonel's pedophilia testimony and the information brought in with it. The prosecutor used the testimony as a non-statutory aggravating circumstance and Mr. Mann was sentenced to death. But for counsel's errors, Mr. Mann probably would have received a life sentence. An evidentiary hearing and 3.850 relief are warranted. Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995); Rose v. State, 675 So.2d 567, 572 (Fla. 1996).

ARGUMENT III

THE CIRCUIT COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING SO THAT MR. MANN COULD ESTABLISH THE PROSECUTOR'S NUMEROUS INSTANCES OF MISCONDUCT WHICH PERMEATED THIS CASE VIOLATED MR. MANN'S SIXTH AND EIGHTH AMENDMENT RIGHTS TO A FAIR TRIAL AND COUNSEL'S FAILURE TO OBJECT AND MOVE FOR A MISTRIAL DUE TO THE MISCONDUCT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The sum of the prosecutor's improper remarks, when taken in their totality, justify a new penalty proceeding. Garron v. State, 528 So.2d 353 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983). Throughout the trial, especially during his closing argument, the prosecutor made arguments which were intended to and did inject elements of fear and emotion into the jury's verdict. The prosecutor overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. Garron, 528 So.2d at 359. At the same time, Mr. Mann's counsel fell far short of the bounds of zealous advocacy and even adequate advocacy. Defense counsel failed to object to much of the prosecutor's improper and prejudicial argument, and also failed to move for a mistrial after the prosecutor's closing argument, which culminated his argument designed to obtain a death sentence through any means. This failure resulted in Mr. Mann's death recommendation of nine to three, based on the prosecutor's

improper argument which the jury should not have heard, and is evident in the questions the jurors submitted to the court during deliberations.

The prosecutor's misconduct began in voir dire when he suggested to a potential juror that the death penalty should be "reserved for special crimes" (S.S. Vol. VII 853). Moments later, he made an impermissible appeal to the jurors to act as the "conscience of the community for Larry Mann" (S.S. Vol. VII 865). This comment was intended to inflame the jury to be the conscience of the community for this "special crime" and was misconduct. United States v. Lewis, 547 F.2d 1030, 1037 (8th Cir. 1977); United States v. Alloway, 397 F.2d 105, 113 (6th Cir. 1968). Defense counsel objected to this comment and the objection was sustained. When questioning the jurors whether they could follow instructions on weighing aggravators and mitigators, the prosecutor stated, "I understand, and I think everyone understands the killing of a child is a bad, bad, bad, bad thing" (S.S. Vol. VIII 1013). This improper commentary was designed to initiate an "unguided emotional response" from the jury and was misconduct.

During the testimony, the prosecutor made irrelevant references to the fact that Mr. Mann's attorneys filed a motion for a new trial. The motion was filed because Mr. Mann was so heavily medicated at his first trial that he was unable to assist his lawyers in his defense. The prosecutor asked Gail Anderson, a defense witness who testified that Mr. Mann was remorseful and accepted his guilt, whether she knew of the motion for a new

trial (S.S. Vol. XIII 1578). This fact, which the prosecutor offered under the guise of refuting remorsefulness, was offered to mislead the jury and induce fear that the man who committed the “bad, bad, bad, bad thing” may soon be released from prison if he does not receive the death penalty (S.S. Vol. VIII 1013).

The prosecutor could not reasonably believe that the motion for a new trial was relevant to Mr. Mann’s personal feelings of remorse or his acceptance of guilt. The prosecutor should have known better than anyone that it was defense counsel’s obligation to file every proper motion that may be relevant to an individual’s defense (S.S. Vol. XIII 1580). This prosecution tactic was “undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury”. Berger v. United States, 295 U.S. 78, 85 (1935). The jury considered this irrelevant information in reaching their verdict of death. The jury asked the court, “Has Larry Mann or his attorneys applied for a new trial on the guilt phase?” (S.S. Vol. XVI 2081). Judge Case instructed the jury to rely on their memories to answer the question (S.S. Vol. XVI 2082). Knowledge of the motion for a new trial was completely irrelevant to the jury’s function of weighing aggravating and mitigating factors. The jury was misled by the prosecutor’s insinuation behind asking Ms. Anderson whether she knew about the motion for a new trial, the insinuation that Mr. Mann, who had admitted to committing this “special crime” which

was a “bad, bad, bad, bad thing” might soon be on the street if he was not sentenced to death.

Throughout the guilt phase of the trial, the prosecutor commented on and elicited from witnesses testimony regarding the victim’s age and size and compared her size to Mr. Mann’s (S.S. Vol. IX 1142-43, 1158, 1172, 1175, 1187, 1202, 1230-33). This line of argument continued into the prosecutor’s closing argument (S.S. Vol. XVI 2002, 2003, 2004, 2006, 2007, 2008). This obvious appeal to the emotions and fears of the jurors was improper. United States v. Lewis, 547 F.2d 1030, 1037 (8th Cir. 1977); United States v. Alloway, 397 F.2d 105, 113 (6th Cir. 1968).

In his closing argument, the prosecutor made two comments which were variations on the proscribed Golden Rule, “the prohibition of such remarks has long been the law of Florida”. Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Remarks which violate the Golden Rule are those which place “the jury in the position of the victim” and those which have the jurors imagine the victim’s pain. Urbin v. State, 714 So.2d 411, 419 (Fla. 1998). The prosecutor first stated:

[w]ords are rarely inadequate to describe to you the terror and suffering that this ten year old girl must have endured from the moment of her abduction to the crushing of her skull, and I certainly don’t pretend to have the eloquence to try to express verbally to you what happened. **What you have to do is through the testimony, through the physical exhibits, reconstruct and recreate that crime, try to understand and**

try to determine what she experienced and what she suffered.

(S.S. Vol. XVI 2007). Because he could not “adequately” describe the crime, the prosecutor told the jury they must recreate the crime and try to determine what Elisa Nelson “experienced” and “suffered” (S.S. Vol. XVI 2007). This was simply asking the jury to imagine Elisa Nelson’s pain, and is clearly prohibited by the Golden Rule. Bertolotti, 476 So.2d at 133; Urbin, 714 So.2d at 419; Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Garron v. State, 528 So.2d 353, 359-60 (Fla. 1988). Defense counsel did not object, and the prosecutor continued, asking the jury to determine what Elisa “experienced” and “suffered” when:

this bearded, hulking stranger, stocking her and approaching her **undoubtedly put her in great fear**. She knew what was about to occur. Now, Elisa is not here to tell you – We cannot reconstruct through eyewitness testimony the exact sequence of events, but **you can by recreating the crime understand the substantial detail [sic.] what happened**.

(S.S. Vol. XVI 2008). The prosecutor asked the jury to put themselves in the victim’s position and to imagine her fear. Again, defense counsel did not object to this blatant violation of the Golden Rule.²

²Counsel did object to the prosecutor’s comment that Elisa was not there (S.S. Vol. XVI 2008). The objection was sustained.

Though similar violations of the Golden Rule have caused this Court to admonish prosecutors and, in Garron, remand the case for a re-sentencing, defense counsel ineffectively failed to object, and no curative instructions were given. Garron, 528 So.2d 353.

The prosecutor made an improper comment on Mr. Mann's right to remain silent. During his closing argument, in an attempt to refute Mr. Mann's remorse, the prosecutor stated, "he is still misleading the experts, lying and refusing to talk about why and how he committed this terrible murder" (S.S. Vol. XVI 2026). This Court has held, "Courts must prohibit all evidence or argument that is fairly susceptible of being interpreted by the jury as a comment on the right of silence." State v. Smith, 573 So.2d 306, 317 (Fla. 1990). This comment, while not directly referring to the fact that Mr. Mann did not testify at the re-sentencing, did point out to the jury that Mr. Mann did not testify. Further, it suggested that Mr. Mann had an obligation to explain to the jury and the court "why and how he committed this terrible murder" (S.S. Vol. XVI 2026). The remark was definitely susceptible of being interpreted by the jury as a comment on the right of silence and thus, was improper. Pope v. State, 441 So.2d 1073 (Fla. 1983); Bertolotti, 476 So.2d 130.

In order to preserve an allegedly improper prosecutorial comment for review, defense counsel must object to the comment or move for a mistrial. Gutierrez v. State,

731 So.2d 94 (4th DCA 1999). As with the majority of the other prosecutorial misconduct, defense counsel did not object or move for a mistrial, and the comments were precluded from appellate review. Counsel's failure to object or move for a mistrial was ineffective assistance.

The prosecutor's most egregious pattern of misconduct occurred in his closing argument which, when considered as a whole, denied Mr. Mann a fundamentally fair sentencing proceeding. The prosecutor did not base his closing argument on the facts of the case, instead he used it as an opportunity for name calling and to inject an irrelevant aspect of fear into the sentencing (S.S. Vol. XVI 1997, 2003, 2004, 2006, 2008, 2014, 2016, 2019, 2024, 2030, 2032). Though there was no evidence besides Dr. Carbonel's testimony that Mr. Mann intended to sexually abuse the victim, the prosecutor started his closing argument stating, Larry Mann "kidnapped her and took her there for the purpose of satisfying **his deviant sexual desire**" (S.S. Vol. XVI 1997). The prosecutor continued, "[Elisa Nelson] was "taken to an isolated area to be kidnapped and **sexually abused. . . . sexual molestation was unquestionably the motive for the kidnapping, the satisfaction of Larry Mann's perverted desires led to Elisa Nelson's kidnapping**"(S.S. Vol. XVI 2003). In reference to that statement, the prosecutor continued, "[o]f all the types of kidnapping that might occur, what can be more significant, what should be given more weight than the kidnapping of a vulnerable,

isolated ten year old girl on her way to school. I think the evidence suggests to you that this aggravating circumstance is, indeed, established beyond a reasonable doubt” (S.S. Vol. XVI 2003-2004). He stated that Dr. Carbonel suggested that “**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** (S.S. Vol. XVI 2014-15). The prosecutor continued, “this man is a **child molester**. . . his fantasy lies about fantasizing about children, as Dr. Carbonel indicated to you that Larry Mann has done through the course of his life. He enhances and builds towards the commission of future crimes” (S.S. Vol. XVI 2016-17). Mr. Mann’s conduct was “conduct engaged in by a **pedophile seeking to satisfy sexual desires**” (S.S. Vol. XVI 2019). To rebut evidence of Mr. Mann’s post incarceration conduct, the prosecutor again referred to pedophilia, stating, “[a]nd the fact he hasn’t got into serious trouble since there are **no children on death row that he can really physically abuse** really doesn’t speak much about his character either” (S.S. Vol. XVI 2024). Even though there was absolutely no evidence of sexual assault, the prosecutor made sexual assault the theme of his closing argument, repeatedly referring to Mr. Mann as a child molester and a pervert. Defense Counsel objected only once (S.S. Vol. XVI 2014-15).

“Closing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.

Furthermore, if comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured outside the scope of proper argument" Urbin v. State, 714 So.2d 411, 419 (Fla. 1998).The prosecutor's attempts to obtain a verdict of death through improper, inflammatory, and abusive argument were obviously prejudicial and denied Mr. Mann his right to a fair trial. Defense counsel's one objection fell far short of reasonable and was ineffective.

The prosecutor's extensive misconduct pervaded Mr. Mann's sentencing procedure, beginning in his opening statement, continuing through testimony, and culminating in his closing argument. In Berger v. United States, Justice Sutherland stated that a prosecutor:

is in the peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). In his effort to obtain a death sentence by any means, the prosecutor used a number of improper methods to strike foul blows, resulting in a nine to three death recommendation for Mr. Mann. "If the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits

by the jury, a new trial should be awarded regardless of the want of objection.” Tyrus v. Apalachicola Northern Railroad Co., 130 So.2d 580, 587 (Fla.). *See also* State v. Townsend, 635 So.2d 949 (Fla. 1994). An evidentiary hearing and, thereafter, a new sentencing are warranted.

Competent counsel would have objected to the comments that injected elements of fear and emotion into the jury’s verdict, misled the jury, violated the Golden Rule, and were nothing more than blatant name calling throughout the course of the trial. Counsel did not object or move for a mistrial after the majority of the prosecutor’s improper comments, or attempt to thwart the prejudicial effects of the comments or to preserve the comments for review by other means. Allen v. State, 662 So.2d 323, 328 (Fla. 1995). Had counsel acted effectively to stop the prejudicial effects to the prosecutor’s misconduct, there is a “reasonable probability that the balance of aggravating and mitigating circumstances would have been different”. Rose v. State, 675 So.2d 567, 570-71 (Fla. 1996). Counsel was ineffective, and the prejudice is Mr. Mann’s death sentence. The trial court erred when it denied this claim without an evidentiary hearing (R. Vol. III 546).

ARGUMENT IV

THE TRIAL COURT ERRED WHEN IT DID NOT GRANT AN EVIDENTIARY HEARING SO MR. MANN COULD PROVE THE CONSIDERATION OF

**NON-STATUTORY AGGRAVATING
CIRCUMSTANCES WAS FUNDAMENTAL ERROR.**

The court denied Mr. Mann's claim for relief in Claim VIII of his Amended Motion to Vacate Judgments of Conviction and Sentence With Special Request For Leave To Amend, that the introduction of non-statutory aggravators and the prosecutor's argument upon the non-statutory aggravators rendered Mr. Mann's sentence fundamentally unfair and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and defense counsel was ineffective for failing to object and argue effectively. In denying Mr. Mann an evidentiary hearing so that he could prove this claim, the court held the issue should have been raised on direct appeal so it is barred under Robinson v. State, 707 So.2d 688 (Fla. 1998). That is the correct rule in most cases, however, when fundamental error occurs, it can be raised for the first time on appeal. State v. Johnson, 616 So.2d 1 (Fla. 1993); Fuller v. State, 540 So.2d 182, 184 (5DCA 1989). Fundamental error is that which denies due process and it can occur when prosecutorial comments are "so inflammatory and impermissible as to vitiate the fairness of the entire proceeding". Kent v. State, 702 So.2d 265, 269 (5DCA 1997). Accordingly, because of the special scope of review in death cases, fundamental errors should be cognizable for the first time in a 3.850 motion for post conviction relief if both trial and appellate counsel ineffectively failed to raise the issue at trial or on direct appeal.

Even though Florida capital penalty phase proceedings require the sentencers to consider only the statutory aggravating circumstances, throughout Mr. Mann's resentencing, the prosecutor made irrelevant, inflammatory, and highly prejudicial arguments and encouraged the jury to render a death sentence based on Mr. Mann's diagnosis of pedophilia and an imagined sexual assault supported by no evidence. Fla. Stat. §921.141(5) (1996); (S.S. Vol. XVI 1997, 2003, 2004, 2006, 2008, 2014, 2016, 2019, 2024, 2030, 2032). These arguments mislead the jury, which ultimately considered the arguments as aggravating circumstances when it rendered Mr. Mann's nine to three death recommendation. Miller v. State, 373 So.2d 882 (Fla. 1979)(causal relationship between aggravating circumstances and mental illness is an impermissible aggravating factor). The jury's verdict based on the improper non-statutory aggravating circumstances in turn infected Judge Case's sentencing because the sentencing judge is required to give the jury's verdict great weight, and a judge can override a life sentence only if the facts suggesting a death sentence are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 332 So.2d 908, 910 (Fla. 1975). The prosecutor's introduction of non-statutory aggravators is fundamental error because it resulted in the standardless sentencing discretion which violates the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420, 427 (1980).

Throughout his closing statement, the prosecutor suggested to the jury that Mr. Mann's diagnosis of pedophilia was an aggravating factor they should weigh when determining whether Larry Mann should live or die. The prosecutor began his insinuations that the jury consider Mr. Mann's pedophilia as an aggravating circumstance when he stated:

that a punishment different in quality (than life imprisonment) and different in quantity above what he has already exposed himself to should be imposed and is appropriate." (S.S. Vol. XVI 2002). "The facts of this particular kidnapping are aggravated in themselves. . . . sexual molestation was unquestionably the motive for the kidnapping, the satisfaction of Larry Mann's perverted sexual desires led to Elisa Nelson's kidnapping. . . . the evidence suggests to you that this aggravating circumstance is, indeed, established beyond a reasonable doubt, and it is an aggravating circumstance that, in particular, should be given a great deal of weight in your deliberations.

(S.S. Vol. XVI 2003-4). The prosecutor falsely argued to the jury that the "aggravated" facts behind the kidnapping--sexual assault-- were proved beyond a reasonable doubt. This was not true, there was no evidence of sexual assault.

In his effort to tie the Mississippi conviction to Mr. Mann's pedophilia and suggesting that the jury weigh real and imagined sexual assaults, the prosecutor argued, "[T]he cause of the nature of the crime because of its significance and its pattern of activity, this is an aggravating factor that should be given great weight in your aggravating

circumstances” (S.S. 2006). The prosecutor continued his effort to make Mr. Mann’s diagnosis of pedophilia an aggravating factor:

this is really, I suggest to you, almost appalling that its offered in mitigation. The primary diagnosis upon which she (Dr. Carbonel) relies is the Defendant is a pedophile. The fact that that has a name does not diminish what that is. She is arguing and suggesting to you on the witness stand that 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.

(S.S. Vol. XVI 2014-15).

It is clear that the jury considered the prosecutor’s improper argument and his contrived sexual assault when they were deliberating. The jury asked the court the following questions:

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?
5. Was the seven year old girl that Mr. Mann fondled ever examined by a medical doctor for being raped?

(S.S. Vol. XVI 2081-82). This consideration of pedophilia as an aggravating circumstance and the spector of actual and contrived sexual abuse had no place in the determination of whether Larry Mann should live or die. Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984). The consideration of these factors violates the minimum

requirements of the Eighth Amendment and the law of Florida. The trial court erred by not granting an evidentiary hearing.

The prosecutor crossed the bounds of mere insinuation and suggestion when he stated to the jury they should consider sexual assault an aggravating circumstance because, it “certainly has not been proved that she wasn’t (sexually molested).” (S.S. Vol. XVI 2030). Mr. Mann had absolutely no duty to prove that he did not sexually molest the victim, especially when there was no evidence of sexual abuse. In fact, the prosecutor had the burden of proving every aggravating circumstance beyond a reasonable doubt. The prosecutor’s statement that Mr. Mann did not prove the victim was not sexually abused not only introduced an illegal non-statutory aggravator into consideration, he again violated the Eighth Amendment by telling the jury that he did not have the burden of proving that aggravator beyond a reasonable doubt and suggested that Mr. Mann had the burden of proving he did not molest her. The prosecutor continued this illegal argument “He is not charged with sexually molesting the girl because he murdered her.” (S.S. Vol. XVI 2033). This too was a false statement. Mr. Mann was not charged with sexually abusing the victim because there was no evidence to support the charge, not because he was charged with killing her. In fact there are many cases where the defendant is charged with both murder and sexual battery of the same victim. The prosecutor misled the jury to believe that a murder charge precludes a charge of sexual battery.

This argument is analogous to one held to be misconduct in Tucker v. Francis, 723 F.2d 1504 (11th Cir. 1984). In that case, the prosecutor’s closing argument was based on a suggestion that the defendant raped his victim before murdering her. The defendant was not charged with rape and no supporting evidence existed. The Eleventh Circuit Court of Appeals held the prosecutor’s closing argument, which suggested to the jury that sexual assault was a consideration, as a whole denied the defendant a fundamentally fair sentencing proceeding and that “the suggestion of possible rape in these circumstances is not a basis upon which the death penalty may be imposed.” Id. at 1508. The Court held that references to a rape which was not charged had “no place in a sentencing which holds a man’s life in the balance”. Id. The same improper argument occurred in Mr. Mann’s case. Mr. Mann was not charged with sexual assault, and no evidence of sexual assault existed. Nonetheless, the prosecutor based his argument on the false fact that Mr. Mann sexually assaulted Elisa Nelson before killing her. The prosecutor even suggested to the jury that the imagined sexual assault be considered as an aggravating factor. In an attempt to tie the 1973 conviction to Mr. Mann’s 1990 diagnosis of pedophilia, the prosecutor argued to the jury, “The cause of the nature of the crime because of its significance and its pattern of activity, this is an aggravating factor that should be given great weight in your aggravating circumstances” (S.S. Vol. XVI 2006). Again, defense counsel did not object. The suggestion of a possible sexual assault was not a basis on which the death

penalty could have been imposed and had absolutely no place in the determination of whether Larry Mann should live or die. It was fundamental error. In the interest of justice such prosecutorial misconduct must be excluded, and Mr. Mann should be awarded a new penalty phase.

This portion of the prosecutor's argument is also prohibited by this Court's decisions in Provence v. State, 337 So.2d 783 (Fla. 1976) and Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). Mr. Mann was not charged with sexually assaulting Elisa Nelson, and certainly, he was not convicted of that crime. It was, therefore, a non-statutory aggravating factor, and the prosecutor's argument was impermissible. Because the jury and the judge weighed both aggravating and mitigating circumstances, it cannot be determined whether the result of the weighing process would have differed if the impermissible non-statutory aggravating circumstance was not introduced. Thus, the case must be remanded for a new re-sentencing. Elledge, 346 So.2d at 1003.

ARGUMENT V

THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT AN EVIDENTIARY HEARING SO MR. MANN COULD PROVE HE WAS DENIED A RELIABLE SENTENCING UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE TRIAL COURT REFUSED TO FIND MITIGATION ESTABLISHED BY THE EVIDENCE.

The trial court refused to find the statutory mitigating circumstances that Mr. Mann suffered extreme emotional disturbance at the time of the crime and that Mr. Mann could not appreciate the criminality of his conduct or conform his conduct to the requirements of the law because the court found there was no “credible” evidence to show that Mr. Mann was intoxicated at the time of the murder (S.S. Vol. VI 675-76). A trial court may reject a defendant’s claim that a mitigating circumstance has been proved only if the record contains, “competent substantial evidence to support the trial court’s rejection of these mitigating circumstances.” Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). In Mr. Mann’s case, there was no competent substantial evidence to reject his mitigation.

Donna Mann testified that when Mr. Mann returned to his home between four and five o’clock on the morning of the crime, Mr. Mann was so intoxicated that he “didn’t know where he was or how he had gotten there or where he had been.” (S.S. Vol. XIII 1539-40). Mrs. Mann testified that Mr. Mann was so intoxicated that he urinated in the waste basket (S.S. Vol. XIII 1539-40). Only Fred Daniels’ testimony seemed to refute Mr. Mann’s intoxication, however, Mr. Daniels also testified that he was not aware of Mr. Mann’s drinking habits (S.S. Vol. XV 1903-05). If Mr. Daniels did not know Mr. Mann’s drinking habits, Mr. Daniels had no facts on which to base his conclusion that Mr. Mann was “ordinary” (S.S. Vol. XV 1901). Indeed, Mr. Mann’s “ordinary” state may well have been very intoxicated. Fred Daniels, who had only brief encounters with

Mr. Mann, could not offer competent substantial evidence to refute Donna Mann's testimony.

The trial court erred, an evidentiary hearing is warranted.

ARGUMENT VI

THE RULES PROHIBITING MR. MANN'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. MANN ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

Under the Eighth and Fourteenth Amendments Mr. Mann is entitled to a fair trial. However, Mr. Mann's inability to fully explore possible misconduct and jury biases prevent him from fully showing the unfairness of his trial. Mr. Mann can only discover jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting claims that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar³, is unconstitutional.

³The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states that

A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

(continued...)

Mr. Mann should have the ability to interview the jurors in this case but, because he is on death row, he must rely upon counsel provided by the State of Florida. This prevents Mr. Mann from interviewing the jurors, because the attorneys provided to Mr. Mann are prohibited from contacting the jurors in his case. The State's action of providing Mr. Mann with counsel who cannot fully investigate his well-recognized claims for relief denies Mr. Mann due process, equal protection, and access to the courts of this state guaranteed by Article I, Section 21 of the Florida Constitution, and the fundamental right of access to courts guaranteed by the United States Constitution and the Eighth Amendment.

If this Court upholds Rule 4-3.5(d)(4), an individual who is not restricted by the rule from contacting jurors should be appointed to assist Mr. Mann. There are social scientists conducting related research who could assist Mr. Mann. Mr. Mann must be appointed an agent who is permitted to interview the jurors who acted as co-sentencers in his case because Mr. Mann is incarcerated on death row and is unable to conduct such interviews personally. Mr. Mann may have constitutional claims for relief that can only be discovered through juror interviews.

(...continued)

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

Given the extensive publicity during the 9 years before Mr. Mann's second sentencing, it is unlikely that any of the jurors empaneled did not read or hear of details of this case or were not influenced by the prejudicial publicity brought by LOVE and other such sources. The jurors were not sequestered during the trial and were available to any illegal influences.

The process by which a jury renders a death sentence is subject to the scrutiny demanded by the Due Process Clause of the Fourteenth Amendment. The opportunity to have one's claims to postconviction relief considered fully by a fair and impartial tribunal is also the essence of a prisoner's right of access to the courts. Mr. Mann seeks to conduct interviews with jurors to determine whether or to what extent the extralegal influences have prejudiced his penalty proceedings. If Mr. Mann is denied this opportunity to investigate and present a claim of juror misconduct, his rights to due process and access to the courts will be denied; the reliability and integrity of Mr. Mann's capital sentence will be questionable.

In light of evidence that the deliberations of Florida capital juries frequently and to a shocking degree consider factors extrinsic to the verdict and engage in overt prejudicial acts, Mr. Mann must be permitted to interview the jurors who contributed to his death sentence in order to assess the extent to which Mr. Mann may have been prejudiced. While juror misconduct during the guilt phase raises serious Sixth

Amendment problems, misconduct during penalty phase proceedings comes under greater scrutiny due to the Eighth and Fourteenth Amendment restrictions on capital sentencing. Juror misconduct gives rise to constitutional challenges to convictions and sentences. The interest in finality shared by the State and the jurors must give way to the opportunity of a death-sentenced defendant to have a claim of newly discovered evidence. The trial court erred and denied Mr. Mann due process of law when it dismissed these claims without giving Mr. Mann an opportunity to prove them in an evidentiary hearing.

ARGUMENT VII

THE TRIAL COURT ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING SO MR. MANN COULD ESTABLISH FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE, AND IN FACT RECEIVED IMPROPER INSTRUCTIONS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, MANN V. STATE, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. MANN'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED.

The jury was instructed on three aggravating factors in the Nelson murder: 1) prior violent felony conviction; 2) felony murder, and 3) heinous, atrocious, and cruel. (S.S.

Vol. XVI 2072-75). The instructions the jury received did not narrow the application of these vague and overbroad aggravators, and the jury's verdict of death is therefore, unreliable. Though the jury's verdict in the penalty phase is only advisory, the sentencing judge is required to give "great weight" to the jury's recommendation. Because of the discretion given to the jury's recommendation, the trial court indirectly weighed the unconstitutional aggravating factors the jury is presumed to have found. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992); Kearse v. State, 662 So.2d 677 (Fla. 1995).

A. Prior Violent Felony

Though Mr. Mann's counsel argued that his Mississippi burglary conviction was "not properly a conviction for a prior violent crime as our statute requires"(S.S. Vol. X 1328) , the trial court instructed the jury:

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.

(S.S. Vol. XVI 2072). This instruction unconstitutionally relieved the State of its burden to prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386, So.2d 538 (Fla. 1980). Burglary is not a crime of violence that automatically constitutes an aggravating circumstance under Florida Statute 921.141(5)(b). *See Mann*

v. State, 453 So.2d 499 (Fla. 1984); Johnson v. State, 465 So.2d 499 (Fla. 1985). Likewise, burglary with intent to commit unnatural carnal intercourse is not per se a crime of violence. The Mississippi statute under which Mr. Mann was convicted defined “unnatural carnal intercourse” was interpreted by the Mississippi Supreme Court as encompassing sodomy, bestiality, buggery, fellatio, and cunnilingus. Miss. Code Ann. §97-29-59 (1972); State v. Mays, 329 So.2d 65, 66 (Miss. 1976). *See also* Taurasi v. State, 102 So.2d 120 (Miss. 1958); State v. Davis, 79 So.2d 452 (1955). As defined by the Mississippi Supreme Court, unnatural carnal intercourse (with the exception of bestiality) is a non-violent crime when both parties consent. Thus, to simply instruct the jury at the sentencing phase of a capital felony trial that burglary with intent to commit unnatural carnal intercourse 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 with intent to commit unnatural carnal intercourse, is error. Johnson, 465 So.2d at 505.

When the court gave this jury instruction, it improperly ruled as a matter of law that the burglary was a prior violent felony and affirmatively removed this entire issue from the jury. “[W]hen 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.” United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988). Accordingly, an evidentiary hearing and 3.850 relief are required.

The prior violent felony aggravator is also unconstitutional because the 1974 Mississippi conviction violated Mr. Mann’s Fifth, Sixth, Eighth, and Fourteenth Amendment Rights for the following reasons:

1. Mr. Mann was denied effective assistance of counsel in violation of the Sixth Amendment.

2. The Florida Statute nearly identical to the Mississippi statute under which Mr. Mann was convicted, was interpreted to be unconstitutionally vague. *See Franklin v. State*, 257 So.2d 21 (Fla. 1971).

3. The conviction violates the Double Jeopardy Clause of the Fifth Amendment. Mr. Mann’s first trial resulted in a mistrial because the state knowingly and recklessly encouraged highly prejudicial and untruthful testimony. Because the state caused the mistrial, the second prosecution resulted in a conviction that violated the Double Jeopardy Clause.

4. The presentation of incompetent testimony violated Mr. Mann’s rights to due process under the Fifth and Fourteenth Amendments. The state presented Mrs. Canfield, knowing her testimony was inherently suspect and highly prejudicial. This violated Mr. Mann’s rights to due

process of law. *See, e.g., Fong Foo v. United States*, 369 U.S. 141, 142 (1962).

5. Mr. Mann was deprived of his Fifth Amendment right to testify. Mr. Mann's counsel did not advise Mr. Mann that he had the absolute right to decide whether he should testify. Rather, counsel merely told Mr. Mann that he would not testify.

6. Exculpatory evidence was erroneously excluded. The trial court erroneously refused to permit Mrs. Barbara Talbot to testify regarding the contents of a letter that she wrote on the day of the alleged crime which confirmed Mr. Mann's alibi.

7. The trial court's failure to grant change of venue violated Mr. Mann's right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article Three of the Mississippi Constitution. Mr. Mann's trial was infected by pervasive prejudicial publicity concerning the alleged facts of the crime, misstatements regarding being cashiered for going AWOL from the Air Force, and blatant untruths concerning an incident when Mr. Mann was a juvenile.

8. The unconstitutionally unreliable identification violated Mr. Mann's right to a fair trial. Witnesses identified Mr. Mann as the burglar using only a yearbook photograph which was taken at least four years before the crime. The description both witnesses gave the police did not describe Larry Mann. Additionally, when the victim saw Mr. Mann for the first time, it was during the trial, and she actually identified Mr. Mann's brother, David Mann, as the burglar. This mistaken identification led to a miscarriage of justice more than any other single factor. This error was twice compounded; it resulted in the original conviction, and the unconstitutional testimony from that conviction was used as a basis for imposing Mr. Mann's death sentence.

9. The evidence, consisting solely of two inherently suspect and unreliable identifications and perjured testimony, was insufficient to find, beyond a reasonable doubt, that Mr. Mann was guilty.

10. Newly Discovered evidence proves Mr. Mann's innocence. Mrs. Canfield's threatening attitude and the fact that an identical crime was committed in the same vicinity while Mr. Mann was incarcerated indicate that the outcome of Mr. Mann's trial would have been different and that he is innocent.

Because the 1974 conviction was unconstitutional, the trial court erred in finding this aggravating factor. Long v. State, 529 So.2d 286 (Fla. 1988).

B. In the Course of a Felony

Mr. Mann's death penalty is predicated upon the unreliable automatic consideration of a statutory aggravating circumstance—the same felony murder felony that was the basis for his conviction. In reaching its verdict of death, the jury weighed the in the course of a felony aggravator, and was instructed that the kidnapping which was the felony underlying his conviction was an automatic aggravator (S.S. Vol. XVI 2072-2073). This aggravator fails to guide the sentencer's discretion, and is unconstitutional under the Eighth Amendment. Stringer v. Black, 112 S.Ct. 1130 (1992).

Because every person convicted of felony murder qualifies for the in the course of a felony aggravator, this aggravator does not “narrow the class of persons eligible for the death penalty”, and it renders the sentencing process unconstitutionally unreliable. Zant v. Stephens, 462 U.S. 862, 876 (1983). “Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.” Maynard v. Cartwright, 486 U.S. 356, 362 (1988). This systematic presumption of death resulting from the in the course of a felony aggravator does not conform to the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Richmond v. Lewis, 113 S. Ct.

528 (1992); Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

This Court has held that the aggravating circumstance of "in the course of a felony" is insufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987). Because there is no way to determine if the jury considered this circumstance as the only aggravating circumstance, Mr. Mann's sentence is unconstitutional.

C. Especially Heinous, Atrocious, And Cruel

The only instruction Mr. Mann's jury received regarding the especially heinous, atrocious, and cruel aggravator was, "Heinous meaning extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of another." (S.S. Vol. XVI 2074). These instructions were not sufficient to "set the crime apart from the norm of capital felonies", and was therefore, unconstitutionally vague and overbroad. State v. Dixon, 283 So.2d 1 (Fla. 1973).

The jury instruction given to the sentencing jury in this case violated the Eighth Amendment because it was unconstitutionally vague. This limiting instruction was incorrect because it did not instruct the jury that Mr. Mann must have intended to cause the victim unnecessary and prolonged suffering. Bonifay v. State, 626 So.2d 1310, 1313

(Fla. 1993). The jury could have likely found from the evidence that Mr. Mann was in a frenzied and highly emotional state when he killed the victim, and therefore, had no such intent. The instruction on intent was necessary to narrow the application of this aggravator to a conscienceless, pitiless, and unnecessarily torturous crime and distinguish it from a crime caused by a state of extreme emotional illness. Dixon, 283 So.2d at 9.

The instruction was also incorrect because it did not instruct the jury that it could not consider actions after the victim was dead, or that it could not consider actions after the victim was unconscious. “Actions taken after the death of the victim are irrelevant in determining this aggravating circumstance. Also, when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness.” Jackson v. State 451 So. 2d 458, 463 (Fla. 1984). At trial, Dr. Corcoran, who performed the victim’s autopsy, testified that the victim could have been unconscious or dead only minutes after the throat wounds and before her head was fractured (S.S. Vol. X 1294-95). Because it was possible that Elisa Nelson was dead or unconscious before Mr. Mann fractured her head, Mr. Mann was constitutionally entitled to those instructions which would narrow the overbroad application of the heinous, atrocious, and cruel aggravating factor.

Mr. Mann's sentencing jury was not given the above limiting instructions but is presumed to have found this aggravator established. Jackson, 451 So.2d 458 (Fla. 1984);

Espinosa, 112 S. Ct. 2926, 2928 (1992). Under these circumstances, erroneous instruction presumably tainted the jury's recommendation and, in turn, the judge's death sentence in violation of the Eighth and Fourteenth Amendments. Espinosa, 112 S.Ct. 2926. Mr. Mann's jury was inadequately guided and channeled in its sentencing discretion. In Espinosa, the United States Supreme Court explicitly held that "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor present.

Mr. Mann was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. The error cannot be harmless in this case:

[w]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence

Stringer, 112 S. Ct. at 1137. Mr. Mann was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments.

In light of the weight given the felony murder aggravator and the evidence of mitigation, the consideration of the three unconstitutional aggravating factors cannot be held harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). If the unconstitutional instructions had not been given, the jury probably would have recommended life. Mr. Mann is entitled to a new penalty phase hearing.

ARGUMENT VIII

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING SO MR. MANN COULD ESTABLISH HE WAS DENIED HIS RIGHT TO EFFECTIVE MENTAL HEALTH ASSISTANCE BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED MR. MANN DID NOT RENDER ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY AKE V. OKLAHOMA, IN VIOLATION OF MR. MANN'S RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Ake v. Oklahoma, 470 U.S. 68 (1985). Mr. Mann did not receive a professionally adequate mental health evaluation, and hence, a fundamentally fair sentencing, in light of the mitigation which should have been presented. “The State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an **appropriate** examination and assist in evaluation, preparation, and presentation of the defense.” Ake v. Oklahoma, 470 U.S. at 83. Dr.

Carbonel did not give Mr. Mann competent mental health assistance because she was not qualified to diagnose the effects of Mr. Mann's fourteen year history of drug and alcohol abuse, she was not qualified to diagnose organic brain injury, and she was ineffective for not obtaining the documents and information from which she could ascertain that she was not qualified to assist Mr. Mann in the psychiatric diagnoses and help he needed. Dr. Carbonel's examination was not appropriate in Mr. Mann's case, and did very little to assist in the evaluation, preparation, and presentation of his defense.

Dr. Carbonel's examination of Mr. Mann was inappropriate. Counsel and Dr. Carbonel were aware of Mr. Mann's extensive history of poly substance abuse and, especially, the long term effects of PCP use, however Dr. Carbonel is not a substance abuse expert and could not conduct an appropriate examination. Rather than investigate this crucial aspect of mitigation, Dr. Carbonel chose to investigate pedophilia, and this decision was highly inappropriate in light of the wealth of available information about Mr. Mann's drug history and the public opinion of pedophiles. Her inappropriate pedophilia evaluation and testimony did not help the defense. In fact, it helped the prosecution.

Dr. Carbonel was also ineffective for failing to conduct tests for organic brain damage or suggesting an expert qualified to give those tests. Dr. Carbonel had clear indications of possible organic brain damage from Mr. Mann's poly substance abuse, history of head injury, and suicide attempt, however, Dr. Carbonel did not investigate the

possibility of organic brain damage. Dr. Carbonel's failure to investigate organic brain damage cannot be considered appropriate in light of this Court's finding that, "a new sentencing hearing is mandated in psychiatric examinations so grossly inefficient that they ignore clear indications of either mental retardation or organic brain damage". State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987).

Mr. Mann did not receive appropriate and competent mental health assistance. Dr. Carbonel overlooked Mr. Mann's obvious psychiatric needs for which she was not qualified, and instead, offered only highly prejudicial pedophilia testimony. Because this mental evaluation was so ineffective that it was the functional equivalent of no evaluation, Mr. Mann's due process right to a fundamentally fair adversarial testing was denied. The trial court erred in not granting an evidentiary hearing on this issue.

ARGUMENT IX

THE TRIAL COURT ERRED WHEN IT DID NOT GRANT AN EVIDENTIARY HEARING SO MR. MANN COULD PROVE THE STATE VIOLATED MR. MANN'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS AND FLORIDA CONSTITUTION ARTICLE I, SECTION 9, RIGHTS WHEN A STATE WITNESS COMMENTED ON MR. MANN'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

In response to a question on cross examination, Manuel Pondakos, a deputy sheriff who investigated Elisa Nelson's disappearance, made an unsolicited impermissible comment on Mr. Mann's right to remain silent:

Q. And the reason for proceeding to Mease Hospital is because that's where Mr. Mann was?

A. Yes. After we received this note, both myself and Detective Newmann went to Mease Hospital while we left officers at the Mann residence. We went to question Mr. Mann and, **of course, there was no statements given.**

(S.S. Vol. X 1236). Griffin v. California, 380 U.S. 609 (1965); 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). Defense counsel objected to this impermissible comment and moved for a mistrial, but the trial court denied the motion for a mistrial (S.S. Vol. X 1241-43). Defense counsel renewed this motion when the state rested (S.S. Vol. XI 1395), and when the defense rested (S.S. Vol. XV 1822), but neither motion was granted.

This impermissible comment on Mr. Mann's right to remain silent was not harmless error. It was cumulatively prejudicial, unconstitutionally suggesting that Mr. Mann had an obligation to speak, and it was used to negate Mr. Mann's mitigating remorsefulness. The trial court erred when it did not grant an evidentiary hearing on this issue (R. Vol. III 549).

ARGUMENT X

WHEN VIEWED AS A WHOLE, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. MANN OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

Mr. Mann did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). Indeed, the process itself failed Mr. Mann because the sheer number and types of errors in Mr. Mann's penalty phase, when considered as a whole, virtually dictated the sentence of death.

The flaws in the system which sentenced Mr. Cole to death are many. They have been pointed out throughout not only this brief, but also in Mr. Mann's 3.850 motion and in his direct appeal. While there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate

safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted Mr. Mann's penalty phase. These errors cannot be harmless. Under Florida case law the cumulative effect of these errors denied Mr. Mann his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DeGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

The errors that occurred in Mr. Mann's penalty phase, cumulatively, establish that Mr. Mann did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v. Singletary. The sheer number and types of errors involved in Mr. Cole's trial due to counsel's prejudicially deficient performance, **when considered as a whole**, resulted in an unreliable conviction and sentence. Gunsby. See also Kyles v. Whitley, 115 S. Ct. 1555 (1995). In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346

(Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether ". . . the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation. . . ." Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991).

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effect of errors must be carefully scrutinized in capital cases.

A series of errors may easily accumulate a very real and prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the sentence. Chapman v. California, 386 U.S. 18 (1967). The errors individually and cumulatively in Mr. Mann's sentencing, and direct appeal deprived him of effective assistance of counsel, his right to counsel, assistance of competent mental health assistance, a fundamentally fair trial, due process of law, and

individualized sentencing under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and those corresponding amendments in the Constitution of the State of Florida.

Mr. Mann is entitled to a new penalty phase an sentencing hearing based on his counsel's ineffective assistance which was tantamount to no assistance at all, and an evidentiary hearing on the other matters because the records do not conclusively refute his claims. This Court should reverse and remand for new sentencing or, at the very least, an evidentiary hearing on the remaining claims.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Mann's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the cases for a new penalty phase trial, an evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant which has been typed in Font Times New Roman, Size 14, has been furnished by U. S. Mail to all counsel of record on October 3, 2000.

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