IN THE SUPREME COURT OF FLORIDA

CASE NO. SC94885

LARRY MANN,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

CORRECTED PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Mann was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "OR ___" followed by the appropriate volume and page numbers. The 1990 penalty phase proceedings shall be referred to as “SS___” followed by the appropriate volume and page numbers. Mr. Mann’s appellate brief will be referred to as “MB___”. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

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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INTRODUCTION

Significant errors which occurred at Mr. Mann's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Mann. "[E]xtant legal principles ... provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Mann is entitled to habeas relief.

PROCEDURAL HISTORY

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 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). 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). 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 circuit court denied Mr. Mann's 3.850 motion on January 13, 1999.

Mr. Mann filed his appeal of that denial on October 11, 1999. This Court affirmed the denial on September 28, 2000 and denied Mr. Mann's motion for rehearing on October 31, 2000. This petition follows.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Mann's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the

context of a capital case in which this Court heard and denied Mr. Mann's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Mann to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Mann's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

This is Larry Mann’s second petition for habeas corpus in this court. The first petition was filed on January 30, 1986, before his case was remanded for a new penalty phase proceeding.

This petition follows his second penalty phase proceeding. By his petition for a writ of habeas corpus, Mr. Mann asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE TRIAL COURT'S CORRESPONDING ERRORS ON APPEAL.

1. The Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United states Constitution and Florida law.

In Jones v. United States, the United States Supreme Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment

affords citizens the same protections under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

At the time of Larry Mann's penalty phase, Florida statute 775.082 provided:

> A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole **unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.**

§ 775.082 Fla. Stat. (1989)(emphasis added). Under this statute,

the state must prove at least one aggravating factor in the separate penalty phase proceeding **before** a person convicted of first degree murder is eligible for the death penalty. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1994); § 921.141(2)(a), (3)(a) Fla. Stat. (1994). Thus, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. § 775.082 Fla. Stat. (1994). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Under the Florida death penalty scheme there are essentially two levels of murder. The first, conviction of first degree premeditated murder or felony murder permits a life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, renders a first level conviction of murder a murder for which a person may be punished by death. Thus, the Florida death penalty system divides murders into two categories, analogous to felony battery and aggravated battery. Felony battery, which is punished as a third degree felony, becomes aggravated battery, punished as a second degree battery, upon

proof of certain aggravating circumstances. §§784.041, 784.045 Fla. Stat. (1999). These circumstances which increase felony battery from a third degree felony to a second degree felony of aggravated battery are elements of the crime which must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt by a unanimous verdict. Likewise the florida death penalty aggravating circumstances, which elevate a murder punishable by a life sentence to a murder punishable by death, must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt. No other crimes in Florida allow increased punishments based on additional findings (other than prior conviction) made by a judge; Apprendi disallows this practice.

In Apprendi, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. Apprendi 120 S.Ct. At 2351. The Apprendi Court clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment protections. The Court wrote,"[b]ut it can hardly be said that the potential doubling of one's sentence from 10 years to 20–has no more that a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance". Apprendi 120 S.Ct. at 2365. As in

Apprendi, in Larry Mann's case, the aggravators were applied only after he was found guilty. The aggravators increased the statutory maximum penalty based on the guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975). *See* Gardner v. Florida, 430 U.S. 349, 357 (1976).

Though Apprendi involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. Apprendi 120 S.Ct. at 2350, 2365; § 921.141 Fla. Stat. (1999). The effect of the Florida death penalty statute is similar to the effect of the federal carjacking statute the United States Supreme Court addressed in Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Three subsections of the Jones statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects of the sentencing factors.

> But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle

> paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, was meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the carjacking sentencing factors increased the maximum penalty for the crime from 15 years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. Jones, 526 U.S. at 230, 242-43.

Although the majority of the Court stated in dicta that Apprendi did not overrule Walton v. Arizona, 497 U.S. 639 (1990), the Apprendi Court was not addressing a death case in which constitutional protections are more rigorously applied, and Apprendi did not specifically address the Florida sentencing scheme. Apprendi 120 S.Ct. at 2366. Moreover, the majority dicta did not carry the force of an opinion of the full court. *See* Apprendi 120 S. Ct. at 2380 (Thomas, J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); Apprendi, 120 S. Ct. at 2387-88 (O'Connor, J., dissenting) ("If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.") Apprendi, 120 S. Ct. 2388.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, at 2365. This did not occurr in Larry Mann's case. Thus, the Florida death penalty scheme is unconstitutional as applied.

2. Appellate counsel was ineffective for failing to raise on appeal the trial court's erroneous denials of Larry Mann's Motion for Statement of Aggravating Circumstances and demurrer to the indictment.

Larry Mann's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Trial counsel filed both a Motion for Statement of Aggravating Circumstances and demurrer to the indictment. However, the trial court refused to correct these constitutional violations by erroneously denying both the Motion and the demurrer to the indictment (S.S. Vol. I, 97, 155-62, Vol. II, 220-224). Appellate counsel performed deficiently by failing to raise this error on appeal.

Under the principles of common law, aggravators must be charged in the indictment.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of

> punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170].

Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000) *quoting* Archbold, Pleading and Evidence in Criminal Cases, at 51. Because aggravators are essentially circumstances of the crime and the defendant's mental state, they are essential elements of a crime for which the death penalty may be imposed, and they must be charged in the indictment.

In Apprendi, the Court addressed the adequacy of New Jersey's procedure in applying their hate crime statute. The Court's concluded that because the hate crime statute increased the penalty beyond the statutory maximum, it was an element of that crime which required Sixth Amendment protection. *See* In re: Winship, 397 U.S. 358 (1970); McMillan v. Pennsylvania, 477 U.S. 79 (1986); Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979).

The Florida death penalty procedure is similarly flawed. Larry Mann's indictment violated the Sixth Amendment because it did not allege the aggravators that the state sought to prove to make Larry Mann eligible for the death penalty. Had appellate counsel raised this issue on appeal, this Court probably would have, at the very least, remanded his case for a new penalty phase proceeding.

3. Appellate counsel was ineffective for failing to raise on appeal the trial court's erroneous denial of Larry Mann's instruction that the jurors must decide unanimously that an aggravating circumstance was established beyond a reasonable doubt.

Larry Mann's jury recommended a death sentence of death by a vote of nine to three (S.S. Vol. XVI 2088). Because aggravators are essentially elements of the crime for which the death penalty can be imposed, Larry Mann's death recommendation violates Florida law because it was not unanimous. The non-unanimous verdict also violates the fundamental principles of constitutional common law. Appellate counsel was ineffective for failing to raise the court's erroneous denial of Larry Mann's instruction that the jurors must decide unanimously that an aggravating circumstance was established beyond a reasonable doubt (S.S. Vol. III, 497; Vol. XV, 1974).

Under Apprendi's reasoning, aggravating factors in the Florida death penalty scheme are elements of a capital crime which must be decided by a unanimous jury before a death sentence may be imposed. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, in capital cases, Florida permits jury

recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. § 921.141(1),(2) Fla. Stat. (1999).

Moreover, Larry Mann's nine to three death recommendation violated the minimum standards of constitutional common law jurisprudence. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.[1] "We think this near-uniform judgement of the Nation provides a

[1]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C. Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat. Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." Burch v. Louisiana, 441 U.S. 130, 138 (1979)(reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." Andres v. United States, 333 U.S. 740, 749 (1948).

Implicit in the states' and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that "death is qualitatively different from a sentence of imprisonment, however long". Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. *See* Johnson v. Louisiana, 406 U.S. at 364. Only a twelve juror unanimous verdict can support the imposition of the death penalty. "In capital cases, for example, it appears that no state provides for less than 12 jurors–a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." Williams v. Florida, 399 U.S. at 103.

The nine to three death recommendation violated Larry Mann's Sixth, Eighth, and Fourteenth Amendment rights as well as his rights under Florida law. The three jurors who voted for life could have found that no aggravators were established beyond a reasonable doubt so that Larry Mann was not eligible for the death penalty. Because the effect of finding an aggravator exposed Larry Mann to a greater punishment than the life sentence authorized by the jury's guilty verdict, the aggravator must have been charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. Apprendi, at 2365. Appellate counsel rendered prejudicially ineffective assistance for failing to raise on direct appeal the court's error in denying Larry Mann's instruction that the jurors must decide unanimously that an aggravating circumstance was established beyond a reasonable doubt (S.S. Vol. III, 497; Vol. XV, 1974). Had counsel raised this error on appeal, Larry Mann probably would have received a new penalty phase.

4. Conclusion

The Florida death penalty sentencing statute was unconstitutional as applied in Larry Mann's case. The trial court erred in denying the motions which could have corrected the constitutional errors. Appellate counsel was ineffective for failing to raise on appeal that the Statute as applied violated Larry Mann's Fifth, Sixth, Eighth, and Fourteenth Amendment

rights, and that the trial court erred in refusing to grant motions which could correct those errors. Neither the constitutional errors, nor appellate counsel's errors are harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a "structural defect in the constitution of the trial mechanism, which defies analysis by 'harmless error' standards". Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991).

CLAIM II

THE PROSECUTOR'S MISCONDUCT THROUGHOUT THE PENALTY PHASE RENDERED LARRY MANN'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE TRIAL COURT ERRED IN ALLOWING THE MISCONDUCT WHICH VITIATED LARRY MANN'S RIGHTS TO A FAIR PENALTY PHASE AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

Appellate counsel performed deficiently by failing to raise the majority of the prosecutor's improper penalty phase misconduct on direct appeal. Though appellate counsel raised a small portion of misconduct, counsel failed to raise the additional fundamentally prejudicial improper argument from which this Court could determine, the misconduct "reach[es] down into the validity of the trial itself to the extent that a verdict

could not have been obtained without the assistance of the alleged error" and remand the case for a new penalty phase. Cochran v. State, 711 So.2d 1159, 1162 (Fla.1998) *quoting* Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996).

The sum of the prosecutor's improper remarks, when considered in totality, require 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. Appellate counsel failed to raise on appeal the majority of the prosecutor's fundamentally improper and prejudicial argument designed to obtain a death sentence through any means. It was counsel's duty to review the record for fundamental error and present a claim of prosecutorial misconduct, but counsel utterly failed to do so.

Larry Mann raised trial counsel's failure to object to the misconduct in his 3.850 motion, but the court denied an evidentiary hearing, holding that the issue should have been raised on direct appeal, so it was barred under Robinson v.

State, 707 So.2d 688 (Fla. 1998). Appellate counsel's failure to raise the misconduct on appeal was ineffective assistance because it prevented Larry Mann from receiving relief at his 3.850 proceedings.

The prosecutor's misconduct in this case was fundamental error, and appellate counsel should have raised it 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). This occurred in Larry Mann's case, and appellate counsel ineffectively failed to raise the issue on direct appeal.

On appeal, counsel argued that the court erred in overruling Larry Mann's objection to a small portion of the prosecutor's closing argument which denigrated the mitigation presented and encouraged the jury to consider a non-statutory aggravating circumstance (MB, 23). In this three and a half page claim, counsel failed to present the majority of the misconduct as argument that denied Larry Mann his right to a fair trial.

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). Trial counsel objected to this comment and the objection was sustained. However, appellate counsel failed to mention it on appeal. 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. Appellate counsel failed to raise this misconduct on appeal.

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, 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, so the jurors likely returned a death recommendation out of fear that Larry Mann might be released after a new trial(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 mislead 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

committed this "special crime" which was a "bad, bad, bad, bad thing" might soon be on the street if he was not sentenced to death. Appellate counsel failed to raise this issue on appeal.

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 was an obvious appeal to the jurors' emotions and fears and 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). Again, appellate counsel failed to raise this on appeal.

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(The prosecutor asked the jury if they could imagine any more pain than that in the victim's last minutes of life); Urbin, 714 So.2d at 419; Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989)(The prosecutor asked the jurors to place themselves in the hotel during the victim's murder); Garron v. State, 528 So.2d 353, 359-60 (Fla. 1988)(The prosecutor asked the jury to imagine the victim's pain and anguish). 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 essentially asked the jury to put themselves in the victim's position and to imagine her

fear.

Though similar violations of the Golden Rule have caused this Court to admonish prosecutors and, in Garron, remand the case for a re-sentencing, counsel did not raise these violations of the Golden Rule on appeal. 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). Though this comment did not directly refer to the fact that Mr. Mann did not testify at the re-sentencing, it 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 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. Appellate counsel failed to raise this issue on appeal.

The prosecutor's most egregious pattern of misconduct

occurred in his closing argument which, when considered in its totality, 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).

* * *

> [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 argued Dr. Carbonel suggested:

> **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)[2].

* * *

> 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).

* * *

> 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

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[2]This comment was included in the small portion of the prosecutor's argument that counsel raised on appeal under the claim that the trial court erred in overruling defense counsel's objection to the argument (MB 23-26).

assault, the prosecutor made sexual assault the focus of his closing argument, repeatedly referring to Mr. Mann as a pedophile, child molester and a pervert. Similar misconduct has caused courts to reverse judgments and remand cases for new trials.

In United States v. Birrell, 421 F.2d 665 (9th Cir. 1970), Birrell's defense to an interstate transportation of a stolen motor vehicle charge was that he was unable to conform his conduct to the requirements of the law. Birrell, 421 F.2d at 665. In support of his defense, Birrell introduced psychological studies which revealed sexual deviations. During closing argument, the prosecutor frequently referenced Birrell's extensive record of car thefts and his homosexual proclivities and encouraged the jury, because of those facts, not to "turn him loose on society". Birrell, 421 F.2d at 665. Reversing the conviction, the court held:

> the argument was fundamentally unfair in inviting the jury to convict even though it might believe that appellant was insane. Even more unfairly, it invited conviction irrespective of innocence of the crime charged, upon the ground that appellant was a homosexual.

Birrell, 421 F.2d at 666. *See also* Brown v. State, 323 S.W.2d 954, 957 (1959)("Reasonable minds could hardly differ upon the question of whether a verdict would be infected by the injection of the matter of unnatural, immoral and unlawful crimes against

nature between a pastor and his male chauffeur."); Killie v. State, 287 A.2d 310, 313 (1972).("Although most of the caselaw and legal literature deal with the subject of prejudice in the context of race, religion, or nationality, we believe that the reasoning applies with equal vigor to an insinuation of homosexuality, especially with young boys. In the absence of even an attempt at curative instruction, we are not persuaded, that the error was harmless.")

The prosecutor's conduct in Larry Mann's penalty phase is indistinguishable from that in Birrell, except the misconduct in Larry Mann's case was more prolific. Had Larry Mann's case been that of a homosexual man who murdered another man and the mental mitigators were based, in part upon his homosexuality, and the prosecutor repeatedly made references to him as a homosexual in closing argument, this Court probably would have reversed the death recommendation on appeal. Current standards of justice would have demanded reversal if that were the case and the prosecutor repeatedly referred to Mr. Mann as a homosexual and more derogatory comments analogous to child molester, pedophile, and pervert. In both cases, the prosecution used a small portion of the defense to encourage a verdict based on the defendants' sexual proclivities. Larry Mann's case, except for the nature of the proclivities and the resulting comments based on those proclivities, is indistinguishable.

Moreover, as in Birrell, this Court has held that causal relationship between aggravating circumstances and mental illness is an impermissible aggravating factor. In Miller v. State, this Court held that consideration of a person's mental illness and the apparent causal relationship between the aggravating circumstance and the mental illness as an additional aggravating circumstance was reversible error. Miller v. State, 373 So.2d 882 (Fla. 1979).

> The motivating role the defendant's mental illness played in this crime, and the apparent causal relationship between the aggravating circumstances and his mental illness, it was reversible error for the trial court to consider as an additional aggravating circumstance, not enumerated by statute, the possibility that Miller might commit similar acts of violence if he were ever to be released on parole.

Miller, 373 So.2d at 886.

In Larry Mann's case, the same error occurred. By repeatedly referring to Larry Mann as a pedophile, child molester, and pervert, the prosecutor urged the jury to consider Larry Mann's mental illness as something they should consider in weighing the aggravating circumstances and:

> 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? What evidence is presented to you for whatever real value it has in this case?

(S.S. Vol. XIV 2027). This error was not cured because the trial court indirectly weighed any unconstitutional aggravating factors the jury found. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992).

Florida capital penalty phase proceedings require the sentencers to consider only the statutory aggravating circumstances however, throughout Mr. Mann's re-sentencing, 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 pedophelia, past sexual assaults, future danger of sexual assaults, and an imagined sexual assault supported by no evidence. §921.141(5) Fla. Stat. (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. The jury's verdict based on the improper non-statutory aggravating circumstances in turn infected Judge Case's sentence because the sentencing judge is required to give the jury's verdict great weight and 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 argument was fundamental error because it resulted in the standardless

sentencing discretion which violates the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420, 427 (1980). However, appellate counsel failed to raise it on appeal.

"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. Counsel failed to raise any of this as prosecutorial misconduct on appeal. This egregious prosecutorial misconduct has never been reviewed by a court because appellate counsel failed to raise it on direct appeal.

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 death cases, prosecutors "are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects". Gore v. State, 719 So.2d 1197, 1202 (Fla. 1998). 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).

Cumulatively, the prosecutor's closing argument utterly destroyed Larry Mann's most important right under our legal system, the right to the "essential fairness of his criminal trial." Cochran v. State, 711 So.2d 1159, 1163 (Fla.1998) q*uoting* Knight v. State, 672 So.2d 590, 591 (Fla. 4th DCA 1996). Because appellate counsel failed to raise each instance of misconduct as fundamental error, this Court did not consider the

substantive and total impact of the misconduct on appeal. When this Court determines whether prosecutorial misconduct was prejudicial, this Court considers whether the cumulative impact of the misconduct deprives a person of a fair trial. Garron v. State, 528 So.2d 353, 359 (Fla. 1988). Thus, appellate counsel performed deficiently by not raising the misconduct for this Court's consideration. As a result, this Court did not consider the cumulative prejudice caused by the prolific prosecutorial misconduct. Competent counsel would have raised on appeal 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 penalty phase. Had counsel raised all of the prosecutor's abhorrent misconduct on appeal, there is a reasonable probability that this Court would have remanded the case for a new penalty phase. Brooks v. State, 25 Fla. L. Weekly s417 (Fla. 2000). Appellate counsel deficiently failed to litigate and correct the prosecutor's misconduct. He was ineffective, and Larry Mann will suffer the ultimate prejudice caused by an unconstitutional penalty phase.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE TRIAL COURT'S ERROR AND THE STATE'S UNCONSTITUTIONAL MISCONDUCT IN MAKING SEXUAL ASSAULT THE FOCUS OF LARRY MANN'S PENALTY PHASE. THIS VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Appellate counsel performed deficiently by failing to raise on appeal that the prosecutor's witnesses and comments made pedophilia the feature of Larry Mann's penalty phase. In Williams v. State, this Court held that the state may not present evidence of collateral crimes so that the testimony regarding the collateral crimes "transcended the bounds of relevancy to the charge being tried, and made the latter offense a feature instead of an incident." Williams v. State,117 So.2d4 73, 475 (Fla. 1960). This is so because, "in a criminal prosecution such procedure devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant whose character is insulated from attack unless he introduces the subject." Id. at 475-76.

In Larry Mann's case, the prosecutor took advantage of the presentation of statutory mental mitigators. He used a small portion of the mental health evidence, pedophilia, to deplorably turn the penalty proceedings into an assault on Larry Mann's character rather than the careful presentation and balancing of

the statutory aggravating and mitigating factors outlined in Florida Statute 921.141. This denied Larry Mann his right to a fundamentally fair penalty phase proceeding.

Larry Mann's counsel presented a mental health expert, Dr. Carbonell, who found that both statutory mental health mitigators applied to Larry Mann, in part, because he was a pedophile. During this testimony, she mentioned that Larry Mann was accused, but not convicted, of assaulting a seven year old girl when Larry was sixteen years old. On cross-examination, the court allowed the prosecutor to extensively question Dr. Carbonell about the this incident. Though this incident was irrelevant to the presence or absence of the mental health mitigators and it was not a formal conviction, the prosecutor repeatedly mentioned the facts and circumstances of this incident. Over approximately thirty-three pages of cross examination testimony, the prosecutor made this incident a feature of the penalty phase (S.S. Vol. XIV, 1648-1681).

Though Larry Mann's fantasies had absolutely no relevance to the presence or absence of the mental health mitigators at the time of the crime, the prosecutor elicited the following information from Dr. Carbonell:

> Q. And the Defendant, in fact, had fantasies about having sexual activity with children. Did he not?
>
> A. Yes. When he would see children, he would have those kinds of fantasies.

> Q. Okay. And then he would masturbate to those fantasies. Would he not?
>
> A. Sometimes he would. He would also get drunk. He finds fantasies repulsive, which is another–

(S.S. Vol. XIV, 1690). Larry Mann's non-violent, legal, and solitary past sexual practices did not relate to the presence of the mental health mitigators at the time of the crime. This testimony, though his actions were not illegal, was offensive, made pedophilia a feature of the penalty phase, and was inherently prejudicial.

During its rebuttal, the state continued to make pedophilia the feature of Larry Mann's penalty phase. The state's expert, Dr. Whalen, testified that Larry Mann caused his pedophilia because he used fantasy and masturbation to teach himself to be a pedophile and encourage pedophilic urges. He testified, "[i]t's 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). "They fantasize about it. They practice it in their mind. They masturbate and have a sexual experience to that fantasy" (S.S. Vol. XV 1846).

This testimony and argument is similar to that held to be improper in Harris v. State, 183 So.2d 291 (Fla. 2d DCA 1966). In Harris, the Mr. Harris was charged with the abominable and detestable crime against nature involving another man. The state presented a clergyman who testified that Mr. Harris told him he

was homosexual and had slept with 20 members of the clergyman's church. Harris, 183 So.2d 292-93. The court set aside judgment and sentence because the testimony was only relevant to show bad character or propensity of defendant.

> While we are not in sympathy with the alleged conduct of this defendant, he has the constitutional right, like every citizen, to a fair and impartial trial. In consideration of our social attitudes regarding such alleged conduct it is necessary that all available safeguards be employed to insure such a trial. It is without question that the testimony in this case severely prejudiced the defendant and he was convicted not solely upon the acts set forth in the Information but also for being homosexual and having committed numerous acts, for which he was not being tried.

Harris, 183 So.2d 293-94.

Likewise, in Larry Mann's case, pedophilia does not evoke sympathy. The testimony regarding Larry Mann's solo and legal proclivities had no impact on his mental and emotional state at the time of the crime. Because of the social attitudes towards pedophilia, safeguards were required to ensure a fair penalty phase. The jury's questions make it clear that they recommended death not solely from the acts set forth in the indictment, but also for being a pedophile, even though Larry Mann was not on trial for that illness. This occurred because the court permitted the prosecutor to make pedophilia a feature of the penalty phase. *See also* Sias v. State, 416 So.2d 1213, 1216 (Fla. 3d DCA 1982).

The prosecutor reinforced pedophilia as the focus of the penalty phase throughout his closing argument. The prosecutor started his closing argument by suggesting 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 insinuated that the jury consider Mr. Mann's history of 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–- an unproven sexual assault-- were proved beyond a reasonable doubt. This was not true, there was no evidence of sexual assault (S.S. Vol. X 1278).

In his effort to tie the Mississippi conviction to Mr. Mann's pedophilia and suggest that the jury weigh real and conjectured sexual assaults, the prosecutor argued:

> 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). He continued:

> [A]nd you know from the mechanics that Dr. Whalen explained to you about the progression of sexual deviance, that is a fantasy life that is engaged in over and over again and fantasies are lived out and planned and finally acted upon.
>
> There is no doubt that this is something this man had thought about.

(S.S. V, 2021).

* * *

> They said he was struggling so hard with himself, struggling so hard about whether to molest this child. Well, if that struggle existed, there is no doubt as to who the winner was, and the winner was the sexual desires, the desire, that lifelong desire for immediate gratification relived in his fantasy life on November 4, 1980.

(S.S. V. 2032).

The prosecutor continued to make sexual assault the focus of the penalty phase, "He is not charged with sexually molesting the girl because he murdered her." (S.S. Vol. XVI 2033). This too was a false statement which continued to make sexual assault the focus of the penalty phase. 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 mislead the jury to believe that a murder charge precludes a charge of sexual battery.

The prosecutor crossed the bounds of mere insinuation and suggestion when he stated to the jury they should consider a sexual assault of the victim, for which there was no evidence, an aggravating circumstance because it:

> certainly has not been proved that she wasn't (sexually molested). And certainly the overwhelming motive was sexual molestation and possibly sexual sadism.

(S.S. Vol. XVI 2030-31). 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 (S.S. Vol. X 1278). 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 suggesting that Mr. Mann had the burden of proving he did not molest the victim.

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 killing 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. This is the most flagrant violation of the Hance and Brooks prohibition of improper argument. It has no place in a sentencing hearing that holds a man's life in the balance. Rape was not an issue, had not been charged, was not proved and should not have been injected into the trial.

Id. at 1508.

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 suggestion of a possible sexual assault was not a basis on which the death penalty could have been imposed, and it had absolutely no place in the determination of whether Larry Mann should live or die. It was fundamental error, and appellate counsel performed deficiently by failing to raise it on appeal. This prejudiced Larry Mann because full

appellate review of this misconduct probably would have resulted in 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. Elledge, 346 So.2d at 1003.

This misconduct, combined with the unrelenting and derogatory name calling in Claim III, made past acts and pedophilia the focus of the penalty phase and clearly prejudiced Larry Mann. Though similar situations have caused courts to reverse cases in which the jury likely returned a guilty or death verdict based upon the prosecutors injection of or focus on a highly prejudicial subject, appellate counsel failed to raise this issue on appeal. United States v. Birrell, 421 F.2d 665 (9th Cir. 1970); Brown v. State, 323 S.W.2d 954, 957 (1959); Killie v. State, 287 A.2d 310, 313 (1972).

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?
>
> 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). These questions must have been provoked because the prosecutor made sexual assault the feature of the penalty phase. The prosecutor clearly lead the jury to believe that Larry Mann molested the victim. This was fundamental error which denied Larry Mann his right to a fair trial because **there was absolutely no evidence of sexual activity** (S.S. Vol. X 1278). The jurors should 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. Sexual assault should not have been the focus of the penalty phase.

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.

Through testimony and argument, the prosecutor made sexual assault, rather than the balance of aggravating and mitigating circumstances, the focus of Larry Mann's penalty phase. Pedophilia should have played only a small role in consideration of the statutory mental health mitigators, but the court allowed the prosecutor to use it to present evidence of a juvenile crime and argue a sexual assault, for which there was no evidence, to make sexual assault the focus of the penalty phase. The questions the jury submitted to the court prove that the jury considered the juvenile incident and the prosecutor's contrived sexual assault as the focus of the proceeding. This was fundamental error because it deprived Larry Mann of a fair trial. *See* Smith v. State, 344 So.2d 915, 918 (1stDCA 1977)("The inescapable conclusion is that the state engaged in overkill and that thereby appellant was deprived of a fair trial."); Snowden v. State, 537 So.2d 1383, 1386 (3rd DCA 1989) *quoting* Green v. State, 228 So.2d 397, 399 (Fla. 2d DCA 1969).(""In itself the mere volume of testimony concerning the propr crime would not necessarily make it a 'feature' . . .However, when considered

with the additional fact that no limiting instruction was given, the prior crime could well have become a 'feature in stead of an incident' of the instant case in jury's mind. They could not be expected to know for what limited purpose the evidence of the prior crime was admitted.""). Appellate counsel rendered prejudicially ineffective assistance for failing to raise this reversible fundamental error on appeal.

CLAIM IV

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

Larry Mann did not receive the fundamentally fair penalty phase 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). The sheer number and types of errors in Larry Mann's penalty phase, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this petition, Larry Mann's 3.850 motion, 3.850 appeal, and in his direct appeal. While there are means for addressing each individual error, 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 Larry Mann's penalty phase. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Larry Mann his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 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).

CLAIM V

MR. MANN'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. MANN MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Larry Mann acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Mr. Mann acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death

warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In re: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel

> precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, Larry Mann raises this claim now.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Mann respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ***Corrected Petition for Writ of Habeas Corpus*** which has been typed in Font Courier New, size 12, has been furnished by U.S. Mail to all counsel of record on this ***19th day of December, 2000.***

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