

IN THE SUPREME COURT OF FLORIDA

LARRY MANN

Petitioner,

v.

Case No. SC00-2602

MICHAEL W. MOORE,

Respondent.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's initial opinion, Mann v. State, 420 So. 2d 578, 580 (Fla. 1982):

On November 4, 1980 ten-year-old Elisa Nelson was abducted while bicycling to school after a dentist's appointment. Her bicycle was found later that day, and searchers found her body the following day. She died from a skull fracture and had been stabbed and cut several times.

The afternoon of the 4th Mann attempted to commit suicide. The police took him to a hospital where he stayed several days. On November 8th Mann's wife, while looking in his

pickup truck for his eyeglasses, found a bloodstained note written by Elisa's mother explaining her daughter's tardiness because of the dentist appointment. The police obtained a search warrant to search Mann's truck and home and arrested him on the 10th.

Mann was charged with kidnaping and first degree premeditated murder, and was found guilty following a jury trial before the Honorable Philip A. Federico, Circuit Judge (DA-R. 6-7, 354-355, 1109-2466).¹ The jury recommended a sentence of death and on March 26, 1981, the judge followed the recommendation, finding four aggravating circumstances: prior violent felony conviction; murder committed during the course of a kidnaping; heinous, atrocious, or cruel; and cold, calculated, and premeditated (DA-R. 369, 387-388, 1101-1102, 2461).

On appeal, Mann was represented by Assistant Public Defender David Davis, and alleged the following errors:

ISSUE I

THE COURT ERRED IN ADMITTING EVIDENCE OF BLOOD FOUND IN MANN'S TRUCK AS IT WAS IRRELEVANT TO HIS CASE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

¹The designation "DA-R." will be used to refer to the record in the direct appeal of Mann's convictions and sentences, Florida Supreme Court #60,569; "RS-R." will be used to refer to the record in the appeal from Mann's 1990 resentencing, Florida Supreme Court #75,952; and "PC-R." will be used to refer to the record in the postconviction appeal, Florida Supreme Court #94,885.

ISSUE II

THE COURT ERRED IN ADMITTING EVIDENCE THAT MANN WAS PREVIOUSLY CONVICTED IN MISSISSIPPI OF BURGLARY AS IT WAS NOT A VIOLENT CRIME IN VIOLATION OF THE FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE III

THE COURT ERRED BY NOT FINDING THAT MANN WAS UNDER THE INFLUENCE OF AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE AND THAT HIS CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE IV

THE COURT ERRED IN ADMITTING IN AGGRAVATION, EVIDENCE OF MANN'S LACK OF REMORSE WHEN ARRESTED FOR THE 1973 BURGLARY AND SEXUAL BATTERY, THREATS TO KILL THE VICTIM OF THE BURGLARY, AND LENGTH OF TIME HE SPENT IN PRISON, HIS ARREST FOR SEXUAL BATTERY, AND A 1969 INCIDENT IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE V

THE COURT ERRED IN FINDING THAT THIS MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AS 1) MANN'S MENTAL ILLNESS WAS THE DIRECT CAUSE OF THE MURDER, AND 2) THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THIS MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE VI

THE COURT ERRED IN FINDING THIS MURDER COLD, CALCULATED, AND PREMEDITATED IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE VII

THE COURT IMPERMISSIBLY FOUND THE MURDER TO BE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AND COLD, CALCULATED AND PREMEDITATED AS THEY REFER TO THE SAME ASPECTS OF THE CRIME IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

ISSUE VIII

THE COURT ERRED IN NOT INSTRUCTING THE JURY DURING THE SENTENCING PHASE OF MANN'S TRIAL THAT THEY COULD CONSIDER THE ABSENCE OF FLIGHT AS A MITIGATING FACTOR WHEN HE KNEW THE POLICE SUSPECTED HIM OF COMMITTING A MURDER IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court affirmed the judgments, but remanded for resentencing by the trial judge due to the trial court's finding that Mann's prior conviction had involved violence, the trial court's failure to make its findings on mitigation with the requisite clarity, and the trial court's finding that the murder was committed in a cold, calculated and premeditated manner. Mann v. State, 420 So. 2d 578 (Fla. 1982).

On remand, the court again imposed the death sentence, after allowing the State to present further evidence (the charging

document) demonstrating the violent nature of Mann's prior felony conviction. On appeal from the remand, Assistant Public Defender W. C. McLain argued the following issues:

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MANN'S PRIOR BURGLARY CONVICTION, FINDING THAT THE CONVICTION WAS ONE FOR A VIOLENT FELONY AND FINDING IT TO BE AN AGGRAVATING CIRCUMSTANCE UNDER SECTION 921.141(5)(b), FLORIDA STATUTES.

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL THEREBY RENDERING MANN'S DEATH SENTENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND WEIGH NONSTATUTORY MITIGATING EVIDENCE OFFERED DURING THE PENALTY PHASE OF THE TRIAL THEREBY RENDERING MANN'S DEATH SENTENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING MANN TO DEATH SINCE MANN'S MENTAL ILLNESS WAS THE CAUSAL FACTOR PROMPTING HIS COMMISSION OF THE HOMICIDE AND THIS MITIGATING CIRCUMSTANCE OUTWEIGHS THE AGGRAVATING CIRCUMSTANCES IN THIS CASE.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO EMPANEL A NEW SENTENCING JURY BEFORE RESENTENCING MANN TO DEATH SINCE THE ORIGINAL JURY WHICH RECOMMENDED A DEATH SENTENCE HAD BEEN TAINTED BY HEARING IMPROPER EVIDENCE IN AGGRAVATION AND IMPROPER JURY INSTRUCTIONS.

This Court affirmed the sentence. Mann v. State, 453 So. 2d 784 (Fla. 1984). Mann sought certiorari review of that opinion in the United States Supreme Court, alleging that the admission of further evidence when the case was remanded to the trial judge for resentencing violated double jeopardy and due process principles. The Supreme Court denied his petition. Mann v. Florida, 469 U.S. 1181 (1985). Thereafter, on January 7, 1986, the Governor signed a death warrant, setting Mann's execution for February 4, 1986.

Mann filed a motion for postconviction relief which was summarily denied by the trial court, and Mann appealed. At the same time it considered the appeal, this Court entertained a petition for writ of habeas corpus, which alleged numerous instances of ineffective assistance of appellate counsel, and a motion for stay of execution. In an opinion rendered February 1, 1986, this Court denied all relief. Mann v. State, 482 So. 2d 1360 (Fla. 1986).

Mann then filed a petition for writ of habeas corpus in federal court, alleging that the state court postconviction proceedings were constitutionally inadequate, along with eighteen

other claims previously raised in state court. The federal district court denied relief, but in the appeal from that ruling, the Eleventh Circuit Court of Appeals ordered that a new sentencing proceeding before a jury was constitutionally mandated under Caldwell v. Mississippi, 472 U.S. 320 (1985). Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), cert. denied, 489 U.S. 1071 (1989).

Mann's resentencing was held January 29 - February 6, 1990, before the Honorable James R. Case, Circuit Judge. Mann's second jury also recommended the imposition of a death sentence for Elisa Nelson's murder, by a vote of 9 - 3, and the trial court again sentenced Mann to death (RS-R. V5/511; V16/2088, 2139-2140). This Court summarized the evidence from the resentencing as follows:

Numerous witnesses testified at the new penalty phase. Among other people, the lead detective of the investigation and several technicians testified as to the circumstances of the crime. The medical examiner described the victim's injuries and told the jury that she died from a skull fracture after being cut and beaten. Mann had been convicted of burglary in Mississippi, and his victim testified to the circumstances of that crime to prove that it was a crime of violence. Several family members and other people testified in Mann's behalf, describing his life, how they thought he had grown as a person since being imprisoned, and his expressions of remorse for committing this murder. A psychologist opined that Mann is an alcoholic and a pedophile but had no brain damage. She also thought that the statutory mental mitigators (FN2) should be applied to Mann. On cross-examination she stated that Mann abducted the victim because he wanted to molest her. In rebuttal the prosecution presented a psychologist, who testified that

Mann is a pedophile and substance abuser, that he is antisocial, and that the mental mitigators did not apply in this case. Two other witnesses testified that they received no indication that Mann was drunk the morning he committed this crime.

603 So. 2d at 1142.

The sentencing judge again found the aggravating factors of prior violent felony conviction, murder committed during a kidnaping, and heinous, atrocious or cruel. In mitigation, the court found the following nonstatutory mitigation: Mann suffered from psychotic depression and feelings of rage against himself because of strong pedophilic urges; had been an exemplary inmate; had a long history of alcohol and drug dependency; had demonstrated great remorse; had developed artistic talents; and had maintained a relationship with his family and friends. However, the judge characterized these mitigators as "unremarkable," and determined that they did not outweigh the aggravators and that the death penalty was appropriate.

On appeal, Mann was represented by Assistant Public Defender Robert Moeller, and the following issues were presented:

ISSUE I

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

ISSUE II

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

ISSUE III

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

ISSUE IV

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

ISSUE V

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

ISSUE VI

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

This Court agreed that an extraneous judgment should be stricken but otherwise affirmed. Mann v. State, 603 So. 2d 1141 (Fla. 1992). Mann sought certiorari review of that decision, claiming that his right to be free from self-incrimination was violated by testimony presented during the resentencing. The United States Supreme Court denied the petition for writ of certiorari. Mann v. Florida, 506 U.S. 1085 (1993).

A motion for postconviction relief was filed in July, 1997, and was denied following an evidentiary hearing (PC-R. SV2/36-106). On appeal, this Court concluded that five issues were procedurally barred -- that the court erred in considering nonstatutory aggravating factors; that the State unconstitutionally commented on Mann's right to remain silent; that the court failed to find mitigating factors; that the rules prohibiting juror interviews are unconstitutional; and that Florida's death penalty statute is unconstitutionally vague and overbroad. Mann v. State, 25 Fla. L. Weekly S727, at n. 2 (Fla. Sept. 28, 2000). As to the other appellate issues raised, this Court agreed that Mann's trial counsels' decision to present evidence of Mann's pedophilia was strategic and reasonable; that other claims of ineffective assistance of trial counsel were refuted by the record and did not warrant an evidentiary hearing; that trial counsel was not ineffective for failing to object to prosecutorial misconduct; that the claim of ineffective mental health assistance was refuted by

the record and did not warrant an evidentiary hearing; and that the claim of cumulative error was properly rejected since all allegations of error were meritless or procedurally barred. Therefore, the denial of postconviction relief was upheld.

Thus, Mr. Mann has had a lengthy history of appellate review of the judgment and sentence of death imposed for his murder of Elisa Nelson. He now seeks further review, this time via habeas corpus.

I. THE INSTANT HABEAS CORPUS PETITION SHOULD BE DISMISSED AS UNTIMELY AND ABUSIVE.

Petitioner Mann seeks habeas corpus review after waiting some fourteen months after the filing of his brief in the most recent postconviction appeal and seven years after his resentencing direct appeal became final. Mann v. State, 603 So. 2d 1141, cert. denied, 506 U.S. 1085 (1993). Such delay is unconscionable and dilatory; furthermore, much of his petition is merely repetitious to claims previously presented and rejected. Since Mann has made no attempt to provide a reasonable basis for the delay or to overcome the presumptive prejudice to the State inherent on these facts, his petition should be dismissed.

This Court has, through procedural rules and case law, developed reasonable time limits on the filing of habeas corpus petitions alleging ineffective assistance of counsel. See, Florida Rule of Appellate Procedure 9.140(j)(3)(B):

A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.

The rule became effective on January 1, 1997. Mann has failed to satisfy the under oath provision with specific factual basis that he was affirmatively misled. In McCray v. State, 699 So. 2d 1366, 1369 (Fla. 1997), this Court declined to dismiss the petition under Rule 9.140(j)(3)(B), noting that the two year time limit did not begin to run until January 1, 1997. Since McCray's petition was filed prior to January 1, 1999, it was timely. However, the Court went on to rule that the petition must be dismissed under the doctrine of laches:

This case represents a perfect example of why the doctrine of laches should be applied to bar some collateral claims for relief. McCray has waited fifteen years to bring this proceeding and has made no representation as to the reason for the delay. Moreover, his claim is based on a brief reference to a collateral crime in his trial, which occurred seventeen years ago. This claim could and should have been raised many years ago. The unwarranted filings of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process.

To remedy this abuse, we conclude, as a matter of law, that any petition for a writ of habeas corpus claiming ineffective assistance of appellate counsel is presumed to be the result of unreasonable delay and to prejudice the state if the petition has been filed more than five years from the date the petitioner's conviction became final. We further conclude that this initial presumption may be overcome only if the petitioner alleges under oath, with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.

Accordingly, we find this petition is barred by

laches and we deny the petition. (emphasis supplied)
Thus, in McCray, this Court held the claim time-barred by laches even though not time-barred by the rule.

Clearly, Mann's petition should be dismissed. It is untimely under Rule 9.140(j)(3)(B) because, although his sentence was final prior to 1997, the petition was not filed by January 1, 1999. Even if this Court determines that this rule does not apply, the petition should be dismissed because, pursuant to McCray, the seven year delay between the finalization of his sentence and the filing of the motion is presumptively unreasonable and prejudicial.

Respondent recognizes that in Robinson v. Moore, 25 Fla. L. Weekly S647 (Fla. 2000), this Court rejected a procedural bar argument by the State. In that case, the State relied on Rule 3.851(b)(6), which requires the simultaneous filing of habeas petitions with the initial brief on appeal of the denial of the 3.850 motion in capital cases. Robinson rejected the State's argument because Rule 3.851 expressly states that it only applies to defendants whose sentences were final as of January 1, 1994. But Robinson did not address Rule 9.140(j)(3)(B) or the McCray ruling that, as a matter of law, any petition for writ of habeas corpus claiming ineffective assistance is presumed to be the result of unreasonable, prejudicial delay if the petition has been filed more than five years from the date the petitioner's conviction became final. 699 So. 2d at 1368.

Thus, under this Court's precedents, the timeliness of habeas petitions is to be determined by the date on which the defendant's conviction and sentence became final. If a capital case was finalized after January 1, 1994, the petition must be filed with the postconviction initial appellate brief under Rule 3.851; in any other case, the petition must be filed within two years of finalization, or January 1, 1999, whichever is later, under Rule 9.140; if neither rule applies, the petition must be filed within five years of finalization, or the presumptively prejudicial delay must be overcome under McCray. Regardless of which of these limits are considered, Mann's petition is untimely and should be dismissed.

It makes no sense to accept any suggestion that defendants in older cases are entitled to additional time to file habeas petitions than those whose convictions became final after 1997 or even 1994. By waiting until several months after the conclusion of his postconviction appeal to file his habeas petition, Mann has ignored this Court's clear attempts -- through Rule 3.851, Rule 9.140, and McCray -- to secure timely habeas petitions. He has effectively extended his state appeals process, perhaps by as much as a year, and has squandered the limited time and resources available for capital litigation by presenting repetitive claims and insisting upon multiple postconviction oral arguments. There is no policy reason to award him such a windfall, and this Court

should dismiss the petition as untimely and abusive.

II. ALTERNATIVELY, THE CLAIMS SHOULD BE DENIED

The bulk of Mann's habeas petition is premised on claims of ineffective assistance of appellate counsel. Of course, such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it undermined confidence in the correctness of the result. Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000); Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995), cert. denied, 516 U.S. 1175 (1996). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case. The record reflects that appellate counsel acted as a capable advocate, asserting six issues for judicial review in a 44-page brief.

Mann's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, one of the issues was argued and rejected; none of the issues now asserted would have been successful if argued in Mann's direct appeal. Therefore, counsel was not ineffective for failing to present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise nonmeritorious issues is not ineffective

assistance of appellate counsel).

Claim I: Whether appellate counsel was ineffective for failing to raise on direct appeal of the resentencing proceeding that Florida's death penalty statute was unconstitutional as applied to Mann.

Mann first alleges that Florida's death penalty statute is only constitutional if the particular aggravating factors are charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. His claim is based on the recent United States Supreme Court decision in Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), which is a state court extension of due process principles announced in Jones v. United States, 526 U.S. 227 (1999). Mann's entire argument is based on Apprendi, including allegations that Apprendi overruled Walton v. Arizona, 497 U.S. 639 (1990), and that due process requires jury unanimity on a recommended sentence, two allegations which are not supported by the Apprendi opinion.

Initially, it is obvious that although Mann asserts that this claim could have been presented in his appeal in an issue alleging that the trial court erred in denying Mann's Motion for Statement of Aggravating Circumstances and demurrer to the indictment, Mann never explains how his appellate counsel could have foreseen the Apprendi ruling. Certainly a claim that under "principles of common law," aggravating circumstances must be charged in indictment would not have been successful in Mann's appeal; that claim had been rejected by this Court many times. See, Chandler v.

State, 442 So. 2d 171, 173, n. 1 (Fla. 1983); Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981), cert. denied, 455 U.S. 983 (1982). Mann's current assertion that, had appellate counsel raised an issue of the aggravating factors not being charged in the indictment, this Court would have, at very least, remanded for new penalty phase is soundly refuted by all relevant authorities.

As this Court has recognized, attorneys will not be deemed to have been ineffective for failing to anticipate changes in the law; this clearly defeats Mann's current argument, which has never been accepted by any court, based on a case which was not decided until eight years after his direct appeal was concluded.

The same reasoning refutes Mann's assertion that appellate counsel should have raised the denial of Mann's request to have the jury instructed that their recommendation must be unanimous. This assertion is also premised entirely under Mann's current counsel's interpretation of the reasoning of Apprendi. Once again, case law at the time of Mann's appeal (and still today) rejects the claim that jury unanimity is required on a sentencing recommendation. This Court has consistently held that a jury may recommend a death sentence on simple majority vote. See, Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994)(constitutional for a jury to recommend death based on a simple majority); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976); see also, Hildwin v. Florida, 490 U.S.

638 (1989). Since no court has applied Apprendi in this context and Mann's appellate counsel did not have the benefit of Apprendi to even formulate the argument, no ineffectiveness can be demonstrated by the failure to raise the jury unanimity claim.

Furthermore, appellate counsel cannot be deemed to have been ineffective for failing to present the reasoning of Apprendi to allege that aggravating factors are "elements" of an offense or require a unanimous jury recommendation because these claims have no merit. In Apprendi, the United States Supreme Court held that due process and the right to a jury trial require that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Apprendi fired several .22-caliber bullets at the home of a black family. Apprendi pleaded guilty to possession of a firearm for an unlawful purpose. The judge sentenced Apprendi to twelve years' incarceration. The normal maximum sentence for this crime was ten years. However, a New Jersey hate crime statute doubled the maximum sentence to twenty years if the defendant committed the crime for the purpose of intimidation based on race, color, gender, handicap, religion, sexual orientation or ethnicity. The statute allowed the trial court to find biased purpose based on a preponderance of the evidence standard. Apprendi argued that due process required that the jury rather than a judge make the determination of biased purpose and that the State must prove

biased purpose beyond a reasonable doubt rather than by a preponderance of the evidence. In other words, Apprendi asserted that biased purpose was an element of the crime rather than a "sentencing factor." The Apprendi Court agreed and noted that the distinction between an element of the offense and a "sentencing factor" was not made at common law. The Apprendi Court noted and relied on their recent case of Jones v. United States, 526 U.S. 227 (1999), which construed a federal statute. In Jones, the United States Supreme Court held that "serious bodily injury" was an element of the crime rather than a sentencing factor which, consistent with due process and the right to a jury trial, must be determined by a jury beyond a reasonable doubt. Both Apprendi and Jones concerned factors which placed the sentence outside of the statutory maximum for the offense charged.

However, the majority specifically rejects any argument that the holding in Apprendi effects the Court's prior precedent upholding capital sentencing schemes that require the judge to determine aggravating factors rather than the jury prior to imposing the death penalty. Apprendi, 120 S. Ct. at 2366, *citing*, Walton v. Arizona, 497 U.S. 639 (1990). In Walton, the United States Supreme Court held that Arizona's death penalty scheme did not violate the Sixth Amendment right to a jury trial. Walton asserted that all the factual findings necessary for a death sentence must be made by a jury, not by a judge. Walton claimed

that a jury must decide aggravating and mitigating circumstances. The Walton Court rejected this claim, noting that any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court. The Walton Court noted that constitutional challenges to Florida's death sentencing scheme, which also provides for sentencing by the judge, not the jury, have been repeatedly rejected. As the Apprendi Court explained, Walton did not involve a judge determining the existence of a fact which enhanced the crime to a capital offense; rather, in death penalty cases, the jury determined whether a capital crime had been committed. The Apprendi Court noted that it is constitutional to have the judge decide whether the maximum penalty of death or a lesser one should be imposed. Basically, because death is within the statutory maximum for first degree murder, a judge may determine the facts relating to a sentence of death just as the judge may do with any other fact within the statutory maximum.

Apprendi is simply inapposite to the issues of whether aggravating factors must be charged in an indictment or whether a jury recommendation should be unanimous. Apprendi requires that a fact that is used to increase the statutory maximum be treated as an element of the crime; it did not change the jurisprudence of unanimity. Moreover, Apprendi concerns what the State must prove

to obtain a conviction, *not* the penalty imposed. Additionally, the Apprendi Court, specifically addressing capital sentencing schemes such as Florida's, stated that the holding did not effect their prior precedent in this area.

For all of these reasons, Mann's claim that his appellate counsel was ineffective for failing to challenge the constitutionality of the death penalty statute as applied in this case must be denied.

Claim II: Whether appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct.

Mann's next claim involves an issue which was argued and rejected in his direct appeal. He asserts that appellate counsel should have raised a claim of prosecutorial misconduct. Clearly, the prosecutorial misconduct claim was a contention in Mann's direct appeal; it was also repeated in his prior postconviction litigation. See, Mann, 603 So. 2d at 1143; Appellant's Initial Brief [Florida Supreme Court Case No. 75,952], pp. 23-26; Mann, 25 Fla. L. Weekly at S728; Appellant's Initial Brief [Florida Supreme Court Case No. 94,885], pp. 50-60). Given its repeated rejections in prior proceedings, the issue is not properly before this Court in this petition. Bryan v. Dugger, 641 So. 2d 61, 65 (Fla. 1994); Turner v. Dugger, 614 So. 2d 1075, 1080 (Fla. 1992) (declining to revisit issues where the issues, or variations thereof, were rejected on direct appeal); Blanco v. Wainwright, 507 So. 2d 1377,

1384 (Fla. 1987) (direct appeal issues will not be revisited under the guise of ineffective assistance of appellate counsel).

In addition, no extraordinary relief is warranted because many of Mann's current arguments were not preserved for appellate review and, even if considered, no reversible error could be demonstrated. Postconviction relief is not, has not been, and should not become a litigious game in which arguments twice rejected can now be asserted anew in the hope that eventually a court will change its mind - out of exhaustion - in order to accommodate the defendant's desires. See, Rutherford v. Moore, 25 Fla. L. Weekly S891 (Fla. Oct. 12, 2000) (while habeas petitions are proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion). See also Thompson v. State, 759 So. 2d 650 (Fla. 2000); Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). To obtain relief it must be shown that appellate counsel's performance was deficient (alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance) and that prejudice resulted (that counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the

result). The failure to raise a meritless issue will not render counsel's performance ineffective and this is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Rutherford.

Mann asserts that several instances of "prosecutorial misconduct" appear in the record. He specifies (1) during voir dire, the prosecutor commented that the death penalty was "reserved for special crimes" and that jurors were to act as the "conscience of the community" (R V7/853, 865); and stated "I understand, and I think everyone understands the killing of a child is a bad, bad, bad, bad thing" (R V8/1013); (2) during the trial, the prosecutor made a reference to Mann having filed a motion for new trial during Mann's prior counsel's testimony about remorse (R V13/1578), and elicited testimony about the victim's age and size which he commented on during closing argument (R V16/2002-04, 06-08); (3) in closing argument, the prosecutor made Golden Rule violations in discussing what the victim experienced (R V16/2007-8) and improperly commented on Mann's right to remain silent (R V16/2026); and (4) in the "most egregious pattern of misconduct" the prosecutor repeatedly suggested that Mann was child molester with deviant sexual desires. Rather than actually discussing the challenged comments, Mann merely recites the incidents, makes a conclusory allegation that misconduct is evident, and requests habeas relief. However, no relief is due.

The record reflects that none of the asserted instances of misconduct involved any improper or unnecessarily prejudicial comments or argument. In fact, the admission that this Court considered what Mann now claims to have been the "most egregious pattern" of prosecutorial misconduct and found *no* error clearly establishes that the other comments now asserted as improper would have been rejected as well. Thus, no error has been demonstrated by appellate counsel's failure to raise these additional claims of alleged prosecutorial misconduct from this record.

Taking the last claim first, the allegation that the prosecutor improperly characterized Mann as a pervert and a child molester was clearly a primary issue presented in Mann's resentencing appeal. Mann's brief cited both Garron v. State, 528 So. 2d 353 (Fla. 1988), and Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), the two cases he primarily relies on in the instant petition. In rejecting the claim, this Court stated:

During closing argument, the prosecutor talked about the defense psychologist's testimony and stated: "She is arguing and suggesting to you on the witness stand because this man is a child molester and a pervert, that his actions are somehow more excusable than a person that is not a child molester and a pervert.... This is actually the best she can do." Mann now claims that this argument turned his being a pedophile into an improper nonstatutory aggravator and denigrated his psychologist's opinion that the statutory mental health mitigators applied to him. We disagree.

As we have stated before: "The proper exercise of closing argument is to review the

evidence and to explicate those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). It is clear from the record that the prosecutor made these statements to negate the psychologist's conclusion that the statutory mental mitigators applied to Mann. Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment. After hearing the evidence and the instructions, it was the duty of the judge and jury to decide the weight to be given to the evidence and testimony, and there was no impropriety here. Cf. Lucas v. State, 568 So. 2d 18 (Fla. 1990); Williamson v. State, 511 So. 2d 289 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988); Craig v. State, 510 So. 2d 857 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988).

603 So. 2d at 1143.

This Court again rejected the issue in Mann's recent postconviction appeal, stating:

Mann's next issue is that the circuit judge erred in denying an evidentiary hearing concerning Mann's claim that counsel was ineffective for failing to object to the extensive prosecutorial misconduct throughout the trial and closing. Our review of the record indicates that defense counsel did object to several of the comments Mann claims to be improper. Additionally, the bulk of Mann's claim in this issue relates to the prosecutor's comments concerning Mann's pedophilia. Defense counsel not only objected to these comments, but this issue was decided adversely to Mann on direct appeal, see Mann, 603 So. 2d at 1143, and is now improperly recast as an ineffective assistance of counsel claim. See Cherry, 659 So. 2d at 1072. We find that counsel's failure to object to the remaining comments that Mann claims were improper does not demonstrate a deficiency

that prejudiced Mann. Thus, the circuit court properly denied relief on this issue.

25 Fla. L. Weekly at S728. This Court's repeated rejection of this issue compels the denial of relief on Mann's claim of appellate ineffectiveness for failing to raise a prosecutorial misconduct issue based on the prosecutor's closing argument.

As to other allegations of misconduct now alleged, to which no objection was made at trial, Mann's contention that they should have been raised as fundamental error in his direct appeal must be denied. It is well established that counsel will not be deemed ineffective for failing to raise claims pertaining to prosecutorial arguments which were not objected to at trial. Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Kelley v. Dugger, 597 So. 2d 262, 263 (Fla. 1992). In this case, Mann's assertion that the prosecutor's closing argument was fundamental error and appellate counsel should have briefed the issue is an improper attempt to have this Court review a direct appeal issue under the guise of ineffective assistance of counsel. Bryan, 641 So. 2d at 65; Turner, 614 So. 2d at 1080.

In addition, counsel cannot be ineffective for failing to raise a nonmeritorious issue, and there is no merit to the claim that the prosecutor's challenged comments presented constitutional or fundamental error. The prosecutor's remarks during voir dire and over the course of the trial have not been shown to be improper. In closing argument, the facts noted by the prosecutor

were clearly relevant in rebutting Mann's assertion of statutory mental mitigation and in establishing that Elisa's murder was "conscienceless and pitiless" to support the applicability of the heinous, atrocious or cruel aggravating factor. This factor was ultimately found by the trial judge and upheld on appeal. See, Muehleman v. State, 503 So. 2d 310, 317 (Fla.) (comments may have excited passions but were highly relevant in establishing aggravating factors), cert. denied, 484 U.S. 882 (1987).

Even if the prosecutor's comments in this case were deemed to be improper, such comments are not reversible error, let alone fundamental, where the remarks did not become a feature of the trial. See, Sims v. State, 602 So. 2d 1253, 1257 (Fla. 1992) (rejecting claim of ineffective assistance of counsel for failure to object to Golden Rule violation), cert. denied, 506 U.S. 1065 (1993); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (prosecutor's penalty phase closing argument not egregious enough to warrant new sentencing). In order to constitute fundamental error, the prosecutor's statements had to "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991), quoting Brown v. State, 124 So. 2d 481, 484 (Fla. 1960). The complained-of comments herein clearly did not meet this standard. See, Crump v. State, 622 So. 2d 963, 972 (Fla. 1993) (prosecutor's

comments, including a narrative to gain sympathy for the victim, not so outrageous as to taint the jury recommendation); Jones v. Wainwright, 473 So. 2d 1244, 1245 (Fla. 1985) (rejecting ineffective assistance of appellate counsel claim based on failure to challenge prosecutorial comments). This was a deplorable offense involving the kidnap and murder of a ten-year-old child, with three aggravating circumstances and only "unremarkable" nonstatutory mitigating factors. The recommendation of death could surely have been obtained, followed, and upheld on appeal without the challenged comments.

Mann has failed to show any deficiency in his appellate counsels' performance regarding any possible claim relating to his current allegations of prosecutorial misconduct, or any prejudice resulting from any alleged deficiency. No habeas relief is warranted.

Claim III: Whether appellate counsel was ineffective for failing to argue that the trial court erred in permitting the State to focus on a sexual assault in Mann's penalty phase.

Mann's next claim asserts that his appellate counsel should have raised an issue challenging the prosecutor's cross examination of Mann's expert witness, Dr. Carbonell. According to his habeas petition, the prosecutor elicited inadmissible and irrelevant testimony about Mann's pedophilia, particularly about Mann's having assaulted a seven year old girl when he was sixteen years old and

Mann's having fantasies about having sex with children. According to the petition, this evidence violated Williams v. State, 117 So. 2d 473 (Fla. 1960), because it became an assault on Mann's character rather than addressing the aggravating and mitigating factors relevant for sentencing.

None of the testimony now challenged from Mann's 1990 resentencing was objected to at the time of trial; his postconviction motion did not even allege that trial counsel should have objected to this testimony. (RS-R. V14/1648-1681, 1690). Thus, once again, Mann is improperly presenting a direct appeal issue, which would have been found to be procedurally barred even if raised on appeal, and no ineffectiveness of appellate counsel is demonstrated. See, Rutherford, 25 Fla. L. Weekly at S892; Thompson, 759 So. 2d at 657; Teffeteller, 734 So. 2d at 1025; Ferguson, 632 So. 2d at 58; Kelley, 597 So. 2d at 263.

Furthermore, even if this issue were reviewed for fundamental error in the earlier appeal or with this petition, Mann would not be entitled to relief. His objection to the testimony about having been accused of assaulting a young girl when he was 16 could not be a basis for relief since this evidence was relevant to his expert's conclusion that both statutory mental mitigating factors applied. Clearly, the prosecutor's questioning about this episode cannot be error, let alone fundamental error. Similarly, the information about Mann's fantasies involving children was relevant to

Carbonell's conclusions about his pedophilia.

Since before the conclusion of Mann's resentencing proceeding, he has continuously complained about the consequences of his attorneys' decision to rely on his pedophilia as mitigation. He objected to the State's response to this evidence during closing argument and on direct appeal, and he challenged his counsels' strategy as ineffective in postconviction proceedings. His current habeas petition again disputes the relevance and admissibility of testimony about his pedophilia, but once again his claim must fail both procedurally and on the merits. His appellate counsel cannot be deemed to have been ineffective for having failed to argue an issue that would have been meritless and unsuccessful, and therefore habeas relief must be denied on this issue.

Claim IV: Cumulative error

Mann's fourth claim presents a conclusory allegation that multiple instances of trial error must be considered cumulatively and collectively demand relief. No particular allegations of error are particularly identified. In denying an identical claim in Mann's recent postconviction appeal, this Court noted, "All of Mann's claims were either meritless or procedurally barred; therefore, there was no cumulative effect to consider." Mann, 25 Fla. L. Weekly at S729. None of the claims presented in the instant petition offer any basis for reconsideration of this

holding, as all of these claims are similarly meritless and barred.

Claim V: Competency to be Executed

Mann also asserts that he may be incompetent to be executed. Although he acknowledges that this claim is not currently ripe for judicial review, since no execution is pending, he suggests that he is including this claim in his current habeas petition in order to preserve the issue for federal court review. Clearly, there is no basis for this Court to rule on Mann's present claim of possible incompetence.

Florida law provides specific protection against the execution of an incompetent inmate. In order to invoke judicial review of a competency to be executed claim, a defendant must file a motion for stay of execution pursuant to Florida Rule of Criminal Procedure 3.811(d). Such motion can only be considered after a defendant has pursued an administrative determination of competency under Florida Statutes 922.07, and the Governor of Florida, subsequent to the signing of a death warrant, has determined that the defendant is sane to be executed. Since the prerequisites for judicial review of this claim have not occurred in this case, there is no basis for consideration of this issue in Mann's present habeas petition. Compare, Provenzano v. State, 751 So. 2d 37 (Fla. 1999); Provenzano v. State, 760 So. 2d 137 (Fla. 2000) (detailing procedural history of similar claim); Medina v. State, 690 So. 2d 1241 (Fla. 1997)

(remanding for evidentiary hearing on issue in postconviction appeal from Bradford County).

Mann's concern with preservation of this issue for federal review does not offer a reason for a premature ruling by this Court. Although the federal courts have refused to permit successive federal habeas petitions in order to secure federal review of this claim, that default may be avoided if a defendant presents the issue prematurely in his initial habeas petition. See, Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). Whether Mann will be deemed to have already defaulted this claim due to his failure to present it in his previously litigated federal petition or whether he will be permitted to pursue it any future federal petition are questions to be properly resolved by the federal courts, not this Court. No federal decision requires this Court to consider and address the claim now presented, contrary to state law, in order to preserve Mann's federal rights.

Since Mann's claim of incompetence to be executed is not properly before this Court, it must be denied.²

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY Mann's Petition for Writ of Habeas Corpus.

²Of course, no claim of incompetency was presented during his recent postconviction proceedings, and his resentencing expert testified that Mann had no brain damage, had average intelligence; the only problems she identified were his substance abuse and his pedophilia (RS-R. V14/1614, 1621, 1623-24).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail, to Eric Pinkard, CCRC, Office of the Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of February, 2001.

COUNSEL FOR RESPONDENT