

IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,885

LARRY E. MANN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

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

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ARGUMENT I

WHETHER THE TRIAL COURT ERRED IN DENYING MR. MANN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AFTER AN EVIDENTIARY HEARING.

1. Whether counsel's decision to present pedophilia testimony was ineffective assistance.

To prove ineffective assistance of counsel, Strickland requires a defendant to plead and demonstrate (1) deficient performance, and (2) prejudice. Strickland v. Washington, 466 U.S. 668, 685 (1984). "As to the deficiency requirement, a reviewing court must determine whether, in light of all the circumstances, counsel's acts or omissions fell outside the wide range of professionally competent assistance." Valle v. State, 705 So.2d 1331, 1333 (Fla. 1997). In light of the circumstances in Mr. Mann's case: counsel's knowledge of the stigma associated with pedophilia, the first sentencing jury's reaction to testimony about Mr. Mann's pedophilia, anticipation that the state would take advantage of the pedophilia testimony as well as use it to elicit information about the 1969 sexual abuse incident, and other available mitigation, counsel's decision to pursue and present pedophilia as mental mitigation was deficient performance.

Appellee couches Mr. Mann's claim that presenting pedophilia testimony was deficient performance which prejudiced Mr. Mann,

as merely a disagreement with counsel's strategic decision to present mental mitigation (Appellee's Answer Brief at 14, 17). In fact, Mr. Mann is not challenging counsel's general decision to present mental mitigation as deficient performance. Rather, Mr. Mann is challenging the type of mental mitigation that counsel chose to present as deficient performance. Mr. Mann's counsel knew the potential results of their decision to present pedophilia as mitigation because it was presented in Mr. Mann's unsuccessful 1981 penalty phase, but whether they failed to investigate other mitigation or simply made a decision that fell below the prevailing professional standards, counsel's performance was deficient (O.R. Vol. XV 2388, 2400-04). Thus, Mr. Mann's case is distinguishable from Rutherford, which the state cites to support its assertion, where this Court held that an informed decision not to present mental mitigation was effective assistance. Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998). Mr. Mann's counsel was aware of the stigma associated with pedophilia, the first sentencing jury's reaction to testimony about Mr. Mann's pedophilia, and anticipated that the state would take advantage of the pedophilia testimony as well as use it to elicit information about the 1969 sexual abuse incident (O.R. Vol. XV 2388, 2400-04, R. Vol. IV 677, 694-95). Therefore, counsel's failure to investigate other mental

mitigation and presentation of essentially the same kind of pedophilia testimony that Mr. Mann's first counsel presented constituted deficient performance which fell below the prevailing reasonable professional standards.

Brian Donnerly, the attorney qualified as an expert who testified at Larry Mann's evidentiary hearing, established that counsel's performance was deficient. Mr. Donnerly offered his expert opinion that his **"primary conclusion was that the decision to put on pedophilia as a mitigating circumstance was below the standard in the community and also that there is a reasonable probability that it affected the result"** (R. Vol. IV 605). Referring to the pedophilia testimony, Brian Donnerly stated,

The State ultimately made the defense mitigation into one of its most potent aggravating circumstances. And from the jury perspective, it would have changed the focus to the extent of the State's argument because the State would not have had a factual basis for that argument.

(R. Vol. IV 618). Mr. Donnerly based his conclusion of counsel's deficient decision to present pedophilia as mental mitigation on both the prosecutor's use of pedophilia in his closing argument

and the additional prejudicial facts and testimony the pedophilia testimony brought into the trial (R. Vol. IV 605,

609-615). Mr. Donnerly stated:

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

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

The state asserts that trial counsel David Perry testified that he felt Mr. Mann's first penalty phase was not successful, so he looked for different strategy for the 1990 penalty phase (Appellee's Answer Brief at 16, R. Vol. IV, 672-73). This establishes that counsel's decision to present pedophilia testimony was deficient performance. Though Perry knew

pedophilia mitigation was not successful at Mr. Mann's first penalty phase, Perry presented essentially the same pedophilia mental mitigation that previous counsel offered in 1981. In Larry Mann's 1981 sentencing phase, his counsel presented Dr. Fireman, a psychiatrist. Dr. Fireman testified that Larry Mann's pedophilic urges and feelings of inadequacy caused him to feel tremendous rage against himself which resulted in the psychotic crime (O.R. Vol. X, 2386-2388). On cross examination, the court allowed the prosecutor to elicit information about Larry Mann's 1969 juvenile sexual offense with a child (O.R.V. X, 2398-2406). In his closing argument, the prosecutor referenced the 1969 offense, pedophilia, and argued to the jury that because of the pedophilia and the 1969 incident, Larry Mann would be dangerous as long as he lived (O.R.Vol. X, 2435). Thus, counsel did know the devastating consequences of pedophilia testimony.

Similarly, in 1990, Perry presented Dr. Joyce Carbonell, a clinical psychologist. Dr. Carbonell testified that Mr. Mann's pedophilia, family problems, and alcohol consumption combined to cause uncontrollable urges which resulted in the crime (S.S. Vol. XIV, 1624, 1630-31). This pedophilia testimony had far more dire consequences than Dr. Fireman's. On cross examination, the court allowed the prosecutor to question Dr.

Carbonell about the role the 1969 incident played in her diagnosis. Over approximately thirty-three pages of cross examination testimony, the prosecutor repeatedly mentioned the facts and circumstances of this juvenile incident which, without the pedophilia testimony, would have been inadmissible (S.S. Vol. XIV, 1648-1681).

On cross examination, the prosecutor also elicited prejudicial testimony regarding Mr. Mann's pedophilia fantasies and related actions:

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). The state's expert, Dr. Whalen, testified that Larry Mann caused his own pedophilic urges because he used fantasy and masturbation to teach himself to be a pedophile and encourage the pedophilic feelings. Dr. Whalen testified, "[i]t's (pedophilia) a learned behavior. Individuals who have this type of sexual problem essentially teach

themselves to be sexually aroused to children" (S.S. Vol. XV 1844). Dr. Whalen gave his opinion on the manner by which pedophiles teach themselves to be sexually aroused by children. "They fantasize about it. They practice it in their mind. They masturbate and have a sexual experience to the fantasy" (S.S. Vol. XV 1846). Testimony regarding Mr. Mann's sexual fantasies and practices was absolutely prejudicial and irrelevant to the crime at hand, and such information would not have been admissible had counsel not presented pedophilia as mental mitigation.

Moreover, the prosecutor used Dr. Carbonell's testimony to make pedophilia the theme of his closing argument, even though there was absolutely no indication that Larry Mann sexually abused the victim (S.S. Vol. X 1278). The prosecutor argued, Larry Mann **"kidnapped her and took her there for the purpose of satisfying his deviant sexual desire"** (S.S. Vol. XVI 1997 *emphasis added*). "[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 *emphasis added*). 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 *emphasis added*). He argued Dr. Carbonell's testimony merely suggested that "**because this man is a child molester and a pervert, that his actions are somehow more excusable than a person that is not a child molester and a pervert** (S.S. Vol. XVI 2014-15 *emphasis added*). The prosecutor continued, "**this man is a child molester. . . his fantasy lies about fantasizing about children, as Dr. Carbonel indicated to you that Larry Mann has done through the course of his life. He enhances and builds towards the commission of future crimes**" (S.S. Vol. XVI 2016-17 *emphasis added*). Mr. Mann's conduct was "**conduct engaged in by a pedophile seeking to satisfy sexual desires**" (S.S. Vol. XVI 2019 *emphasis added*). To degrade 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 *emphasis added*).

The state asserts that Perry "felt that Carbonell was clearly the best witness available to discuss other mitigation, including Mr. Mann's family background, alcoholism, and remorse (R. Vol. IV 681-82, 692)" (Appellee's Answer Brief, 16). The state misrepresented Perry's testimony. Perry testified that Dr. Carbonell's testimony regarding alcoholism was better than that of the other lay witnesses he contacted, and she could also testify to Mr. Mann's remorse, honesty, and personal changes in prison (R. Vol. IV, 681-82, 692). Dr. Carbonell was the only expert counsel consulted. Because she is a clinical psychologist, her testimony regarding alcoholism obviously should be better than that of the lay witnesses Perry contacted.

Though Perry testified that after inheriting Dr. Carbonell from CCR, he reviewed her background and credentials and spoke with several attorneys who worked with her, Perry did not testify that he researched Dr. Carbonell's background and credentials to determine whether she was an appropriate expert to testify to the best mitigation-history of substance abuse and organic brain damage--available for Larry Mann's penalty phase (R.Vol. IV 673). In fact, Dr. Carbonell was the only expert counsel contacted. Although counsel had the resources to hire an expert in the field of the effects of substance abuse, or to

have neurological tests performed by a neurological expert ("I could have had somebody look at him"), counsel unreasonably failed to investigate alternative non-aggravating forms of mitigation and relied on Dr. Carbonell's testimony (R. Vol. IV 694). Had counsel investigated, counsel could have presented a neuropharmacologist or other substance abuse expert who could testify to the general long term effects of the drugs Larry Mann abused to establish mental mitigation without bringing in the pedophilia testimony counsel knew to be prejudicial. See Hitchcock v. State, 673 So.2d 856, 862 (Fla. 1996).

Likewise, counsel could have established Larry Mann's remorse, honesty, and personality changes without Dr. Carbonell's testimony or even used her to establish remorse, honesty, and personality changes without the pedophilia testimony. See Hitchcock v. State, 673 So.2d 856, 862 (Fla. 1996). Dr. Carbonell was not counsel's most qualified witness to testify to remorse, honesty, and personality changes. Dr. Carbonell met with Larry Mann for only about eight and a half hours including time she spent conducting the Halstead-Reitan Neurophysiological test battery, Trails A, Trails B, the Canter Bender Gestalt, the MMPI, the WAIS-R Revised, the Stroop Color Word Test, the Wechsler Memory Scale Revised, and the Rorshack. Therefore, because she spent such a short time with

Mr. Mann, Carbonell was comparatively inadequate to describe Larry Mann's remorse, honesty, and prison renaissance (S.S. Vol. XIV 1615). Mr. Mann's former CCR attorney and investigator were much better prepared to testify to Mr. Mann's remorse, honesty, and change in personality. Gail Anderson, who knew Larry Mann for four years and met with him at least eighteen times, testified that Larry Mann shows great remorse and has taken responsibility for the crime and has made great efforts to improve himself while in prison, devoting most of his time to religious studies and prison ministry and teaching himself to read the Bible in Greek (S.S. Vol. XIII 1575-77). Mr. Nolas, who knew Mr. Mann for four years and met with him at least twelve times, testified that Larry Mann felt great remorse for his actions beginning hours after the incident with his suicide attempt (S.S. Vol. XIII, 1583-84). Mr. Nolas stated that Larry Mann was unique among his other death row clients because he is honest and he has no interest in getting out of prison because he understands his situation and suffers extreme remorse (S.S. Vol. XIII 1585-87). Larry Mann taught himself to read Greek so that he could read the Bible and concentrates on helping others through the prison ministry. (S.S. Vol. XIII 1587). Nolas testified that, unlike any other client he represented, Larry Mann is genuinely concerned about other people and tries to help

them (S.S. Vol. XIII 1589). Nolas also testified that he never asked Larry Mann why he acted the way he did, so pedophilia would have been irrelevant (S.S. Vol. XIII, 1592-1593). Thus, counsel could have established the non-damaging mitigation without Dr. Carbonell and her devastating pedophilia testimony.

The state also asserts that the record supports counsel's decision not to hire an expert trained in the field of substance abuse. The record does not support this conclusion. Perry testified that because Larry Mann was not going to testify, counsel needed to present a witness to testify to Mr. Mann's history of alcohol abuse and he felt Dr. Carbonell's credibility supported her testimony (R. Vol. IV 682). Thus, Perry felt the jury and judge should hear about Mr. Mann's history of substance abuse. Dr. Carbonell is a clinical psychologist, and had no specialities in the field of substance abuse (S.S. Vol. XIV 1603-1611). She did not testify to the way long term substance abuse affects the brain generally, or specifically describe Larry Mann's extensive history of substance abuse. Dr. Carbonell only offered testimony that Larry Mann is an alcoholic and the way alcohol might have affected him the morning of the incident (S.S. Vol. XIV 1619, 1623). In fact, Larry Mann abused a number of drugs besides alcohol, including PCP, LSD, marijuana, speed, barbiturates, heroin, and cocaine. (R. Vol.

II 333, 350, O.R.Vol. XV 2406-7, Vol. XIII 2003, 20014-15). Dr. Carbonell was not qualified to and did not explain the long term effects those drugs have on the brain. A neuropharmacologist would have been qualified to explain the effects of years of substance abuse, and would have held much more credibility than Dr. Carbonell in the field of substance abuse.

Despite the state's contrary assertions, this is not a case in which a person sentenced to death is challenging his counsel's decision whether to present mental mitigation without prior knowledge of the effects the mental mitigation. Mr. Mann's counsel knew the prejudicial effects of pedophilia testimony as mitigation because it was presented at his first penalty phase where the state used it to introduce the 1969 incident and used it in closing argument. After that penalty phase, Mr. Mann received a death sentence. Knowing those consequences, counsel failed to investigate other mental mitigation and presented mental mitigation that was fundamentally the same as that presented in the first penalty phase which counsel knew and felt to be unsuccessful (R. Vol. IV, 673). Thus, the state's reliance on Davis v. Singletary, 119 F.3d 1471, 1478 (11th Cir. 1997), and Rivera v. Dugger, 717 So.2d 477, 485 (Fla. 1998), to refute the assertion that pedophilia can never be used as a mitigating factor is amiss.

Mr. Mann is not simply disagreeing with counsel's decision to present pedophilia as mental mitigation, Mr. Mann disagrees with counsel's decision to present pedophilia mental mitigation counsel knew to be ineffective and highly prejudicial in Mr. Mann's case.

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

The test for determining whether counsel's deficient performance prejudiced his client is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695. A reasonable probability is one which undermines confidence in the outcome of the sentencing. Strickland, 466 U.S. at 694.

Despite the state's assertion that, "no possible prejudice could be demonstrated on the facts of this case", the prejudice is clear (Appellee's Answer Brief, 10). Without Dr. Carbonell's testimony, Mr. Mann's prior instance of sexual abuse of a minor (Mr. Mann admitted to Dr. Carbonel that he fondled a seven year old girl when he was sixteen years old) would not have been admissible because Mr. Mann was never formally convicted of that juvenile charge. The prosecutor could have argued kidnapping and Mr. Mann's Mississippi conviction of burglary with the

intent to commit unnatural carnal intercourse, but, because the victim was an adult, the prosecutor's comments about pedophilia would have been irrelevant. Without Dr. Carbonel's testimony, there would have been no evidence of Mr. Mann's juvenile charge, and because there was no evidence of sexual assault with this incident, the prosecutor could not have prejudicially referred to Mr. Mann as a "child molester" and a "pervert" (S.S. Vol. X 1278, Vol. XVI 2003, 2014-15, 2016-17). See Hitchcock v. State, 673 So.2d 856, 863 (Fla. 1996).

Four of the seven questions the jury submitted to the judge during deliberations (1, 2, 5, and 6) concern facts which would not have reached the jury without the pedophilia testimony (S.S. Vol. XVI 2081-82). Without the pedophilia testimony and the way the prosecutor used it as an aggravating circumstance, the jury would have no reason to suspect that the victim was molested because **there was absolutely no evidence of sexual activity** (S.S. Vol. X 1278). Thus, the jurors would not have considered whether the victim's autopsy showed evidence of a sexual encounter, or whether there was evidence of natural or unnatural sexual intercourse. Judge Case refused to answer questions one and two, and did not explain that there was absolutely no evidence Mr. Mann sexually assaulted the victim before he killed her. Judge Case only instructed the jury to

rely on the evidence produced at trial. If the jury mistakenly relied on the prosecutor's closing argument as evidence, the jury recommended a sentence of death, in part, because of a sexual assault of the victim that Mr. Mann did not commit. The jury asked whether the seven year old girl Mr. Mann fondled was examined for rape, showing the jury gave great weight to the irrelevant evidence brought in by the pedophilia testimony. The jury also asked whether Dr. Whalen was an expert in his field, suggesting that they seriously considered Dr. Whalen's testimony that Mr. Mann taught himself to be a pedophile. Questions one, two, five, and six prove that the jury was giving great weight to the evidence and argument admitted solely because of the pedophilia testimony, and that the evidence played a large role in the deliberations.

The jury returned a nine to three verdict, sentencing Mr. Mann to death. Despite the damaging effects of the pedophilia testimony, three jurors felt the aggravating circumstances did not outweigh Mr. Mann's other mitigating circumstances. Had Mr. Mann's counsel not offered the pedophilia testimony and instead pursued substance abuse and head trauma mitigation, counsel probably would have changed the outcome of the sentencing. Mr. Donnerly testified that he believed there was a reasonable probability Mr. Mann would have received a life sentence if the

pedophilia testimony was not used (R. Vol. IV 615). Mr. Mann needed only three more votes for a life sentence.

The circuit court clearly erred when it held “[n]either the defense attorneys performance in general nor their adoption of the strategy to present mental mitigation including pedophilia falls below the applicable standards of Strickland v. Washington” and “there is no reasonable likelihood, in light of the aggravating factors proved by the state, that the result of the proceedings would have been different had the evidence been withheld from the jury”(R. Vol. III 539-40). Though counsel considered Mr. Mann’s first penalty phase unsuccessful, counsel failed to investigate mitigating circumstances beyond pedophilia, and offered essentially the same pedophilia mitigation even though counsel knew it was not successful in Mr. Mann’s first sentencing, and counsel anticipated that the state would use it to Mr. Mann’s disadvantage. Given the circumstances, counsel’s conduct fell far below the prevailing professional standards of reasonableness (R. Vol. IV 605). Strickland, 466 U.S. at 688; Valle v. State, 705 So.2d 1331, 1333 (Fla. 1997). The prejudicial effect of counsel’s deficient performance is clear. The jury heard all of the otherwise irrelevant evidence resulting from the pedophilia testimony including thirty-three pages of cross examination regarding the

1969 juvenile incident and the prosecutor's prejudicial and inflammatory closing argument. The questions the jury submitted to the court prove that the otherwise irrelevant evidence played a large role in the jury's deliberations. There is sufficient evidence to undermine the outcome of the sentencing. Strickland, 466 U.S. at 694.

ARGUMENT II

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

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

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

Appellee asserts that counsel's strategy supports their failure to investigate Mr. Mann's history of substance abuse as a mitigating factor (Appellee's Answer Brief at 25). If, as the state asserts, counsel's strategy was to focus on positive

changes in Larry Mann's character over the ten year period before his second penalty phase, counsel failed. Counsel presented essentially the same mental mitigation—that Larry Mann's substance abuse, feelings of inadequacy, and pedophilia combined in an uncontrollable rage which resulted in the crime—that Mr. Mann's first counsel presented in 1981. (Appellee's Answer Brief at 25, *citing* V. 4, 606-07, 689, 673) (O.R. Vol. X, 2386-2388, 2398-2406, 2435, S.S. Vol. XIV, 1624, 1630-31). The state also asserts that "the portrait of Mann as a serious drug abuser would carry many of the same negative connotations as the evidence of pedophilia" (Appellee's Answer Brief at 25). In a case with a child victim and absolutely no physical indication of sexual assault, presenting Larry Mann as a serious substance abuser and the effects long term substance has on the brain would not carry the same connotations as pedophilia. Offering evidence that Larry Mann used numerous drugs which could affect the way his brain functions is quite different from offering evidence that Larry Mann was not only a convicted murderer, but also a pedophile who had acted upon his pedophiliac tendencies in the past by abusing a seven year old girl, and that he probably intended to sexually abuse the victim before killing her. Certainly a history of drug abuse carries vastly different connotations.

Appellee also asserts that counsel used Dr. Carbonell to present evidence of substance abuse (Appellee's Answer Brief, 24). At the resentencing, Dr. Carbonell testified that she conducted neuropsychological testing because she was aware of Mann's serious history of substance abuse (RS-R. Vol. 14/1614). She discussed the test results which indicated that Mann had strong characteristics of a serious abuser (RS-R. Vol. 14/1619). She noted that Mann began drinking at about age twelve or thirteen, and that she believed he was intoxicated on the morning of the crime (RS-R. Vol. 14/1623, 1630). (Appellee's Answer Brief, 24). This meager testimony barely touches the substance abuse evidence available (R. Vol. II 333, 349-350, O.R.Vol. XV 2406-7, Vol. XIII 2003, 20014-15). Counsel knew of Mr. Mann's drug history and should have known this Court considers long-term substance abuse a mitigating circumstance.

Heiney v. State, 620 So.2d 171 (Fla. 1993); *See also*, Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985)(a defendant's past drinking problems, among other things, were "collectively a significant mitigating factor"); Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989) (Unrebutted evidence that the defendant's reasoning abilities were substantially impaired by his addiction to hard drugs" is "significantly compelling" mitigation). Counsel could only use Dr. Carbonell to present

minimal testimony of substance abuse as mitigation because counsel deficiently failed to investigate and hire an expert qualified to investigate and present evidence of the effects of long term substance abuse. Counsel's failure to investigate and present evidence of the effects of Mr. Mann's fourteen year record of substance abuse cannot be justified as a decision supported by reasonable professional judgment. Strickland, 466 U.S. at 691.

Appellee contrarily asserts that presenting evidence of Mr. Mann's extensive history of substance abuse "would detract from the picture of Mann the defense sought to present", resulting in an inconsistency (Appellee's Answer Brief at 25). However, the only inconsistency between defense counsel's theory of defense and the evidence counsel could have presented if they had investigated is the great amount of compelling mitigation counsel could have presented to the jury if they investigated the history of which they were aware.

Counsel deficiently failed to investigate and present this mitigating evidence. These facts are not conclusively rebutted by the record and demonstrate counsel's deficient performance prejudiced Mr. Mann; if counsel had investigated and presented this mitigation, the aggravators and mitigators would have weighed differently and Larry Mann probably would have received

a life sentence. Roberts v. State, 568 So.2d 1255, 1259 (Fla. 1990). The circuit court erred in not granting a new sentencing or, at least, an evidentiary hearing on this issue.

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

Mr. Mann is not, as Appellee contends, merely challenging counsel's choice of experts. Mr. Mann challenges counsel's failure to hire an expert qualified to investigate this mitigating circumstance (Appellee's Answer Brief at 26). Counsel was aware that Larry Mann likely suffers from brain damage. Larry Mann had not been tested for brain damage since his trial nine years earlier. Thus, counsel could not know whether changes in technology and testing procedures could now reveal organic brain damage. Dr. Carbonell, who is not an expert in the field of organic brain damage, conducted some neurological testing and found, "[t]here is [sic.] a couple of things here and there. He does not look brain damaged in other kinds of testing that I did." (R. Vol. XIV., 1614). Dr. Carbonell's results gave some indication of brain damage, counsel knew that Mr. Mann's long term drug abuse likely caused brain damage, Dr. Merin's 1981 report reported some reduced memory functions, Mr. Mann was hospitalized for a "nervous condition", Mr. Mann has a

long history of mental illness, and Mr. Mann suffered a head injury in a car accident (R. Vol. II 248, 349, O.R. Vol. XVI 2406-7). However, counsel failed to hire a neuropsychologist or other expert qualified to diagnose organic brain damage. Because evidence of brain damage is a mitigating circumstance under Florida law, counsel's failure to hire a qualified expert to evaluate and present evidence of brain damage can constitute ineffective assistance of counsel. See, e.g., Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Mitchell v. State, 595 So.2d 938 (Fla. 1992); Strickland, 466 U.S. at 691; Armstrong v. Dugger, 833 F.2d 1430, 1432-34 (11th Cir. 1987). Had counsel investigated and presented evidence of brain damage, the aggravating and mitigating circumstances would have weighed differently, and Larry Mann probably would have received a life sentence. Accordingly, the trial court erred when it did not grant an evidentiary hearing on this issue.

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

Appellee claims that counsel's failure to effectively cross examine Ms. Johnson, the witness the state offered to prove the circumstances of the 1973 burglary, was not deficient

performance because Appellee believes this Court's holding in Finney v. State would prevent effective cross examination. Finney v. State, 660 So.2d 674, 684 (Fla. 1995). Appellee fails to note, however, that Finney v. State was decided in 1995, five years after counsel failed to effectively cross examine Ms. Johnson. Therefore, Appellee points to no case law, existing in 1990, which could have prevented effective cross examination.

Even if Finney v. State existed in 1990, it does not necessarily forbid the type of cross examination outlined in Mr. Mann's initial brief. Though this Court noted in Finney v. State that, " it is not appropriate to go behind the jury's verdict in the proper case and attempt to retry those convictions", this Court also held, "**[t]estimony concerning the circumstances that resulted in a prior conviction is allowed to assist the jury in evaluating the defendant's character and the weight to be given to the prior conviction so that the jury can make an informed decision as to the appropriate sentence.**" Finney v. State, 660 So.2d 674, 684 (Fla. 1995)(*emphasis added*).

Counsel chose not to challenge the reliability of the Mississippi conviction and hence, the weight of the prior violent felony aggravator, even though Mr. Mann filed a post conviction motion in the Mississippi Supreme Court challenging that conviction and has continuously maintained that he did not

commit the Mississippi crime (R. Vol. II 272, 330). Though counsel had the duty to investigate all possible defenses and aggravators, counsel made no effort to investigate and present evidence of Mr. Mann's alibi or to cast doubt upon the quality of the Mississippi conviction. Nor did counsel challenge the weight of this conviction by vigorously cross examining Ms. Johnson even though Mr. Mann's first penalty phase record contained evidence that Ms. Johnson's identification of Larry Mann was unreliable. During Mr. Mann's first penalty phase, Ms. Johnson testified that she identified Mr. Mann from a yearbook photograph (O.R. Vol. XV 2372). Mr. Mann quit school in 1969, so the photograph was at least four years old at the 1973 trial. Ms. Johnson testified she described her attacker to the police as a man between twenty-five and thirty-five years old, but she identified Mr. Mann, who was twenty years old at the time, from a photograph taken when he was sixteen years old or younger. Ms. Johnson also testified that she identified Mr. Mann in person for the first time in the courtroom after the proceedings against Mr. Mann had started (O.R. Vol. XV 2372). Had counsel effectively cross-examined Ms. Johnson or offered evidence of Mr. Mann's alibi, counsel would have challenged the weight of the prior violent felony aggravator, and the aggravating and mitigating factors would have weighed differently, probably

resulting in a life sentence. The trial court erred when it dismissed this claim without an evidentiary hearing, offering as an explanation only that it "lacked merit". (R. Vol. III 545).

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

Mr. Mann relies on the argument in his initial brief for this issue.

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

Mr. Mann relies on the argument in his initial brief for this issue.

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

Mr. Mann relies on the argument in his initial brief for this issue.

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

Trial counsel ineffectively failed to object to the improper

jury instructions regarding the "prior violent felony" aggravating circumstance which unconstitutionally relieved the State of its burden to prove every aggravating circumstance beyond a reasonable doubt. Williams v. State, 386, So.2d 538 (Fla. 1980). Mr. Mann's direct appeal did not specifically raise this error, so this error likely was not considered when this Court found no error. Counsel ineffectively failed to object to the instruction for these reasons and, because the issue was not preserved, this Court declined to consider it on appeal. Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992). The trial court erred in not granting an evidentiary hearing.

ARGUMENT III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS OF PROSECUTORIAL MISCONDUCT AND RELATED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Defense counsel deficiently failed to object to much of the prosecutor's improper and prejudicial argument, including comments that injected elements of fear and emotion into the jury's verdict, misled the jury, violated the Golden Rule, and were nothing more than blatant name calling throughout the course of the trial. *Cf.* Pendarvis v. State, 2000 WL 192131 *1 (Fla.App. 2 Dist. 2000) ("To underhandedly characterize him to the jury as a pervert was not only improper in that it was

obviously intended to inflame the jury, but also was a clear violation of a prosecutor's duty to fairly present the evidence and permit the jury to come to a fair and impartial verdict."). Because these comments were not preserved, they were not raised on direct appeal. Accordingly, counsel's deficient failure during this misconduct was appropriately raised in Mr. Mann's 3.850 Motion for Post Conviction Relief and is not procedurally barred.

This Court considered only a minute portion of the prosecutor's misconduct on Mr. Mann's direct appeal. Mann v. State, 603 So.2d 1141 (Fla. 1992). This Court considered and resolved the small portion,

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.

Mann, 603 So2d at 1143. Because counsel deficiently failed to object or move for a mistrial after the majority of the prosecutorial misconduct, it was not raised on direct appeal (S.S. Vol. VII 865, Vol. XVI 2014-15). Thus, this Court did not consider the totality of the prosecutorial misconduct outlined in Mr. Mann's initial brief.

The cumulative impact of the prosecutor's misconduct constitutes fundamental error. It reached into the integrity of the sentencing phase itself to obtain a death sentence that could not have been obtained without the error. See Delgado v. State, 2000WL 124382 *30 (Fla.); Urbini v. State, 714 So.2d 411, 418 n.8 (Fla. 1998); Tyrus v. Apalachicola Northern Railroad Co., 130 So.2d 580, 587 (Fla.1961). Because the prosecutor's comments constitute fundamental error, there was no procedural bar to raising the claim on direct appeal, and likewise, there should be no procedural bar to raising the claims, which were not raised at trial or direct appeal, in Mr. Mann's 3.850 motion for postconviction relief. Cf. Smith v. State, 741 So.2d 576, 577 (Fla. 1st DCA 1999) ("We must reverse the trial court's disposition of the first claim, because a violation of the

prohibition against double jeopardy is a fundamental error, see State v. Johnson, which can be presented for the first time in a postconviction motion."); Christopher v. State, 397 So.2d 406, 406-407 (Fla. 5th DCA 1981)("The question whether the court has subject matter jurisdiction involves a claim of fundamental error and can be raised at anytime); Hill v. State, 730 So.2d 322 (Fla. 1st DCA 1999)("fundamental error. . . can be raised for the first time in a postconviction proceeding); MacDonald v. State, 743 So.2d 501, 505 (Fla.1999).

Larry Mann needed only three more votes for a life sentence. If counsel had objected or otherwise tried to thwart the prosecutor's improper and prejudicial comments and argument, the jury would not have heard it or would have heard curative instructions. If that had happened, at least three more people probably would have voted for a life sentence. A new sentencing phase or, at the very least, and evidentiary hearing is warranted.

ARGUMENT IV

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MANN'S CLAIM THAT THE TRIAL COURT'S CONSIDERATION OF NON-STATUTORY AGGRAVATING CIRCUMSTANCES WAS FUNDAMENTAL ERROR.

During his closing argument and thirty-three pages of cross-examining Dr. Carbonell, the prosecutor made pedophilia into a

nonstatutory aggravator which the jury considered when determining Larry Mann's death sentence (S. S. Vol. XIV, 1648-1681, S.S. Vol. XVI 1997, 2003, 2003-2004, 2006, 2014-15, 2016-17, 2019, 2024, 2081-82). This violated the Fifth, Sixth, Eighth, and Fourteenth Amendments, and is not, as Appellee claims, procedurally barred. The court summarily denied this claim, holding that the issue should have been raised on direct appeal so it is barred under Robinson v. State, 707 So.2d 688 (Fla. 1998). Because trial counsel deficiently failed to object to most of the state's argument of pedophilia as a nonstatutory aggravator, appellate counsel did not fully raise this issue on direct appeal, and it was not fully litigated. Thus, this issue was not fully litigated because of counsel's deficient failure to object and move for mistrials. The prosecutor's argument which turned pedophilia into a nonstatutory aggravator is fundamental error because it infected the reliability of Mr. Mann's death sentence and resulted in standardless sentencing discretion which violates the Eighth Amendment of the United States Constitution and Florida law. See Sochor v. Florida, 504 U.S. 527, 532, 112 S.Ct. 2114, 2119, 119 L.Ed.2d 326 (1992); Stringer v. Black, 503 U.S. 222, 232, 112 S.Ct. 1130, 1140, 117 L.Ed.2d 367 (1992); Parker v. Dugger, 498 U.S. 308, 319-321, 111 S.Ct. 731, 738-740, 112 L.Ed.2d 812 (1991); Clemons v.

Mississippi, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990); Wike v. State, 596 So.2d 1020 (Fla.1992); McCampbell v. State, 421 So.2d 1072, 1075 (Fla.1982); Miller v. State, 373 So.2d 882, 885 (Fla.1979). Because fundamental error can be raised for the first time on appeal, it also should be cognizable for the first time in a 3.850 motion for post conviction relief if both trial and appellate counsel deficiently failed to raise the issue at trial or on direct appeal. Cf. Smith v. State, 741 So.2d 576, 577 (Fla. 1st DCA 1999); Christopher v. State, 397 So.2d 406, 406-407 (Fla. 5th DCA 1981); Hill v. State, 730 So.2d 322 (Fla. 1st DCA 1999); State v. Johnson, 616 So.2d 1 (Fla. 1993); Fuller v. State, 540 So.2d 182, 184 (5DCA 1989). Accordingly, the trial court erred. A new sentencing phase or, at the very least, an evidentiary hearing is warranted.

ARGUMENT V

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

Larry Mann relies on the argument set forth in his initial brief for this issue.

ARGUMENT VI

WHETHER THE TRIAL COURT ERRED IN DENYING AN

EVIDENTIARY HEARING REGARDING THE
CONSTITUTIONALITY OF RULES REGULATING JUROR
INTERVIEWS.

Mr. Mann relies on the argument in his initial brief for this issue.

ARGUMENT VII

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

Mr. Mann relies on the argument in his initial brief for this issue.

ARGUMENT VIII

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

Appellee erroneously claims that Mr. Mann's 3.850 motion did not offer factual support for the claim of ineffective assistance of mental health assistance. In fact, Mr. Mann's

3.850 motion specifically alleged:

The failure of defense counsel to pursue and secure available additional testing of Mr. Mann including, *inter alia*, a CAT scan and a PET scan, was unreasonable in light of the facts counsel knew: 1) Mr. Mann had a history of drug abuse and alcoholism; 2) drug abuse and alcoholism may cause organic brain damage; 3) organic brain damage caused by a history of drug abuse or alcoholism, when not reflected in neuropsychological testing, may be revealed by other advanced testing, such as a PET scan, 3)[sic.] and that Mr. Mann suffered from head injuries. . . . Although Dr. Carbonell testified as to Mr. Mann's chronic substance abuse problem, she was not an expert on poly-substance abuse.

(S.R. 92) See (S.R. 91-97). The record clearly does not rebut the fact that Dr. Carbonell did not give Mr. Mann competent mental health assistance because she simply was not qualified to diagnose the effects of Mr. Mann's fourteen year history of drug and alcohol abuse, nor was she qualified to diagnose organic brain injury. Dr. Carbonell was also ineffective for not obtaining the documents and information from which she could ascertain that she was not qualified to assist Mr. Mann in the psychiatric diagnoses and help he needed. Dr. Carbonel's examination was not appropriate in Mr. Mann's case, and did very little to assist in the evaluation, preparation, and presentation of his defense. This claim is not refuted by the record. Accordingly, the trial court's summary denial was

error.

ARGUMENT IX

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

Mr. Mann relies on the argument in his initial brief for this issue.

ARGUMENT X

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

Mr. Mann relies on the argument in his initial brief for this issue.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly concluded that counsel's decision to present pedophilia as mitigation was not ineffective assistance and improperly denied Mr. Mann's other claims without an evidentiary hearing. This Court should order that his conviction and sentence be vacated and remand the case for a new penalty phase trial, an evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant which has been typed in Font Courier New, Size 12, has been furnished by U. S. Mail to all counsel of record on May 12, 2000.

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