IN THE SUPREME COURT OF FLORIDA

JEFFERY A. FARINA,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 80,985

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0353973
112-A Orange Avenue
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS, CONTINUED

TABLE OF CITATIONS

TABLE OF CITATIONS, Cont'd

TABLE OF CITATIONS, Cont'd

TABLE OF CITATIONS, Cont'd

TABLE OF CITATIONS, Cont'd

PAGE NO.

CASES CITED:

TABLE OF CITATIONS, Cont'd

TABLE OF CITATIONS, Cont'd

TABLE OF CITATIONS, Cont'd

IN THE SUPREME COURT OF FLORIDA

JEFFERY A. FARINA, Defendant/Appellant, v. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 80,985

STATEMENT OF THE CASE AND FACTS

At 2:18 on the morning of May 9, 1992, Daytona Beach police received a "911" emergency telephone call reporting a robbery in progress at a Taco Bell restaurant. (TR13-16;20-21; State's Exhibit 1).[1] Less than four minutes later, police entered the restaurant and met with 16-year-old Derek Mason, a Taco Bell employee. (TR55-58;98-100). Mason, who had been shot in the mouth, directed police to the rear of the restaurant where two other employees, 18-year-old Kimberly Gordon and 17-year-old Michelle Van Ness, were lying unconscious with their hands tied behind their back on the floor of a walk-in freezer. (TR34-35;59-61;125;359;617; 359-60). Ms. Van Ness had been shot in the head and Ms. Gordon had been stabbed in the back. (TR61-63). A fourth Taco Bell employee, 19-year-old Gary Robinson, had been shot in the chest and was found kneeling in a rear office where he had remained after making the 911 telephone call. (TR70-73;328).

[1] (R) refers to the transcripts up to and including Volume 21; (TR) refers to the transcripts of the trial commencing with Volume 22.

Paramedics quickly arrived. Mason declined treatment so the more seriously injured could be cared for - he explained what had happened, provided descriptions of an automobile and two assailants, and told police he recognized the robber who had a tattoo of a burning heart on his right shoulder as an ex-employee of Taco Bell named "Tony." (TR67-72). With Mason's help, police found the personnel file of Anthony Farina. (TR67-72;134-35). It was later determined that Mason, Van Ness and Robinson had been shot with the same .32 caliber revolver. (TR314-319). Ms. Van Ness died the next day without regaining consciousness. (TR96;271). Mr. Robinson stayed in intensive care for seven days. (TR343). Mason was released from the hospital after three days (TR140) and Gordon after nine days. (TR382-83).

20-year-old John Henderson, 18-year-old Anthony Farina, and his 16-year-old brother Jeffery were arrested on the same day of the incident, May 9, 1992, after another Taco Bell employee called police when she saw Anthony buying gasoline at a local service station. (TR167-72;279-80;2156-57). On May 11, 1992, two days after the incident, the three defendants were transported to the Daytona Beach Police Department in a patrol car equipped with hidden equipment to monitor their conversations, and two defendants were left in the police car as the third was processed. (R375-81). Inside the police station, each defendant signed a waiver of rights form and was questioned. (R360-61;426-35;445-50;476-81). Then, the defendant was returned to the police car with the others so their conversations could be monitored and recorded. (R379).

Following an evidentiary hearing (R356-392;425-570) on motions[2] to suppress those statements, the court ruled that the statements obtained from Jeffery Farina by the fingerprint expert were inadmissible because the agent improperly questioned Jeffery after the right to counsel was invoked. (R2857). The court refused to suppress the statements intercepted while the defendants were in the rear of the police car. (R2847-61). John Henderson's case was severed. (R2430-31).

FACTS CONCERNING JURY SELECTION/CHANGE OF VENUE

Jeffery and Anthony Farina moved to change venue. (R241; 2862-64). Appended to that motion were newspaper articles showing extensive local media coverage of the incident and great community awareness of the crime. (R2253-78). The court denied the motion without prejudice. (R246-47). It was supplemented with additional newspaper articles unsuccessfully renewed by both defendants during voir dire. (R1748;2525-46). The court stated without explanation that it was "striking all these addendums (sic) that have been filed since we began." (R1988).

The morning of trial, Anthony moved to recuse Judge Orfinger following the denial of a motion seeking to disqualify the state attorney's office for misconduct. (R2504-23). Judge Orfinger granted Anthony's motion and on his own recused himself from

---

[2] With permission of the court (R333-335), Jeffery Farina adopted motions to suppress the statements obtained while he was in the police car, alleging that secret electronic interception of the conversation was an unreasonable search and seizure and violation of his right to privacy under the Fourth, Fifth and Fourteenth Amendments, Article I, Section 23 of the Florida Constitution, and Chapter 934, Florida Statutes. (R561-563).

presiding over Jeffery Farina's case. (R981-82). Judge Blount arrived later that morning, announced that he had read and was familiar with the court file, ratified all prior rulings (R994), and ruled that a change of venue would be taken up if it became necessary. (R997-98). Jury selection began.

Voir dire established that the vast majority of citizens, after discussing the case with others, had concluded that serious crimes had occurred. The court denied challenges for cause as to such jurors, stating; "He can presume that. I read him an indictment that says there was." (R1901); "I told them that during the course of the trial. I think that question is a little bit silly, to be honest with you[.]" (R2055-56). Six additional peremptory challenges were provided and exhausted; requests for more by both defendants were denied. (R1625;1671;1946;1989;2064-66). As a result, jurors who had discussed the facts of the case with other and who concluded "horrendous" crimes had occurred served on the jury after the defendants' challenges for cause were denied.[3]

---

[3] Marriott believed that crimes were committed and told his wife that "it was a horrendous deal." (R2061-62). Challenges for cause were denied (R2064-66) and he served on the jury. Stewart had a "fixed assumption" that crimes were committed. (R2053). Challenges for cause were denied (R2064-66) and she served on the jury. Marley believed that crimes were committed. (R2042-43). Challenges for cause were denied and he served on the jury. Nice stated he could give the defendants a fair trial "if they deserve one." (R1955-57). Challenges for cause were denied (R1983-85) and he served on the jury. Connover stated that, based on her knowledge of the crime, she would vote for the death penalty. (R1283). Challenges for cause were denied (R1303) and she was peremptorily struck by Jeffery Farina. (1303-04). Moran agreed that, to him, the only question was "who did it" and stated he expected the defendants to prove their innocence. (R1740). Challenges for cause were denied and he was peremptorily struck by Jeffery Farina. (R1744-47).

The court granted the State's challenges to jurors who were against the death penalty in general but who unequivocally stated they could follow the court's instructions. (Heffelfinger-R1289;1298)(Gulin-R1766-75)(Hudson-R1777-94). The court denied sequestered voir dire (R2243;997), and motions to strike the panel resulted when prejudicial comments were given by citizens in the presence of other prospective jurors. (R1155-56;2020;1560). Other motions to strike the panel were based on the placement of the victims, their families and a television camera next to the jury box over repeated objections. (R1308;1456;1591;1588-89;1749-54; 1991-95;2966-69). Defense counsel accepted the jury under protest, subject to the motions to strike the panel, change of venue and over requests for more challenges. (R2064-67).

FACTS CONCERNING THE MOTION TO DISQUALIFY STATE ATTORNEY'S OFFICE

On October 17, 1992, a local newspaper reported that the Clerk of the Court, Mr. Newell Thornhill, denied accusations of "judge shopping" in the Taco Bell case while speaking at a local bar function and explained that the case had been moved to DeLand at the request of the State Attorney to prevent students from attending the trial. (R2919). Both defendants moved to disqualify the State Attorney's Office based on that misconduct. (R2913-19). A hearing (R773-933) on November 6, 1992 showed that, pursuant to the Chief Judge, the Clerk was to use a blind rotation system to assign capital cases. (R849-53;877-78). The "Taco Bell" case would have been assigned to Judge Briese had that normal rotation been followed. (R844;857).

Judge Briese returned from vacation and learned from the courthouse computer that he was to arraign the defendants in the Taco Bell case. (R866). His judicial assistant was also told by the clerk's office that he was to be assigned the Taco Bell case. (R895-96). Assistant State Attorney Damore contacted Judge Briese's office and asked for hearing time for a motion[4] for the public defender to withdraw and for the matter to be expedited. (R789;897). He was told by Judge Briese's judicial assistant that the public defender would have to set his own hearing and that the case would neither be expedited nor treated differently than any other first-degree murder case because that was a firm rule of Judge Briese. (R897-98).

The Clerk stated that Mr. Tanner came to his office and asked for the Taco Bell case to be tried in the DeLand area:

> Thornhill: We were talking and the other people in the office got up and walked out. I don't know if they went outside the door or where. I don't think the state attorney ever sat down. He just stood up. And I was standing up also and talking to the other gentlemen that had left. And he just said that he has some serious concerns with the Taco Bell case being held in Daytona Beach and would like for the case to be tried in the DeLand area.

(R798).

Mr. Thornhill testified that he had merely repeated Mr. Tanner's request to a deputy clerk who assigned the capital case to Judge Orfinger. (R803). However, that deputy clerk testified that

---

[4] The State filed a Motion to Appoint Counsel dated May 14, 1992. (R2161). The defendants were indicted May 19, 1992 (R2167) and arraigned May 22, 1992. (R2168).

Mr. Thornhill, though apprised the chief judge's administrative order that controlled assignment of capital cases, directed that the Taco Bell case be assigned to the west side of the county at the request of State Attorney Tanner. (R841-43). At that time, Judge Orfinger was the *only* judge handling felony cases on the west side. (R841). When Judge Briese learned that the case was no longer assigned to him he called the Clerk to find out why and was told, "I don't want to be smart, but I decline to answer." (R876).

Judge Briese, unaware of the State Attorney's request to the Clerk, notified Chief Judge McFerrin Smith of his suspicions that the Taco Bell case was being manipulated. (R891-92;884-86). Judge Smith contacted the Clerk and was told that the case had been assigned at the request of the State Attorney for security reasons and to prevent truancy of high school children. (R888-89). Those reasons did not seem credible to Judge Briese but he declined the Chief Judge's offer to have the case reassigned to him because he believed that no judges were involved in the manipulation and that no favoritism was going to result. (R885;893-94).

Based on the testimony presented at the evidentiary hearing, Judge Orfinger found that the case had been assigned at the request of the state attorney (R922) and noted, "this type of situation gives the entire judicial system a black eye." (R926). However, he refused to disqualify the state attorney's office and imposed no sanction because the defendants could not show actual prejudice. (R931;2970-78). Had the case been assigned to Judge Briese, arraignment would have occurred June 6, 1992.

FACTS CONCERNING THE CRIMES

The testimony of the three surviving Taco Bell employees established that, in the early morning hours of May 9, 1992, after the restaurant closed, Mr. Mason and Ms. Van Ness went outside to empty the trash and were there confronted by Jeffery and Anthony Farina. (TR103-108). Jeffery was armed with a pistol and Anthony with a knife; both wore gloves. (TR109-110). The employees were ordered into the restaurant where the two more employees were rounded up - three were held at gunpoint at the rear of the restaurant by Jeffery while Anthony had Ms. Gordon open the safe and hand over that day's receipts. (TR111-13). It appeared to Mason (TR111;141) and Gordon (TR372) that Anthony was in charge.

There were repeated assurances that no one would be hurt. (TR118;337;376). The women smoked cigarettes. (TR115-16;335;371-72). Mason did not smoke and was taken by Jeffery into a back area where his hands were tied behind him[5] with rope brought by the Farinas. (TR109;115-16). Robinson's hands were next tied in the same manner. (TR117-18;335). Anthony then tied the hands of Ms. Van Ness and Ms. Gordon. (TR120;336;373).

Anthony told the employees to go into a walk-in cooler and refused to push a red "Emergency" button to turn off the refrigeration because he was concerned it would set off an alarm. (TR120-121;338;374-75). After talking briefly with his brother, Anthony entered the cooler and told the employees to walk into the

---

[5] Jeffery Farina had first asked Mr. Mason to place his hands where they would be comfortable. (R117).

freezer located at the rear of the cooler. (TR122;338;380). They did and Robinson was then shot by Jeffery. Robinson testified that Anthony had the knife and was standing behind Jeffery, who was grimacing with "a look of disgust" on his face. (TR339). Robinson felt something hit him but did not see a bullet hole - he thought blanks were being fired (TR339) but realized he was shot when he saw blood on Derek's face. (TR339-40). Michelle was shot and she dropped to the floor. (TR339-40). The gun misfired when aimed at Ms. Gordon, and Jeffery obtained the knife, tried to stab her in the head and then stabbed her in the back. (TR340-41).

Derek Mason testified that soon after they entered the freezer Jeffery aimed the gun at Robinson's chest and pulled the trigger - Robinson said "ah" and sat down. (TR122-23). When the gun was aimed at him, Mason stepped aside and, though struck in the face, he did not really feel anything. (TR124-25). The gun misfired and he sat down. (TR125). Mason looked down, saw blood, heard a shot and saw Ms. Van Ness fall as if dead. (TR125-26). Trying to stay calm, he saw Anthony hand Jeffery the knife and saw Jeffery stab Ms. Gordon. (TR127-29). Mason played dead until the Farinas left and then untied himself, as did Robinson, and they went to get help. (TR130-31). The event lasted twenty minutes. (TR141).

Ms. Gordon remembers seeing Anthony in the restaurant earlier that evening as she was counting money. (TR362;385). She knew Anthony, having worked with him before at a different Taco Bell. (TR368). Ms. Gordon testified that the shooting began when they turned around after stepping into the freezer. (TR380). She

saw Robinson get shot, then Mason, and then Van Ness. (TR380). When the gun was pointed at her she shielded herself and felt her head forced down, heard a grinding noise as the knife struck her head and then felt herself being stabbed in the back. (TR380-81). She sat down, was aware of blood coming out of her mouth and then she passed out. (TR381-82). She awoke in the hospital five days later. (TR382).

When arrested, Jeffery possessed a receipt from a K-Mart indicating that he had purchased .32 caliber bullets, gloves and clothesline just after noon on May 8, 1992. (TR200-201;210-12;286-87). A total of $2,158 was taken from Taco Bell, and when arrested the Farinas possessed $1,885, including $83 in coins contained in a Taco Bell bag. (TR193-94;365;202-03). Part of the conversation between Jeffery and Anthony Farina was published to the jury. (TR298-301;State's Exhibits 58 & 59; See, Appendix E).

FACTS ESTABLISHED AT PENALTY PHASE

The jury found the Farinas guilty on all counts as charged and the penalty phase began the next day. Repeated objections were made to argument contained in the State's opening statement which emphasized the young age of the victims. (TR585-94). The victims were called to the front of the courtroom by the State to re-enact the crime but were prevented from doing so by defense objection. (TR605-13). Defense objections were sustained when the State then called the murder-victim's father to the stand to present "victim impact" testimony contrary to prior unequivocal rulings. (TR614-20). The State rested without presenting any evidence. (TR621).

The defendants presented testimony showing they came from a very dysfunctional family. (TR627). Their mother, when 18 years old, married a man who was 58. (TR716). Anthony, born on November 20, 1973, was physically abused for the next five years. (TR717-18). Their mother left with the children after Mr. Farina hit Anthony with a crutch. (TR718-19). Homeless, they lived on a beach in St. Petersburg for an entire year when the boys were 6 and 7 years old. They slept in an automobile when it rained and on the beach when it did not; they took salt-water baths in a cooler; they used the rest room at a nearby gas station. (TR724-26).

Their mother married James Brant in the summer of 1980 when Anthony was seven. (R719). Brant was a mentally disturbed Viet Nam veteran known to be aggressive and violent. (TR758-59). Their house was soiled with dog feces - beer cans littered the yard. (TR762-63;800-801). The Brants would sit on the porch, drink beer and then toss the empty cans into the front yard. They were commonly under the influence of alcohol. (TR832-33). Brant made the children watch as he beat their mother. (TR732). He routinely beat the children with the buckle end of a belt for periods of 15 to 20 minutes. (TR720; 730-31;760). He beat Anthony daily, but Jeffery was "only" beaten a couple times a week. (TR730-31;744). Brant once hit Jeffery in the head with a wrench with such force that the tool bounced off Jeffery's head and broke a truck's windshield. (TR731).

In 1987, Brant was convicted of abusing the children and Anthony was placed in a foster home by the Illinois Department of

Children and Family Services. (TR48;757-60). Then 11-years-old, Jeffery was left with his mother and young sister. (TR770-72;840-41). That same year, after going from 110 to 88 pounds in two weeks and developing seizures, Jeffery was taken to a doctor who diagnosed epilepsy. (TR702-06). The doctor recalled that Jeffery was "very quiet, receptive" (TR709), very withdrawn and that he would not volunteer things when his mother was around. (TR711). Jeffery's mother left in 1986 to avoid having her other children placed into care by the state agency. (TR731-32;739). At the time of the Taco Bell incident, Jeffery, his mother, sister, Anthony, Anthony's fiancee and her two children, and John Henderson were staying in a one-room apartment that cost $165.00 a week. (TR749;753).

Anthony at eighteen-years-old weighed over 200 pounds and was 6'3" tall. (TR842). Sixteen-year-old Jeffery was a typical child, kidded by co-workers about peach fuzz on his face. (TR310; 910). Jeffery had a fake identification card indicating that his name was "Buddy Chapman" and that his birthday[6] was June 2, 1971 - an age old enough to legally work but too young to drink. (TR280-82;309-310). At thirteen, he got his first job washing dishes at a Sheraton (TR733), and at the time of the robbery he was working at least 40 hours a week and giving his earnings to his mother. (TR733-34). He was a very hard worker who helped without being asked. (TR913-17;905-909). Jeffery was a soft-spoken child who walked women employees to their cars at night. (TR909). His actions

[6] Jeffery Farina was born July 27, 1975. (R2713).

at Taco Bell were definitely out of character for him. (TR909;917). In that regard, Jeffery expressed remorse to the co-workers who came to see him in jail (TR916-17), his brother (State's Exh. 58) and the court.

Over objection, the State argued that under these facts age was an aggravating consideration (TR1010-13), and concluded by arguing there were almost four young people rotting in the ground - that there were almost four grieving mothers this past Mother's Day. Objections were overruled (TR1017-18) and the jury recommended death by a 7-5 margin for Anthony (R2639) and by a 9-3 margin as to Jeffery. (R3041).

At the sentencing hearing, the trial judge granted judgments of acquittal to the kidnapping charges. (TR2121). Prior to sentencing, Jeffery addressed the court, expressed regret and offered to waive any appeal of his convictions and sentences if sentenced to life so that the matter could be concluded for the surviving victims. (TR2139-40). Counsel pointed out that Jeffery was counseling young first-time offenders at the jail and that his participation in such programs was a more fitting tribute to Ms. Van Ness than would be a death sentence. (TR2139). Jeffery was sentenced to six consecutive life sentences for three convictions of attempted first-degree murder, armed robbery with a firearm, burglary with a battery, and conspiracy to commit first degree murder. (TR2143-2147 3113-30) and to death based on findings of five statutory aggravating factors, two statutory and several non-statutory mitigating factors. (R2146;3093-98) (Appendix A).

During trial the newspaper reported that the judge frequently criticized defense counsel and referred to them as uncooperative "___holes" (R3090), and included quotes made by the judge from the bench in open court that sequestered voir dire was "a fishing expedition" and an "idiotic procedure" agreed to by him only to avoid reversible error. (R3082;3090). Counsel asked for the court to determine whether the jurors had been exposed to any media reports of the trial. (TR482-84). The judge refused and told counsel to do it, stating, "I'll give you all the opportunity you desire, sir. I don't ask questions of the jury. I instruct them only." (TR482).

Defense counsel moved in writing for the jury to be instructed as follows during both the guilt and penalty phase:

> Where a statute does not specifically define words of common usage, such words are to be construed in their plain and ordinary sense. If a word or term is expressly defined by statute, the definition provided by statute must be followed and the word or terms must be applied according to the fixed legal meaning.

(R2998-99). The request was denied. (TR479). The request for the above instruction was renewed during jury deliberations when the jury asked for a dictionary and a transcript of the closing arguments. (TR573-75). Written objections to the standard penalty phase jury instructions were filed by the defense, accompanied by proposed instructions (R3017-3038) which were rejected. (TR985). The judge ruled that the objections need not be renewed, stating, "I have already ruled on it, I thought, sufficiently enough so even the Supremes should understand it." (TR998).

SUMMARY OF ARGUMENTS

POINT I: Imposition of the death penalty on this sixteen-year-old offender is cruel, unusual and disproportionate punishment under the Eighth and Fourteenth Amendments, United States Constitution and/or Article I, Section 17 of the Florida Constitution. The recommendation by this jury is entitled to no weight because the jury was unconstitutionally selected (Point II) and was otherwise improperly influenced by the media (Point III) and by deliberate prosecutorial misconduct. (Point IV). Error is affirmatively reflected in the court's sentencing order. The uncontroverted mitigation in this case requires that the death sentence be reversed and that a sentence of life imprisonment be imposed.

POINT II: These jurors were required to set aside firm opinions that were formed after discussions with other citizens and exposure to extensive and prejudicial media coverage. The court's perception that uncooperative defense attorneys were asking silly questions in what he characterized from the bench as "fishing expeditions" and an "idiotic" procedure agreed to by him "only" to avoid reversible error dispels any presumption that the bias of these jurors was adequately scrutinized by the court. The denial of sequestered voir dire resulted in jurors being unfairly exposed to prejudicial and influential opinions of their peers. Some jurors were improperly excused - others who should have been removed served on the jury because the defendants exhausted their peremptory challenges and were refused more. In short, jury selection was unconstitutional and unfair, and as a whole the jury composition was tainted.

POINT III: Also unfairly prejudicial was the positioning of the television camera and/or the victims and their families next to jurors over repeated objections. The television camera was unduly distracting and unnecessarily positioned next to jurors contrary to established rules and in a manner that would call undue attention to the victims and their families during presentation of testimony. The positioning of the television camera, the victims and their families denied a fair trial, due process and a reliable sentencing recommendation in violation of the state and federal constitutions.

POINT IV: Prosecutorial misconduct denied due process, a fair trial and a reliable sentencing recommendation. The Clerk assigned this case at the improper, *ex parte* request of the State Attorney. The lack of any sanction for such misconduct resulted in the case coming to trial while community emotions remained stirred by extensive media coverage in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. The ruling allowed the deliberate misconduct to continue. Bad faith of the prosecutor is shown by a penalty phase opening statement that transgressed all bounds of propriety. The State improperly called the father of the victim to the witness stand to evoke feelings of sympathy, emphasized the young age of the victims and then improperly argued that age is an aggravating consideration. The bad faith of the State Attorney and his chief assistant require that an appropriate sanction now be imposed and that a new penalty phase be provided if this Court declines to impose a life sentence as set forth in Point I.

POINT V: Defense counsel moved in writing for the jury to receive a special jury instruction during the guilt and penalty phase concerning definition of terms. Counsel further objected to the standard penalty phase instructions and proffered in writing requested instructions to be given during the penalty phase. All requests were denied. The omission of these specially requested instructions denied due process, a fair trial and a reliable sentencing recommendation contrary to Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

POINT VI: The death penalty is unconstitutional on its face and as applied because this Court, rather than the legislature, has provided the substance of the terms set forth in Section 921.141, in violation of the separation of powers doctrine. The statutory aggravating factors are too broad to sufficiently narrow the class of persons eligible for the death penalty. Additionally, the denial of notice as to which statutory aggravating factor(s) the state seeks to prove violates the notice and due process requirements of the state and federal constitutions. The "outweigh" burden and standard instruction permitting imposition of the death penalty based on a preponderance of the evidence unduly dilutes the state's burden to prove beyond every reasonable doubt that the death penalty is warranted in a particular case. Because Florida's death penalty violates the state and federal constitutions, the death sentences should be vacated and sentences of life imprisonment with no possibility of parole for twenty-five years imposed.

POINT I

EXECUTION OF THIS SIXTEEN-YEAR-OLD INFANT OFFENDER VIOLATES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At some point, irrespective of the heinousness of the crime or presence of statutory aggravating factors, it necessarily is cruel and unusual punishment to execute infant offenders below a certain age. Unless expressly authorized by the death penalty statute, execution of infantsa who are fifteen-years-old or younger at the time of the crime is cruel and unusual punishment barred by the Eighth and Fourteenth Amendments under ***Thompson v. Oklahoma***, 487 U.S. 815 (1988). The ***Thompson*** court did not decide whether it is cruel and unusual punishment as a matter of federal constitutional law to execute infants who were sixteen-years-old or older when their crimes were committed because Thompson was only fifteen-years-old at the time of his crime.

After ***Thompson***, this Court upheld a death sentence for a seventeen-year-old offender in ***LeCroy v. State***, 533 So.2d 750 (Fla. 1988), but in doing so carefully noted, "As the ***Thompson*** court did, we limit our decision to the case at hand and hold that there is no constitutional bar to the imposition of the death penalty on defendants who are seventeen years of age at the time of commission of the offense." ***LeCroy***, 533 So.2d at 758. Thus, as a matter of state constitutional law, question remains open as to whether imposition of the death penalty on sixteen-year-old offenders categorically violates proscriptions against cruel and/or unusual punishments.

Appellant is aware of two relevant cases pending before this Court that concern the constitutionality of a death sentence for infants, to wit, ***Allen v. State***, #79,003 (15-years-old) and ***Morgan v. State***, #75,676 (16-years-old). Appellant here adopts the arguments made by those defendants in reference to whether imposition of a death sentence committed by a sixteen-year-old child violates Article I, Section 17 of the Florida Constitution and/or the Eighth and Fourteenth Amendments to the United States Constitution.

In ***Tillman v. State***, 591 So.2d 167, 169, n.2 (Fla. 1991), this Court held that the Florida Constitution prohibits "cruel *or* unusual punishment." The significance is that, under Article I, Section 17, separate determinations must be made as to whether electrocution of sixteen-year-old offenders as a class is "cruel," and also whether the execution of ***this*** sixteen-year-old offender is "unusual." The standard of whether a punishment is "cruel or unusual" is malleable - it changes as the standards of civilized society evolve. Examples are abundant. Dungeons are a thing of the past. Racks are obsolete. No longer are children in England hanged in public squares for being pickpockets. No longer are sailors keel-hauled. No longer are women doused or burned at the stake for being a gossip or suspected witch. See, ***"The Wonders of the Invisible World"***, Cotton Mather (1693). No longer are rapists executed when a human life has not been taken. ***Coker v. Georgia***, 433 U.S. 584 (1977); ***Buford v. Florida***, 403 So.2d 943 (Fla.1981). See, ***Enmund v. Florida***, 458 U.S. 782, 800 (1982).

ELECTROCUTION OF ALL SIXTEEN-YEAR-OLD INFANTS IS CRUEL

Appellant asserts that electrocution is a cruel and unusual punishment. That aside, whether a sanction is "cruel" encompasses more than the manner in which life is extinguished. The question also involves the purpose(s) for inflicting the punishment. If punishment does not serve any legitimate societal purpose, it is unjustified, excessive, and cruel. Rehabilitation is a legitimate purpose of punishment, yet there can be no rehabilitation of the offender when the death penalty is imposed. Thus, rehabilitation necessarily cannot serve as justification for imposition of a death penalty:

> Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.

Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1989). That said, a *potential* for rehabilitation presents a compelling reason not to impose a death penalty. See, ***Francis v. Dugger***, 514 So.2d 1097, 1098 (Fla. 1987) ("The potential for rehabilitation constitutes a valid mitigating factor."); ***Furman v. Georgia***, 408 U.S. 238, 306 (1978)(Stewart, J., concurring) ("death penalty denotes the "absolute renunciation of all that is embodied in our concept of humanity.").

It is widely recognized that, to some extent, behavior is learned. Legislatures and courts have expressly recognized that childhood years are "formative" and that "minors often lack the

experience, perspective and judgment expected of adults." ***Bellotti v. Baird***, 443 U.S. 622, 635 (1979). Execution of an infant during "formative" years constitutes a premature abandonment of the goal of rehabilitation and is otherwise cruel because it punishes the child for not *yet* developing the attributes that society demands without providing a full and fair opportunity for the child to develop those traits that society demands of its adult citizens.

The two justifications offered for capital punishment are "retribution and the deterrence of capital crimes by prospective offenders." ***Gregg v. Georgia***, 428 U.S. 153, 183 (1976) (Stewart, Powell, Stevens, JJ.). In ***Thompson***, a plurality of the United States Supreme Court concluded that the death penalty has no deterrent value for infant offenders because "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually non-existent." ***Thompson***, 108 S.Ct. at 2700. Simply said, deterrence is not a legitimate reason to execute infant offenders.

Society's interest in retribution itself cannot justify a death sentence, for if it does, the question is reduced to Biblical terms of "an eye for an eye" and the death penalty becomes an automatic sanction to be imposed on adults or children alike whenever a murder has been committed. ***Woodson v. North Carolina***, 428 U.S. 280 (1976). See, ***Enmund v. Florida***, 458 U.S. 782, 800 (1982) ("retribution as justification for executing (offenders) very much depends on the degree of culpability.").

IS EXECUTION OF THIS SIXTEEN-YEAR OLD INFANT UNUSUAL?

Under the uncontroverted facts of this case, imposition of the death penalty is disproportionate and unusual punishment for a 16-year-old infant who has no prior record and who shows great potential for rehabilitation. Florida's current death penalty was enacted in 1973. Since then, ten[7] 17-year-old offenders have been sentenced to death, three 16-year-old offenders (including Jeffery Farina), two 15-year-old offenders, and no offender under fifteen has been sentenced to death. A review of those cases shows that a death sentence is unusually disproportionate for Jeffery Farina.

REVIEW OF DEATH-SENTENCED SEVENTEEN-YEAR-OLD INFANT OFFENDERS

Seventeen-year-old Larry Thompson was sentenced to death in 1974 after stabbing a man to death during a robbery. The jury unanimously recommended a life sentence. Thompson had no prior criminal record. Noting that "it was the legislative intent to extract the penalty of death for only the most aggravated and the most indefensible of crimes," this Court ordered imposition of a life sentence. ***Thompson v. State***, 328 So.2d 1, 5 (Fla. 1978).

Seventeen-year-old Willie Simpson was sentenced to death for the first-degree murder of a police officer. Simpson's jury recommended the death penalty. Simpson was awarded a new trial in ***Simpson v. State***, 418 So.2d 984 (Fla. 1982) and subsequently pled guilty to second-degree murder.

At seventeen, Paul Magill robbed a store and abducted, raped and murdered the clerk by shooting her three times with a .44

---

[7] Affidavit of Professor Michael Radelet, Appendix D.

caliber pistol. The matter was first remanded for resentencing due to a defective sentencing order which failed to articulate what mitigation was found by the court. ***Magill v. State***, 386 So.2d 1188 (Fla. 1980). The court again sentenced Magill to death, finding four aggravating and three mitigating factors. The death sentence was upheld by this Court, ***Magill v. State***, 428 So.2d 649 (Fla. 1983), but Magill was sentenced to life after the Eleventh Circuit vacated the death sentence because counsel had been ineffective and non-statutory mitigating evidence had been improperly excluded. ***Magill v. Dugger***, 824 F.2d 879, 889 (11th Cir. 1987) (fact that murder may have been impulsive act not likely to be repeated is compelling mitigating factor.).

In 1980, a resident of a rooming house was stabbed to death by Robert Peavy during a robbery and burglary. Peavy was sentenced to death pursuant to a death recommendation by the jury. Resentencing was ordered because one of four aggravating factors was improperly weighed in imposing the death sentence. ***Peavy v. State***, 442 So.2d 200 (Fla. 1983). Peavy received a life sentence.

After stealing a pistol during an earlier burglary, 17-year-old Livingston robbed a gas station and shot at two women, killing one. Livingston was sentenced to death in accordance with a jury recommendation. This Court ordered that he be resentenced to life, noting, "The record discloses several mitigating factors which effectively outweigh the [2] remaining valid aggravating circumstances." ***Livingston v. State***, 565 So.2d 1288, 1292 (Fla. 1990).

Wilburn Lamb was sentenced to death in accordance with a jury recommendation after he beat a home-owner to death during a burglary and was convicted of first-degree murder. Noting that the trial court may have improperly failed to weigh valid non-statutory evidence, this Court reversed for resentencing. ***Lamb v. State***, 532 So.2d 1051 (Fla. 1988). Lamb was sentenced to life.

In ***Lecroy v. State***, 533 So.2d 750 (Fla. 1988), this Court upheld imposition of a death sentence on a defendant who was two-months away from being 18-years-old when he killed two people on a camping trip. The jury had recommended life for the murder of the man and death for the murder of his wife. Noting that the question of whether the Legislature "consciously considered and decided that persons sixteen years of age or younger may be subject to the death penalty" was not before the Court, ***Lecroy***, 533 So.2d at 757, this Court expressly left open that question open and affirmed LeCroy's death sentence.

In ***Hegwood v. State***, 575 So.2d 170 (Fla. 1990), a death sentence for a seventeen-year-old offender was reduced to life imprisonment under facts comparable to those of the case now before the court. There, three employees of a Wendy's restaurant were killed by Hegwood during a robbery. His jury recommended life. The judge imposed death, finding six statutory aggravating factors and **one** mitigating factor (age). Even though *three* restaurant employees were killed and six aggravating circumstances were found, this Court found a reasonable basis for the life recommendation as follows:

> Besides knowing that Hegwood was seventeen years old when he committed the instant crimes, the jury heard testimony from family members and other people about Hegwood's being a generally good and obedient child who had an unfortunate and impoverished childhood. A great part of Hegwood's ill-fated life appears to be attributable to his mother, described by witnesses as a hard-drinking, lying drug addict and convicted felon who tended to abandon her children and who turned Hegwood in and testified against him, apparently motivated by the reward in this case. Based on the mental health expert's testimony the jury may have believed that Hegwood was mentally or emotionally deficient because of his upbringing.

Hegwood, 575 So.2d at 173.[8]

In ***Ellis v. State***, 18 FLW S417 (Fla. July 1, 1993), a seventeen-year-old offender was granted a new trial following imposition of two death sentences in accordance with 8-4 death recommendations by the jury. This Court expressly addressed the trial courts' inconsistency in weighing the age factor:

> We believe the proper approach in cases involving murders committed by minors is that used in *LeCroy*. Whenever a murder is committed by one who at the time was a minor, the mitigating factor of age ***MUST*** be found and weighed, but the weight can be diminished by other evidence showing unusual maturity. It is the assignment of weight that falls within the trial court's discretion in such cases.

Ellis, 18 FLW at 420 (emphasis added).

---

[8] The result in ***Hegwood*** compels that a life sentence be imposed in the instant case, where the jury recommendation is tainted, where substantially the same non-statutory mitigating considerations exist, where Jeffery Farina was a year younger than Hegwood when the crime was committed, where only one person died, and where another compelling statutory mitigating consideration exists in Jeffery's case. (No significant prior criminal history).

In ***Bonifay v. State***, 18 FLW 464 (Fla. September 2, 1993), this Court ordered a new penalty phase for a seventeen-year-old offender who had, consistent with a jury recommendation, been sentenced to death for a first-degree contract murder. Because the trial court improperly found the murder to be heinous, atrocious or cruel and the weight given that factor could not be determined, a new penalty phase was required.

REVIEW OF DEATH-SENTENCED SIXTEEN-YEAR-OLD INFANT OFFENDERS

As shown by the foregoing cases for seventeen-year-old offenders, a death sentence for Jeffery Farina is unusual under these facts. The disproportionality is even greater when his death sentence is contrasted against other death-sentenced, sixteen-year-old infant offenders. There are only two, Henry Brown and James Morgan.

Sixteen-year-old Henry Brown and two others stole an automobile after beating, shooting at, and then drowning its owner. Finding only one mitigating consideration (age), the trial court overrode a life recommendation and sentenced Brown to death. This Court reversed the death sentence and remanded for imposition of a life sentence. ***Brown v. State***, 367 So.2d 618 (Fla. 1979).

James Morgan was sixteen-years-old in 1977. He has since been sentenced to death for his crime three times, and each time his conviction has been reversed and the matter remanded for retrial. ***Morgan v. State***, 392 So.2d 1315 (Fla. 1981); ***Morgan v. State***, 453 So.2d 394 (Fla. 1981); ***Morgan v. State***, 537 So.2d 973 (Fla. 1981). This Court has not passed upon the propriety of a

death sentence for Mr. Morgan because, each time, he has received a new trial. The description of his crime provided by this Court, however, is pertinent here:

> Morgan was sixteen years old at the time of the incident, of marginal intelligence, unable to read or write, had sniffed gasoline regularly since he was four, and was described as an alcoholic. He brutally murdered an elderly woman while at her home to mow her yard, after entering the house to telephone his father. Inside the home, appellant killed the woman by crushing her skull with a crescent wrench, stabbing her face, neck, and hands numerous times, and also biting her breast and traumatizing her genital area. According to Morgan, he killed the woman because he thought she was writing his mother about his drinking. There is no dispute over appellant's commission of the homicide; the single issue is the appellant's sanity. . . .

Morgan, 537 So.2d at 974. It is within the foregoing framework, i.e., substantially similar cases, that this Court must determine whether it is "unusual" under Article I, Section 17 for this sixteen-year-old infant offender to be sentenced to death based on the facts and circumstances of his case.

This jury's recommendation is entitled to no weight in this comparison. The composition of this jury was unconstitutional and its sentencing recommendation process was unfairly tainted by prejudicial influences. (Points II & III). The recommendation was likely affected by intentional prosecutorial misconduct and argument, left uncorrected by the court despite timely objections, that age could be rejected as mitigation and otherwise viewed as an aggravating consideration. (Point IV). The jury instructions were vague and faulty. (Point V). It cannot confidently be said that this recommendation was made by a fair and impartial jury.

The proportionality analysis requires this Court to compare the facts of this case with those of similar cases to determine whether imposition of the death penalty here is unusual. The death penalty is reserved for the most aggravated and least mitigated of serious offenses. *Fitzpatrick v. State*, 527 So.2d 809, 811 (Fla. 1989). Several factors were improperly weighed in imposition of this death sentence. The court found that this murder was especially heinous, atrocious or cruel:

> The court finds that this factor has been established beyond a reasonable doubt. The terror that the victims of this robbery/murder suffered was obvious from the evidence introduced at trial and at the penalty phase. Testimony was presented that the victim in this case begged for her life and that she was certainly aware of her impending murder and suffered the agony of contemplating her death as the four victims were ushered into the small back room where they were lined up for execution by the defendant and his brother. As the shots rang out as each prior victim suffered and cried out in pain, the terror inflicted on Michelle Van Ness in the contemplation of her own inevitable pain and demise is obvious. The horror suffered by the victim as she contemplated her own death imprisoned with her fellow victims in the cold cramped freezer chosen as the spot for execution establishes this factor beyond a reasonable doubt.

(R3095) (Appendix A).

The evidence supports neither the facts recounted by the sentencer nor its "obvious" conclusions. The employees were not "lined up" but were instead shot immediately upon entering the freezer. Before that, they were given repeated assurances they would not be harmed. Mason and Robinson believed blanks were being

fired and experienced no pain when shot. Ms. Van Ness was shot once and unconsciousness was immediate. The reference that Ms. Van Ness "begged for her life" apparently comes from the prosecutor's improper opening statement. (TR585-86).

A statutory aggravating factor must be proved beyond a reasonable doubt. To establish the HAC aggravating factor, the State must prove beyond a reasonable doubt that a victim's murder was "**both** conscienceless or pitiless **and** unnecessarily torturous to the victim." ***Richardson v. State***, 604 So.2d 1107, 1109 (Fla. 1992) (emphasis added). See, ***Cochran v. State***, 547 So.2d 928, 931 (Fla. 1989) ("Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply."). Cases that uphold the use of this factor where a defendant transports a victim for a great distance or has held a victim captive for some appreciable time are inapposite here because the fear of Ms. Van Ness and the other victims was an element of the robbery and the "force" attending the robbery was not excessive.

Specifically, the employees were repeatedly reassured that they would not be hurt. (TR118;337) They were allowed to smoke when they asked to do so. The men employees, tied by Jeffery, were not tied too tightly. (TR117). Anthony seemed to be in charge. (TR111;372). He was congenial, and the shooting came as a complete surprise. (TR346-48). The threat that was associated with the robbery was not excessive and in fact appears to have been minimal.

The use of this factor under these facts is controlled by and must be rejected based on the analysis set forth in ***Bonifay***, supra. The violence that occurred was not intentionally done in an "unnecessarily torturous" manner, and this factor should not apply because there are "no additional acts of torture or harm." See, ***Mendyk v. State***, 545 So.2d 846, 850 (Fla. 1989) (murder HAC where defendant "kidnapped, repeatedly abused, sexually molested, bound and gagged, and literally toyed with the victim.").

Lay people would, due solely to the age of the victims, consider this event to be "especially heinous, atrocious and cruel." Indeed, the responses of the jurors during voir dire reflect that the young age of the victims was why the crime was "a horrendous deal" (R2062), why they were "devastated" and why "it is upsetting for the entire community" for a young girl to be killed. (R1215). The improper questions and argument of the State over timely objection made the victims' youth a feature that necessarily was weighed by the jurors contrary to the legal definition of the statutory factor in violation of Article I, Section 17 and the Eighth and Fourteenth Amendments to the United States Constitution. See, ***Espinosa v. Florida***, 112 S.Ct. 2926 (1992) ("aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.") (emphasis added). It was constitutional error for this consideration to be so used over objection.

The court found that this murder was cold, calculated or premeditated, with no pretense of moral or legal justification:

> The discussion between the brothers prior to the killing and the execution style in which the attempted murders and murder was perpetrated without any need to do so to accomplish the robbery all serve to demonstrate a cold, calculated premeditate (sic) murder in which the capital felony was perpetrated. The defendant with his brother sought to eliminate all witnesses. The victims were moved to a small isolated and easily controlled portion of the restaurant where they were arranged in a manner to limit the possibility of escape during the execution process that followed. But for the grace of God more would have died as the defendant and his brother employed gun and knife to carry out their plan. The purpose and calculated nature of the attack is supported by the admissions of the defendant and his brother as they discussed that their plan might have been successful had they simply slit the throat of all the victims.

(R3095). The reference to the defendants' statements comes from the questions of the prosecutor - not competent testimony:

> Q: (Tanner) You also reviewed the tapes that were made of Jeffery and Anthony when they were having discussions in the back seat of the police car and didn't know they were being recorded, didn't you?
>
> A: (Dr. Krop) Yes.
>
> Q: And do you recall in one of the tapes where Jeffery, in response to one of the questions from Anthony or Henderson while Anthony was present said, when he's talking about his confession to his statement, earlier statement to the police officer, said, I told her exactly what happened inside. We got the cash, TJ called me in the office, they were in the cooler. And he said, what do you want to do. It's your call from here, it's your show. And then Jeffery says, I thought for a minute and then I stood -- then I looked at TJ and said, I'm going to shoot them.

> (Powers) Your Honor, I'm going to object. It's assuming facts not in evidence. Outside the scope.
>
> Court: Objection overruled.
>
> (Mott) I would like, for the record, to interpose an objection as well, on the same grounds.
>
> Court: Overruled.
>
> Q: Jeffery said, I'm going to shoot them, and Anthony said, when. He said, I said, you tell them to get in the freezer. He told them to get in the freezer and I shot them. That doesn't sound like a panic situation, does it?
>
> A: No. Not -- not in terms of that particular discussion.

(TR880-81). Even assuming that the conversation as vaguely related by the prosecutor is to be considered, it shows a sudden impulse to shoot the employees instead of deliberate, heightened premeditation to kill them. See, ***Maulden v. State***, 617 So.2d 298, 303 (Fla. 1993) (not CCP where murders were not product of "deliberate plan formed through calm and cool reflection.").

The sentencer erroneously found that the murder was committed to avoid arrest. (Appendix A). The sentencer's express reference in the "CCP" finding to an intent to "eliminate all witnesses" shows improper doubling of aggravating considerations. See, ***Castro v. State***, 597 So.2d 259, 261 (Fla. 1992) (sentencer cannot consider same aspect of offense to establish more than one aggravating factor). To properly find the CCP factor, the State must prove beyond a reasonable doubt a pre-existing plan to kill the victim - a pre-existing plan to commit a felony does not show heightened premeditation to commit murder. See, ***Geralds v. State***, 601 So.2d 1157 (Fla. 1992).

Jeffery Farina's secretly recorded statements show that he has no real recollection of the incident (Appendix E), and that he only later rationalized that he shot them for that reason:

> Q: (Mott) And what did he report to you?
>
> A: (Dr. Krop) He reported to me that, as I think I testified earlier, that from what he could recall, the only discussion was, if someone had charged him or attacked him in the midst of the robbery. He indicated that essentially he did not recall any discussion of elimination of witnesses and that he made afterward was basically a statement that he made in retrospect, thinking back about why he did it, that could be the only reason that could possibly be in any way rational. But he, himself, does not recall actually thinking in terms of witness elimination.

(TR886). Where the victim is not a law enforcement officer, strong proof of the defendant's motive is required that the dominant or sole motive for the murder was the elimination of witnesses. See, ***Perry v. State***, 522 So.2d 817, 820 (Fla. 1988); ***Caruthers v. State***, 465 So.2d 496 (Fla. 1985).

Another factor improperly applied by the trial court in this instance was that the defendant was previously convicted of a violent felony. Appellant recognizes this Court has rejected the argument that contemporaneous violent felonies against other victims may not be used to find this factor, but respectfully asks this Court to reconsider. Specifically, Section 921.141(5)(b), Florida Statutes (1991) states, "Aggravating circumstances shall be limited to the following: The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The incongruity of having a defendant

with no history of significant criminal history yet "previous" convictions of a capital or violent felonies suggests that this ambiguous factor is being used to gauge defendants' culpability in a manner unintended by the legislature. See,***Ellis v. State***, 18 FLW S417, 421 (Fla. July 1, 1993)(Kogan, J., dissenting).

As previously argued, the sentencing recommendation is invalid. The court's factual findings reflect faulty weighing of statutory aggravating considerations. That aside, the sentencer's improper treatment and weighing of uncontroverted mitigating evidence in and of itself requires reversal of this death sentence. Compelling statutory and non-statutory mitigating considerations exist, but the sentencer erroneously concluded they were of "little significance" because of the "magnitude" of the crime. This was error.

There are two distinct areas of mitigation, one involving the character or record of the defendant and the other involving the circumstances of the offense:

> "Mitigation" is defined broadly as any aspect of the defendant's character or record and any of the circumstances of the offense that reasonable may serve as a basis for imposing a sentence less than death.

Campbell v. State, 571 So.2d 415, 419, fn. 4 (Fla. 1990).

These two areas - facts concerning the crime and facts concerning the defendant - must be separately analyzed to achieve consistent and individualized imposition of the death penalty. This sentencer's myopic focus on the circumstances of the offense was arbitrary and contrary to Article I, Section 17 and the Eighth

and Fourteenth Amendments. The uncontroverted mitigation existing here prevents this case from fairly being categorized as one of "the least mitigated" of serious offenses.

An offender's age is a statutory mitigating factor. §921.141(6)(g), Fla.Stat. (1991). This sentencer found that statutory mitigating factor applied but *expressly* gave it little weight, erroneously reasoning that:

> it is of little significance in light of the magnitude of the defendant's case. The defendant was sixteen at the time of the crime but held a job and attempted to support himself. He was planning on moving into his own apartment to live as an adult and there is no indication that his age imposed upon his ability to understand the responsibilities of following the law as well as understanding the criminality of his conduct.

(R3096). This sentencer ruled, affirmatively and clearly, that the age of sixteen has "little significance" because Jeffery "held a job and attempted to support himself." Under that logic, a child who, as here, was never in trouble, who got a job and who made genuine efforts to operate within expected norms is more culpable for impulsively doing something incredibly stupid than is the sixteen-year-old offender who constantly breaks the law, steals rather than works and stays home living off their parents' labors. Infancy has tremendous mitigating worth. See, ***Johnson v. Texas***, 509 U.S. ___, 125 L.Ed.2d 290, 306 (June 24, 1993) (child's lack of maturity and underdeveloped sense of responsibility "often result in impetuous and ill-considered decisions."); ***Eddings v. Oklahoma***, 455 U.S. 104, 116 (1982). Society has historically given immense mitigating deference to infancy - this is as necessarily shown by

the dearth of death sentences that have been imposed on infants who commit a first degree murder. This sentencer's reasoning is wrong, arbitrary and contrary footnote 7 of ***Ellis***, supra, which expressly notes that full weight must be afforded an infant's youth in the absence of record evidence showing *unusual* mental or emotional maturity. ***Ellis***, 18 FLW at S420, 421 fn.7. (emphasis added). The distortion here of valid mitigating considerations into reasons not to give full weight to a statutory mitigating factor violates the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution.

Jeffery Farina has no significant history of prior criminal activity, but the sentencer once again expressly gave statutory mitigation "little mitigating significance in light of the grievous nature of this capital felony as well as the other numerous violent felony offenses perpetrated by the defendant in this case. (R3095; Appendix A). This sentencer again arbitrarily refused to separately consider the record of the accused because of conduct at the time of the crime, and the court's reasoning points out why the aggravating factor concerning previous convictions of a capital or violent felony should not enter into the equation when that factor is based on crimes contemporaneously committed at the time of a murder, even if on other victims.

Specifically Section 921.141(6)(a) draws attention to the defendant as an individual, focusing on his or her prior criminal activity as an indication of the defendant's true character. See, ***Bello v. State***, 547 So.2d 914, 917-918 (Fla. 1989) (improper to

reject lack of significant history of criminal activity because of contemporaneous crimes). It is truly illogical to diminish the importance of a defendant's lack of prior criminal behavior solely because he or she committed the crime for which sentencing is pending, yet this statutory mitigating consideration was expressly given "little" weight by the sentencer because serious crimes were committed at the time of the murder. That reasoning is flawed and constitutes an arbitrary refusal by the sentencer to consider the valid mitigating characteristics of the individual offender contrary to the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution.

Another mitigating consideration overwhelmingly proved but found by this sentencer "to be of little weight when viewed against the defendant's crimes" was a dysfunctional home and an abusive childhood. (R3097). Being an abused child is compelling mitigation:

> . . . The trial court found [childhood abuse] to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find this analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse *during the defendant's formative childhood* and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990)(emphasis added).

If a nine year gap cannot attenuate the mitigating worth of an abusive childhood, how much weightier is an abused childhood when the incident was committed by an adolescent child during the years of "formative childhood" in the midst of such abuse? As in ***Nibert***, 574 So.2d 1059, 1063 (Fla. 1990), this sentencer failed to properly weigh the mitigation considerations by focusing on the fact that a serious crime had occurred rather than the individual traits of the defendant. Under the reasoning employed here, any sentencer could address each mitigating consideration and reject it because a serious murder has been committed, resulting in arbitrary and capricious imposition of the death penalty. But see, ***State v. Dixon***, 283 So.2d 1, 8 (Fla. 1973) (discrimination or capriciousness cannot stand where reason is required).

This sentencer found a potential for rehabilitation but summarily rejected its mitigating value because, again, serious crimes had occurred:

> The defendant's mental health expert suggests the defendant is capable of rehabilitation, yet his history and pattern of violence suggests otherwise rendering that opinion questionable. This court acknowledges that this defendant can be educated when he accepts education and can maintain employment. While having these opportunities he chose to rob and murder defenseless innocent young adults without regard for their pain and suffering.

(R3097). A potential for rehabilitation is firmly recognized as a valid mitigating consideration that a sentencer cannot refuse to consider or be prevented from considering. See, ***Skipper v. South Carolina***, 476 U.S. 1, 7 (1986) ("a defendant's disposition to make

a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination."). The instant finding is ambiguous and it otherwise fails to show what if any weight was accorded the great potential for rehabilitation which is conclusively shown by the defendant's good employment record at a very young age, his average intelligence, an ability to be educated and the absence of a history of any prior criminal activity. (R3097).

Another mitigating consideration here is uncontradicted evidence of Jeffery Farina's remorse. Genuine remorse is a valid mitigating consideration. ***Smalley v. State***, 546 So.2d 720 (Fla. 1989). The evidence of Jeffery Farina's remorse was questioned by this sentencer as follows:

> The mental health expert opined that the defendant felt remorse and accepted responsibility seeking to lessen the consequence to his brother and accept punishment for his deeds. The defendant's alleged remorse for the killing is rendered questionable by his own statements made close in time to the offense.

(R3097; Appendix A).

It is unclear whether this sentencer found remorse to be a valid mitigating consideration because the court curiously[9] stated that the defendant's remorse "is rendered questionable by his own statements made close in time to the offense." Jeffery Farina clearly said in the secretly recorded statements to his brother that he was truly sorry Michelle died:

---

[9] The sentencer apparently attributes Anthony's "we should have sliced their fucking throats" statement to Jeffery. (State's Exhibit 58; TR-301).

> Anthony: What'd you feel? What did you tell him?
>
> Jeffery: I told him the truth, I felt nothing. When it happened, I felt nothing. *Now I'm sorry Michelle died*. You know? But there's nothing I can do about it. I thought Kim was the one that was going to die. Didn't you?

(State's Exh. 58; TR299). He expressed remorse to visitors at the jail (TR916-17) and later to the trial court. (TR2139-40). The offensive statements contained in State's Exhibit 58 are those of Jeffery's brother, Anthony, and the sentencer's confusion suggests that the court also overlooked the influence that Anthony had on Jeffery. Anthony, older and a drug user, came up with the idea to rob the Taco Bell to help out the financial problems their family was having. (TR 880).

Comparison of this case to others where the death penalty has been upheld on infant offenders shows that the death penalty is disproportionate. It is clearly unusual to sentence to death an infant offender who is sixteen years old in the absence of evidence of unusual maturity and prior criminal activity. Comparison of this case to other cases involving a death-sentenced infants shows that, as a matter of law, this death sentence is disproportionate. It is respectfully submitted that it is cruel and unusual punishment to execute 16 year old offenders as a class. As in ***Livingston***, 565 So.2d at 1292, this Court need not decide that constitutional issue because execution of this offender is unusual and disproportionate. Accordingly, the death sentence must be reversed and Jeffery Farina sentenced to life imprisonment.

POINT II

THE CONVICTIONS AND SENTENCES MUST BE REVERSED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 DUE TO SERIOUS ERRORS WHICH UNDERMINE CONFIDENCE IN THE FAIRNESS AND IMPARTIALITY OF THIS JURY

Perhaps the greatest protection guaranteed citizens by the state and federal constitutions is the right to an impartial jury. In Florida, a defendant charged with a capital offense has a fundamental[10] entitlement to twelve[11] impartial jurors.

> Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon others can be quantitatively measured.

Hicks v. City of Tatonga, Okl., 942 F.2d 737, 748 (10th Cir. 1991). A biased juror denies the basic rights to due process, a fair trial, an impartial jury and a reliable sentencing recommendation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. This type error is *not* subject to a harmless error analysis. ***Sullivan v. Louisiana***, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182 (1993).

There can be no doubt that a legitimate concern existed as to whether fair and impartial jurors to hear this matter could be selected from the Daytona Beach area. These crimes occurred May 9, 1992. Jury selection began just six months later on November 9,

---

[10] Florida Constitution, Article I, Sections 9, 16 and 22; United States Constitution, Amendments V, VI and XIV.

[11] Section 913.10, Florida Statutes (1991)

1992. During those six months, local media articles featured the incident, the burial of Ms. Van Ness, the effect the crimes was having on the community and the families, the rehabilitation of the victims, the apprehension of the defendants, and the litigation that preceded jury selection.[12]

---

[12] Typical captions from the articles appended to counsels' Motions for Change of Venue include the following:

"RESTAURANT SHOOTING VICTIM DIES - 16-YEAR-OLD, TWO OTHERS CHARGED WITH MURDER"
Front page headline, with subcaptions, "Remembering a friend" and "Family, friends mourn death of teenage worker" with picture of crying youth being comforted and a picture of Ms. Van Ness
Daytona Beach News Journal, May 11, 1992 (R2266)

"PLANS SET FOR TEENAGE VICTIMS FUNERAL"
Front page headline, with subcaption, "Suspect makes statement admitting crime"
Daytona Beach News Journal, May 12, 1992 (R2271)

"TAPES GIVE 2 VIEWPOINTS OF TACO BELL BLOODSHED"
Subcaption, "1 suspect said they wanted no witnesses"
Orlando Sentinel, May 13, 1992 (R2265)

"COMMUNITY SAYS FAREWELL TO SLAIN TEEN"
With picture of mourning friends at gravesite.
Orlando Sentinel, May 15, 1992 (R2263)

"MORE THAN A THOUSAND MOURN MICHELLE"
Headline, with pictures of Michelle Van Ness and funeral, with subcaption "Saying Goodbye to a Friend"
Daytona Beach News Journal, May 15, 1992 (R2273)

"TACO BELL STABBING SURVIVOR RECOUNTS HER NIGHT OF TERROR"
Headline with picture of Kimberly Gordon in hospital bed and subcaption, "Please don't kill us! We don't want to die!"
Daytona Beach New Journal, May 17, 1992

"AFTERMATH OF LOCAL TEEN'S SHOOTING DEATH" -
(letters to the editor)
Daytona Beach News Journal, May 17, 1992 (R2260)

"TEEN ROBBERY SURVIVORS HOME FROM THE HOSPITAL" -
Subcaption, "A beautiful angel" with picture of Michelle Van Ness with her brother.
Daytona Beach News Journal, May 18, 1992 (R2264)

"SURVIVORS REBOUND FROM ROBBERY"
Subcaption, "Not only must the 3 teens recover from their injuries, but they also must deal with the death of a co-worker and the robbery suspects' trial."
Daytona Beach News Journal, July 9, 1992 (R2277)

"SHOOTING SURVIVORS TRY TO REBUILD SHATTERED LIVES"
Headline, with subcaption, "But the teen' physical, emotional scars remain" with pictures and comments of Gary Robinson, Derek Mason and Kimberly Gordon.
Daytona Beach News Journal, August 2, 1992 (R2268)

"NIGHTMARES, ANGER LINGER IN WAKE OF SHOOTING"
Subcaptions: "I take things day by day;"
"I don't even like looking at the building;"
"I get scared and jumpy at night"
Daytona Beach News Journal, August 2, 1992 (R2269)

"MURDER SUSPECTS: CONFESSION MADE WHILE HIGH ON CRACK."
Daytona Beach News Journal, September 10, 19922 (R2543)

"SUSPECTS CONFESSIONS QUESTIONABLE"
"Attorneys for 3 suspects in the Taco Bell murder case say their clients' rights were violated."
Daytona Beach News Journal, September 10, 1992 (R2542)

"JUDGE: TACO BELL TRIO'S CONFESSIONS ALLOWED IN COURT"
Daytona Beach News Journal, September 18, 1992 (R2541)

"TACO BELL SLAYING TRIAL MAY MOVE"
"A state circuit judge says that if an impartial jury isn't seated in Volusia a new trial will begin in Jacksonville."
Daytona Beach News Journal, October 22, 1992 (R2537)

"JUDGE SWITCH WON'T AFFECT MURDER TRIAL."
Subcaption, "Because the prosecutor handpicked a judge, the defense argued, his office should be disqualified."
Daytona Beach News Journal, November 7, 1992 (R2532)

"ANGRY JUDGE SCOLDS DEFENSE, TAKES HIMSELF OFF MURDER TRIAL."
The Orlando Sentinel, November 10, 1992 (R2529)

The court was insensitive to expressions of bias. For six months, the media had sensationalized the incident and citizens had discussed with their spouse and other citizens what had happened and what should happen to the offenders. Challenges to jurors who concluded that "horrendous" and "terrible" crimes were committed were summarily disregarded by the judge with comments such as, "He can presume that. I read him an indictment that says there was." (R1901) or, "I told them that during the course of the trial. I think that question is a little bit silly, to be honest with you. . . ." (R2055-56).

"A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." ***Hill v. State***, 477 So.2d 553, 556 (Fla. 1985). See, ***Irvin v. Doud***, 366 U.S. 717, 727 (1961) ("The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."). It is obvious that this judge did not take the inquiry into the jurors' bias seriously. For example, Mr. Moran had concluded that crimes were committed. (R1739).

> Q: (Mott) So the only question the newspaper left open is who committed the crimes?
>
> A: (Moran) Who, you could put it that way.
>
> Q: As a result of having read the newspaper and seeing the TV stories, sir, do you expect the defense to try to have to overcome the impression you've been left with from those newspaper stories and TV accounts?
>
> A: ***Well, I will expect they will have to eventually overcome them***.

(R1740) (emphasis added).

Q: (Tanner) Mr. Moran, you understand that the defense don't have to prove they're innocent at all, do you understand that?

A: (Moran) I understand that.

Q: And Mr. Mott asked you something to the effect because of what you read in the newspaper, do you think the defense has to overcome that, and you said, well, I suspect they do or suspect they might. Are you saying that you think they have to prove they're innocent?

A: ***Well, yes, they have to prove their innocence***.

Q: Do you understand they don't have a burden to prove anything? We have to prove.

A: From what I understand yesterday, state has to prove the . . .

Q: Okay. His Honor would instruct you that the defendants don't have the burden to prove anything. Would you follow the judge's instructions on that?

A: Yes, sir.

(R1741-42).

(Powers): I would join in Mr. Mott's challenge for cause on Mr. Moran, and I will state another ground. In response to Mr. Mott's questioning about has he formed any opinions about whether a crime has been committed, I think he said he had formed an opinion about a crime being committed, and --

Court: He didn't say these defendants did it.

Powers: I know, but it's the burden of the state to prove all the elements.

Court: And I read him an indictment. He has a right to express an opinion. He heard the indictment read by the court. He gathers he's here because a crime was committed, otherwise he wouldn't be here. For cause, denied.

Powers: We would use one of our peremptories on Mr. Moran.

(R1746-47). The court found that Mr. Moran had been "misled" by the questioning. (R1744). Peremptory challenges were similarly used on Fields (R1901) and Connover (R1283;1303) when challenges for cause were denied.

Moran was objectionable because he required the defense to prove innocence contrary to the Fifth and Fourteenth Amendments and to him the matter was solely a question of who committed the crimes. See, ***Patterson v. New York***, 432 U.S. 197, 210 (1977) (Prosecution bears burden of proving all elements of the offense charged). The court should have excused Moran, Fields and Connover for cause rather than have counsel expend peremptory challenges to prevent them from serving as jurors. Because peremptory challenges were used to remove these jurors, objectionable jurors such as Mr. Marriott served on the jury when challenges for cause were denied:

> Q: (Mott) Could you tell me, do you consider yourself a strong supporter of the death penalty?
>
> A: (Mr. Marriott) If it's proven, yes.
>
> Q: You say if it's proven. Are you talking about -- tell me what you're talking about.
>
> A: If he's proven guilty, yes.
>
> Q: Okay. Is it in your mind a question of guilt or innocence whether or not the death penalty ought to be imposed?
>
> A: Yes.
>
> Q: Have you, without telling me what, have you been exposed to any news media accounts of the case that we're dealing with here, the Taco Bell case?
>
> A: No. Just what was said in the media.

Q: Okay. That's what I'm talking about. So you've seen news stories on the television about it?

A: Yes.

Q: Have you read about it in the newspaper?

A: Yes.

Q: Have you formed an opinion about whether or not there has been a crime in this case?

A: I know there was a crime, yes.

Q: Is that a fixed opinion?

A: No.

(R2025-26).

Q: (Powers) Good morning, Mr. Marriott. If I heard you correctly, you generally support the death penalty, correct?

A: If proven guilty, yes.

Q: Can you tell me why it is you support the death penalty?

A: If they do a guilty job, they should be punished.

Q: What function do you see the death penalty serving in today's society?

A: I beg your pardon?

Q: What function does the death penalty serve?

A: Well, if they committed a crime, they should be.

(R2026-27).

Marriott served on this jury because challenges for cause (R2028) and requests for an additional peremptory challenge to strike him (R2029) were denied contrary to the tenet that jurors who are unqualifiedly predisposed to impose the death penalty

should be removed for cause. ***Floyd v. State***, 569 So.2d 1225, 1230 (Fla. 1990); See, ***Moore v. State***, 525 So.2d 870, 872 (Fla. 1988) (When a reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause). It is refreshing that Mr. Marriott would not impose the death penalty if a defendant was not guilty, but such staunch advocacy for the death penalty if a defendant is guilty creates a reasonable doubt as to his fairness and ability to properly weigh aggravating and mitigating factors.

In that regard, the general rule guiding jury selection was set forth in ***Singer v. State***, 109 So.2d 7, 23-34 (Fla. 1959):

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

(emphasis added). The responses of these jurors professing an ability to set aside previously-formed opinions were to carefully framed, leading questions. Such responses are not dispositive:

> A juror's assurance that he or she is able to remove any opinion, bias, or prejudice from his or her mind, and decide the case solely on the evidence adduced at trial, is not determinative of whether that juror should have been excused for cause. (citation omitted).
>
> We have no doubt but that a juror who is being asked leading questions is more likely to "please" the judge and give the rather obvious answers indicated by the leading questions, and as such these responses alone must never be determinative of a juror's capacity to impartially decide the cause to be presented. * * *

Price v. State, 538 So.2d 486, 489 (Fla. 1989). Simply said, the judge must carefully and critically analyze the responses of the jurors to gauge whether a reasonable doubt exists as to the jurors' ability to aside conclusions formed prior to trial. The presence and proximity of a television camera during these proceedings[13] adds yet another dimension to the inquiry.

> It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the mind is better and more worthy of belief than the former?

Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796 (1929).

Not only were these jurors required to set aside their own beliefs, they were required to disregard the beliefs of other citizens that these defendants had committed "horrendous" crimes that devastated the entire community. Over objection, the court required that voir dire questions be asked before the entire venire. As a result, the prospective jurors were unfairly and unnecessarily exposed to prejudicial responses of their peers who had discussed the case with others and formed fixed and unwavering beliefs about the guilt of these defendants and/or the appropriate sanction to be imposed.

---

[13] The proximity of the television camera likely affected the jurors' ability to candidly admit an inability to be fair and impartial. As prospective juror Pritchard observed, "You're making it very difficult for the jurors to be unbiased." (R1213). See, POINT III, infra.

The following comments are typical of those needlessly and repeatedly overheard by jurors who tried this case - comments of their peers which denied the defendant due process, a fair trial and a fair and reliable sentencing recommendation in contravention of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution:

> Mr. McGowan has a fixed opinion that Jeffery and Anthony Farina are guilty. (R1155)(Motion to strike panel denied)(R1156).
>
> Ms. Hilderbrandt discussed case with co-workers and formed a fixed opinion that cannot be set aside. (R1158).
>
> Mr. Ursini has formed a fixed opinion based on pretrial media exposure that he cannot set aside. (R1160).
>
> Ms. Lee is "devastated" by the crime and believes that "it's upsetting for the entire community." (R1216).
>
> Mr. Perkins has formed a fixed opinion that cannot be changed. (R1032)
>
> Mr. Hymowitz is unsure of whether he could be fair because he is "revolted" by the crime. (R1036)
>
> Mr. Miller states that he discussed the case with others where ". . . we all expressed ourselves[14] to the crime. It's a shame it was done. We all felt remorse for the people. But as far as guilt, I don't know if they're guilty or not." (R1054).
>
> Mr. Smiley relates that after being seen on television he went to work and that was all everybody talked about. (R1209).

---

[14] The court forbade questioning as to whether the others with whom this juror had conversed expressed opinions about the defendants' guilt. (R1053).

> Ms. Connover states that based on what she had heard in the media, her verdict would be for the death penalty because she has a child and she has heard about it and that is what she would want to have happen if it were her child. (R1283-84).
>
> Mr. Bretz volunteers the details of an incident where a friend's father was killed during a robbery and the killer, though convicted, is now eligible for parole, that the friend's family "disintegrated" after the incident and that he "does not feel that a life sentence is really a life sentence." (R1205-06). He states he could never look his friend in the eye again "if I let a murderer walk away with a life sentence." (R1207)
>
> Ms. Bryant does not feel that age is a mitigating concern and that "it was a terrible thing they had done." (R1321-22).
>
> Ms. Artin volunteered that her husband's law firm is representing several of the victims in a civil suit on the matter. (R1546) (Motion to strike panel denied, R1560).
>
> Mr. Williams believes a "very serious, ruthless" crime committed and he cannot have an open mind about it. (R2019) (Motion to strike panel denied, R2020).

The court prevented counsel from asking the specifics of what jurors recalled of the media coverage (R1095), and defense counsel refrained from again asking such questions:

> (Powers): * * * There was one thing I wanted to clarify with the court as to one of my questions I asked one of the potential jurors what details had they heard, and that was objected to and I was --
>
> Court: I sustained the objection, as I recall, and I don't generally respond back to those things. If you would like a brief, you take it with the proper appellate procedures and not to me. I already ruled on the question.
>
> Counsel: All right.

> Court: Anything else will go either before the five (sic) supremes or --
>
> Counsel: Yes. And would it be a consistent ruling?
>
> Court: I think you're going to find it to be consistent. I learned a long time ago if you're a son-of-a-bitch, be a consistent son-of-a-bitch.
>
> Counsel: Okay. I assumed it would be, and that's why I did not ask that particular question again. I would have, had it not been sustained.

(R1147).

The State Attorney warned the court that it might be error to deny sequestered voir dire where the media published articles concerning the defendants' confessions. (TR1237-41). The court then agreed to sequestered voir dire (R1387), ruled that jurors would be sworn if not struck after individual voir dire[15] (R1408), and remarked that sequestered voir dire was an "idiotic" procedure agreed to by him "only" to avoid reversible error. (R1412). From the bench in open court, the judge directed the bailiff to bring in the prospective jurors as follows: "Bring in Mr. Voss for a fishing expedition." (R1423); "Bring Mr. Cochran out for a fishing expedition." (R1428); "Bring Mr. Pritchard in for a fishing expedition." (R1432); "Bring in Miss Phan for a fishing expedition. You notice I do this after the TV camera gets out of here." (R1438); "Bring in Mr. Cherry for this fishing expedition." (R1442).

---

[15] The trial judge later stated that he was aware of the impropriety of such a procedure, but was giving the State an opportunity to make new law but would not do so since the State objected. (R1419-1423).

At this point, the judge recessed for the night[16] and teased, "Counsel, when you go out to your cars, walk with your heads high and straight. Don't bother to look behind the trees because I assure you no one is going to jump out and attack you." (R1444-45). The next morning, the judge indicated that he felt the procedure was game playing, a "charade," (R1488), and referred to it as "one-at-a-time crap." (R1901).

The foregoing prevents this Court from confidently concluding that this trial judge fulfilled his obligation to carefully determine whether reasonable doubt existed as to the impartiality of these citizens and whether a fair trial could be conducted in the Daytona Beach area. From the onset, the inquiry was deemed a "charade" (R1488;1490;1528), an "idiotic" procedure which was agreed to by this judge "only" to avoid reversible error. The record affirmatively shows that this judge proceeded under the belief that counsel was being uncooperative and he made it obvious that he was very annoyed at counsel for not cooperating with the court to get on with the trial - annoyance that the citizens on the venire could not help but notice and which quite probably affected their responses. This Court's attention is respectfully invited to another case that involved extensive pretrial publicity and the way the judge there approached his responsibility to ensure a fair and unbiased jurors in a highly-publicized case:

---

[16] The next morning the motion to strike the jury panel was renewed, as was the objection to the placement of the television camera and proximity of the victims and victims' families to the jury venire and panel. (R1456-57). These considerations will be addressed in Point III, infra.

> A trial court enjoys broad discretion in structuring appropriate voir dire. (citation omitted). We review the lower court's exercise of discretion to determine "'whether the procedure used or testing juror impartiality created "a reasonable assurance that the prejudice of the jurors would be discovered if present.'" (citation omitted). *In cases involving extensive publicity, this Circuit has expressed a preference for an individual voir dire conducted by the trial court outside the presence of prospective jurors.* (citation omitted). The trial court in the instant case collectively questioned the venire and then conducted an extensive and searching individual voir dire outside the presence of prospective jurors. The court questioned individual jurors about drug use, attitudes toward drug use and the appellants, specific knowledge of the case and exposure to media accounts relating to the trial ant to the appellants. The parties were then permitted to conduct their own individual voir dire. We find that the lower court's voir dire reflects careful attention to ensuring discovery of jurors harboring prejudice. (citation omitted).

United States v. Lehder-Rivas, 955 F.2d 1510, 1523 (11th Cir. 1992) (emphasis added).

If a judge knows that a procedure is so important that failing to follow it is reversible error, he or she should not from the bench in open court[17] accuse counsel of playing games and being paranoid when they legitimately request that the procedure be used. If a judge does not feel that the request is legitimate, he or she should deny it rather than cast insulting epithets at counsel in open court.

---

[17] The judge was careful to make such comments after the television camera had left for the night. (R1438). However, the newspaper reported that the judge criticized defense counsel as being uncooperative "___holes" (R3090) who were using an "idiotic procedure" to engage in a "fishing expedition." (R3082;3090).

It can only be concluded that the court failed in its duty to conscientiously determine whether the pretrial publicity had so affected this community that a fair trial by impartial jurors could not be had. The media articles were such that any prudent jurist would recognize that the request was made in good faith and that sequestered voir dire was otherwise desirable to avoid tainting unbiased jurors by exposing them to the beliefs of their peers about the propriety of a guilty verdict and/or a sentence of death. Contrary to the evidence[18], the court found that any problem caused by pretrial publicity was "a figment of defense counsels' imagination." (R1745).

---

[18] When Judge Blount made this finding he had excused a third of the jurors due to bias:

Demuth - R1027	Hymowitz - R1037	Marchione - R1557
Chicko - R1027	McGowan - R1155	Artin - R1556
Moran - R1027	Gatley - R1235	Mueller - R1556
Lee - R1234	Hilderbrandt - R1158	Becker - R1586
Smiley - R1236	Ursini - R1120	Hartnett - R1592
Bretz - R1234	Bryant - R1331	Campbell - R1638
Perkins - R1032	Dure - R1338	Duckett - R1638
Abdalian -R1714	Eifert - R1586	

Virtually every juror had been exposed to publicity and admitted discussing the case with others: Miller: "I think we all have talked about it, sir." (R1052); Wasko discussed the crime with husband and co-workers. (R1073); Patterson discussed the case with his wife after reading about it in the paper: "We seen it, we read it, and we discussed it between the two of us." (R1088-89); Nimmo, after reading about it discussed the case with his wife. (R1094); Shephard discussed the case with her husband. (R1103); Pritchard learned of murder from a neighbor. (R1106); Phan talked about the case with co-workers. (R1255); Graham talked about the case with her husband. (R1477); Durant talked about the case with his wife. (R1482). Only three prospective jurors from one panel had not had a conversation with others about the case. (R1055).

Other problems concerning the composition of this jury exist. The court erroneously excused for cause jurors who were personally against the death penalty but who otherwise were fully qualified to serve on this jury. Mr. Heffelfinger stated that he would "probably almost always" vote for a life sentence, *with exceptions*. (R1250-51). A crime could be so heinous that he would consider death an appropriate sentence and he could follow the law given to him by the court notwithstanding his personal views. (R1263-64). A peremptory challenge by the State (R1278), was withdrawn when counsel objected to the State's peremptory excusals of jurors who voiced dissatisfaction with the death penalty. (R1280). Mr. Tanner then asked whether anyone would never impose the death penalty on a 16-years-old defendant. Mr. Heffelfinger indicated he might not, (R1286), later explaining:

> Mr. Heffelfinger: I think the death penalty is unproductive. I think it's not necessarily a dispensation of justice. I think it's vindictive and inhumane and I think there are certain incorrigible situations that nothing could be done.
>
> Mr. Tanner: So are you saying sometimes you would vote for the death penalty, perhaps?
>
> Heffelfinger: Probably could happen. I don't know. I'm not experienced in voting for it.
> * * * Probably not a 16 year old <u>where I feel the life is salvageable</u>.

(R1288-89) (emphasis added).

Heffelfinger later unequivocally stated that he could follow the court's instructions on the law and his oath. (R1297-98). The State challenged him, misrepresenting that "He said he would ***never*** vote for the death penalty for a 16-year-old because he

could be rehabilitated." (R1301). The challenge was granted over objections of both defendants. (R1302). That ruling and similar rulings on Gulin (R1766-75) and Hudson (R1777-94) violated Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Prospective jurors may not be excluded for cause "simply because they voiced general objections or religious scruples against its infliction." ***Witherspoon v. Illinois***, 391 U.S. 510, 522 (1968); ***Lockhart v. McCree***, 476 U.S. 162, 176 (1986). "The relevant inquiry is whether the juror's views would 'substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" ***Gray v. Mississippi***, 481 U.S. 648, 658 (1987). Heffelfinger, Gulin nor Hudson gave any indication that they could not follow the oath and the instructions given by the court, and in fact the State never asked them that question.

Heffelfinger's responses failed to disqualify him in any way from being a fair and impartial juror. A defendant's age may properly be considered because age is a statutory mitigating factor. §921.141(6)(g), Fla.Stat. (1991). An infant's age of 16 is so compelling that it may appropriately be considered by any juror as a legitimate reason to impose a life sentence. Even at that, Heffelfinger did not say that he would always vote for life for a sixteen year old, but that age *in conjunction with an ability to be rehabilitated* would, to him, "probably" outweigh any aggravation that could be shown. He clearly could follow the law.

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986).

The excusal of Heffelfinger, Hudson and Gulin for cause is constitutional error which goes to the integrity of the overall composition of the jury. "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution." ***Witherspoon v. Illinois***, 391 U.S. 510, 523 (1968). As in ***Chandler v. State***, 442 So.2d 171, 174 (Fla. 1983), these prospective jurors never came close to expressing an unyielding and rigid opinion regarding the death penalty that as a matter of law disqualified them as jurors in a capital case.

Mr. Nice became a juror after he was challenged unsuccessfully challenged for cause by both defendants (R1983-84) and after requests for an additional peremptory challenge to strike him were denied. (R1988). Nice was objectionable based on the following:

> Q: (Tanner) Mr. Nice, were you able to hear us this afternoon most of the time we've been talking?
>
> A: Most of the time, but not too good.
>
> Q: Okay. Are you of a state of mind right now that you couldn't give these two young men a fair trial?
>
> A: ***If they deserve one.***

(R1955). A juror's response that a fair trial will be given to those defendants who "deserve one" creates grave doubt about the fairness of that prospective juror. Either the challenges for cause should have been granted or an additional peremptory provided when both defense attorneys asked to have Nice removed.

Here, and in summary, the record fails to instill any confidence that the jury that recommended death for Jeffery Farina was composed of twelve impartial jurors who remained uninfluenced by their previously formed opinions and discussions with other citizens, uninfluenced by the opinions of contemporaries who sat in the same jury box and expressed unequivocal, fixed beliefs that the defendants were guilty of horrendous crimes that upset the entire community, and uninfluenced by the television camera, victims and their families which were unfairly situated next to the jury over repeated objection. (See, Point III). Because Appellant was denied a fair and impartial jury, a new trial is required if this Court declines to order imposition of a life sentence as set forth in Point I.

POINT III

THE TRIAL COURT DENIED A FAIR TRIAL, DUE PROCESS AND AN IMPARTIAL JURY CONTRARY TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION BY OVERRULING DEFENSE COUNSELS' OBJECTIONS TO PLACEMENT OF THE TELEVISION CAMERA, VICTIMS AND THE VICTIMS' FAMILIES IN CLOSE PROXIMITY TO THE JURORS AND PROSPECTIVE JURORS.

Another problem seriously undermines confidence in the impartiality of this jury and the fairness of the trial. Over repeated objection, a television camera, the victims and their families were positioned in the front row of the courtroom next to the jury box. The proximity of the jurors and the venire to the television camera, the victims and their families over repeated objections denied rights to due process, a fair trial, an impartial jury and a reliable sentencing recommendation in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Judges are charged with the responsibility of ensuring that cameras do not interfere with the fairness of proceedings:

> Subject at all times to the authority of the presiding judge to (i) control the conduct of the proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

Canon 3A(7), Code of Judicial Conduct.

Early on, counsel complained that media microphones were picking up the discussions between the court and the attorneys at side bar. (R1065). Thereafter, the State and the court repeatedly ridiculed counsel as being paranoid. ("We continue to have paranoid thinking." TR898; ". . . tomorrow you leave your paranoid thinking in your briefcases." TR1445; "We keep having these motions based on paranoid thinking . . . ." TR1486). An attorney should not be considered paranoid for showing concern that a media microphone is so sensitive and positioned that it picks up private conversations with the court and perhaps his client:

> To protect the attorney client privilege and the effective right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, **or between counsel and the presiding judge held at the bench.**

Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings, paragraph 6. (emphasis added).

The use of television cameras in courtrooms was authorized after a one-year pilot program failed to establish any significant prejudice associated with televised judicial proceedings. ***In re Petition of Post-Newsweek Stations, Florida, Inc. for Change in Code of Judicial Conduct***, 370 So.2d 764 (Fla. 1979). It must be emphasized, however, that the result of minimal adverse influences associated with televised judicial proceedings was *necessarily* a consequence of the placement of the television camera in the most inconspicuous place possible during that trial period. The media

is not constitutionally entitled to place a television camera anywhere in the courtroom during a trial:

> While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings *per se*, by the same token we reject the argument . . . that the first and sixth amendments to the United States constitution mandate entry of the electronic media into judicial proceedings.

In re Petition, etc., 370 So.2d at 774. There was absolutely no entitlement whatever for a television camera to be placed within a foot of a juror's face.

The court here failed in its duty to ensure the fair administration of justice by allowing the television camera to intrude on the sanctity of the jury. In response to the first objection, the judge replied, "In all courtrooms, everybody is close. We don't have the benefit of football fields." (R1308). When the objection was renewed the next morning, (R1456), the judge misstated the proximity of the jurors to the camera, the victims' and their families:

> Court: I want you to get some measurements for me so we can have it in the record. You keep making these motions but the record is silent as to distance, so please take some measurements next time you make this motion so I have something in the record. They're probably sitting the width of the courtroom away, but the record doesn't show that. See, it's silent. So get your tape measure during the next break and come down here so the record will be totally complete.

(R1457) (emphasis added). The lens of the television camera was at that time ***ONE FOOT*** from the face of the nearest juror. (R1591).

Counsel obtained a tape measure and a .35mm camera to record the placement of the television camera. The State objected

and the judge replied, "I want him to have the camera here for the record. I suggested to get a tape measure, but I think a camera is even better, but the camera will not fairly represent it because it will not show people unless they stage it, and we'll see." (R1485-86). During the next break, two photographs were taken as the cameraman moved the television camera from the first to the second aisle of the audience area. (R2996-97)(Appendix B).

The court denied the motion again when it was renewed by counsel after measurements were presented. (Appendix C;R1588-89). The next morning, counsel filed a written motion to strike the panel due to the intrusive placement of the television camera, victims and their families. (R2966-69). When asked to be heard on the motion at sidebar, the court required that counsel return to their tables and argue the motion in open court, stating, "I want the tv camera on you when you make this one." (R1749). Counsel argued that the impartiality of the jury was being unfairly tainted by the positioning of the television camera, the victims and their families. (R1750). In open court, with the camera rolling, the State Attorney countered as follows:

> Mr. Tanner: Your Honor, with regard to the issue of unfairness, what has become abundantly clear is that the defense is attempting to obtain unfair advantage by so prejudicing this jury through frivolous delaying tactics that they may taint the jury to the point that the State can't get a fair trial, but the height, and I think the breadth of the unfairness goes back to that night when these young men tied up those kids and shot them and stabbed them and murdered them, that's what's been unfair, and they would drag this thing out without letting the jury hear the facts and make a fair ruling on what these guys did to these people.

(TR1752). Noting that the television camera was in the courtroom by mandate of the Florida Supreme Court, the court overruled the objections and denied the motion to strike the jury venire because the motion was based on "paranoid" thinking of counsel. (R1754).

The court agreed that counsel could photograph the jury selection. (R1754). Defense counsel had a video camera set up in the "media" room located at the rear of the courtroom behind one-way glass. Approximately an hour later, the following transpired:

> Court: The cameraman on the right side back there has his video on. Do you have ample amplification to make your tape? Can I have an answer, please? Whoever is in the back, right-hand room video-taping, can you hear what's going on?
>
> Johnston: Yes, Your Honor.
>
> Court: I want to make sure you take everything down. You know, it's a usual practice you don't take pictures without consent of the court, ma'am, and I don't recall you taking any requests of this court for the right to photography here. Would you please give the court reporter your name?
>
> Johnston: My name is Joni Johnston.
>
> Court: And where are you employed?
>
> Johnston: Public Defender's office.
>
> Court: All right. Thank you very much. You may depart.
>
> Johnston: Thank you.
>
> Court: You may continue to run your film, ma'am. You have plenty of amplification?
>
> Johnston: I'm sorry, Your Honor?
>
> Court: You have plenty of amplification back there?
>
> Johnston: Yes, sir. It's fine.

Court: So you can hear everything?

Johnston: Yes, sir.

Court: If you miss anything, please come in and tell me, because I want it all on the record.

Johnston: Yes, sir.

Court: Counsel, that's a pretty cheap shot, but I'm going to let it continue. You know, that's almost bordering on unethical conduct, but we're going to let it go. We're going to let you continue to do it, and I'm also going to give you one hour and 45 minutes to find up some new motions for me at 2:30.

(R1858-59). Court reconvened at 2:30, a new group of jurors was brought in and preliminarily qualified. (R1861-66). Thereafter, in the presence of those prospective, the following occurred:

Court: All right, you are qualified to sit as jurors in this particular trial. Now, Mr. Kendricks, could you come in here just a minute.

(Off the record discussion between Mr. Kendricks and Judge Blount)

Thank you, Mr. Kendricks. Mr. Bailiff, would you go back to the room there on the right-hand side and impound that camera and bring it forward so I can see what we have, and any other equipment that's with it, and the operators. Is this the operator of the camera?

Peshek: Yes, Your Honor.

Court: Could you tell the court reporter what your name is?

Peshek: Robert Peshek. P-e-s-h-e-k.

Court: Do you have a button on there? Are you an employee of this building?

Peshek: Yes, Your Honor. Public Defender's Office.

Court: In the Public Defender's Office. This is a home videotape camera, isn't it?

Peshek: Yes.

Court: And that's a colored glass back there that's almost impossible to see through, isn't it?

Peshek: Yes, Your Honor.

Court: Yes, it is. So anything you get would certainly not be good representation of what goes on in this courtroom. Mr. Bailiff, take that camera and equipment with it in custody and put it in the evidence room and I'll dispose of it later. Now, we need to call Ms. Bible for her to send the remainder of the jury up and our six that are here. Mr. Bailiff, can you call on your radio? Is there a deputy down that way or not?

Bailiff: We have a bailiff going right now, Your Honor.

Court: Okay. Thank you, sir. That's a home individual, isn't it?

Peshek: Yes, Your Honor. I just walked back there five minutes ago.

Court: That's not too professional, is it? What training have you had in photography?

Peshek: None. Camcorder or years.

Court: Just little side shows for home viewing? With that tinted glass back there, it's very difficult to see, isn't it?

Peshek: I haven't seen anything that was recorded on there, so I don't know.

Court: You can go now. Thank you. Give my best to your boss.

(R1866-68).

Jurors who deliberated this case were present in the courtroom when the camera was impounded. (R1903). All objections to the placement of the television camera and the victims were denied. (R1753). The motions to strike were renewed by the defendants on

all grounds previously stated additionally because the impoundment of the camera and chastisement of the Public Defender's Office in the presence of jurors unfairly tainted the jury. (R1991-95). The objections were overruled and the motions denied. (R2064-67).

The positioning of television cameras during the initial survey conducted in ***In re Petition of Post-Newsweek, etc.***, supra, is the same as now required by paragraph 3 of the Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings:

> a. Television camera equipment *SHALL* be positioned in such location in the court facility as shall be designated by the chief judge of the judicial circuit or district in which such facility is situated. The area designated shall provide reasonable access to coverage. *If and when areas remote from the court facility which permit reasonable access to coverage are provided* ***ALL*** *television and camera equipment* ***SHALL*** *be positioned* ***ONLY*** *in such area.* Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the court facility.

(emphasis added). Appellant submits that the positioning of the television camera next to the jury, next to the victims and next to the victims' families inside of the courtroom while rooms designed for television coverage remained idle over repeated objection is a clear violation of the above rule. Prejudice should be presumed.

There is no showing whatever that the television camera could not provide "reasonable coverage" from a media room designed for that purpose. In fact, the video recording seized during voir dire and made a part of the record after sentencing conclusively shows just the opposite. (R2151) (Defendant's Exhibit A for identification).

It is respectfully submitted that, assuming *arguendo* that tinted glass prevented "reasonable access to coverage" despite there being no evidence[19] of that and assuming the camera had to be inside the courtroom, the trial judge abused his discretion and denied a fair trial, due process and an impartial jury under the state and federal constitution by allowing the television camera to be placed, over repeated objections, next to the jurors, the victims and their families. As stated in ***Duncan v. Louisiana***, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968), the right to a fair trial by an impartial jury reflects "a profound judgment about the way in which law should be enforced and justice administered." Id. at 155. The denial of a fair jury determination of the facts has "consequences that are necessarily unquantifiable and indeterminate, [and which] unquestionably qualifies as "structural error." ***Sullivan v. Louisiana***, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 182, 191 (1993).

Traditionally, this Court has been vigilant to protect against influences that may distract jurors from performing their

---

[19] In this regard, the trial judge stated:

> Well, the technician, a technician from the television station *told* me that they can't do it with their $30,000 camera and you had a Mickey Mouse thing from Service Merchandise and I don't think it's going to cut through that painted glass because I went and looked. * * * I did give you consent to leave it there until I examined that glass and found that it serves you no useful purpose[.]

(R2151).

sworn and sacred duty, especially in capital cases. See, ***Livingston v. State***, 458 So.2d 235, 238 (Fla. 1984) (jury in capital case must be sequestered during deliberation to avoid improper outside influences). A primary responsibility of all judges is to prevent jurors from being subjected to improper or distracting influences. See, ***Deeb v. State***, 131 Fla. 362, 179 So. 894, 900 (1937) (bloody clothes of murder victim "should not, if objected to, be so exhibited or displayed as to unduly prejudice or excite or distract the minds of the jury.").

Here, objections were made to placement of the television camera. The movements of the camera and cameraman were obviously distracting the jurors. One juror noted that the distractions were making it hard for him to be impartial. (R1213). Trial judges are given broad discretion so they can meet their responsibilities of providing litigants with a fair trial. Such discretion is abused when a television camera is placed within a foot of a juror's face over timely objection and in violation of strict rules of procedure that govern the placement of electronic media reporting equipment. The State cannot show that the jury recommendation was not affected by the placement of the camera and the victims and their families. A new trial is required if this Court declines to order imposition of a life sentence as set forth in Point I, supra.

POINT IV

INTENTIONAL PROSECUTORIAL MISCONDUCT DENIED A FAIR TRIAL AND/OR SENTENCING RECOMMENDATION CONTRARY TO ARTICLE I, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

An elected State Attorney is a quasi-judicial officer whose "duty to the citizen charged with the crime is as sacred as his duty to the State." ***Goddard v. State***, 143 Fla. 28, 196 So. 596, 602 (1940). Prosecutors should be guided by the principles stated by Mr. Justice Sutherland:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Florida courts echo those sentiments. See,***Bertolotti v. State***, 476 So.2d 130, 133 (Fla. 1985) ("It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office."); ***Kirk v. State***, 227 So.2d 40, 42-43 (Fla. 4th DCA 1969) (cases brought on behalf of the State of Florida "should be conducted with a dignity worthy of the client.");

The misconduct addressed in this point did not arise in the heat of battle. It was deliberate. It was done in bad faith to deny these defendants a fair trial in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This intentional misconduct is by the elected State Attorney and his chief assistant. Their misconduct began before Jeffery Farina was arraigned and it persisted throughout trial and the penalty phase. There can be no doubt whatever that calculated misconduct rendered the sentencing recommendation unreliable.

IMPROPER MANIPULATION OF ASSIGNMENT OF CASE

The defendants moved to disqualify the State Attorney's Office after a newspaper article reported that the Clerk publicly denied his opponent's accusations made during a campaign speech that the Clerk had allowed judge shopping in the Taco Bell case. Testimony presented during an evidentiary hearing proved that Mr. Tanner had, indeed, personally gone to the Clerk and privately circumvented the normal assignment of the Taco Bell case. Left alone, the case would have been assigned to Judge Briese. At the State Attorney's request, it went to Judge Orfinger.

Judge Orfinger found impropriety, observing, "this type of situation gives the entire judicial system a black eye." (R926). Yet, rather than correct the problem in a manner that would foster confidence in the impartiality and fairness of the court and set firm precedent that the consequences of such actions by any attorney would be his or her immediate removal from the case, the

judge, truly believing that he could remain totally fair and unbiased, instead imposed no sanction whatever and denied the motion to disqualify the State Attorney's Office because the defendants could not show they were actually prejudiced by having him as their judge.

The ruling was wrong. Judge Orfinger missed the point by focusing solely on his ability to remain unbiased and give both parties a fair trial. The motion was not in any way directed at his actions or the integrity of the court, but instead at the actions and integrity of the attorney representing the State of Florida in a capital case ***YET TO BE TRIED***. As soon as it was proved that the State Attorney personally and privately asked the Clerk to assign this case contrary to an administrative order of the chief judge, immediate disqualification should have followed. By focusing on his own ability to be fair rather than the State Attorney's inability to follow clear ethical rules, the court encouraged and otherwise enabled this prosecutor's continued misconduct.

There was prejudice. The advantage gained by the State was not a biased judge, but instead acceleration of the case after its first improper attempt to do so failed. Specifically, the State's *ex parte* request for Judge Briese to expedite the matter was met with a reply that the case would treated as any other first-degree murder case because Judge Briese's policy was to treat all cases alike. (R897-98). Presumably, that is the policy of all judges. Realizing this, the State Attorney personally, adroitly and unethically sidestepped the court by going to the top of the

administrative process, privately reshuffling the case to DeLand where only Judge Orfinger could receive it.

The State had the Taco Bell case assigned to Judge Orfinger, not because he *would* intentionally try the case sooner than Judge Briese, but because logistically he *could* try the case sooner than Judge Briese. The unfairness of the manipulation does not vanish solely because the second judge did not corruptly or even knowingly agree to the State's efforts to expedite the case. A tangible benefit was brought about by Mr. Tanner's *ex parte* request - the matter was expedited because arraignment occurred two weeks sooner with Judge Orfinger than it would have with Judge Briese:

May 19, 1992 - Indictment returned
May 20, 1992 - Notice of arraignment
May 22, 1992 - Arraignment of defendants
June 4, 1992 - Status conference by Judge Orfinger (and State's request for early trial date)
June 6, 1992 - Date arraignment would have occurred before Judge Briese.

(R909).

The timely objection of the defendant to being prosecuted by a State Attorney who unfairly manipulated the case outside of rules of procedure and ethics should have been granted, in that disqualification of Mr. Tanner and his office would have inspired public confidence in the integrity and the lack of complicity of the court. The opposite occurred when no sanction whatever was imposed. The lack of any sanction convinced Anthony Farina that Judge Orfinger was, indeed, showing favoritism to the State.

It is respectfully submitted that, as a matter of policy and to deter such conduct in the future, a *per se* rule should apply

requiring the automatic and immediate removal of any attorney shown to have engaged in *ex parte* communications with a clerk to have any case assigned to a particular judge. Allowing attorneys to "forum shop" for judges is harmful, in that it promotes the conclusion that not every judge is equally fair, just and impartial. An *ex parte* communication from attorneys seeking special assignment of litigation to a particular judge denies due process and is wholly indefensible. During trial, deliberate prosecutorial misconduct will not automatically produce a reversal:

> The supervisory power **of the appellate court**[20] to reverse a conviction is inappropriate as a remedy when the error is harmless; prosecutorial misconduct or indifference to judicial admonitions is the proper subject of bar disciplinary action. Reversal of the conviction is a separate matter; it is the duty **of appellate courts** to consider the record as a whole and to ignore harmless error, including most constitutional violations. . . .

State v. Murray, 443 So.2d 955, 956 (Fla. 1984). It is imperative, therefore, for trial judges to timely assert their authority to prevent the unethical State Attorney and/or his assistant(s) from prosecuting a case where, as here, there is a timely objection and overwhelming proof presented before trial of the State Attorney's personal, deliberate misconduct and bad faith.

A harmless error standard invites prosecutors with strong cases to crowd ethical limits with confidence that there will be no

---

[20] The duty of the trial judge to control counsel requires that a State Attorney's *intentional* misconduct that is proved to have occurred *before* a criminal trial be squarely addressed and properly sanctioned to ensure subsequent compliance with ethical standards during trial. Here, a "harmless error" analysis is improper because an "unfair" trial was encouraged by the absence of timely sanctions for proved misconduct.

reversal if they stray across the line. See, ***Bertolotti v. State***, 476 So.2d 130, 133 (Fla. 1985) (continuing lack of prosecutorial restraint in death penalty cases is" deeply disturbing."). Without doubt, the State here was well aware of the strength of its case as to the guilt of these defendants. The unfair tactics were used by the State here due to the weakness of its argument for the death penalty. In that regard, a separate harmless error analysis must and should be performed as to whether it can be proved beyond a reasonable doubt that the deliberate prosecutorial misconduct here did not contribute to the jury recommendation. See, ***California v. Ramos***, 463 U.S. 992, 998 (1983) (the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.).

The bad faith of the prosecutor was not limited to an *ex parte* communications. Bad faith is shown in the improper argument, clearly calculated and deliberate, that was made during the penalty phase opening statement. Opportunities for an attorney to directly address jurors are rare. "[M]any experienced trial lawyers contend, and the available empirical jury studies tend to confirm, that an opening statement is frequently the most critical stage in the trial of a lawsuit, as here the jury forms its first and often lasting impression of the case."

Maleh v. Florida East Coast Properties, Inc., 491 So.2d 290, 291 (Fla. 3d DCA 1986).

Yet, reversals based on improper opening statements are infrequent, probably because jurors are admonished by the court

that what is said in an opening statement is not evidence but is instead a preview of what will hopefully be presented. That said, reversal is none-the-less here necessary because of the bad faith shown in abusing the opportunity to address the jury. The State's opening exceeded all bounds of propriety. It was a deliberate and calculated ploy to inflame the emotions of the jurors with argument laden with provocative terms to create vivid, lasting impressions:

> Through the testimony of the witnesses in this case you have come to know the *terror* and the *horror* that ***four young people*** came to on that evening. (TR585)(objection overruled).
>
> They attempted to murder each of these ***young*** people. (objection overruled). They kidnapped each of these ***young*** people. (TR588).
>
> They should not benefit by the fact that we only had one ***child*** dead on that *cold* floor. (TR589) (objection sustained).
>
> Consider the circumstances of this crime. Is this an ordinary robbery where someone walks into a store? This was no ordinary robbery. (TR589) (objection sustained).
>
> You should also consider the crime that they committed in the kidnapping of each of these ***young*** people. . . . what these two men did to that ***young*** woman and those three other ***young*** people. . . . You'll also hear instructions that you are to consider what was the purpose, why were these ***four young people*** shot? Why was Michelle Van Ness ruthlessly murdered? (TR590).
>
> . . . from the time that they went into that store until they put those ***children*** into that cooler, and Anthony walked in and he told Kim, we've got one more precaution to take, get into the freezer. What was their purpose for moving them back into that *execution chamber*? (TR591) (objection sustained).
>
> As Derek described to you the ***young girl*** who held

> onto his shoulder, held onto his arm as he tried to console her, as she contemplated her death -- (TR592)
>
> Can there be more of an obvious execution style -- (TR592)
>
> . . . And that when they came in there that night, there were ***two young girls and two young boys***. (TR593)(objection sustained)
>
> In our history there have been others that have moved people into the *cold* chambers, bound and tied, unsuspecting ***like lambs***. Consider whether or not this was an execution style killing. Weigh that aggravating factor. (TR592-93)
>
> And consider the actions of Jeffery and Anthony as they acted in concert to eliminate ***these children*** as their witnesses. (TR594)(objection sustained)

The court admonished the prosecutor twice. When asked by counsel, the court stated, "Mr. Damore, restrict your comments to opening statement." (R596). Later, when the prosecutor argued, "We will ask you not to recommend *the possibility of parole* for these two individuals in 25 years with a life sentence" (R597), the court stated, "The Court will instruct the jury as to the law." (R597).

> It is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial. The trial judge must protect the accused from improper or harmful statements, or conduct by a witness or by a prosecuting attorney during the course of a trial. It is also the duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled.

Kirk v. State, 227 So.2d 40, 42-43 (Fla. 4th DCA 1969).

The court neglected its duty to "zealously protect the rights of the accused" to a fair trial. The argument made in the

State's opening was intended to inflame the passions of the jury. It undeniably did. Noting that the average juror is aware of the obligations of prosecutors, this Court has recognized that a prosecutor's "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." ***Deas v. State***, 161 So. 729, 731 (1935).

> When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial judge should not only sustain an objection at the time of such improper conduct when objection is offered, but *should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments*.

Deas, 161 So. at 731 (emphasis added).

The significance of the State's argument was multiplied ten-fold when the court overruled properly made objections and let the prosecutor continue this ploy, thereby placing the imprimatur of the court on the legitimacy of the State's argument. See, ***Pait v. State***, 112 So.2d 380, 385 (Fla. 1959) ("Thus it is that an error which might be viewed as harmless under many circumstances can assume proportions of utmost importance when equated to the possibility of a mercy recommendation in a capital case."); see also, ***The Florida Bar v. Schaub***, 18 FLW S295, 296 (Fla. May 13, 1993) (prosecutorial misconduct when state attorney "engages in

conduct designed to delude the fact-finder.").

Following the opening statement, the State did not actually introduce any evidence. The prosecutor unsuccessfully[21] sought to re-enact the crime, using the victims, employees of the State Attorney's Office as the defendants, and using a gun, knife and rope produced from Mr. Tanner's briefcase. (TR606-13). The State, contrary to prior unequivocal rulings by the court, then called the murder-victim's father, Mr. Van Ness, to the stand to "give a brief background of the victim, without getting into the loss to the family, the dreams or aspirations of the victim." (TR615). The objection was sustained; the following transpired:

> Mr. Mott: Your Honor, we'd like an objection noted for the record. We believe Mr. Van Ness being called as a witness was designed to invoke the sympathy of the jury. Ask that the State be admonished from doing any of these antics in the future. We've had knives paraded, a gun paraded.
>
> Court: Let's don't play games, let's get on with the case. **I'm not going to admonish anybody for anything.** You know your ethics, or at least I assume you do. And I found out a long time ago, when you assume anything, you're in error.

(TR618-619). Counsel asked for a curative instruction that the jury was not to consider any of what had happened as evidence, and

---

[21] The trial judge required that counsel make a request for a curative instruction in the presence of the jury at this time. (TR607-608). Counsel then voiced objections to having such a re-enactment without providing defense counsel with notice or any meaningful opportunity to confirm its fairness or accuracy. The Court asked whether counsel wanted to take depositions of the undisclosed participants, and when counsel said yes, the jury was excused. Objections to the re-enactment were sustained following further argument. (TR610-611).

the court directed counsel to "submit an instruction to the court and I'll review it." (TR619-620).

It is respectfully submitted that the foregoing ploys were deliberate attempts to improperly prejudice both defendants and their counsel in the eyes of the jury. Before trial, the court had unequivocally ruled that such victim impact testimony could not be presented by the State. (R2383-89;996). The issue was thoroughly litigated, and the State had to be well aware of the impropriety of calling the victim's father to the stand in front of the jury for the purpose stated by Mr. Tanner. It was patently done in bad faith for no purpose other than to inflame the jurors' emotions by reminding the jury of the suffering of the victim's family.

> The personal characteristics of the victim and emotional trauma suffered by the victim's family are wholly unrelated to the defendant's blameworthiness and thus create an impermissible risk of an arbitrary capital-sentencing decision.

Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990). The intentional, bad faith conduct of the State denied due process and rendered the jury recommendation unreliable under Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Because Jeffery Farina was sixteen years old at the time of the offense, as a matter of law the statutory mitigating factor of age applied and, absent any evidence of unusual maturity on his part, that statutory mitigating consideration necessarily was entitled to great weight. See, ***Ellis v. State***, 18 FLW S417, 420, Fn7 (Fla. July 1, 1993). However, the emphasis placed on the young

age of the victims over objection of counsel throughout trial came full-circle when the State Attorney argued that the jury could wholly reject the *defendant's* age as a mitigating consideration and instead consider *age* as an aggravating consideration:

> Mr. Tanner: * * * The mitigating factors that the defense will argue is, the age of the defendants at the time of the crime. Is that a mitigator under these circumstances?
>
> Counsel: (Mott) Objection, Your Honor. That is the law.
>
> Court: Objection overruled. The Court will instruct the jury as to the law.
>
> Mr. Tanner: His Honor will instruct you that you're to weigh the evidence and accept it or reject it. Is that a mitigator, the age of these young men? They're certainly old enough, mature enough, and experienced enough to know exactly what they were doing. **If anything, *age* is an aggravator.** These aren't 13 or 14 ---
>
> Counsel: (Henderson) Objection, Your Honor.
>
> Counsel: (Mott) That is a misstatement of the law.

(TR1010-11).

Counsel argued that the argument misstated the law and that an immediate curative instruction was required to correct the impression being left with the jury. (TR1011-12). The court ruled, "I will instruct the jury that they're to follow the instructions to be given by the Court and I'll instruct them on the law." (R1011). A mistrial was denied. (TR1011-13). When the jury returned, Mr. Tanner began where he had left off, stating:

> Thank you, Your Honor. May it please the court. In addition to the alleged mitigator of age, they will argue no prior significant criminal history.

(TR1014).

Under these facts, the court failed in its duty to correct a misleading argument being made over timely objection. The State asked the jurors whether age of these defendants was a mitigating consideration, thereby implying that the jury could fairly conclude that it was not, and then deftly converted age into a generic non-statutory aggravating consideration. It was incumbent on the court to timely address that misleading argument.

As a matter of law, the fact that Jeffery Farina was sixteen-years-old **is** a statutory mitigating consideration that **must** be afforded weight by the sentencer. See, ***Campbell v. State***, 571 So.2d 415, 419-420 (Fla. 1990) (court must find as mitigation each factor "reasonably established by greater weight of evidence" and, "factor once found cannot be dismissed as having no weight."); ***Garron v. State***, 528 So.2d 353, 359 (Fla. 1988) ("These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct."). The intentional prosecutorial misconduct throughout the case denied due process, a fair trial and otherwise made the jury recommendation unreliable under Article I, Sections 9, 16, 17 and 22, Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, if this Court declines to order imposition of a life sentence as set forth in Point I, supra, the convictions must be reversed and the matter remanded for a new trial.

POINT V

THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENDANT'S SPECIALLY REQUESTED JURY INSTRUCTION(S) DENIED DUE PROCESS, A FAIR JURY TRIAL AND RELIABLE SENTENCING RECOMMENDATION IN VIOLATION OF ARTICLE 1, SECTIONS 9, 16, 17 AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A trial court has a fundamental responsibility to give the jury full, fair, complete and accurate instructions on the law. ***Foster v. State***, 603 So.2d 1312 (Fla. 1st DCA 1992). The standard jury instructions, though presumed correct, not always are. See, ***Yohn v. State***, 476 So.2d 123 (Fla. 1985) (standard jury instruction concerning law of insanity incorrect); ***Sochor v. Florida***, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (standard jury instruction concerning "especially heinous, atrocious or cruel" statutory aggravating factor unconstitutionally vague.).

> While the standard jury instructions are intended to assist the trial court in its responsibility to charge the jury on the applicable law, the instructions are intended only as a guide, and can in no wise relieve the trial court of its responsibility to charge the jury correctly in each case.

Steele v. State, 561 So.2d 638, 645 (Fla. 1st DCA 1990).

Here, objections to the standard jury instructions and proposed instructions were submitted to the trial judge in writing. (R3017-38). The trial court overruled the objections and refused to give the instructions. (TR985). Appellant again asserts each objection to the standard instructions made below and in particular argues that the following rulings denied due process, a fair trial and a reliable sentencing recommendation contrary to the Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution:

Defense counsel proposed in writing that the jury be instructed during both the guilt and penalty phase as follows:

> Where a statute does not specifically define words of common usage, such words are to be construed in their plain and ordinary sense. If a word or term is expressly defined by statute, the definition provided by statute must be followed and the word or terms must be applied according to the fixed legal meaning.

(R2999). The instruction sets forth a basic principle of law and is based on language found in ***Williams v. Dickerson***, 28 Fla. 90, 9 So. 847 (1891); ***State v. Hagan***, 387 So.2d 943, 945 (Fla. 1980); ***Shell Harbor v. Department of Business Regulation***, 487 So.2d 1141, 1142 (Fla. 1st DCA 1986); and, ***Dept. of Administration v. Moore***, 524 So.2d 704, 707 (Fla. 1st DCA 1988). (R2998).

The trial judge refused to give the requested instruction during the initial charge conference (R3001;TR479) and again during deliberations when the jury asked for a dictionary. (TR574). The refusal of the trial court to instruct the jury as set forth in the above instruction denied due process in that the standard jury instructions do not adequately inform the jury that it must accept and exclusively apply the definition(s) of words and terms of art as they are defined by statutes. The omission of the requested instruction enabled jurors to apply statutory provisions in ways unintended by the Legislature.

Specifically, with reference to statutory aggravating factors, several unconstitutionally broad terms must be expressly limited and carefully defined to avoid arbitrary and capricious imposition of the death penalty. Unless instructed by the trial court that use of such terms as "heinous, atrocious or cruel" and/or "cold, calculated and premeditated" is necessarily limited to the definitions of those terms provided by the court, jurors are left free to use far broader and commonly understood meanings with arbitrary, capricious and unconstitutional results.

> We require close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. [citations omitted]. In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. Otherwise, the defendant is deprived of the precision that individualized consideration demands[.]

Stringer v. Black, 503 U.S. ___, 112 S.Ct. ___, 117 L.Ed.2d 367, 378-379 (1992). Refusal of the request for an instruction limiting the jury's consideration of the statutory aggravating factors to only the circumstances as defined by the court was an abuse of discretion resulting in arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution. ***Espinosa v. Florida***, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). The court's refusal to (R3033) expressly limit the jury's consideration to statutory aggravating factors also results in arbitrary and capricious imposition of the death penalty.

The reliability of the death penalty is suspect based on several standard jury instructions given here over objection. The proposed instructions would have cured the defects. The standard preliminary instruction is objectionable because it can reasonably be read as limiting the things that may be presented as mitigation to "the nature of the crime and the character of the defendant." (R3022). The limitation violates the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22. ***Penry v. Lynaugh***, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Instructing the jury that the sentencing decision rests "solely" (3021) with the trial judge and that the recommendation is "advisory" (R3024) is misleading and incorrect, as explained in ***Espinosa***, supra, and it is prejudicial in that it tends to diminish the responsibility of the jury in violation of the Eighth and Fourteenth Amendments and Article I, Section 17. ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S.Ct. 2633 (1985).

The instructions given the jury as to the statutory aggravating factors failed to adequately channel the discretion of the jury to recommend the death penalty in violation of the Eighth and Fourteenth Amendments and Article I, Section 17 of the Florida Constitution. The instructions given as to an "especially heinous, atrocious or cruel" aggravating factor (TR1048) and a "cold, calculated and premeditated murder, with no pretense of moral or legal justification" aggravating factor fail to limit the class of people eligible for the death penalty and are too broad

and unconstitutionally vague in violation of ***Espinosa v. Florida***, 505 U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), ***Sochor v. Florida***, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992), ***Maynard v. Cartwright***, 486 U.S. 356 (1988), ***Shell v. Mississippi***, 498 U.S. ___, 111 S.Ct. 313 (1990), *Godfrey v. Georgia*, 446 U.S. 420 (1980). (R3026).

The standard instruction states that the jury "should" recommend a life sentence if the aggravating circumstances do not justify the death penalty. (TR1049). The term "should" is too equivocal. It fails to mandate a life recommendation when a death penalty is not justified by sufficient statutory aggravating circumstances. (R3027). As commonly understood, the term "should" fails to instruct jurors that a life recommendation is required in cases where the statutory aggravating circumstances fail to justify a death sentence and instead suggests that the option remains open to recommend a death sentence even in the absence of sufficient statutory aggravating factors in violation of the Fifth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. (R3027). See, *Cage v. Louisiana*, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Counsel asked for an instruction to be given during the jury charge that would define mitigation as follows:

> "Mitigation" is defined broadly as any aspect of the defendant's character or record and any of the circumstances of the offense that reasonable may serve as a basis for imposing a sentence less than death.

(R3034). That definition is found verbatim in ***Campbell v. State***, 571 So.2d 415, 419, fn. 4 (Fla. 1990) and ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978). The absence of that instruction failed to insure that the jury would perceive what, as a matter of law, must be weighed in opposition of the aggravating considerations.

Similarly, the trial court refused the request that the jury be instructed that, as a matter of law, mitigation includes but is not limited to an abused childhood, remorse, and a potential for rehabilitation. (R3035). There was substantial evidence supporting each of those mitigating considerations of each of these mitigating considerations presented. However, in the absence of an instruction from the court informing the jurors that such factors must necessarily be considered as mitigation, the jury may well have disregarded the evidence and summarily rejected the argument of counsel because they were not so instructed by the court. The arbitrary refusal to instruct the jury that as a matter of law such things as an abused childhood or a potential for rehabilitation, if proved to exist, must be weighed against imposition of the death penalty denied due process, a fair trial and a reliable sentencing recommendation in violation of Article I, Sections 9, 16, 17 and 22 of Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A sentencer cannot be precluded from considering valid mitigation, ***Lockett v. Ohio***, 438 U.S. 586, 604-605 (1978), nor can a sentencer refuse to consider valid mitigation. ***Eddings v. Oklahoma***, 455 U.S. 104, 115-116 (1982). See, ***Penry v. Lynaugh***, 492

U.S. 302 (1989) (Eighth Amendment requires that jury be allowed to consider mental retardation as a mitigating circumstance.). The omission of instructions from the court was especially prejudicial here due to the manner in which voir dire was conducted in the presence of the entire venire. For example, the following is a typical exchange of what the entire venire heard during voir dire:

> Q: (Mott) Would you consider on the issue of what the appropriate penalty is, would you consider matters of, for example, family background of the person accused?
>
> A: (venireman) No.
>
> Q: Would you consider on the issue of appropriate penalty whether or not a person had an abusive background?
>
> A: No.
>
> (Tanner) Excuse me. If it please the court, I would object. The out-of-context nature he's asking the jurors to negatively commit to a course of conduct without having the court's instructions or the benefit of the law, it's an improper question.
>
> Court: I would sustain the objection. I would ask the lady would you follow the instructions as given to you by the court?
>
> A: Yes.
>
> Court: You may proceed, Mr. Mott.

(R1081). Questions concerning acceptance of age as a mitigating consideration were then asked, and another State objection was sustained. (R1085). Counsel argued that he was entitled to ask each prospective juror if a particular, previously recognized mitigating consideration could be properly weighed by a juror. (R1085). The court responded:

> Court: That's what we don't need to do today. *We're not here to instruct the jury*, just trying to find a jury that can impartially try the case without any outside factors. That's all we're here for now and can they follow the instructions of the court.

(R1086).

The trial court limited voir dire and required that defense counsel ask generally whether, in recommending a sentence, the jurors could follow the instructions given by the court. (R1086). The refusal of the judge to thereafter expressly instruct the jury that an abused childhood and potential for rehabilitation were legally recognized mitigating considerations that must be weighed in opposition of imposition of a death sentence was misleading and an unfair denial of due process resulting in arbitrary and capricious recommendation and imposition of a death penalty in violation of Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

In order to provide a constitutional and consistent standard for determining whether the aggravation "outweighs" the mitigation (R3036), counsel asked for the following instruction: "If a reasonable quantum of competent, uncontroverted evidence has been presented as to a particular mitigating factor, the mitigation consideration has been adequately proved." (R3036). The omission of that instruction renders the "outweigh" standard for imposition of the death penalty impermissibly vague and susceptible to arbitrary and freakish application contrary to the requirements of due process and reliably consistent sentencing in violation of Article

I, Sections 9,1 6, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. ***Cage v. Louisiana***, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Because the instructions below were unconstitutionally infirm as set forth in the record at pages R3017-3018 and as otherwise argued above, the death penalty is based on a tainted and unreliable jury recommendation. Accordingly, the death sentence must be vacated and the matter remanded for a new penalty phase if this Court declines to order imposition of a life sentence as argued in Point I, supra.

POINT VI

FLORIDA'S DEATH PENALTY STATUTES UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by defining the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court is promulgating substantive law in violation of Article II, Section 3 of the Florida Constitution. (separation of powers). The Florida Legislature has the sole power and responsibility to pass substantive legislation under Article III, Florida Constitution (1976). The Legislature enacted Section 921.141, Fla. Stat. (1975) to establish the substantive criteria for authorization of imposition of the death penalty. The factors contained there are unconstitutionally vague and overbroad. See, *Espinosa v. Florida*, 112 S.Ct 2926 (1992).

The substantive definitions of the vague statutory terms are found in *State v. Dixon*, 283 So.2d 1 (Fla. 1973) and various other decisions of this Court. See, *Peek v. State*, 395 So.2d 492, 499 (Fla. 1980) (parole and work release constitute being under sentence of imprisonment, but probation does not); *Johnson v. State*, 393 So.2d 1069 (Fla. 1981) (more than three people required to constitute a great risk of death or injury to many persons)[22];

---

[22] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360 (Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the proper case to find the "great risk to many persons" factor, how

Banda v. State, 536 So.2d 221, 225 (Fla. 1988) ("a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.").

A court is not empowered to so enact laws, either directly or indirectly. The passage of death penalty legislation for it to be refined, defined, re-defined and otherwise given substance by the Supreme Court of Florida is a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions. This Court should reject being placed in a position of substantively defining the operative terms of Florida's death penalty legislation and declare Section 921.141, Florida Statutes (1991) unconstitutionally vague. See, *Chiles v. Children A, B, C, D, E, and F, etc.*, 589 So.2d 260 (Fla. 1991).

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF

The death penalty statute in Florida requires that statutory aggravating factors "outweigh" the mitigation. Section 921.141(2) and (3), Florida Statutes (1989). The statute expressly places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1989). As written, the statute violates the Fifth and Fourteenth Amendments of the United States Constitution, Article I, Section 9

---

did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

of the Florida Constitution and the holding of ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). To avoid constitutional impropriety, this Court placed the burden on the State to prove that the aggravating factors outweigh the mitigating factors. See, ***Arrango v. State***, 411 So.2d 172, 174 (Fla.1982); ***Alvord v. State***, 322 So.2d 533, 540 (Fla.1975) ("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.")

Even when the statute is changed by judicial fiat to place the burden on the State to demonstrate that the statutory aggravating factors "outweigh" the mitigation, a violation of due process under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution occurs because the bare "outweigh" standard fails to adequately apprise either the jury or the sentencer of what must objectively be present to determine whether imposition of the death penalty is warranted.

As worded, the standard instructions dilute the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. The standard instruction requires only that the State show that the death penalty is warranted by a mere preponderance of the evidence, in violation of due process. See, ***Cage v. Louisiana***, 498 U.S. __, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990); ***Francis v. Franklin***, 471 U.S. 307 (1985); ***Sandstrom v. Montana***, 442 U.S. 510 (1979). Imposition of the death penalty based on a preponderance of the evidence is unconstitutional. ***In re: Winship***, 397 U.S. 358 (1970); ***Mullaney v. Wilbur***, 421 U.S. 684 (1975).

LACK OF NOTICE

Prior to trial, a motion seeking to have the State elect and justify which statutory aggravating factors it was seeking to prove was denied. (R2761-62). The failure of the State to provide adequate notice prior to trial as to which factors it sought to prove denies due process and violates the notice requirements of the state and federal constitutions. Here, the evidence presented during the guilt phase was used to meet the State's burden of proving the existence of statutory aggravating factors beyond a reasonable doubt. See, ***Banda v. State***, 536 So.2d 221 (Fla.1988) (death penalty not authorized if no statutory factor present.).

The denial of notice as to which aggravating factor(s) the state was seeking to prove when the evidence was presented denied a meaningful opportunity to address that evidence and it otherwise was a denial of due process of law guaranteed under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (citations omitted). It is equally fundamental that the right to notice and an opportunity to be heard "Must be granted at a meaningful time and in a meaningful manner." (citation omitted).

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

Adequate notice provides a significant constitutional protection. See, ***Mays v. State***, 519 So.2d 618, 619 (Fla. 1988) ("We

agree that due process requires notice and an opportunity to be heard prior to an assessment of costs under Section 27.3455."); See also, ***Jenkins v. State***, 444 So.2d 947 (Fla.1984). As the United States Supreme Court noted in ***Fuentes***, "

> It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights. And [n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and the opportunity to meet it.' (citation omitted).

Fuentes, 407 U.S. at 81.

Procedural due process is not static. The minimum procedural requirements necessary to satisfy due process depend on circumstances and interests of the parties. See, ***California v. Trombetta***, 467 U.S. 479 (1984) (Due process under Fourteenth Amendment must comport with prevailing notions of fundamental fairness.); ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); ***Cafeteria Workers v. McElroy***, 367 U.S. 886, 895 (1961) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."). Unless notice precedes presentation of evidence as to which statutory aggravating factor the State intends to prove, a defendant is denied the ability to meaningfully confront witnesses and/or rebut that evidence. Belated notice after presentation of evidence that the State proved a particular statutory aggravating factor constitutes a denial of due process under the Fifth, Sixth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution.

The Sixth Amendment right "to be informed of the nature and cause of the accusation" is applicable to the state's through the due process clause of the Fourteenth Amendment. ***In re: Oliver***, 333 U.S. 257, 273-74 (1948). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused." ***Cole v. Arkansas***, 333 U.S. 196, 201 (1948) (emphasis added). In ***Cole***, Petitioners were convicted at trial of one offense but a conviction was affirmed on appeal based on evidence on the record indicating that a different, uncharged offense had been committed. A unanimous United States Supreme Court reversed, finding a denial of procedural due process:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, Petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court.

Cole v. Arkansas, 333 U.S. at 201-2 (emphasis added). See, ***Presnell v. Georgia***, 439 U.S. 14, 16, fn.3 (1978) ("in the present case, when the Supreme Court of Georgia ruled on Petitioner's motion for rehearing it recognized that, prior to its opinion in the case, Petitioner had no notice, either in the indictment, in the instructions to the jury or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnapping.").

Relying on ***Spinkellink v. Wainwright***, 578 F.2d 582, 609-10 (5th Cir. 1978), this Court has previously rejected a Sixth Amendment "lack of notice" challenge. See ***Preston v. State***, 444 So.2d 939, 945 (Fla.1984); ***Sireci v. State***, 399 So.2d 964, 970 (Fla.1981); ***Menendez v. State***, 368 So.2d 1278, 1282 (Fla.1979) (footnote 21). The Fifth Circuit in *Spinkellink* decided this issue on **lack of preservation** grounds. "A review of the record indicates that neither *Spenkellink* (sic) nor his attorney objected at trial to the indictment, which Fla.R.Crim.P. 3.190(c) requires in order for the alleged defect to be preserved for appellate review. Accordingly, the defect, if any, was waived." ***Spinkellink***, 578 F.2d at 609-10 (emphasis added). Any further discussion by the Fifth Circuit was dicta. Further, the instant challenge is based on procedural due process requirements of the Fifth Amendment and Article I, Sections 9 and 16 of the Florida Constitution.

It cannot reasonably be claimed that the interests of fairness do not require a defendant to know when evidence is being presented what statutory aggravating circumstance the State is attempting to prove. To say that the aggravating factors are limited to those specified in statutes does not satisfy the notice requirement. All crimes are contained in statute books. It is incumbent on the State, as the prosecuting party, to notify the defendant which statutes it seeks to utilize. It is incumbent on the court, as the neutral enforcer of Constitutional rights, to require proper notice.

For the aforesaid reasons, the death penalty in Florida is unconstitutional on its face and as here applied.

CONCLUSION

Based on the argument and authority set forth herein, this Court is asked in reference to Points I and VI to reverse the death sentence and to remand for imposition of a life sentence; in reference to Points II through V, to reverse the convictions and remand for a new trial or, alternatively, to reverse the death sentence and remand for a new penalty phase.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLA. BAR # 353973
112-A Orange Avenue
Daytona Beach, Fl. 32114
(904) 252-3367

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Ste. 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to Mr. Jeffery Allen Farina, #725254 (44-1235-A1), P.O. Box 221, Raiford, FL 32083, this 16th day of September, 1993.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JEFFERY A. FARINA,	)	
	)	
Defendant/Appellant,	)	
	)	
v.	)	CASE NO. 80,985
	)	
STATE OF FLORIDA,	)	
	)	
Plaintiff/Appellee.	)	
	)	

INDEX TO APPENDIX