IN THE SUPREME COURT OF FLORIDA

ANTHONY J. FARINA,

Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,

Appellee/Cross Appellant.

CASE NO. 81,118

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On May 19, 1992, the Grand Jury for Volusia County, Florida, returned an eleven count indictment against the Appellant charging him with: First Degree Murder, Attempted First Degree Murder in three counts, Armed Robbery with a Fire Arm or Deadly Weapon, Burglary of an Occupied Structure, with a Battery, Kidnapping in four counts, and Conspiracy to Commit Murder and/or Armed Robbery. (R2162-2167)[1] Numerous pre-trial motions were filed. (R2169-2701) The trial court entered a pre-trial order on June 26, 1992, which, among other things, set a trial date for November 9, 1992, (R2227) set deadlines for filing pre-trial motions which in effect amended the Florida rules for criminal procedure, (R2228) and prohibited counsel on questioning potential jurors on anticipated instructions for theories of law. (R2229)

A motion to sever defendants was filed on August 7, 1992

[1]"R" refers to the record and transcripts up to and including Volume 21; "TT" refers to trial transcripts beginning with Volume 22.

(R2245-2246), and the motion was in part denied. (R2430) Also on August 7, 1992, motions to suppress statements and confessions were filed. (R2250-2252) An order pertaining to the defendant's motions to suppress was filed on September 17, 1992. (R2339-2353) The motions were granted in part and denied in part. (R2339-2353) On October 28, 1992 an order was entered and filed granting the Defendant's motion for severance, unless the state elected either not to use statements and confessions obtained or use only those portions of statements and confessions that were redacted so as to avoid any "Bruton" problems. (R2430-2431)

A motion to change venue was filed on August 11, 1992 (R2253-2278A), the motion was denied. (R247, TT996)

Several motions pertaining to "victim impact evidence" were filed on August 21, 1992. (R2283-2321) An order on the Defendant's motions pertaining to victim impact evidence was entered on October 20, 1992 and filed on October 21, 1992. (R2383-2389) The motions were denied in part and granted in part. (R2383-2389)

On October 30, 1992 Appellant moved to disqualify the Office of the State Attorney for the Seventh Judicial Circuit, on the grounds that the State Attorney had engaged in "forum shopping" and had in effect hand picked the Judge to try the Taco Bell case. (R2434-2440) A hearing was held on November 6, 1992 pertaining to the motion to disqualify the Office of the State Attorney. On November 6, 1992, the day of the hearing, the State filed a response to the Defendant's motion to disqualify the State

Attorney's Office. (R2486-2489) An order denying the Defendant's motion to disqualify the State Attorney was entered on November 13, 1992 *nunc pro tunc* to November 6, 1992. (R2559-2568) While the Court denied the Defendant's motion to disqualify the State Attorney, the Court did find that the State Attorney had improperly manipulated the case and that those improper procedures gave the entire judicial system a "black eye." (R2562) On November 9, 1992, the Defendant filed a motion for additional peremptory challenges or to declare Florida Statute 913.08(1)(A), unconstitutional. (R2498-2500)

Also on November 9, 1992, the day that the trial commenced, the Defendant filed a motion to disqualify the trial judge. (R2504-2523) The motion to disqualify Judge Richard Orfinger was granted and Judge Uriel Blount was substituted as the trial judge, and the case proceeded to trial, without delay. (TT1-1063) On November 12, 1992, the Chief Judge of the Circuit filed a written order of reassignment pertaining to the substitution of Judge Blount for Judge Orfinger; the order was entered on November 9, 1992. (R2547-2751)

The case proceeded to jury trial on November 16, 1992 and on November 18, 1992 the jury returned verdicts of guilty on all eleven counts of the indictment. (TT1-1064; R2609-2919) The case proceeded to the penalty phase the next day and on November 20, 1992 the jury returned a recommendation of seven jurors recommending death and five jurors life. (R2639)

A motion for a new trial was filed on November 30, 1992.

(R2640-2647) On December 16, 1992 a hearing on the motion for a new trial and a sentencing hearing was conducted. (R2117-2155) The trial court followed the recommendation of the jury and sentenced the Defendant to death. (R2650-2684)

On January 4, 1993 the State filed a notice of Appeal/Cross Appeal. (R2865-2686) On January 15, 1993 a timely notice of appeal was filed by the Defendant. (R2687) This appeal follows.

STATEMENT OF THE FACTS

This is a case the media has labeled the "Taco Bell" case. (R1023, 2262) In the early morning hours of May 9, 1992, Derek Mason, Kimberly Gordon, Michelle Van Ness and Gary Robinson were preparing to close a Taco Bell restaurant in the city of Daytona Beach, Florida. (TT98-105, 328-331, 359-367) Derek Mason was the first victim to testify: He and Michelle Van Ness gathered the trash and took it outside to the garbage cans. (TT104-105) Once outside, Mason noticed a dark colored car about fifteen feet from the garbage cans. (TT105) Two people jumped out of the car and ran toward Mason and Van Ness. One person pulled a gun and shoved it in Mason's back. (TT106) Mason was ordered into the store to get the manager. (TT106) The two people were identified as Anthony and Jeffrey Farina. (TT109-110) Jeffrey was armed with a hand gun and Anthony was armed with a knife. (TT109-100) Once in the restaurant the manager, Kim Gordon, and the other employee, Gary Robinson, were located and held at gun point, along with Mason and Van Ness. (TT110-113) Then, Jeffrey Farina held Van Ness, Mason and Robinson at gun point in the rear of the restaurant while Anthony took the manager, Kim Gordon, to her office to open the safe. (TT111-113) Anthony Farina returned with Kim to the rear of the store where he asked if anyone wanted a cigarette. (TT115) Ms. Van Ness and Ms. Gordon said yes and Anthony gave them cigarettes. (TT115) Mason was then taken to the manager's office by Jeffrey Farina where he tied up Mr. Mason. (TT115-117) When Jeffrey returned Mason to the rear of the store, Mason asked

Anthony Farina if he could sit down and Anthony said yes. (TT117) At that time, Jeffrey Farina took Gary Robinson to the manager's office and tied him up. (TT118-119) Mason recognized Anthony Farina from working with him at another Taco Bell. (TT107) When Jeff Farina and Gary Robinson were in the manager's office, Derek Mason asked Anthony Farina to come to him for a moment. (TT118) Anthony walked over to Mason and Mason asked if anyone was going to be hurt; Anthony replied, just cooperate and everything will be all right. (TT 118) According to Derek Mason, Anthony Farina had taken Ms. Van Ness and Ms. Gordon to the manager's office and tied them up. (TT120) Upon his return, Anthony Farina directed everyone to enter the cooler area. (TT120-121) Upon Ms. Gordon's request Anthony Farina considered turning the freezer off but was concerned that he might set off an alarm. (TT121-122) The Farina brothers left the cooler area for a few moments and upon their return they ordered the four victims into the freezer. (TT122-123) Jeffrey Farina then raised the pistol and pointed it at Gary Robinson's chest and began to fire. (TT123) Jeffrey Farina then shot Derek Mason in the face. (TT124) When Jeff pointed the gun at Derek's chest and pulled the trigger the gun misfired. (TT125) Mason then realized that he had been shot and then he heard another shot and saw Michelle Van Ness fall. (TT125-126) Mason then saw Anthony Farina hand Jeffrey Farina a knife and Jeffrey stabbed Kim Gordon. (TT127-128) Mason was not sure, but he believed that Anthony Farina was holding Gordon's head down while Jeffrey stabbed her. (TT128) Ms. Gordon later testified that Anthony Farina was

at the exterior part of the cooler when the stabbing occurred. (TT388) The Farinas then left the Taco Bell. (TT131)

Gary Robinson was the next victim to testify. (TT328-358) For the most part, Mr. Robinson's testimony corroborated the testimony of Mr. Mason. When the Farinas came into the store, Jeffrey was carrying the gun and Anthony was carrying the knife. (TT3322) The Taco Bell employees were asked to go to the back of the store in front of the cooler. (TT334) Jeffrey held a gun on Derek, Michelle and Gary while Anthony and Ms. Gordon went to the manager's office to get the money. (TT334-335) When Anthony and Kim Gordon returned to the area just outside the cooler, Anthony offered everyone a cigarette. (TT335) After everyone was tied they were ordered into a walk-in cooler. (TT336-337) Once in the cooler, Kim Gordon asked Anthony to shut off the cooling unit. (TT338) Anthony told Kim that he would turn off the cooling unit. (TT387) Anthony walked outside of the cooler for a moment with Jeffrey; when he returned he announced that he could not turn off the cooling unit because he was afraid of setting off an alarm. (TT338) Anthony Farina then said I am going to have to ask you to step into the freezer. (TT338) According to Robinson's testimony, a few moments after being in the freezer the shooting started. (TT338-340) After shooting Robinson, Mason and Van Ness, Jeffrey attempted to shoot Gordon but the gun misfired. (TT340) At that time, Anthony handed Jeffrey a knife and Jeffrey stabbed Ms. Gordon. (TT340) After Jeffrey stabbed Gordon the Farinas left the store. (TT341-342) Robinson testified on cross-examination that

Anthony Farina was congenial toward him and the others, until the time that the shooting started. (TT346-348, 351) Robinson testified that Anthony Farina did not shoot anyone and did not stab anyone; he testified that Anthony did not encourage Jeffrey Farina to shoot or stab anyone. (TT353) Additionally, Robinson testified that Anthony did not actually assist Jeffrey in the shooting and did not assist Jeffrey in stabbing Kim Gordon. (TT353) In contrast to Mr. Mason's testimony, Mr. Robinson testified that Anthony Farina did not touch Kim Gordon, that he was aware of, even though he watched the stabbing occur. (TT353)

The next victim to testify was Kim Gordon. (TT358-390) As Ms. Gordon was performing her closing duties, she heard someone call her name. (TT368) When she looked up she saw Anthony and Jeffrey Farina and Michelle Van Ness and Derek Mason. (TT368) Anthony had a knife and Jeffrey had a gun. (TT369) Anthony took Kim Gordon to the manager's office to get money out of the safe. (TT370-371) Kim asked for a cigarette and Anthony gave her one. (TT371) Each employee was then tied up one by one. (TT372-374) Once everyone was tied up, Kim Gordon asked for another cigarette and Anthony provided one for her. (TT374) Thereafter, accordingly to Kim Gordon:

> Anthony said, well, everybody get in the cooler. And he asked me how to turn the cooler off. And I said, the only way I know is by the emergency button, which is at the left of the door. And he, Anthony, then said, well, I don't want to -- I don't want to hit that because I don't want an alarm to go off."

(TT376)

Anthony then left and came back a few moments later and indicated that everyone would have to enter the freezer. (TT379-380) As soon as the victims had entered the freezer they turned around and the shooting began. (TT380-382) When Ms. Gordon last saw Anthony Farina he was "by the door of the walk-in when I last saw him." (TT380) The only other thing she remembered was feeling a knife going in her and then passing out. (TT381-382)

Ms. Gordon further testified that Anthony Farina did not encourage Jeffrey to shoot anybody. (TT386) She testified that Anthony Farina offered to turn the cooler off, without anyone requesting that the cooler be turned off. (TT386-387) She could not tell if Anthony Farina was armed and she never saw Anthony make any threatening gestures toward anyone with any weapon. (TT386-388) She also testified that Anthony was back by the entrance to the walk-in cooler away from the freezer door. (TT388)

After the Farinas had left the store, Mason and Robinson went to the manager's office and called 911. Shortly thereafter, the police arrived at the Taco Bell, entered the restaurant and made contact with Mr. Mason. (TT55-58; 98-100)

Upon arrival of the paramedics, Mason declined immediate treatment so the more seriously injured could be cared for. (TT65-67) He explained what had happened, gave descriptions of an automobile and two assailants. He told the police he recognized one of the assailants who had a tattoo of a burning heart on his right shoulder as a former employee of Taco Bell. He said his name was "Tony." (TT67-72) With Mason's help, the police located the

personnel file of Anthony Farina. (TT67-72; 134-35) Mason, Van Ness and Robinson had been shot with the same .32 caliber pistol. (TT314-319) Ms. Van Ness died the next day without regaining consciousness. (TT96; 271) Mr. Robinson, who had been shot through the left lung, was in intensive care for seven days. (TT343). Mr. Mason had surgery and was released from the hospital three days later. (TT140) Ms. Gordon remained in the hospital for nine days. (TT382-83)

POST ARREST FACTS

Sixteen-year-old Jeffrey Farina and his brother Anthony (who was eighteen at the time of the offense), along with twenty-year-old John Henderson were arrested on the same day of the incident, May 9, 1992. (TT167-172, 279-280; R2156-2159) When Ms. Van Ness died, the State Attorney's Office obtained a court order authorizing the defendants to be transported for "booking and fingerprinting" for first-degree murder. (R2160-61) On May 11, 1992 the three defendants were transported, together, to the Daytona Beach Police Department in a patrol car wherein their conversations were monitored and recorded. (R375-81)

Once inside the station, each defendant signed a waiver of rights form and was questioned by Detective Sylvester. (R360-61; 426-35; 445-50) A Florida Department of Law Enforcement fingerprint expert also asked questions (R476-81), and then the defendant was returned to the police car so the conversations could be monitored/recorded. (R379)

Following an evidentiary hearing (R356-392; 425-570) on motions to suppress those statements, Judge Orfinger ruled that the

statements obtained from Jeffrey Farina by the FDLE expert were inadmissible because the agent improperly questioned Jeffrey after the right to counsel was invoked (R2857), but the court refused to suppress statements intercepted while the defendants were in the rear of the police car. (R2847-61) Judge Orfinger, however, severed John Henderson's case. (R2430-31) Anthony and Jeffrey Farina could be tried together if the State used only those intercepted statements that were made when both Anthony and Jeffrey Farina were present. (R2431)

On October 17, 1992, the Daytona Beach News Journal reported that, while speaking at a local bar function, the Clerk of the Court, Mr. Newell Thornhill, denied accusations of "judge shopping" in the Taco Bell case and explained that the case had been moved to DeLand at the request of State Attorney John Tanner to prevent students from attending the trial. The newspaper quoted the Republican candidate for Clerk of Court, Mrs. Matousek, as alleging:

> The present clerk, if you're one of his good old boy buddies, will even allow you to judge shop, Mrs. Matousek said. She referred to the Taco Bell murder case, in which three young men are charged with murdering a teenage girl. The case, originally assigned to an East Volusia judge, was shifted by Thornhill to a DeLand judge.

(R2440, 2919) Defense counsel investigated and then moved to disqualify the State Attorney's Office based on prosecutorial misconduct. (R2434-2440, 2913-19)

An evidentiary hearing conducted by Judge Orfinger on November 6, 1992 showed that, pursuant to an order from the Chief Judge, the

clerk's office was to use a "blind filing system" whereby capital cases are normally assigned on a rotational basis influenced by the number of capital cases presently assigned to a particular circuit court judge. (R849-53; 877-78) The "Taco Bell" case would have been assigned to Judge Briese had normal procedures followed. (R844; 857) With the public defender's office consent to contact Judge Briese's judicial assistant to determine if hearing time could be obtained for a motion to withdraw (R789), Assistant State Attorney Damore contacted Judge Briese's office and asked for hearing time and indicated the matter needed to be expedited. (R897) Damore was told by Judge Briese that the public defender would have to set own hearing and that the case would be treated no differently than any other first-degree murder case because that was a firm rule of Judge Briese. (R897-98)

Thereafter, State Attorney John Tanner went to see The Clerk of Court, Newell Thornhill, at the DeLand clerk's office. (R798). Mr. Thornhill testified that the State Attorney came into his office and asked for the Taco Bell case to be tried in the city of DeLand. (R798) Mr. Thornhill testified that he simply repeated Mr. Tanner's request to the deputy clerk who assigned the capital cases. (R803) However, the deputy clerk testified that Mr. Thornhill, though aware of the administrative order controlling 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)

Judge Briese learned that the case was no longer assigned to him and called Thornhill to find out why; The Clerk replied, "I don't want to be smart, but I decline to answer." (R876) Judge Briese believed the timing was suspect, in that the assignment was soon after Damore was told that Judge Briese would not give the Taco Bell case priority treatment. (R891-92) Judge Briese reported to Chief Judge McFerrin Smith that it appeared the Taco Bell case was being manipulated. (R884-86) Judge Smith contacted the Clerk and was told that the case had been assigned at Mr. Tanner's request for security reasons and to prevent truancy of high school children. (R888-89)

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;2970-2978)

JURY SELECTION FACTS

The day of trial, Anthony Farina moved[2] to recuse Judge Orfinger. (R2504-2523) Judge Orfinger granted that motion and on his own motion recused himself from presiding over Jeffrey Farina's case. (R981-982) Shortly thereafter, Judge Blount replaced Judge Orfinger later that morning and announced that he had read and was

[2] Affixed as an exhibit to the motion to recuse Judge Orfinger is a copy of a newspaper article from the Daytona Beach News Journal dated November 7, 1992, which sets forth the evidence and rulings made concerning the motion to disqualify the state attorney's office. (R2516)

familiar with the court file, ratified all prior rulings and orders (R994), and ruled that the change of venue would be taken up again if it became necessary during jury selection. (R997-98)

In the instant case, the tone of the jury selection was set by the voir dire of the first twelve jurors called from the first venire. (R1007-1279) Six of the first twelve jurors were excused for cause because they could not be fair because of their exposure to pre-trial publicity. (R1027, 1234, 1236, 1241) Venireman Chicko stated that he could not be fair because of his exposure to pre-trial publicity. (R1025) Ms. Moran and Ms. Demuth also stated that their exposure to pre-trial publicity made it impossible for them to sit as fair and impartial jurors. (R1024-1025) Venireman Smiley stated that he was exposed to pre-trial publicity and when he returned for the second day of voir dire he indicated:

> MR. SMILEY: For example, I have to be truthful with you. I went into work last night, that's all everybody talked about.
>
> MR. MOTT: All everybody talked about on your job was this case?
>
> MR. SMILEY: Right. Everyone seen me on the news, and that's all they talked about.

(R1209)

Ms. Carolyn Lee, who was also among the first twelve jurors voir dired, stated she was "devastated over the thing . . . ." (R1126) She stated that everyone had heard the devastating "Taco Bell" case news stories and they were very, very sad; they had upset the entire community. (R1130, 1215-1216) Ms. Lee was excused for cause. (R1234-1241) The final venireman of the

original twelve jurors voir dired was Ms. Katheleen Bretz. (R1007, 1234, 1241) She was shocked by the initial news stories and stated that she "thought that's unbelievable." (R1075) She stated that because of her exposure to the media coverage of the Taco Bell case she had concluded that the events had occurred and that it was "such a tragedy." (R1076, 1133) Ms. Bretz was excused for cause. (R1234, 1241)

Of the remaining original twelve jurors to be voir dired, each had been exposed to pre-trial publicity. Mary Shepherd stated that "it was a terrible thing that occurred," and that it "was a terrible crime that was committed . . . ." (R1104,1215) When asked about her ability to be fair, Ms. Shepherd was equivocal and stated that she didn't think she could completely set aside the exposure to pre-trial publicity. (R1214) Ms. Shepherd was peremptorily challenged by the state. (R1331) Mr. Pritchert had heard his neighbors talk about the case and had heard that the case was being transferred from one court to another. (R1106,1433) Mr. Patterson had read newspaper accounts, discussed the case with his wife and concluded that the Taco Bell case was a "pretty bad thing." (R1088-1089) Patterson was peremptorily challenged by counsel for the co-defendant. (R1148) Mr. Hutcherson had been exposed to both television and newspaper accounts of the Taco Bell case. (R1116) After Appellant's cause challenge was denied, he was peremptorily challenged by Appellant. (R1304) The remaining two jurors from the original twelve to be voir dired from the first venire, Michael Olson and Debra Riley both had been exposed to pre-

trial publicity. (R1067,1118,1122,1471)

Not withstanding the prejudicial statements that the jurors were making in each others presence, the trial court denied the Appellant's motion for separate/individual voir dire. (R1027-1028) After additional tainting of the venire, Appellant again renewed his Motion for Individual Voir Dire and again it was denied. (R1240-1241) Finally, the State voiced a concern that the potential jurors might taint each other with reference to confessions which were publicized but partially suppressed. (R1237-1238) After the concern voiced by the State, the trial court granted individual voir dire. (R1239) Even though the State's motion for individual voir dire being granted general voir dire continued for a significant number of jurors. (R1240-1417) Finally, Appellant's counsel renewed his Motion for Individual Voir Dire:

> MR. MOTT: I'm requesting individual voir dire.
>
> THE COURT: Granted. I did that once before. I don't generally rule but once. I don't know what useful purpose it's going to serve other than cause more paranoia definitely, and paranoia prevails.

(R1387)

The trial court was clearly displeased and annoyed with the process of individual voir dire. At one point the trial court threatened to swear jurors individually if they were not rejected:

> It suits me whatever you want to do, but I'm going to start swearing the jurors individually if you don't reject them at the time they're there, dig?

(R1408)

The trial court referred to individual voir dire as an "idiotic procedure." (R1412) The trial court repeatedly referred to individual voir dire as a "fishing expedition," (R1421, 1423, 1428, 1432, 1442) once as a "charade," (R1490) and also once as "one at a time crap." (R1901)

Defense counsel renewed all motions to strike the jury venire (R1991-95) Defense counsel accepted the jury under protest, subject to the motions to strike the panel and over requests for more challenges. (R2064-67)

PENALTY PHASE

The first witness to testify for Appellant in the penalty phase was Dr. Clifford Levin. (TT 622-701) Dr. Levin had a specialist expertise of being a board certified addictionologist. (TT 622) Dr. Levin testified that he had administered several psychological profile tests to Anthony Farina. (TT 624-646) Dr. Levin noted that Anthony Farina grew up in a family that was very dysfunctional. (TT627) Dr. Levin explained that the family was transient and had no physical stability; there was no parent/child stability. Anthony's mother was a heavy drinker and extremely neglectful of her children. Dr. Levin noted that Anthony Farina was an extremely emotionally and physically neglected child growing up. (TT 627-628) Also adding to the dysfunction of the family and the instability that Anthony experienced as a child was that he was abandoned by his natural father when he was approximately five years old. (TT628)

Anthony's mother remarried a Viet Nam veteran who suffered from mental illness including manic-depressiveness. (TT 628) The manic-depressive step-father, Jim Brant, was a documented abuser of Anthony Farina and the other children in the family. (TT 629) As a result of the physical abuse that Anthony suffered (at the hands of James Brant) Anthony was removed from the home for a period of at least two years. (TT 629)

Because of his dysfunctional family environment and neglect and abuse, Anthony Farina did not form a sense of what is socially right and wrong; this was complicated by a drug addiction, a learning disability and only completing the ninth grade. (TT 629-631, 643) It was also noted that Jim Brant, the step-father, physically abused Anthony's mother in front of Anthony and the other children. (TT 630) Dr. Levin indicated that Anthony "got stuck" developmentally. That is, there was no role modeling at the home to get a sense of what was appropriate and what was not appropriate; Anthony Farina did not have a role model. (TT 630) Consequently, he developed a defensive, dependant type of personality. (TT 630) As a result of his childhood, Anthony did not develop the social skills necessary to enable him to make correct and appropriate decisions. (TT 631) Dr. Levin further observed that even though Anthony was of average intelligence, he did have a learning disability. (TT 632)

The doctor also noted that there was a documented history of Anthony being sexually abused as a child. (TT 632-633) Anthony Farina had been incopretic (meaning that he soiled his pants) from

age seven through age thirteen or fourteen. (TT 633, see also, 722-724, 728, 792-794, 834, 838-839) Dr. Levin observed that an incopretic condition is symptomatic of being sexually abused, "typically anally penetrated." (TT 633)

Dr. Levin indicated that the psychological profile test that he conducted strongly correlated with a dependency profile for alcoholism and drug addiction. This he found consistent with the reports from Anthony Farina that he had been experimenting with crack cocaine for six months. (TT 634) Being a board certified addictionologist, Dr. Levin was quite aware of the fact that one simply does not "experiment" with crack cocaine for six months. (TT 635) Even the State's expert witness Dr. Mahtre agreed that Anthony Joseph Farina was a crack cocaine addict. (TT 950) Levin attributed the drug addiction, at least partially, to Anthony's neglected, abused and impoverished background. (TT 636) The doctor noted that Anthony had a personality type that was passive, submissive and the type that would try to avoid conflict. (TT638) The doctor stated that Anthony is a good candidate for rehabilitation. (TT 639-640) Anthony had no history of violence, and he had a long history of employment (including at the age of ten or eleven having three paper routes, the money from which he contributed support for the family). (TT640-641) Anthony was always the one to get a job when the family moved to a new location. (TT 641)

Prior to the instant cause, there were no felony convictions in Anthony's background. (TT 641-642) Based upon the information

that Dr. Levin had and the evaluation that he conducted, the doctor stated that Anthony would be a good candidate for a general prison population. (TT642)

In explaining the power of a crack cocaine addiction, the doctor noted that a crack addict is always under the influence of the addiction itself. (TT643) This is something that the State's expert was in total agreement with. (TT950-951) The addiction itself effects the person's abilities to make decisions; poor judgement is one of the features of a crack cocaine addict. According to Dr. Levin, ". . . judgement is greatly impaired by the addiction . . . ." (TT 644)

In explaining how Anthony Farina's background, personality type and drug consumption and addiction would have affected him at the time of the incident, Dr. Levin explained:

> The important factors here are several. One is that the fact that this person -- is socially deprived, is not functioning from a normal, normative group would be.
>
> He's responding based on immediate circumstances. He doesn't -- he hasn't developed a good sense of social conscious to make those kind of good judgement kind of decisions.
>
> It's further complicated that he has been abusing crack cocaine. He's been teaching his body and mind to function in the immediate, get immediate reward, response to what feels good at the time, rather than relying on social norms.
>
> The other complicating factor is, a learning disability, which has produced a lot of frustration for this young man, where he responds very poorly verbally, in terms of he can talk and he sounds good, but his judgement and his abilities formulate his thoughts and

wording are very poor.

> And this is going to greatly effect any kind of judgement, especially under any kind of stress.

(TT 645-646)

Dr. Levin testified that Anthony has a very, very limited ability to formulate heightened concentration and focus or to direct his mind and attention to achieve a particular result and then take the logical steps to achieve that result. (TT 647-648) The doctor characterized Anthony as being a person who does not look ahead, does not plan out things, and does not form opinions and make decisions based on social norms. (TT 648) Dr. Levin testified that Anthony Farina was acting in a passive role when Jeff shot the victims.

The next witness to testify was Dr. Sun Park. (TT 701-715) Dr. Sun Park was primarily a witness for Jeffrey Farina; however, Dr. Park had examined Anthony's sister in regard to an allegation that Anthony had sexually abused his sister when he approximately thirteen years old. (TT 701-702, get additional citations records in regard to this) Dr. Park testified that she had examined Anthony's sister and found no physical signs of abuse. (TT 702)

The next witness to testify was Anthony's mother, Susan Brant. (TT 716-755) Ms. Brant's testimony revealed that Anthony had been abused from the time he was five years old. (TT 717-718) The mother herself was abused by the natural father during Anthony's tender years; the abuse of the mother occurred from the time Anthony was six months old until the time he was five. (TT 717-

718) The home he lived in in those early days was a house of horrors. There was screaming, name calling, things were thrown, and finally, when the natural father struck Anthony with a crutch, the mother took Anthony and left the home. (TT 718-719) There was a time when the boys were six and seven years old when the family lived homeless on the beach in St. Petersburg. They had a large cooler and filled it with salt water to take baths. (TT 725)

Their mother married James Brant in the summer of 1980; Anthony was seven. (R719). Brant was a mentally disturbed Viet Nam veteran known to be aggressive and violent. (TT758-59). Their house was soiled with dog feces throughout and beer cans littered the yard. (TT762-63;800-801) The Brants would sit on the porch and drink beer, and then discard the empties by tossing them into the front yard -- they were commonly under the influence of alcohol. (TT832-33). James Brant made the children watch him beat their mother. (TT732). He routinely beat the children for periods of 15 to 20 minutes. (TT720; 730-31;760) He beat Anthony daily, often with the buckle end of a belt, because Anthony "shit his pants." (TT 722) [3] There was documentation that somewhere between the ages of five and seven, Anthony was anally raped by a motel manager where Anthony's family was living. (TT 724)

The mother testified that Anthony had worked from the time that he was eleven years old. (TT 727) When he was eleven he had three paper routes; he would get up seven days a week at 4:30 a.m.

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[3] As noted earlier Anthony Farina was incopretic from the time that he was seven until the time he was fourteen years of age. His incoprecis was one consequence of having been anally raped.

to deliver his papers. (TT 727) He spent his earnings from the paper routes on family living expenses. (TT 728) Anthony was never without a job from the time that he was eleven years of age. (TT 729)

The next witness was Mr. David Sharp who was with the Department of Children and Family Services (DCFS) in Monmouth, Illinois. (TT 757) Mr. Sharp was an investigator with Child Protection Services (CPS) and had direct dealings with the Farina Family. (TT 758-760) Prior to becoming a CPS Investigator, Sharp was a police officer. (TT 758) He had known Anthony Farina's step father, Jim Brant, for eight to nine years and stated that he had a reputation of being very violent and aggressive. (TT 759) According to Sharp, Jim Brant was a Viet Nam veteran who had been diagnosed as a "bipolar manic-depressive." (TT 763) Sharp described the living conditions at the Farina home as extremely impoverished and unsanitary; the yard was littered with empty beer cans and abandoned automobiles. (TT 762-763) Jim Brant admitted to drinking on average twelve beers a day and Susan Brant, the mother, consumed about a six-pack a day. (TT 764) Mr. Sharp described the family status as ongoing abuse and neglect, involving extreme corporal punishment, alcoholism and lack of supervision. (TT 764) Jim Brant was arrested for cruelty to children, and Anthony was placed in various alternate home situations over the next couple of years. (TT 760)

The next witness to testify on behalf of Anthony Farina was Dean Dearborn. (TT 791-829) Mr. Dearborn had been a policeman for

thirteen years and had specialized training in dealing with juveniles. (TT 791) Dearborn first met Anthony at the Guardian Angel Home (GAH) in Peoria, Illinois, which is a residential treatment facility for abused and neglected children. (TT 791) At that time, Dearborn was a residential counselor at the GHA. (TT 791) Anthony was in the home in the year of 1987. (TT 791) Dearborn counseled Anthony for about fourteen months. (TT 794) When Anthony arrived at the home, he was still suffering from the disorder known as incopresis. (TT 792) As a counselor and a former police officer specializing in juvenile matters, Dearborn had the opportunity to handle (first hand) well over a thousand cases; in his experience with juveniles, Dearborn had learned that incopresis was symptomatic of being sodomized. (TT 793-794) According to Dearborn, Anthony Farina had been subjected to severe abuse. (TT 795) The GAH was approximately sixty miles from Monmouth; yet, not once within the fourteen month period that Anthony was in the home did anyone from his family come to visit him. (TT 795-796)

Significantly -- given Dearborn's extensive background in juvenile matters both in law enforcement and in counseling -- it was Dearborn's opinion that the social service system had failed Anthony Joseph Farina. (TT799) In Dearborn's opinion, the social services system should have never returned Anthony to the squalor and abuse of his mother's home. (TT 799-800) Dearborn described the living conditions at the Farina home as being "deplorable." (TT 800) When pressed on cross-examination, Dearborn adhered to

his position that social system had failed Anthony Farina and that it should have never returned Anthony to his mother. (TT 805) Dearborn went so far as to say that the social system's failure with Anthony Farina is to a certain degree accountable for the Taco Bell tragedy. (TT 806)

Dearborn had also discovered that the report that Anthony Farina had abused his sister was made closely after Anthony had filed a criminal complaint against James Brant for physically abusing him. (TT 815) Accordingly, there was evidence that the entire accusation that Anthony had sexually abused his sister was fabricated and false and was nothing more than Jim Brant's retribution toward Anthony, because Anthony had filed a criminal complaint against him.

The next person to testify on the behalf of Anthony Farina was Reverend Thomas Crider. (TT 830-851) Reverend Crider first met Anthony in the spring and summer of 1987 when he attended the Reverend's church. (TT 830) Anthony attended the church with his brother and sister; they were neither transported nor accompanied by their mother. (TT830) Rather, the Farina children took it upon themselves to catch a church bus to get to church on Sunday. (TT831) Reverend Crider described Anthony as very quiet, very cooperative, eager to please, starved for attention, appreciative and very helpful with smaller children around the church. (TT 831-832) Reverend Crider had often witnessed the Farina home environment; he described it as filthy. (TT 832) Most of the time he would find Anthony's mother and her boyfriend sitting outside

drinking beer and littering the yard with empty beer cans. (TT 832) Crider was also informed the adults in the home smoked dope. (TT 832) The children usually wore the same clothes and they were usually very dirty. (TT 833) Crider also knew Jim Brant; he knew of Brant's Viet Nam related disability and "saw the outburst of his violence on Anthony." (TT 833) Crider had gone to visit Jim Brant in jail, after Brant's arrest for severely beating Anthony. (TT 834) When Crider asked Brant what had happened, Brant replied that Anthony had messed his pants and that he (Brant) had beat him for it; Brant further indicated that he had not done anything unintentional and that he was going to continue to beat Anthony until he got the problem (incopresis) stopped. (TT 834) When Reverend Crider confronted Anthony's mother, Sue Brant, about the beating, Sue Brant took sides with Jim Brant. (TT 834-835)

Reverend Crider took Anthony into his home until a placement could be found for him. (TT 837) At the time Anthony was thirteen years of age. (TT 838) Reverend Crider described Anthony's arrival at their home:

> He came [to] us with everything he owned in a grocery sack. He had no underwear. He was literally walking out of his old tennis shoes.
>
> Q Walking out of his old tennis shoes?
>
> A Yes, they were just rags, rags. They were just hanging on his feet. He had an old pair of socks that just needed to be thrown away, which is what we did with them.
>
> Physically he was -- he was dirty, he was in old clothes. He still bore the bruises and the scars from the beating he'd received a few days earlier.

> And we took him home and cleaned him up, bought him some underwear, some shoes and some socks.

(TT837-838) Reverend Crider disclosed the extreme humiliation that Anthony experienced as a result of his incopretic disorder. (TT 838-839) After speaking with representatives of DCFS about Anthony's incopresis, Reverend Crider learned that that condition was a red flag indicator for a lot of sexual abuse. (TT 839)

Jeffrey's mother left Jim Brant in 1986 to avoid having her other children taken by family services. (TT731-32;739). At the time of the Taco Bell incident, Anthony, Anthony's fiancee and her two children, Jeffrey, his mother, sister, and John Henderson were staying in a one-room apartment that cost $165.00 a week. (TT749; 753)

The State called Dr. Mhatre as an expert witness in the penalty phase. Dr. Mhatre examined Anthony Farina at the Volusia County Branch Jail. (TT31) Mhatre acknowledged the history of child abuse; however he disagreed that incopresis could have been caused by physical or sexual abuse. (TT934) Instead, Mhatre explained the incopresis as being a manifestation of frustrations and considered it a sign of a child expressing defiance. (TT934-935) Mhatre acknowledged that Anthony Farina had consumed crack cocaine the night of the incident; however, he indicated that it would have not have had any effect on his behavior because he wasn't actually under the influence of crack cocaine at the time of

the incident, in the doctor's opinion.[4] On cross-examination, Dr. Mhatre acknowledged that Anthony Farina was a crack addict. (TT950) Dr. Mhatre also acknowledged that a crack cocaine addiction is extremely powerful and that at the time of the offense Anthony Farina was under the affect of the addiction itself. (TT951)

Defense counsel unsuccessfully objected and moved for a mistrial when the State argued that age was here an aggravating not a mitigating consideration. (TT1010-13) The jury recommended the death penalty by a 7-5 margin for Anthony Farina (R2639) and by a 9-3 margin as to Jeffrey Farina. (R3041)

In accordance with the recommended sanction, (TT2121-22), Anthony was sentenced to consecutive life sentences on all non-capital offenses. (TT2143-2145;2147) He was sentenced to death based on a finding[5] of five statutory aggravating factors, no statutory mitigating and several non-statutory mitigating factors. (R2146;3093-98)

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[4]This testimony is contrary to the testimony of co-defendant Henderson, who testified that at the time of the incident he was under the influence of crack cocaine and he had smoked crack cocaine at the same time with Anthony Farina.

[5] §§ 921.141(5)(b) (prior convictions of violent felony), §921.141(5)(e) (avoid lawful arrest), § 921.141(5)(f) (pecuniary gain), §921.141(5)(h) (especially heinous, atrocious or cruel), §921.141(5)(i) (cold, calculated and premeditated murder). The mitigation included §921.141(6)(a) (no significant history of prior criminal activity), §921.141(6)(g) (age), abused childhood, employment record, potential for rehabilitation and remorse.

SUMMARY OF ARGUMENTS

POINT I: The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Florida Constitution were violated and Appellant was thereby denied a fair trial where he was tried by jurors who were biased and partial. The jurors made statements that indicated that they were biased and prejudiced. They had formed opinions that crimes had been committed and waivered on whether they could be fair. Three of the jurors indicated that they would vote for death in a premeditated murder case.

POINT II: The Appellant was denied his right to a fair and impartial jury because he was forced to use peremptory challenges to exclude jurors when the trial court denied his motions to exclude those jurors for cause and when as a result thereof, objectionable jurors were seated after Appellant used all of his remaining peremptory challenges and the trial court refused to grant any additional peremptory challenges.

POINT III: The Appellant was deprived of a fair and impartial jury where the court excused for cause over objection jurors who could be fair and impartial. The jurors indicated they could follow the law even though they had reservations about the death penalty.

POINT IV: The Appellant was denied a fair trial where the trial court restricted the voir dire so as to prevent Appellant from unveiling grounds for cause challenges and from developing information to assist him in intelligently exercising peremptory challenges.

POINT V: The trial court erred in denying the Appellant's repeated motions for change of venue where the community in which the Appellant was tried was so hostile, prejudiced and biased that the Appellant could not get a fair trial. A very high percentage of the jurors voir dired knew about the Taco Bell case from media sources. Several of the jurors who tried the case were prejudiced by pre-trial publicity.

POINT VI: The Appellant was denied a fair trial where he was tried with a co-defendant, where incriminating statements of the co-defendant were offered at trial and where Appellant was not able to cross-examine the co-defendant. The statements were extremely prejudicial -- establishing elements of the crimes and giving weight to aggravating factors.

POINT VII: The trial court's failure to give the Defendant's specially requested jury instructions denied Appellant his rights pursuant 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, to due process, a fair trial and reliable sentencing recommendation. Counsel objected to the standard penalty instructions and requested in writing special instructions.

POINT VIII: In violation of the Eighth Amendment to the United States Constitution the trial court erred in sentencing Appellant to death where the sentence was disproportional, where aggravating circumstances found by the trial court were not supported by the evidence and where the court failed to find mitigating

circumstances that were supported by the evidence. The trial court erred in finding significant prior record as a valid aggravating circumstance. The trial court in entering its written findings involving mitigators erred because it did not weigh or consider mitigators that were clearly established by the evidence.

POINT IX: Appellant was denied his right to a fair sentencing hearing when in the phase II case and closing argument the prosecutor engaged in a series of acts of misconduct which deprived the Defendant of a fair sentencing hearing.

POINT X: The Defendant was deprived his right to a fair trial pursuant to due process principals where the State Attorney hand-picked the judge who was to try the case and engaged thereby in prosecutorial misconduct.

POINT I

THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION WERE VIOLATED AND APPELLANT WAS THEREBY DENIED A FAIR TRIAL WHERE HE WAS TRIED BY JURORS WHO WERE BIASED AND PARTIAL.

Where voir dire reveals that a potential juror has the propensity to impose the death penalty or is predisposed to impose the death penalty a challenge for cause should be granted; if a juror in voir dire indicates that he or she has a predisposition toward imposing the death penalty, he or she must be excused, and failure to grant a cause challenge will result in reversible because such error cannot be harmless. *Hill v. State*, 477 So.2d 553 (Fla. 1985).

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.) cert. denied, U.S., 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). If there is any basis for any reasonable doubt about a juror being totally impartial and basing a verdict only on the evidence submitted and the law announced, he or she should be excused on the motion of any party or on the court's own motion. *Singer v. State*, 109 So.2d 7 (Fla. 1959). Where a juror equivocates on issues of fairness and impartiality, challenges for cause must be granted. *Singer*, supra. A juror should not only be fair and impartial, but should also be beyond any reasonable suspicion of partiality and if

there is doubt about a juror's fairness and impartiality, the juror should be excused for cause. *Hill*, supra at 556.

Several of the jurors who were sworn and actually tried Appellant's case gave answers to questions during voir dire which showed that they were biased and prejudiced. Juror Carl Nice stated that he would give the defendants a fair trial "if they deserve one." (R1955) Mr. Nice later indicated that he would base his decision whether or not to give the defendants a fair trial on the evidence presented. (1957) A cause challenge by Appellant was denied. (1983-1984) After exhausting his peremptory challenges, Appellant requested additional peremptories and identified Mr. Nice as one of the jurors upon whom he would exercise a peremptory challenge. (R1989-1990) The request for more peremptory challenges was denied. (R1989-1990)

Juror Peggy Marley indicated that because of pre-trial publicity she was biased and could not be fair. (R1998, 2009-2010) Specifically, when Ms. Marley was asked if she could presume the defendants innocent, she replied:

> MS. MARLEY: I *guess* because I read about the case from witnesses, I feel from that point what I feel, but then it's a trial.

(R1998) (emphasis added) When asked whether or not she could put the impressions and opinions created by the media aside, Ms. Marley replied:

> MS. MARLEY: Well, I *guess* once the case has been presented I would be able to put it aside, you know. Once the case was presented, I base my decision on that.

(R2009-2010) (emphasis added) Marley was exposed to both

television and newspaper coverage of the case. (R2042) As a result, she held the opinion that a crime had been committed. (R2042) There was clearly a reasonable doubt about her ability to be a fair and impartial juror. (R1998-2010, 2042-2043) Appellant's cause challenge on Ms. Marley was denied. (R2064-2066) After exhausting his peremptory challenges, Appellant requested additional peremptory challenges and identified Ms. Marley as one of the jurors upon whom he would exercise a peremptory challenge. (R2066) No additional peremptories were allowed. (R2066)

Juror William Marriott's voir dire revealed significant bias and prejudice toward the Appellant. When asked if he would be influence by pre-trial publicity and whether or not he could be fair, Marriott equivocally replied: "I don't *think* so." (R2021) (emphasis added) Mr. Marriott's voir dire revealed that he was highly predisposed to vote for death if there was a guilty verdict:

> MR. MOTT: Could you tell me, do you consider yourself a strong supporter of the death penalty?
>
> MR. MARRIOTT: If it's proven, yes.
>
> MR. MOTT: You say if it's proven. Are you talking about -- tell me what you're talking about.
>
> MR. MARRIOTT: If he's proven guilty, yes.
>
> MR. MOTT: Okay. Is it in your mind a question of guilt or innocence whether or not the death penalty ought to be imposed?
>
> MR. MARRIOTT: Yes.

(R2025-2026) Due to pre-trial publicity Marriott had formed an opinion that a crime had been committed; at first he said his

opinion was not fixed however later he clearly indicated that the opinion was a fixed opinion. (R2026, 2061-2061) As a result of being exposed to pre-trial publicity, Marriott had occasion to discuss the case with his wife and express the opinion that the case was a "horrendous deal." (R2061) Appellant's cause challenges were denied. (R2028, 2064-2066) Having exhausted all of his peremptory challenges, Appellant requested additional peremptory challenges and identified Marriott as a juror upon whom he would exercise a peremptory challenge. (R2066) The motion for additional peremptory challenges was denied. (R2066)

Ms. Stewart identified herself as a strong proponent of the death penalty. (R2007) Stewart also revealed that she *"knew"* that a crime had been committed by what she had heard on the TV. (R2009) She had come to a firm, fixed assumption that a crime was committed as a result of exposure to television coverage of the case. (R2053) Appellant's cause challenge was denied. (R2064-2066) Appellant's request for additional peremptory challenges was denied. (R2066) Appellant identified Ms. Stewart as a juror who he would exercise a peremptory against if he had any peremptory to exercise. (R2066)

Ms. Tonya Sullivan, who also served on the jury, indicated that she would automatically vote for the death penalty in the case of a conviction for first degree murder. (R1598) Ms. Sullivan saw and heard news coverage of the death and funeral on the television. (R1688-1689) The case was also discussed at her work place. (R1688)

It is fundamental that the State has a burden to prove each and every element of an offense. Florida Standard Jury Instruction 2.03 provides in pertinent part:

> To overcome the defendant's presumption of innocence the State has the burden of proving the following two elements:
>
> 1. The crime with which the defendant is charged was committed.
> 2. The defendant is the person who committed the crime.
>
> The defendant is not required to prove anything.

Jurors Marley, Marriott and Stewart all had concluded prior to the trial commencing that a crime had been committed. Accordingly, the only element that the State had to prove was identification. Such a situation is clearly and fundamentally unfair to a person accused of a criminal offense. In effect, the pre-trial publicity had carried the burden of proof beyond a reasonable doubt for the State on each and every element on every offense except for the sole element of identity.

The bias and prejudice of jurors Marley, Marriott, Stewart and Sullivan clearly deprived Appellant of a fair trial. This is especially true in the instant case where one vote could have resulted in a jury life recommendation for Appellant.

POINT II

THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION SIXTEEN OF THE FLORIDA CONSTITUTION BECAUSE HE WAS FORCED TO USE PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHEN THE TRIAL COURT DENIED HIS MOTIONS TO EXCLUDE THOSE JURORS FOR CAUSE AND WHEN AS A RESULT THEREOF, OBJECTIONABLE JURORS WERE SEATED AFTER APPELLANT USED ALL OF HIS REMAINING PEREMPTORY CHALLENGES AND THE TRIAL COURT REFUSED TO GRANT ANY ADDITIONAL PEREMPTORY CHALLENGES.

A juror is not impartial when one side must overcome a pre-conceived opinion in order to prevail; when any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render a fair and impartial verdict, the juror must be excused for cause. *Moore v. State*, 525 So.2d 870, 872 (Fla. 1988); *Hill v. State*, 477 So.2d 553, 556 (Fla. 1985), cert. denied U.S. ,108 S.Ct. 1302, 99 L.Ed.2d 512 (1988); see *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). As the Fourth District Court of Appeal has succinctly stated, "[c]lose cases involving challenge to impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to his or her impartiality." *Sydleman v. Benson*, 463 So.2d 533 (Fla. 4th DCA 1985).

In a capital case, it is entirely proper for counsel to inquire of jurors whether there are any circumstances where they would consider "mercy." *Poole v. State*, 194 So.2d 903 (Fla. 1967).

Where a cause challenge is denied based upon a juror stating that he could not recommend any "mercy" in the sentencing phase of a capital case, the case must be reversed and remanded for a new trial. *Thomas v. State*, 403 So.2d 371 (Fla. 1981). Both veniremen Wagoner and Jeffers indicated that they would not consider mercy in a capital case. (R1807, 1908) Accordingly both Wagoner and Jeffers should have been excused for cause.

It is also proper for counsel to inquire of jurors whether or not they would recommend death in every case where a person is convicted of premeditated murder. See *Bryant v. State*, 601 So.2d 529 (Fla. 1992). In *Bryant*, the death penalty was reversed and the case was remanded for a new penalty phase hearing where defense counsel cause challenged two jurors who indicated that they would automatically vote for death if there was a conviction for premeditated murder was denied. *Bryant* at 533. Both veniremen Wasko and Doneij indicated that they would view the death penalty as the only appropriate penalty in a premeditated murder case. (R1062-1063, 1620) While Ms. Wasko equivocably indicated that she would not automatically vote for the death penalty, her answers to the questions left reasonable doubt about her ability to be fair and impartial on the issue of appropriate sentence. See *Moore v. State*, 525 So.2d 870, 872 (Fla. 1988).

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court. *Lusk v. State*, 446 So.2d 1038, 1041 (Fla.)

cert. denied, U.S., 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). If there is any basis for any reasonable doubt about a juror being totally impartial and basing a verdict only on the evidence submitted and the law announced, he or she should be excused on the motion of any party or on the court's own motion. *Singer v. State*, 109 So.2d 7 (Fla. 1959). Where a juror equivocates on issues of fairness and impartiality, challenges for cause must be granted. *Singer*, supra. A juror should not only be fair and impartial, but should also be beyond any reasonable suspicion of partiality and if there is doubt about a juror's fairness and impartiality, the juror should be excused for cause. *Hill v. State*, 477 So.2d 553 (Fla. 1985).

Moreover, where a court refused to excuse a juror for cause where the defense was insanity and the voir dire of a juror ferreted out a reasonable doubt about his ability to follow the court's instructions on the insanity defense, the case was reversed and remanded for a new trial. *Moore v. State*, 525 So.2d 870 (Fla. 1988). Likewise, a trial court erred in restricting a defendant's voir dire about a juror's ability to consider an intoxication defense. *Lavado v. State*, 492 So.2d 1322, 1323 (Fla. 1986).

In the instant case, a very significant aspect of Appellant's defense, specifically in the penalty phase of the case, was his age, his abusive background, and various other non-statutory mitigating circumstances, including but not limited to, Appellant's learning disability, not withstanding his average I.Q., his drug addiction, his potential for rehabilitation, his employment

background from the age of eleven, among others. (R2620-2621) For Appellant to properly exercise his right to a fair and impartial jury and fair trial, it was essential for him to be able to explore the attitudes of the potential jurors pertaining to the mitigating circumstances he anticipated establishing. (See R622-698, 715-755, 790-822, 829-851) When Appellant's voir dire of the potential jurors yielded information that they would not give fair consideration to factors such as age and a history of being abused as a child in determining what a proper penalty would be, Appellant found himself in a situation analogous to the defendants in *Moore*, supra, and *Lavado*, supra. The instant case is analogous to the situation in *Lavado* and *Moore*: mitigating circumstances in a capital case are at least as crucial to a capital defendant as are the elements of a crime or the nature of an affirmative defense in a non-capital case. Moreover, a juror's indication that he or she would not give fair consideration to factors such as age, child abuse and other non-statutory mitigators is an indication that the juror would be predisposed to choose death over life as an appropriate sentence. A predisposition to choose death over life for a sentence is grounds for a cause challenge. See *Bryant*, Supra. Accordingly, Wasko, Graham, and Jeffers should have been excused for cause on the sole ground that they had indicated that they would not consider factors such as age and/or a history of child abuse in determining whether or not death would be an appropriate sentence.

Additionally, there was clearly reasonable doubt as to

venireman Jeffers's ability to be fair and impartial because he gave an equivocal answer to the question whether or not he could base his verdict solely upon the evidence and not on pre-trial publicity. (R1905) Anne Johnson was also extremely equivocal in her answers about her ability to be fair and impartial. (R1928) There is also reasonable doubt in the record as to whether Ms. Daniel would or would not show favoritism toward the prosecutor because she equivocated when she was asked directly if she would show the prosecutor any favoritism. (R1344) Her response that she would "not necessarily" show any favoritism implies that there was a possibility that she would show favoritism. The voir dire of Ms. Graham clearly indicated that there was reason to believe that she could not be fair and impartial when she indicated that she expected the defense to rebut the impressions created by the pre-trial publicity. (R1478-1480) As stated above, a juror is not impartial when one side must overcome a preconceived opinion to prevail. See *Price v. State*, 538 So.2d 486 (Fla. 3rd DCA 1989). Finally, Ms. Wasko should have been excused for cause based solely upon the reasonable doubt created about her ability to be fair and impartial given her employment background with a local police agency, the fact that she had been exposed to pre-trial publicity and discussed the Taco Bell case with co-workers. Based upon the foregoing cumulative and individual errors, Appellant was denied his right to a fair and impartial jury as guaranteed by the Florida and United States Constitutions.

Appellant was provided with and exhausted all sixteen

peremptory challenges. (R1340, 1279, 1146, 1149, 1609, 1487, 1491, 1332, 1367, 1487, 1625, 1651, 1813, 1860, 1984, 1931) After exhausting the first ten peremptory challenges provided for by Fla. R. Crim. P. 3.350, Appellant asked for additional peremptory challenges; the trial court granted six additional challenges. (R1625) After exhausting all sixteen peremptory challenges, Appellant requested but was denied any additional challenges. (R1989-1990, 2020, 2066) Of the sixteen peremptory challenges available to Appellant, he was forced to exhaust seven of those peremptory challenges on jurors who should have been excused for cause.

The first such juror was Ellen Wasko. (R1029) Ms. Wasko was employed as a dispatcher at the Ormond Beach Police Department. (R1071) Ms. Wasko discussed the Taco Bell case at the Police Department with her co-workers. (R1073) Ms. Wasko was also exposed to pre-trial publicity; she read the initial newspaper article covering the Taco Bell case. (R1114) Most significantly, Ms. Wasko indicated that she would not consider the social background of the accused as a factor in deciding whether or not the death penalty should apply. (R1060-1061) When Counsel pursued this subject and further voir dired Ms. Wasko, he ran into a series of sustained objections:

> MR. MOTT: * * *
>
> Would you consider at the stage of a -- sentencing stage, if, in fact, you're a juror and we ever get to that stage, would you consider whether or not the person who has been charged was an abused child?

MR. TANNER: Objection, Your Honor. He's attempting to preconvince the jury to --

THE COURT: Sustain the objection.

MR. MOTT: In what kind of cases do you think the death penalty ought to be imposed?

MS. WASKO: I really would have to think about that. In the case of deliberate, premeditated murder, I would agree a death sentence would be appropriate.

MR. MOTT: So I understand and have it clear in my mind, in every case where there's a deliberate, premeditated murder, you would think the death penalty is appropriate?

MR. TANNER: Death penalty, Your Honor, that's not what the juror said.

THE COURT: Sustain the objection.

(R1062)

Ms. Wasko went on to say that she would not automatically vote for the death penalty. (R1063) Nevertheless, the record leaves doubt about whether Ms. Wasko would in fact fairly consider a life sentence; because, her answers, *in toto*, were equivocal. More importantly, her statement that she would not consider the social background of the accused in deciding whether or not the death penalty should apply was clear and unequivocal. (R1061-1062) Because his cause challenge was denied (R1141), Appellant was forced to exercise a peremptory challenge on Ms. Wasko. (1279)

Appellant was also forced to exercise a peremptory challenge on Ms. Graham (R1489), after a challenge for cause had been denied. (R1488) Ms. Graham had indicated in voir dire in a clear and unequivocal manner that she would not consider age as a factor in deciding whether or not the death penalty was appropriate. (R1264)

Ms. Graham also indicated that she expected the defense to present evidence to rebut the impression created by the pre-trial publicity. (R1478-1480) Ms. Graham reported that she read the initial newspaper accounts of the Taco Bell case and discussed the "tragedy of it" with her husband. (R1477-1478)

Margaret Daniel was the next juror upon whom Appellant had to exercise a peremptory challenge (R1367), after a cause challenge had been denied. (R1353) Ms. Daniel reported that her family had business dealings with the State Attorney's, John Tanner's, family. (R1431) As a result of this inter-family business dealing, Ms. Daniel was equivocal on the question whether or not she would show favoritism toward the State Attorney. (R1344) When asked specifically whether or not she would show favoritism toward the State Attorney, Ms. Daniel replied: "Not necessarily." (R1344) Ms. Daniel also indicated that she would not consider the accused's age in determining whether or not the death penalty would be appropriate. (R1344) Ms. Daniel indicated that she had been exposed to pre-trial publicity within the week before jury selection. (R1366-1367)

Venireman Jonathan Doneij stated that in a case of deliberate premeditated murder he would view death as the only appropriate penalty. (R1620) Appellant's challenge for cause was denied. (R1624) Appellant then requested additional peremptory challenges; the Court granted an additional six peremptory challenges and Appellant exercised a peremptory challenge on Mr. Doneij. (R1624-1625)

Mr. Paul Wagoner indicated in voir dire that he would not consider mercy in a capital case. (R1807) Appellant's cause challenge on Mr. Wagoner was denied. (R1812-1813) Therefore, Appellant exercised a peremptory challenge on Mr. Wagoner. (R1813)

Appellant was next forced to exercise a peremptory challenge against Anne Johnson (R1984), after a challenge for cause on Ms. Johnson had been denied. (R1931) Ms. Johnson was exposed to both newspaper and television pre-trial publicity coverage of the Taco Bell case. (R1924) She indicated that she had heard from the television news that the Taco Bell robbers wanted to eliminate witnesses. (R1925) When asked if the pre-trial publicity prejudiced Ms. Johnson and whether she could be fair in the case she answered thusly:

> MR. MOTT: Do you think you can be fair in this case?
>
> MS. JOHNSON: I *hope* so.
>
> MR. MOTT: Are you absolutely certain about that?
>
> MS. JOHNSON: Well, I really wouldn't feel comfortable serving as a juror on this case.
>
> MR. MOTT: You would not?
>
> MS. JOHNSON: No.

(R1928) (emphasis added) Ms. Johnson was extremely equivocal on the question of whether or not she could be fair and impartial. There was clearly reasonable doubt about whether or not she could sit as a fair and impartial juror; therefore, the challenge for cause should have been granted. Veniremen Curtis Jeffers was

extremely equivocal when he was asked whether or not he could be an impartial juror. (R1905) When asked whether or not he could put aside pre-trial publicity and base his verdict solely on the evidence he answered, "I *think* I can, yes." (R1905) Jeffers revealed that he would not consider mercy in a capital case. (R1908) He also indicated that he would not consider childhood background or a neglected childhood on the part of the accused in a premeditated murder case to decide whether or not death would be an appropriate penalty. (R1908-1909) Jeffers was a bus driver in the Daytona Beach community and was privy to the talk on the street about the Taco Bell case for up to two weeks after the incident. (R1912-1913) Jeffers said people expressed the opinion that the Taco Bell case was horrible and terrible; an opinion he also adopted. (R1912) As a result of his exposure to pre-trial publicity Jeffers had no doubt whatsoever that a robbery had occurred at the Taco Bell. (R1914-1915) Appellant's challenge for cause was denied (R1929-1930) Therefore, Appellant was forced to exercise a peremptory challenge against Mr. Jeffers. (R1931)

By forcing Appellant to exercise peremptory challenges on jurors who should have been excused for cause, the trial court deprived Appellant of a fair trial.

POINT III

APPELLANT WAS DEPRIVED OF A FAIR AND IMPARTIAL JURY CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION WHERE THE COURT EXCUSED FOR CAUSE OVER OBJECTION JURORS WHO COULD BE FAIR AND IMPARTIAL.

Over Appellant's objection, the State successfully challenged veniremen Robert Heffelfinger for cause. (R1301-1302) Heffelfinger indicated that he was opposed to the death penalty, but not in all cases. (R1250) Heffelfinger indicated that he personally would impose the death penalty in some cases and that in any event he would follow the law and put his personal beliefs aside. (R1262-1264) Appellant successfully rehabilitated Heffelfinger notwithstanding running into a series of sustained objections which had an inhibiting effect on a full and fair voir dire designed to ensure and protect the principles of a fair trial. (R1263-1264) Mr. Heffelfinger clearly stated he would put his personal beliefs aside and follow the law. (R1297-1298) The State's initial cause challenge against Heffelfinger was denied. (R1278) The State then exercised a peremptory on Heffelfinger, but then withdrew the peremptory challenge. (R1277-1280) Ultimately, the trial court granted the State's cause challenge against Heffelfinger over Appellant's objection. (R1301-1302)

The State next challenged Mr. Barry Gulin for cause. (R1774) The prosecutor stated as grounds that Mr. Gulin had indicated that he opposed the death penalty and would not vote to recommend the

death penalty. (R1774) The defense objected, noting that Mr. Gulin had said he could follow the law and put his personal opinions aside. (R1774) The record simply does not support the position of the prosecution. Mr. Gulin was called from the venire pool along with Mr. Thomas Gallagher, Ms. Nancy Griffin and Mr. Norman Meyer. (R1756-1757) The State started its voir dire of these four new members of the jury by directing questions toward the issue of pre-trial publicity. (R1758) Mr. Meyer indicated that the pre-trial publicity had such an influence on him that he could not be a fair juror. (R1758-1759) The prosecutor then directed his attention at the remaining three new members of the jury, to wit: Gallagher, Griffin and Gulin. (R1759) The prosecutor focused his questions on the jurors's attitudes about the death penalty:

* * *

> Of the three remaining, are any of you opposed to the death penalty?
>
> MS. GRIFFIN: I am.
>
> MR. TANNER: And that's Miss Griffin, correct?
>
> MS. GRIFFIN: Yes.
>
> * * *
>
> MR. TANNER: All right. I will primarily speak to, now, the two remaining jurors, and I would ask you this: Do each of you, Mr. Gallagher and Mr. -- would you pronounce your name for me?
>
> MR. GULIN: Gulin.
>
> MR. TANNER: Do you presume the defendants innocent right now as the law

requires? And you understand that they don't have to prove they're innocent, they're presumed innocent right this minute. Each of you agree with that?

MR. GALLAGHER: Yes.

MR. GULIN: Yes.

MR. TANNER: And if, in fact, they are to be proven guilty, state has to prove that. Is that the way each of you feel it should be and you will abide by that?

MR. GALLAGHER: Yes.

MR. GULIN: Yes.

MR. TANNER: I have no further questions for the prospective panel, Your Honor. Thank you.

(R1759-1760) During the State's voir dire, by implication Mr. Gulin indicated that he was not opposed to the death penalty. Moreover, whatever his attitudes on the death penalty, Mr. Gulin indicated that he could return a verdict of guilty in the guilt phase of the trial. (R1760) During voir dire with Appellant's counsel, Mr. Gulin stated:

MR. MOTT: You indicated -- I couldn't hear very well over there because of the acoustics, but I think you indicated you support the death penalty.

MR. GULIN: No, I do not.

MR. MOTT: Okay. Are there any circumstances whatsoever that you would impose the death penalty?

MR. GULIN: No. Just that I'm against it, that's it.

MR. MOTT: All right. So would you be able to follow the law?

MR. GULIN: Follow the law?

MR. MOTT: Even if it's different than your own personal opinion?

MR. GULIN: Well, I'll follow the law. That's what they say.

(R1770-1771) Mr. Gulin clearly stated that he would follow the law. (R1771) Accordingly, the prosecutor's stated grounds to support his challenge for cause on Mr. Gulin is not supported by the record. Additionally, when Appellant's counsel requested to clarify Mr. Gulin's attitude on the death penalty by further voir dire, the court ruled: "We've already done the voir dire we need to. They've been harassed enough. Each of them will be discharged for cause." (R1774)

Over objection by the defense, the State successfully challenged for cause Ms. Fannie Hudson. (R1794) Ms. Hudson indicated that she had "mixed feelings" about the death penalty. (R1778) She was further voir dired:

MR. TANNER: All right. Miss Hudson, are your feelings such that you would never recommend the death penalty in, let's say, a murder case?

MS. HUDSON: It would depend on the circumstances.

MR. TANNER: Okay. Are you telling me that you would fairly consider the imposition of the death penalty, depending on the evidence you heard in the courtroom?

MS. HUDSON: Yes.

MR. TANNER: You would be able to do that?

MS. HUDSON: Yes.

(R1778) In the final voir dire by the State, Ms. Hudson stated

without equivocation that she would be able to find a person guilty of first degree murder if the evidence supported the charge. (R1781) The State's challenge for cause was granted without the State having to articulate any grounds for the cause. Additionally, the challenge for cause was granted over objection by the defense. (R1793-1794)

A juror may not be challenged for cause based on his or her views about capital punishment, unless those views prevent or substantially impair the performance of the juror's duties in accordance with his or her instructions and the oath; the trial court's evaluation of this issue raises a question of fact. *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed.2d 841, 105 S. Ct. 844 (1985). Prospective jurors who believe the death penalty is unjust or have other reservations about the death penalty may serve as jurors and cannot be excluded for cause simply because of their beliefs; however, they may be removed when their beliefs prevent them from applying the law and discharging their sworn duty. See *Randolf v. State*, 562 So.2d 331 (Fla. 1990).

In the instant case, nothing that any of the three jurors said indicated that they would be substantially impaired in the performance of their duties in accordance with their instructions and their oath. Mr. Gulin clearly stated that he could put his personal opinions aside and follow the law. (R1770-1771) Moreover, if the trial court had any question about Mr. Gulin's qualifications the court should have either allowed counsel to conduct further voir dire, or the trial court should have conducted

further voir dire. See *O'Connel v. State*, 480 So.2d 1284 (Fla.1985). The state's challenge for cause against Fannie Hudson was completely unsupported by the record. The record clearly showed that Ms. Hudson without question would be able to fulfill her duties as a juror and follow her oath. (R1778) Heffelfinger's statement that he could personally impose the death penalty in some cases and that in *any event* he would follow the law and put his personal beliefs aside conclusively showed that he would not allow his personal beliefs to substantially impair his duties.

Because the State was allowed to challenge for cause Mr. Heffelfinger, Mr. Gulin, and Ms. Hudson, either individually or collectively, the Appellant was deprived of his right to a fair and impartial jury of his peers as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by the Florida Constitution. Accordingly, this cause should be reversed and remanded for a new trial.

POINT IV

APPELLANT WAS DENIED A FAIR TRIAL CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 16 OF THE FLORIDA CONSTITUTION WHERE THE TRIAL COURT RESTRICTED THE VOIR DIRE SO AS TO PREVENT APPELLANT FROM UNVEILING GROUNDS FOR CAUSE CHALLENGES AND FROM DEVELOPING INFORMATION TO ASSIST HIM IN INTELLIGENTLY EXERCISING PEREMPTORY CHALLENGES

An accused's constitutional rights to a impartial jury and due process under the Sixth and Fourteenth amendments are violated unless an impartial jury is impaneled. *Jordan v. Lippman*, 763 F.2d 1265, 1267 (11th Circuit 1985) It is apodictic that a meaningful voir dire is critical to effectuating an accused's constitutional right to a fair and impartial jury. *Pinder v. State*, 27 Fla.370, 375, 8 So. 837, 838 (1891); *Pope v. State*, 94 So. 865 (Fla. 1922); *Pait v. State*, 112 So.2d 380 (Fla. 1959); *Lewis v. State*, 377 So.2d 640, 642-43 (Fla. 1979).

Appellant was denied a fair and impartial jury selection by repeated restrictions on his voir dire. In voir diring Ms. Wasko about the death penalty, Appellant was not allowed to ask her whether in every case where there is a deliberate premeditated murder she would impose the death penalty. (R1062) That is clearly a proper question and the State's objection to it should not have been sustained. In sustaining the objection the court unduly restricted Appellant's voir dire. Out of caution and out of respect to the court, Appellant explained the purpose of the question was to explore the jurors's attitude on the death penalty

and on the effect of pre-trial publicity. (R1070)

When voir diring Ms. Lee, Appellant asked whether or not she would consider if the accused had an abusive background in trying to decide the appropriate penalty. (R1081) The question drew an objection which was sustained. (R1081) The court then inquired of Ms. Lee: " I would ask the lady would you follow the instructions as given to you by the court?" Ms. Lee replied: "Yes." (R1081)

Mr. Olson was voir dired on his attitudes on mitigating factors of age and child abuse of the accused. (R1085-1086) The State's objection to these questions were sustained. (R1085-1086) The court did allow counsel to inquire whether the juror would consider age as a mitigator if so instructed by the court. (R1086) However, counsel was not allowed to explore the juror's personal feelings about age as a mitigator. This was extremely prejudicial to the Appellant in that it would be unreasonable to expect the juror not to follow the law; however, they would be more open and revealing about their personal feelings on a subject. It is counsel's knowledge of a juror's personal beliefs and attitudes that equips and enables counsel to make intelligent decisions about exercising challenges for cause and peremptory challenges.

When counsel directed a general question to the entire panel, about whether or not they would consider age in making a decision in what penalty would be appropriate, the State objected and the court sustained the objection. (R1087) Not wanting to waive a voir dire on these very crucial issues and not wanting to antagonize the trial judge, defense counsel asked to proffer

questions to the court to prevent being interrupted during his voir dire. (R1150) Counsel indicated that his desire was to explore the attitudes and feelings of the jurors on certain mitigators. (R1151) The court replied:

> What their attitude is is immaterial. You ask a specific question. I don't need any philosophical sessions up here on what they think the law is, because that's not their job, and the reason is until somebody is elected to the legislature, no need to ask them what they're going to vote for. That's not a decision for them to make, do you see where I'm coming from?

(R1515) When conducting a voir dire examination of Mr. Miller, counsel asked whether the juror had been exposed to anything in the media that would make him think Appellant was guilty. (R1052) The State objected and the court sustained the objection. (R1052) Counsel next inquired whether the juror had heard other people express the opinion that the Appellant was either innocent or guilty; again, the State objected and the court sustained the objection. (R1053) These questions were clearly proper questions and necessary for counsel to gather information which may have formed the basis of a cause challenge or assisted counsel in exercising peremptory challenges. Because counsel was not allowed to voir dire on the issue of whether or not the juror, Mr. Miller, had formed an opinion on guilt or innocence, counsel was forced to exercise a peremptory challenge on Mr. Miller. (R1149) Had counsel been able to ask and Miller been able to answer the question about whether he thought Appellant was guilty, Appellant could have challenged Mr. Miller for cause and thereby saved

himself a peremptory challenge. Accordingly, the restriction of the voir dire of Mr. Miller was prejudicial to Appellant.

Juror Cameron said that he would give age consideration in deciding an appropriate penalty if so instructed by the court. (R1316) Counsel then asked what the juror's *personal* view was regarding age as a mitigator; the State objected and the court sustained the State's objection. (R1316) Later, Counsel made the same inquiry of Mr. Cochran. (R1347) The State objected, and in sustaining the objection the court chastised counsel in the presence of the jurors:

> THE COURT: I sustain the objection because this goes to the same objection you made a few minutes ago, Mr. Mott. We sufficiently on all sides confused the jury completely. Let's stay with the statutes as they're set forth and proceed according to the statutes.
>
> Can you follow the instructions of the law as given to you by the court? Can you, Ma'am?
>
> MS. DANIEL: Yes.
>
> THE COURT: Can you, sir?
>
> MR. STALNAKER: Yes.
>
> MR. MOTT: Well, just for the record, Your Honor, I want to ask them what their attitude is about the law.
>
> THE COURT: You're trying to pre-commit them and that's the part we're going to stop, because I'm hearing what you're asking and I'm hearing the answer and I'm also getting the motions at bench conferences.

(R1347-1348) Further attempts to voir dire jurors' attitudes about the mitigating factors lead to restrictions by the court:

* * *

I admonish you to stay within the law in the future and don't discuss the law.

MR. MOTT: May we have a clarification of that?

THE COURT: . . . I do not want counsel making reference here to the law illegally. And stay out of the law. Ask questions about their responsibility to serve as a juror on this particular case.

And be prepared to try the case, gentlemen, because it's going to get done.

MR. MOTT: Yes, sir. We're prepared for that.

THE COURT: And we've had enough charades and it's time to get serious.

MR. MOTT: Just so I don't incur the anger of the court --

THE COURT: You don't anger me.

MR. MOTT: I'm trying to understand if the court is instructing and ordering me not to ask the question about --

THE COURT: Counsel is competent enough to know what they're doing.

MR. MOTT: I'm trying to get to the attitudes of the jury.

THE COURT: I've already told you what I said. And what I'm telling counsel is you have been trying to trick the jury. You have been trying to impeach the whole panel by your questions. You have done everything you could to taint the panel. You have failed miserably in doing so, so now we will proceed to the jury selection.

MR. MOTT: I'm trying to find out what their attitudes are.

THE COURT: I'll not explain the law. I made my comment. I think it's self-explanatory.

MR. MOTT: If I may respectfully reply to that, Your Honor.

THE COURT: Yes, sir.

MR. MOTT: My purpose is to explore the attitudes of the jurors on the issue of certain mitigators, not to get them to commit, but just to ask them what their attitudes would be on that.

THE COURT: It's for the purpose of jury selection, not jury rejection. It's pretty obvious. You don't have to answer it.

The jury knows what you're doing. You have to give them credit for having a 7th grade mentality, too.

You're going to ask them to be fair to your client. That's all I'm suggesting to you. You remember that in your continued voir dire.

(R1527-1520) (emphasis added) When exploring juror Meadows' attitude about whether mercy is appropriate in a case of premeditated murder, counsel ran into a sustained objection. (R1554) When Mr. Parrish was asked if he would consider child abuse in deciding the appropriate penalty, the state objected and the court sustained the objection. (R1657) When voir diring Ms. Johnson, counsel inquired if she would be prone to convict unless the defense came up with evidence to rebut or overcome that which she had heard through pre-trial publicity. (R1928-1929) Again, the State's objection to the question was sustained. (R1929)

During voir dire Mr. Williams made a statement that was extremely and highly prejudicial and counsel attempted to voir dire jurors on the influence that the statement had on their attitudes about the case. (R2017-2019) Counsel's voir dire on this subject

was constantly interrupted and severely restricted. (R2044-2046, 2048-2050)

When voir diring Mr. Campbell, who eventually became a sworn juror in the case, counsel asked about Mr. Campbell's attitude about the appropriate punishment if there was a finding of guilt:

> MR. MOTT: Would you also, and this is what I need to know most importantly, even if there is a finding of guilt, would you keep your mind open to the issue of what punishment is appropriate?
>
> MR. TANNER: Objection. Repetitious, Your Honor.
>
> THE COURT: Sustain the objection. It's repetitious.
>
> MR. MOTT: Would you not come to any conclusions during the trial about what the appropriate punishment might be?
>
> MR. TANNER: Objection. Repetitious.
>
> THE COURT: Sustain the objection.
>
> MR. MOTT: Could you be absolutely fair in this case, sir?
>
> MR. CAMPBELL: Yes.

(R2040-2041)

Because the jury recommendation was a close 7 for death and 5 for life, the prejudice to Mr. Anthony Farina emanating from the severely restricted voir dire is manifest and deprived him of both a fair trial and fair sentencing phase.

POINT V

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REPEATED MOTIONS FOR CHANGE OF VENUE WHERE THE COMMUNITY IN WHICH THE APPELLANT WAS TRIED WAS SO HOSTILE, PREJUDICED AND BIASED THAT THE APPELLANT COULD NOT GET A FAIR TRIAL.

A change of venue in a highly publicized case is required where the state of mind of the community is so infected with knowledge of the incident and accompanying prejudice, bias, and perceived opinions that jurors could not possibly put those matters out of their minds and try the case solely on the evidence in the courtroom. *Holsworth v. State*, 522 So.2d 348 (Fla.1988) To meet this test a defendant must show that the general atmosphere of the community is deeply hostile by showing inflammatory publicity or difficulty in seating a jury. *Holsworth*, at 350. Publicity about a confession is one significant factor to consider; however, standing alone it is not *per se* grounds for granting a change in venue. *Holsworth*, at 350-51. The operative factor where there is pre-trial publicity of any kind is the extent of the prejudice or lack of impartiality among potential jurors that may accompany knowledge of the incident. Holsworth, at 351. Refusal to grant a change of venue will be reversed only where there is manifest abuse of discretion. *Holsworth*, at 351.

Appellant respectfully contends that the trial court abused its discretion in refusing to allow a change of venue in the instant case. Not including the alternate jurors, ninety nine (99) jurors were voir dired during jury selection in this cause.

(R1007-1211) The jury selection was an extremely arduous task that was conducted in an extremely hostile environment (not at all conducive to yielding a fair trial as guaranteed by the Constitutions of this State and Nation). Of the ninety nine (99) jurors voir dired (not including alternates) the vast majority (in excess of eighty five percent [85%]) of the jurors were exposed to pre-trial publicity. After five days of jury selection, it was still not possible to seat a jury without allowing jurors who had indicated that they would be prejudiced and biased against the Appellant to sit on the jury. (See POINTS I, II, III and IV above)

There was extensive publicity covering the Taco Bell case. The following are examples of some of the headlines in the local newspapers:

"TRIO PLEAD NOT GUILTY TO KILLING AT TACO BELL" [6]

"AFTER MATH OF LOCAL TEEN'S SHOOTING DEATH" [7]

"JUDGE: TATOOS MAY BE PHOTOGRAPHED FOR EVIDENCE" [8]

"THE TACO BELL DEFENDANTS PLEAD INNOCENT" [9]

"COMMUNITY SAYS FAREWELL TO SLAIN TEEN" [10]

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[6](R2259)

[7](R2260)

[8] **This article included photographs of the co-defendants and Appellant.** (R2261)

[9] **This article also included photographs of the co-defendants and Appellant. (R2262)**

[10] **A large photograph with mourners was included in this article. (R2293)**

"TEEN ROBBERY SURVIVORS HOME FROM HOSPITAL" [11]

"TAPES GIVE TWO VIEW POINTS OF TACO BELL BLOODSHED" [12]

"RESTAURANT SHOOTING VICTIM DIES" [13]

"TACO BELL SHOOTING SURVIVORS REBUILD SHATTERED LIVES" [14]

"DAYTONA TEEN DIES ONE DAY AFTER ROBBERY AT TACO BELL" [15]

"PLAN SET FOR TEENAGE VICTIM'S FUNERAL" [16]

"MORE THAN A THOUSAND MOURN MICHELLE" [17]

"TACO BELL STABBING SURVIVOR RECOUNTS HER NIGHT OF TERROR" [18]

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[11] This article included an emotional photograph of the deceased and her brother arm in arm. (R2264)

[12] This article included a photograph of the Appellant in prison garb along with his co-defendants. It also included a sub heading of "1 suspect said they wanted no witnesses." This also made reference to incriminating statements made by a co-defendant. (R2265)

[13] This article included emotional photographs of the deceased and friends of the deceased mourning her death and included the following: "a hospital spokesman said telephones at the hospital brought calls of concern from families of the victims, friends and even strangers. A switchboard operator said she hadn't counted the calls, 'but there have been plenty, people are really upset by this.'" (R2266-2267)

[14] This was a front page story in the local Sunday paper. It included on the front page photographs of the three surviving victims on the inside story there were three photographs of the defendants again there is reference made to an incriminating statement by a co-defendant that he was to eliminate witnesses. (R2268-2269)

[15] (R2270)

[16] (R2271-2272)

[17] This article included photographs of an emotional graveside scene with mourners embracing each other next to the casket. (R2273)

[18] This article appeared on the front page of the local Sunday newspaper and included a photograph a victim in a hospital bed visiting with her mother. (R2274-2276)

"SURVIVORS REBOUND FROM ROBBERY" [19]

"JUDGE ORDERS SUSPECTS HELD WITHOUT BOND" [20]

"MURDER SUSPECTS: CONFESSION MADE WHILE HIGH ON CRACK" [21]

"SUSPECTS CONFESSION QUESTIONABLE" [22]

"JUDGE: TACO BELL TRIOS CONFESSIONS ALLOWED IN COURT" [23]

"JUDGE TO RULE ON MAKEUP OF TACO BELL TRIAL" [24]

"ATTORNEY IN TACO BELL CASE CLAIMS CONFLICT" [25]

"NO DECISION ON SEPARATE TRIALS FOR TACO BELL MURDER SUSPECTS" [26]

"TACO BELL SLAYING TRIAL MAY MOVE" [27]

"TACO BELL SUSPECT GETS SEPARATE TRIAL" [28]

"DEFENSE SEEKS NEW PROSECUTOR IN TACO BELL CASE" [29]

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[19] (R2277)

[20] This article also includes reference to incriminating statements made by a co-defendant.

[21] Obviously this article made reference to confessions in the case. (R2543)

[22] Again this article made reference to confessions in the case. (R2542)

[23] This article gave detailed information about the confessions in the case. (R2541)

[24] (R2540)

[25] (R2539)

[26] This article contained a large photograph of the three defendants and again made reference to the reported confessions in the case. (R2538)

[27] This article contained reference to the reported confessions in the case. (R2537)

[28] This is another article that made significant to the report confessions in the case. (R2536)

[29] (R2533-2534)

"JUDGE SWITCH WON'T AFFECT MURDER TRIAL" [30]

"JUDGE CRITICIZES PROSECUTOR BUT WON'T REASSIGN TACO BELL CASE" [31]

"TACO BELL TRIAL BEGINS MONDAY" [32]

"MURDER DEFENDANTS GET NEW JUDGE - A TOUGH ONE" [33]

"TACO BELL TRIAL GETS UNDERWAY WITH NEW JUDGE" [34]

"4 TEEN EMPLOYEES WOUNDED DURING TACO BELL ROBBERY" [35]

"THREE INDICTED IN TACO BELL MURDER, ROBBERY" [36]

"LAWYERS QUERY TACO BELL JURORS SEPARATELY" [37]

"JURY HUNT CONTINUES IN TACO BELL MURDER" [38]

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[30] (R2532)

[31] (R2531)

[32] This article appeared in the Sunday newspaper before Monday jury selection and made extensive reference to the alleged facts of the case including the reported confessions. (R2530)

[33] (R2529)

[34] This article again refers to the reported confessions in the case. (R2528)

[35] This article contains a detailed recitation of the facts according to witness statements. (R3049-3051)

[36] (R3055-3056)

[37] This news article included the following "Rankled at deviating from his usual practice, the Judge in the Taco Bell murder case Tuesday let defense lawyers interview perspective jurors individually. Circuit Judge Uriel Blount testily said he allowed the 'fishing expedition' only to protect against an appeal. 'I have no intention in giving you reversible error, that's why I agreed to this idiotic procedure,' Blount growled at defense lawyer Tom Mott and Assistant Public Defender Larry Powers." The article went on to say "nearly all of the forty-two perspective jurors queried over the two days admitted hearing about the case. Lawyers were concerned they couldn't remain impartial" (R3082)

[38] (R3048)

"JURY: BROTHERS MURDERED TEEN AT TACO BELL" [39]

Clearly, Appellant was tried in an atmosphere of extreme hostility, an atmosphere of prejudice and bias; an atmosphere which, in the end, denied him of a fair trial, contrary to the guarantees of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 6 and 9 of the Florida Constitution.

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[39] This article captures the hostile environment in which the Appellant was tried: 'The Defense team has been frequently criticized by Judge Blount, who was called in to try the case after they complained the original Judge was hand picked by the Prosecution. During a week of jury selection, Blount referred to various defense actions as an 'idiotic procedure' or 'fishing expeditions.' the judge even confiscated a video camera defense lawyers were using to tape juror selection. During testimony, Blount overruled most defense objections. While awaiting the verdict Wednesday, Blount grumbled concerns about defense lawyers having their case prepared for today. 'You've seen how cooperative those -- holes are," the Judge said. (R3090)

POINT VI

APPELLANT WAS DENIED A FAIR TRIAL WHERE HE WAS TRIED WITH A CO-DEFENDANT, WHERE INCRIMINATING STATEMENTS OF THE CO-DEFENDANT WERE OFFERED AT TRIAL AND WHERE APPELLANT WAS NOT ABLE TO CROSS-EXAMINE THE CO-DEFENDANT.

Pre-trial, Appellant filed a motion to sever his case from his co-defendants. (R2245-2246) The grounds stated therein included, *inter alia*, that use of co-defendant's statements against the Appellant would create a "*Bruton*" problem and deny the Appellant his right to confront and cross-examine witnesses pursuant to the Sixth Amendment of the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. A hearing was held on the Motion To Sever on October 2, 1992. (R711-757) At the hearing, the State made the representation that at a joint trial the State would not seek to introduce the taped confessions unless they were needed for impeachment and that they would use the confessions (if at all) without any "spill over" to any other defendant. (R757) On October 28, 1992, the trial court entered an order in pertinent part stating in paragraph two thereof:

> The Motions for Severance filed by ANTHONY JOSEPH FARINA and JEFFREY ALLEN FARINA are granted unless the State elects not to introduce into evidence or utilize at trial the statements of these Defendants to Detectives Sylvester and Flynt on May 9, 1992 and utilized only those portions of the conversations between these two defendants in the police car on May 11, 1992 when both of these defendants were present and redacts ANTHONY FARINA's statement to Kelly May on May 11, 1992 to omit any references to JEFFREY FARINA. The state shall notify the court and

> opposing counsel in writing of its decision on this issue no later than Tuesday, November 3, 1992 at 4:30 p.m.

(R2430-2431).

The State elected to try Anthony Farina and Jeffrey Farina together. (TT1-1064) At trial, defense counsel requested a copy of the tape that would comply with the pretrial order. (R150-152) Notwithstanding the pretrial order, the state attempted to elicit testimony about and move unedited versions of the tapes into evidence. (R291-295) State's exhibits Q-1 through Q-6 were the original tape recordings of statements made by the three co-defendants (Anthony Farina, Jeffrey Farina and John Henderson) in a conversation in the back of a police car on May 11, 1992. (TT291-292) After a defense objection, the state withdrew Q-1 through Q-6 and submitted in their place state's NNN-1 and NNN-2 which were edited versions of the original tapes. (TT292-295) Over defense objection, the edited versions of the tape were played and testimony about the statements therein was given by Detective Sylvester. (TT296-303)

In the Penalty Phase, on recross-examination of a defense mitigation witness, the prosecutor asked:

> Q Reverend Crider, with regard to Jeffrey, are you saying that Jeffrey, *when he said*, it's my call, as --
>
> MR. MOTT: Objection. That is not in evidence.
>
> Mr. TANNER:
>
> Q -- to whether to kill them or not, that that came from his past?

THE COURT: Overruled.

MR. MOTT: Facts not in evidence.

THE COURT: That is true, sustained.

MR. MOTT: Your Honor, we have to move for mistrial. That can not be cured by an instruction.

THE COURT: Denied. Mr. Powers, join in?

MR. POWERS: We join in.

THE COURT: Denied. Go ahead.

(TT847-848) (Emphasis added) In mitigation, the co-defendant, Jeffrey Allen Farina, called Dr. Harry Krop as a witness. (TT851-884) On cross-examination by the State, Dr. Krop testified as follows:

Q Well, they did discuss killing anyone that tried to resist them, didn't they?

A According to Jeffrey in my interview which I specifically --

MR. MOTT: Your Honor, I object to this as being a demonstration of Mr. Anthony Joseph Farina's ability [sic] to cross-examine.

That's why we moved to sever these cases. This is an example of prejudice to him. *I can not cross-examine Jeffrey on this issue.*

I'm moving for a mistrial at this time.

THE COURT: Motion for mistrial denied.

THE WITNESS: I discussed with Jeffrey the discussions that he, perhaps, had with his brother with regard to any type of violent behavior.

As far as I understood, the only question or the only time that issue was brought up was, what would happen if someone tried to come at them or attack them. And it's my understanding that that possibility, of having

to shoot someone, was brought up.

* * *

Q Jeffrey 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.

Q So, it was a *premeditated killing*, premeditated robbery, *economic driven*, correct?

A The robbery was economic driven, yes.

Q And Jeffrey on several occasions said, the witnesses were killed to *eliminate witnesses* to prevent identification, correct?

A That's what has been said, yes.

MR. MOTT: Objection, move to strike. *I can not cross-examine his statements.*

THE COURT: Objection overruled. *I already ruled on it. I don't need anymore talking.*

(TT879-882) (Emphasis added)

Clearly, the above statements by Jeffrey Farina were extremely prejudicial to the Appellant at both the guilt and penalty phase of the case. It is well established that a severance of defendants is required to ensure a fair trial where the incriminating statements of a co-defendant can be used against a defendant but the defendant is unable to cross-examine the co-defendant. Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). When a nontestifying co-defendant's confession incriminating the defendant

is not directly admissible against the defendant, the confrontation clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The introduction of testimony about Jeffrey Farina's confession and admissions added substantial weight to the state's case in a form not subject to cross-examination by Anthony Farina, thereby violating Anthony's Sixth Amendment right of cross-examination.

In the instant case, the Appellant was deprived of his right to cross-examine the co-defendant's statements which were extremely prejudicial to the Appellant. All of the co-defendant's statements implicated the Appellant on crucial issues including premeditation and aggravating circumstances, such as cold calculated and premeditated, elimination of witnesses and financial motivation. Accordingly, failure to sever the defendants in this cause deprived Appellant of a fair trial pursuant to the Sixth Amendment of the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

POINT VII

THE TRIAL COURT'S REFUSAL TO GIVE THE DEFENDANT'S SPECIALLY REQUESTED JURY INSTRUCTIONS DENIED APPELLANT HIS RIGHTS PURSUANT 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, TO DUE PROCESS, A FAIR TRIAL AND RELIABLE SENTENCING RECOMMENDATION.

Appellant submitted seven requested jury instructions at the penalty phase. (R2620-2628) Appellant also, with court approval, adopted the written objections to the jury instructions and written requests for special instructions which were filed by his co-defendant. (R985-987, 3017-3039) The standard jury instruction on "non-statutory mitigating circumstances" which was given in this case is totally inadequate, misleading and ambiguous. The instruction reads: "any other aspect of the Defendant's character or record, and any other circumstance of the offense." (R2635) To supplement and clarify the instruction and make it applicable to the facts of the instant case, Appellant submitted his special jury instruction number one. (R2620-2621)

A Defendant has an absolute right to have a jury instructed on the law applicable to a case. See *Foster v. State*, 603 So.2d 1312 (Fla. 1st DCA 1992) This is true for example, in cases of affirmative defenses. It would be unthinkable for a defendant not to be provided with a jury instruction on self-defense, in the appropriate case or any other applicable defense in the appropriate case. In a case with death as a possible penalty, non-statutory

mitigating circumstances may mean the difference between life and death. Accordingly, if it is fundamental for a person accused of theft to have a jury instructed on alibi, it is, *aforti*, fundamental for a jury in a capital case to be specifically instructed on the applicable non-statutory mitigating circumstances. This is especially compelling where the evidence of the mitigating circumstances is substantial and where the non-statutory mitigating circumstances have been previously recognized and identified by law.

In the instant case, it was undisputed that Appellant grew up in a dysfunctional family environment, that he suffered extreme physical abuse as a child, that he suffered sexual abuse as a child, that not only was he physically and sexually abused he was also neglected, that notwithstanding having an average IQ he had a learning disability, that he had a drug addiction and that at the time of offense he was under the influence of the drug addiction[40], that he had a passive personality type, that he had used a mind-altering drug at the time of the offense, that he did not have any felony convictions prior to the criminal episode comprising the instant case, that his employment background extended to the age of eleven, that a state social welfare system had failed to remedy his problems through no fault of his own, that he had potential for rehabilitation, that he had the ability to make a positive contribution to an open prison population, that he was remorseful,

---

[40]Even the State's expert agreed that Appellant was addicted to crack cocaine and that he was under the influence of the addiction at the time of the offense.

that he was not the "trigger man." Appellant respectfully submits that the standard jury instruction on non-statutory mitigating circumstances, especially in his case, diminishes, undermines and renders insignificant all of the independent, separate, significant, non-statutory mitigating circumstances that existed in his case. Notwithstanding the adequate evidence supporting each of the non-statutory mitigating circumstances, because the instruction given was inadequate and ambiguous, the jury may have been led to disregard and reject the evidence presented and the arguments made pertaining to these recognized non-statutory mitigating circumstances.

Accordingly, in view of the overwhelming non-statutory mitigating circumstances that were established by the evidence, the instruction given by the court was totally inadequate and had the tendency to preclude the jury from considering valid mitigating circumstances, which is prescribed by current case law. *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). Additionally, the trial court's refusal to give a more specific instruction on non-statutory mitigating circumstances in the instant case was tantamount to the jury refusing valid mitigation, which is also contrary to the law pertaining to mitigating circumstances. *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982). The failure of the court to more precisely instruct the jury on non-statutory mitigating circumstances was extremely prejudicial, especially in view of the way the Appellant conducted voir dire and conducted the penalty phase presentation of his evidence and his final argument

to the jury.

Counsel proposed an instruction that defines mitigations 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 reasonably 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). Similarly, the trial judge refused the request that the jury be instructed that such mitigation includes but is not limited to an abused childhood, remorse, a potential for rehabilitation, and that any premeditation that existed was not of long duration. (R3035). There was substantial evidence of each of these mitigating considerations presented, but the jury may well have disregarded the evidence and summarily rejected the argument that such considerations were mitigating under the law because the trial judge arbitrarily refused to instruct the jury that as a matter of law such things as remorse, an abused childhood or a potential for rehabilitation must be weighed against imposition of the death penalty.

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 express 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.

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 particular recognized mitigating considerations could be properly weighed against imposition of a death sentence. (R1085). The court responded as follows:

> THE 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). (Emphasis added)

The trial court required defense counsel to limit the inquiry as to whether, in recommending a sentence, the jurors could follow the instructions of the court. (R1086) The refusal of the judge to thereafter expressly instruct the jury that having an abused childhood and a 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, 16, 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. ___, 112 L.Ed.2d 339 (1990).

Much of Appellant's voir dire focused on the potential juror's willingness to consider matters such as age, and child abuse as mitigation in a death penalty case. Appellant produced more than adequate evidence during the penalty phase to support numerous non-statutory mitigating circumstances. Clearly all of these matters were a part of his strategy to convince the jury to be merciful, to give the jury justification for being merciful in hopes of saving his life. The trial court's refusal to give the specially requested jury instruction on non-statutory mitigating circumstances had the affect of gutting a substantial part of the Appellant's effort to save his life.

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 are instructive and presumed to be accurate, but they are not exclusive. ***Steele v. State***, 561 So.2d 638, 645 (Fla. 1st DCA 1990). At times, instructions set forth in the Standard Jury Instructions have been incorrect and/or incomplete. See, ***Yohn v. State***, 476 So.2d 123 (Fla. 1985) ***Sochor v. Florida***, 504 U.S. ___, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992).

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, ***State Dept. of Administration v. Moore***, 524 So.2d 704, 707 (Fla. 1st DCA 1988). (R2998) The trial judge refused to so instruct the jury. (R3001;TR479) During deliberations the jury asked for a dictionary and defense counsel asked that the jury receive the above instruction. The trial judge refused. (TR574). The refusal of the trial court to instruct the jury as set forth in the above instruction denied due process and a reliable jury recommendation in that the standard jury instructions do not 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 Florida's statutory aggravating factors, several unconstitutionally broad terms must be expressly limited 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 as those terms are defined by the court, jurors are left free to use far broader meanings of those terms, with arbitrary and capricious 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).

The refusal of the timely request for an instruction limiting the jury's consideration of the statutory aggravating factors only to 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). Similarly, the trial court's refusal to provide an instruction (R3033) expressly limiting the jury's consideration to the statutory aggravating factors 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 and proposed instructions that would have cured the defect. The standard preliminary instruction is objectionable because it can reasonably be read as limiting the things that may be considered as mitigation to "the nature of the crime and the character of the defendant." (R3022). Thus, it violates the Fifth, Sixth, Eighth and

Fourteenth Amendments and Article I, Sections 9, 16, 17 and 22. ***Penry v. Lynaugh***, 492 U.S. 302, 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 v. Florida***, 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 instruction given as to an "especially heinous, atrocious or cruel" aggravating factor (TR1048) is unconstitutionally vague and it fails to genuinely limit the class of people eligible for the death penalty, resulting in arbitrary and capricious imposition of the death penalty 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 instruction given as to a "cold, calculated and premeditated murder" (TR1049) is unconstitutionally vague and it

fails to genuinely limit the class of people eligible for the death penalty, resulting in arbitrary and capricious imposition of the death penalty in violation of ***Espinosa v. Florida***, supra; ***Sochor v. Florida***, supra; ***Maynard v. Cartwright***, supra; ***Shell v. Mississippi***, supra; ***Godfrey v. Georgia***, supra. (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 if 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. ___, 112 L.Ed.2d 339 (1990).

Because the instructions below were constitutionally tainted as set forth in the record at pages 3017-3018 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.

POINT VIII

IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH WHERE THE SENTENCE WAS DISPROPORTIONAL, WHERE AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL COURT WERE NOT SUPPORTED BY THE EVIDENCE AND WHERE THE COURT FAILED TO FIND MITIGATING CIRCUMSTANCES THAT WERE SUPPORTED BY THE EVIDENCE. THE TRIAL COURT ERRED IN FINDING SIGNIFICANT PRIOR RECORD AS A VALID AGGRAVATING CIRCUMSTANCE. THE TRIAL COURT ERRED IN ENTERING ITS WRITTEN FINDINGS INVOLVING MITIGATORS, IN THAT IT DID NOT WEIGH OR CONSIDER MITIGATORS THAT WERE CLEARLY ESTABLISHED BY THE EVIDENCE.

The trial court, in the instant case, found beyond a reasonable doubt that the aggravating factor especially heinous atrocious or cruel (HAC) was established by the evidence. (R2651) Appellant herein respectfully contends that the trial court's factual findings as to this aggravating factor are not supported by the record. According to the testimony of Derek Mason, Anthony Farina assured Mason in the presence of others that no one would be hurt and he promised that everything would be alright. (TT118-119) Thereafter, Anthony considered turning off the cooler, implying that he was considerate about their physical comfort. (TT121-122, 338) Moreover, according to the testimony of Gary Robinson, Derek had announced that Anthony had told him that no one was going to be hurt. (TT337-338) The length of time was very short from the time that the announcement was made that no one would be hurt to the time that the shooting occurred. (TT338) Also, during that time Anthony was considering turning the cooling unit off presumably for the comfort and well-being of the victims. (TT338) According to

Robinson they were in the freezer for only a few seconds when the shooting started. (TT338) On cross-examination, Mr. Robinson stated that Anthony Farina was congenial toward him and the others up until the time that the shooting started. (TT346) The victims were in the cooler for only two to three minutes before they were asked to go into the freezer, where the shooting occurred. (TT349) Significantly Robinson testified that Anthony Farina stated, "I'm going to *have* to ask you to step back into freezer." (TT338) (emphasis added) There is an implicit reluctance in the wording of that statement. It is not an order and it is not a demand -- it is more in keeping with the testimony of Dr. Levin that Anthony Farina was in a passive role during the shooting. Accordingly, in support of that proposition, Anthony Farina was assuring the victims that everything would be alright, he was attending to their personal comforts showing concern about the temperature in the cooler and the freezer and, by all reports from all witnesses, he was concerned and congenial towards them. For example, he saw to it that the victims who desired them had cigarettes. (TT371) Anthony Farina was at least in some way attending to the personal comforts of the victims. Indeed, a second time he provided a cigarette for Ms. Gordon he lighted the cigarette for her. (TT374) Again, according to Ms. Gordon's testimony Anthony Farina offered to turn the cooler off, as opposed to being asked by someone to do it. (TT376) The last time that Ms. Gordon saw Anthony Farina he was at the door to the walk-in cooler -- not at the freezer door. (TT380) On cross examination Ms. Gordon indicated that Anthony did not

encourage Jefferey to shoot anybody. (TT386) Apparently, Anthony was not acting in an aggressive manner, because Ms. Gordon was not even aware that he was armed. (TT387)

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.")

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.

In the instant case, Anthony Farina gave every indication of being somewhat concerned about the comfort of the victims. Accordingly, it is contrary to the facts to find that his actions were conscienceless and tortuous.

The trial court also found the aggravating factor of "cold calculated and premeditated" (CCP). (R2652) This factor has been defined as a heightened form of premeditation. See *Hill v. State*,

515 So.2d 176 (Fla. 1987). Impulsive killings during a felony do not qualify for the CCP aggravating circumstance. See *Rogers v. State*, 511 So.2d 526 (Fla. 1987) The facts do not support the trial court's finding of this aggravating factor. In *Cannady v. State*, 427 So.2d 723 (Fla. 1983), the defendant stole money from a Ramada Inn, kidnapped the night auditor and drove him to a wooded area where he shot him; the defendant said he had not meant to shoot the victim. Under these circumstances the CCP aggravating factor was not found. *Cannady*, at 730. Also, in *White v. State*, 446 So.2d 1031, 1037 (Fla. 1984), the defendant shot three people and attempted to shoot two others during a robbery; the court found that the aggravating factor of CCP was not present and the fact that the underlining felony may have been fully planned ahead of time did not qualify the crime for the CCP factor if the plan did not include the commission of the murder. See *Jackson v. State*, 498 So.2d 906 (Fla. 1986); *Hardwick v. State*, 461 So.2d 79 (Fla. 1984)

Pursuant to §921.141(5)(b) Fla. Stat., the trial court in its written findings of fact in support of the death penalty, found the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence. (R2650) The factual basis that the trial court relied upon to make this finding were the contemporaneous offenses for which the Appellant was tried and convicted in this case. (R2650-2651) The plain language of the Statute provides that the Defendant must have been "*previously*" convicted of a "*prior*" violent felony before that fact can be used

in aggravation. Statutes which are penal in nature must be strictly construed according to their precise meaning. ***Perkins v. State***, 576 So.2d 310 (Fla.1991). Justice Kogan in his concurring opinion in *Ellis v. State*, 18 FLW S417, 420-421 (Fla. 1993), keenly observes that the statute does not specifically authorize contemporaneous felonies to be used in aggravation. Accordingly, the trial court's use of the contemporaneous felonies as aggravation in the instant case violates Appellant's rights to due process under the Florida and the United States Constitutions.

Finally, Appellant's death sentence is disproportionate to him considering the substantial quality and quantity of non-statutory mitigating evidence, considering the fact that he was an accomplice and not the "trigger man," and the fact that he did not actively encourage Jeffery Farina to shoot the victim and, notwithstanding the trial court's findings, Anthony Farina's age (of eighteen years) at the time of the offense.

When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. The Court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been *reasonably established* by the greater weight of the evidence. The Court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each

established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by sufficient competent evidence in the record. *Campbell v. State*, 571 So.2d 415, 419 (Fla. 1990)

Contrary to the requirements of *Campbell*, supra, the trial court's order (R2650-2655) failed to expressly evaluate the following non-statutory mitigating circumstances:

1. Anthony Farina's learning disability, notwithstanding his having an average I.Q.

2. Anthony Farina's drug addiction.

3. Anthony Farina's passive/submissive dependant personality.

4. Anthony Farina's use of drugs at or near the time of the offense.

5. Anthony Farina's lack of felony convictions, prior to the instant criminal episode.

6. Anthony Farina's confession to the police.

7. Anthony Farina's employment background from the time that he was age 11.

8. Anthony Farina's potential for rehabilitation.

9. Anthony Farina's ability to make a positive contribution to an open prison population.

10. Anthony Farina was not the "trigger man," he did not shoot and kill the victim.

11. Anthony Farina had been failed by a state social welfare system.

12. Anthony Farina did not by word or act encourage Jeff Farina to shoot the victim.

13. Anthony Farina showed consideration for the physical and mental comfort of the victim.

Since the trial court did not specifically address the above-listed non-statutory mitigating circumstances, it is not clear that the court considered these circumstances or, more importantly, weighed the circumstances in determining and reaching its decision. This is extremely significant in light of the quality and quantity of mitigating circumstances. Considering the quality and quantity of mitigation established in the penalty phase the trial court's characterization of the case having "limited mitigation" is clearly contrary to the facts in the record.

POINT IX

APPELLANT WAS DENIED HIS RIGHT TO A FAIR SENTENCING HEARING WHEN IN THE PHASE II CASE AND CLOSING ARGUMENT THE PROSECUTOR ENGAGED IN A SERIES OF ACTS OF MISCONDUCT WHICH DEPRIVED THE DEFENDANT OF A FAIR SENTENCING HEARING.

At the beginning of the penalty phase, the State gave an "opening statement." Actually the State began *strenuously* arguing -- in open statements -- that the evidence proved that the death penalty was appropriate. The first six objections made by defense counsel were overruled. The next fourteen objections by defense counsel were sustained on the grounds of improper argument. Some of the improper arguments were:

> They should not benefit by the fact that we only had one child dead on that cold floor. (TT589)
>
> What was their purpose for moving them back into that *execution chamber*? (TT591) (emphasis added)
>
> 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. (TT592)
>
> Can there be more of an obvious execution .... (TT592)
>
> 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. (TT592-93)
>
> You came to know the terror of Michelle Van Ness. Though she could not be with us in this courtroom today and could not be with us in the courtroom throughout these proceedings, sat here silently in testimony of what occurred to her on that night -- (TT 585)

After numerous objections by the defense were sustained, and

the State persisted in engaging in an inflammatory argument during its opening statement, defense counsel moved for a mistrial on the grounds of extreme prosecutorial misconduct. (R593) The motion for mistrial was denied; however, the objection to the argument was sustained. (R593) The Prosecutor pressed further and not only continued to argue the case during opening statement, but engaged in a "golden rule" argument when he put the jurors in Derek Mason's shoes by arguing:

> Consider as he pointed that gun at Derek Mason, and he pulled the trigger first and struck him in the face. Consider Derek up against the back wall. And consider that second attempt to pull the trigger --
>
> MR. MOTT: Objection, this is argument designed to inflame the passions of the jury.
> . . .
>
> THE COURT: Sustained the objection.

(R595) The State was not satisfied with the degree to which it had already inflamed the jury; thus, Mr. Damore continued to fan the flames of prejudice by continuing to improperly argue during opening statement. (R596) Finally, to control the prosecutor, the Court sustained additional objections and implicitly warned the prosecutor that the Court would grant a mistrial if the Prosecutor continued its improper argument:

> **THE COURT: Restrict your statements to opening statement, not closing argument, Mr. Damore, and I will not sustain any further objections. I'll grant other motions.**

(R596)

Not being satisfied with the prejudice that it had injected into the penalty phase during opening statements, in its case-in-

chief in the penalty phase, the State immediately began to fuel the fires of prejudice by engaging in improper and prejudicial tactics. The State called Derek Mason and attempted to stage a theatrical reenactment of the incident. (TT 605-613) Initially, in the presence of the jury, the State Attorney showed Mr. Mason a .32 caliber pistol, a dagger, and a section of rope. (TT 605) None of the items had been entered into evidence, and none of the items had been previously disclosed to the defense, in violation of discovery rules. (TT 605-606) Upon objection by defense counsel to the relevancy of the pistol, the dagger and the rope, the prosecutor explained that the items were being used as "*props*" in a reenactment of the assault. (TT606) (emphasis added) The objection by the defense was sustained. (TT607) Defense counsel then moved for a mistrial based upon the prosecutor displaying the irrelevant items to Mr. Mason in the presence of the jury, with the clear intent of inflaming the passions of the jury. (TT 608) The motion for a mistrial was denied. (TT 608)

Continuing with its plan to further inflame and prejudice the jury, the prosecutor next asked the other two victims, Gary Robinson and Kimberly Gordon if they would step to the front of the courtroom. (TT 608-609) The prosecutor then called four employees to the front of the courtroom and announced that the employees "will help in the *reenactment*." (TT 609) (emphasis added) Defense counsel objected to the procedure, especially if there was to be testimony from the seven "actors" and also on the grounds the prosecutor was engaging in theatrics. (TT 609) The objection was

overruled. (TT 609) The prosecutor then identified each of the "actors" and identified the characters who they would be representing. (TT 609-610) Defense counsel again objected noting that he had not been notified of the names of the "actors" in clear violation of the rules of discovery and on the additional grounds that:

> MR. MOTT: * * *
> This is totally outrageous. It's designed to inflame the passions of the jury in an already highly emotional case.
>
> We strongly object to this procedure.

(TT 610) After hearing argument of counsel, the Court sustained the objection to the procedure. (TT 612) Not being satisfied, the State pressed on and attempted the "reenactment" with only the three surviving victims. (TT613) Defense counsel again objected and requested that a proffer be made. (TT 613) The court sustained the objection. (TT 613)

Continuing with it's prejudicial dramatics, the State next called Mr. Van Ness, the father of the deceased victim, as a witness. (TT 614) Defense counsel immediately objected (TT 614) and the court sent the jury into the jury room. (TT 614) The defense successfully argued that the State was attempting to offer improper victim impact evidence, contrary to the law and contrary to the pre-trial orders in the instant case. (TT 614-619; R2383-2389) The court sustained the objection; however, the State had succeeded in further prejudicing the jury simply by having Mr. Van Ness come to the front of the courtroom to be sworn as a witness.

The next opportunity that the State had to address the jury it

again began to engage in improper conduct. The State began its closing argument by expressing personal feelings about the case by saying "I'm sorry that you are here," and "I'm sorry that any of us are here." (TT 1002-1003) Objections to both of those statements were overruled. (TT 1002-1002) Next, the State diminished the role of the jury in the penalty phase by emphasizing that it's recommendation as to sentence was only "advisory." (TT 1006) An objection to that emphasis was overruled. (TT 1006) The State next engaged in an improper golden rule argument and put the jury in the shoes of the deceased victim, by arguing:

> What was Michelle Van Ness going through for that 20 to 30 minutes, as they consciousless and pitiless -- without pity, contemplated and clearly carried out the murder?

(TT 1008-1009)

An objection to the argument on grounds of a "golden rule" violation, was overruled. (TT 1009) Incredibly, the Prosecutor next engaged in an argument that "age" was not a mitigator but rather an aggravator. (TT1010) Defense counsel objected and moved for a mistrial on the grounds of intentional prosecutorial misconduct, arguing that the prosecutor knew what the law was and was intentionally engaging in an argument which demeaned and distorted the law pertaining the mitigating factor of "age," and in effect converted the mitigating factor of "age" into a non-statutory aggravating factor.

The jury recommended the death penalty by a 7-5 margin for Anthony Farina. (R2639) It cannot be said that the prosecutor's misconduct in the penalty phase did not improperly sway one juror.

Clearly, in a case where one jury vote is the difference between life and death, the prejudice is manifest. The case should be reversed and remanded for a new penalty phase. See *State v. Murray*, 433 So.2d 955-956 (Fla. 1984).

POINT X

THE DEFENDANT WAS DEPRIVED HIS RIGHT TO A FAIR TRIAL AND TO DUE PROCESS WHERE THE STATE ATTORNEY HAND-PICKED THE JUDGE WHO WAS TO TRY THE CASE AND ENGAGED THEREBY IN PROSECUTORIAL MISCONDUCT.

On October 30, 1992, Appellant filed a motion to disqualify the Office of the State Attorney on grounds of "Judge shopping." (R2434-2440) An evidentiary hearing on November 6, 1992, established that the Circuit Court Clerk's Office was to use a "blind filing system" for capital cases which would only be altered if a particular Judge was getting an inordinate number of capital cases. (R849-853, 877-878) Under the standard system, the Taco Bell case would have been assigned to Judge Briese. (R844, 857) Indeed, the case was originally assigned to Judge Briese. (R844, 857)

Judge Briese returned from vacation and learned that he was to arraign the defendants in the Taco Bell case. (R866) Judge Briese's office had also been notified by the clerk's office that the Taco Bell case had been assigned to his court. (R895-896) With authorization from opposing counsel to contact Judge Briese's office *exparte*, to acquire hearing time for motions to withdraw for the Public Defender's office, Assistant State Attorney Damore contacted Judge Briese's office to secure hearing time for the motion to withdraw and informed Judge Briese's assistant that the matter must be expedited. (R789, 897) Damore was informed by Judge Briese's judicial assistant that the Public Defender's office would have to set their own hearing and that the case would not be

expedited nor given any special treatment beyond that of a normal first degree murder case. (R897-898)

The State Attorney for the Seventh Judicial Circuit, John Tanner, sought out the clerk of court, Newell Thornhill and requested that the Taco Bell case be moved to DeLand. Thornhill testified:

> 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 gentleman 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 the case to be tried in the DeLand area. (R798)

According to Thornhill, he then requested that his deputy clerk reassign the Taco Bell case to DeLand. (R803) In contrast, the deputy clerk testified that Mr. Thornhill, being fully aware of the normal procedures governing the assignment of capital cases, directed her to assign the case to the west side of the county because of the request of the State Attorney. (R841-843) Significantly, Judge Orfinger was the *only* Judge handling felony criminal cases on the west side of the county. (R841)

Judge Briese was surprised that the Taco Bell case was shifted out of his court and called the clerk's Office to investigate; the Clerk of the Court told Judge Briese, "I don't want to be smart but I decline to answer." (R876) Judge Briese was suspicious of the timing of the reassignment of the Taco Bell case in that it was soon after Damore was informed by Briese's office that the Taco Bell case would not get any preferential treatment. (R891-892) Judge Briese reported to the Chief Judge that it appeared that the

Taco Bell case was being manipulated. (R884-886) Chief Judge McFerrin Smith contacted the Clerk and was informed that the case had been assigned to the west side of the county at Mr. Tanner's request for security reasons and to prevent truancy of the high school classmates of the victims. (R888-889)

After hearing all the testimony, Judge Orfinger, who at that time was still presiding in the case, found that the Taco Bell case had been assigned at the request of the State Attorney, that that request and assignment were contrary to the applicable administrative order controlling the assignment of capital indictments, and that both the request for the assignment and the actual assignment itself was wrong. (R2560) The Court observed: "This type of conduct gives the entire Judicial system a black eye." (R2562)

In *Castro v. State*, 17 FLW S177 (Fla. 1992), this Court held that the disqualification of a State Attorney's Office was proper where the defendant was given reason to believe that the judicial process had been compromised:

> Our system must not only refuse to tolerate impropriety but even the appearance of impropriety as well. An imagined advantage on one side or the other side in a criminal proceeding can be just as erosive and destructive of the integrity of the judicial system as a real advantage. [Citation omitted]

The improper procedure used by the State Attorney, in the instant case, gives the appearance that the State Attorney was in effect hand picking the judge to try a most serious and high profile case. The blatant "forum shopping" engaged in by the State in this cause

constitutes a gross and flagrant violation of Appellant's rights to due process of law and a fair trial. Attendant to the rights of due process of law is the right to be noticed and the right to be heard. Appellant was neither notified nor given the opportunity to be heard on the issue on whether the case should or should not be transferred from Judge Briese to Judge Orfinger. The prosecutor in effect recused a judge unilaterally without filing a motion or having a hearing. See Fla.R.Crim.P. 3.230.

Contrary to the trial court's ruling, the prejudice to Appellant was manifest. For example, he had no opportunity to object to the case being transferred, he had no opportunity to inquire as to the motivation for the case being transferred and he was not given the opportunity to even consider the pros and cons of such a transfer. To the contrary, he was forced to twist and turn in the mental anguish of trying to understand why the prosecutor would desire to hand-pick a judge to try the case. Consequently, when the trial court denied Appellant a remedy for the State's misconduct, he had little choice but to file his motion to recuse the trial judge. By failing to follow normal procedures for changing courts, the State Attorney's Office grossly and fragrantly violated Appellant's rights to due process of law and to a fair trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I Sections 2, 9, and 21 of the Florida Constitution.

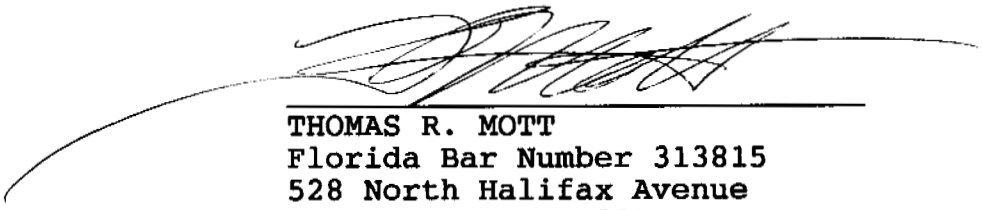
CONCLUSION

Based upon the foregoing authority and argument Appellant respectfully requests that this Honorable Court:

1. Reverse and remand for new trial as to Points I, II, III, IV, V, VI, VII and X.

2. Reverse and remand for imposition of a life sentence or alternatively a new penalty phase as to Points VIII and IX.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Margene Roper, Esquire, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114; and to Anthony J. Farina, #684135, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32088-0221, on this 16 day of September, 1993.

THOMAS R. MOTT
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CROSS-APPELLEE