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

REPLY BRIEF OF APPELLANT
AND
ANSWER BRIEF OF CROSS-APPELLEE

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SUMMARY OF ARGUMENTS

Appellant will reply to Points I, II, III, IV, V, VI and VIII. In regard Points VII, IX and X, Appellant will stand on his arguments in his Initial Brief.

POINT I: Appellant was tried by biased and partial jurors. One juror indicated he would give the defendants a fair trial *if they deserved one*. There was reasonable doubt about the bias of other jurors; several jurors indicated they would not consider mercy but would vote for death in the case of premeditated murder.

POINT II: The Appellant was forced to use peremptory challenges to exclude jurors who should have been excused for cause, and 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. Several of the jurors who tried the case were prejudiced by pretrial 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 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 and where aggravating circumstances found by the trial court were not supported by the evidence.

Cross-Appellee's Answer

POINT I: The trial court properly prohibited the state from introducing victim impact evidence at the penalty phase. The victim impact law is unconstitutional and its application to Appellant would violate ex post facto principles.

POINT II: The trial court did not err in severing Henderson and restricting the testimony of the co-defendants. Even with the severance and restriction or limitation of testimony, Appellant's rights to confrontation and cross-examination were violated. See Point VI above.

POINT III: The trial court properly granted judgements of acquittal non obstante verdict as to the kidnapping charges. The facts supporting allegations of kidnapping were incidental to and

inherent in the other felonies charged. Also, a judgement of acquittal is not subject to appeal.

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE ARGUMENT THAT APPELLANT WAS TRIED BY JURORS WHO WERE BIASED AND PARTIAL.

Juror Carl Nice clearly stated that he would give the defendants' a fair trial "if they deserve one." (R1955) He later explained that he would decide whether or not the defendants' deserved a fair trial based upon the evidence. (R1957) There can be no more egregious flaw in the competency of a juror than that of the *inability* to be fair. One's ability to be a fair juror has nothing whatsoever to do with the evidence at trial. Fairness is a prerequisite to the impartial and unbiased assimilation and evaluation of the evidence during the trial. It is constitutionally axiomatic that no criminal defendant -- not even a guilty criminal defendant -- in the United States of America deserves an unfair trial. The issue of Mr. Nice's competency as a juror was not whether or not he would base his verdict solely on the evidence and put aside outside influences; rather, the issue of Mr. Nice's competency as a juror was a basic question of fairness. *See Singer v. State* 109 So.2d 7 (Fla. 1959). The total record of Mr. Nice's voir dire leaves a deeply disturbing, reasonable doubt about his ability to be fair. He was not rehabilitated. Accordingly, juror Carl Nice should have been excused for cause.

Juror Marley "*guessed*" that she could presume the defendants innocent and "*guessed*" that she could put aside impressions and opinions created by pretrial publicity and base her verdicts solely on the evidence. (R1998, 2009-2010) Juror Marley was not

rehabilitated from these equivocal responses. Accordingly, there was a reasonable doubt about whether or not juror Marley could be a fair and impartial juror. Moreover, based upon her exposure to pretrial publicity, juror Marley concluded that a crime had been committed. (R2042) It is fundamental in American Criminal Jurisprudence that the burden of proof is on the State. It is fundamental in American Criminal Jurisprudence that the citizen accused is presumed innocent. There is nothing *novel* nor *silly* about those fundamental principles. Appellee characterizes as novel and silly the proposition that juror Marley should have been excused for cause, because having been exposed to pretrial publicity she had come to the conclusion that a crime had been committed. (AB30)[1] Appellee agrees with the trial judge that jurors could assume that a crime was committed or they wouldn't be summoned to jury service. (AB30) Appellee also adopts the proposition of the trial court that the jurors could assume that a crime was committed because an indictment was filed. (AB30) Such notions are contrary to basic principles of fairness and due process of law guaranteed by State and Federal Constitutions. A juror should not assume that a crime was committed simply because an indictment or information is filed. Indeed, there is a specific jury instruction which cautions jurors that charging documents are not evidence; no inferences should be drawn from the fact that charges have been filed. *See* Fla. Std. Jury Instr. (Crim) §1.01.

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[1]"AB" will be used herein to refer to citations to Appellee's Answer Brief.

If jurors were allowed to presume that a crime had been committed based upon their being summoned to jury service and based upon there being criminal charges filed, then the only issue for the jury to decide would be one of identity. Clearly, that is not the law. Rather, the law is that the State has the burden of proving each and every element of each and every offense charged beyond into the exclusion of a reasonable doubt additionally; also, the State must prove identity beyond and to the exclusion of a reasonable doubt. *See* Fla. Std. Jury Instr. (Crim) §2.03.

During the voir dire of Mr. Marriott, the following exchange occurred:

> MR. TANNER: With regard to this particular case, Mr. Marriott, have you received outside information from the media or conversations or family members of such a level you could not be a fair juror to the state and the defendants in this case?
>
> MR. MARRIOTT: I don't *think* so.

(R2021)(Emphasis added) Appellee contends that this answer is not equivocal. (AB32-33) Appellee simply *asserts* that the *real* meaning of Mr. Marriott's answer was that he had not received outside information to such a degree that he could not be fair. (AB33) Notwithstanding Appellee's assertions, juror Marriott's response was equivocal and ambiguous. Additionally, because of pretrial publicity, Marriott "*knew*" a crime had been committed. (R2026, 2061-2062) Consequently, there was reasonable doubt about whether or not extrajudicial information had tainted juror Marriott's ability to be a fair juror.

The record clearly supports the proposition that Mr. Marriott

was highly predisposed to vote for death if there was a guilty verdict, as the following voir dire shows:

> 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.
>
> * * *
>
> MR. POWERS: Good morning, Mr. Marriott. If I heard correctly, you generally support the death penalty, is that correct?
>
> MR. MARRIOTT: If proven guilty, yes.
>
> MR. POWERS: Can you tell me why it is you support the death penalty?
>
> MR. MARRIOTT: If they do a guilty job, they should be punished.
>
> MR. POWERS: What function do you see the death penalty serving in today's society?
>
> MR. MARRIOTT: I beg your pardon?
>
> MR. POWERS: What function does the death penalty serve?
>
> MR. MARRIOTT: Well, if they committed a crime, they should be --

(R2025-2027) Mr. Marriott was never rehabilitated by the State in regard to his predisposition to impose the death penalty. Prior to the above-quoted portion of his voir dire, Mr. Marriott was voir

dired by the State. (R2021-2024) Appellee asserts that Marriott "was only a supporter of the death penalty if it had been proven to be appropriate." (AB33) The record simply does not support such an assertion. The pertinent part of the State's voir dire of Mr. Marriott concerning predisposition of the death penalty is as follows:

> MR. TANNER: The State, if, in fact, a verdict of murder in the first degree is rendered, is going to ask the jury who sits on this case to recommend that this judge impose a death sentence.
>
> If you were convinced that was the appropriate sentence, could you make such a recommendation?
>
> MR. MARRIOTT: I believe I could.
>
> MR. TANNER: Okay. In a case such as this, you may hear evidence in the penalty phase as to a person's age or background or rough childhood. If the judge admits that type of evidence, it certainly is worthy of considering. Would you give it consideration?
>
> MR. MARRIOTT: I can give it consideration, yes.
>
> MR. TANNER: By the same token, you wouldn't necessarily excuse someone from a crime because they had a rough childhood or something, would you?
>
> MR. MARRIOTT: No.
>
> MR. TANNER: Even in a case of premeditated, deliberate, first degree murder, if the jury makes that kind of a finding in their verdict, the jury must also be able to consider whether to recommend a life sentence without parole for twenty five years or whether to recommend a death sentence. Would you be able to consider both verdicts fairly if, in fact, you found these defendants guilty?
>
> MR. MARRIOTT: Yes.

(R2022-2023) Again, it should be noted that this portion of Mr. Marriott's voir dire occurred *prior* to voir dire by defense counsel. Accordingly, this is not rehabilitative voir dire.

Considering Mr. Marriott's voir dire in its entirety, it is clear that he was highly predisposed to vote for death upon a finding of guilt. Accordingly, the cause challenge against Marriott should have been granted, because his views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *See also*, *Bryant v. State*, 601 So.2d 529 (Fla. 1992).

Appellee asserts that Ms. Stewart had not come to a firm fixed assumption that a crime had been committed. (AB34) On this issue Ms. Stewart was voir dired as follows:

> MR. POWERS: Now Mrs. Stewart, without hearing any of the evidence here today, have you made any presumption that a crime has been committed at the Taco Bell?
>
> MS. STEWART: I only *know* the crime has been committed by what I heard on television. I do not read newspapers.

(R2009) (emphasis added) Subsequent voir dire of Ms. Stewart yielded the following:

> MR. MOTT: Let me put it this way: Did you form an opinion about whether a crime had occurred?
>
> MS. STEWART: I will have to say, and I know this is a bad word, I assumed there was a crime, because of what I had seen on television.
>
> MR. MOTT: Okay. Is that assumption a fixed assumption?
>
> MS. STEWART: Pretty much, yes.

(R2053) While in other parts of her voir dire Ms. Stewart indicated that she could base her verdict on the evidence in court, the totality of her voir dire left a lingering reasonable doubt

about her ability to be a fair and impartial juror.

Contrary to Appellee's assertion that Juror Sullivan would *not* automatically vote for the death penalty based upon a verdict of guilty in the first degree, the voir dire of Ms. Sullivan reveals:

> MR. TANNER: First degree premeditated murder is potentially a capital offense in the state of Florida, but not every premeditated murder necessarily carries with it or would necessarily call for the death penalty. Can you tell all of us that you would not automatically vote for death just based upon a verdict of guilty in first degree?
>
> MS. SULLIVAN: No.

(R1597-1598) The clear and unequivocal meaning of this question and answer is that Ms. Sullivan could *not* say that she would *not* automatically vote for the death penalty, upon a verdict of first degree murder. Her voir dire continued:

> MR. TANNER: So you would consider each case on its own merits as to whether or not to vote to recommend death?
>
> MS. SULLIVAN: Yes.

(R1598) This leading question is not adequate rehabilitation of Ms. Sullivan on the issue of whether or not she would automatically vote for the death penalty upon a conviction of first degree murder. *See Price v. State*, 538 So.2d 486 (Fla. 3d DCA 1989) When asking for additional peremptory challenges, Appellant identified Ms. Sullivan as a juror against whom he would exercise a peremptory. (R1989)

POINT II

IN REPLY TO THE STATE AND IN SUPPORT IN THE CONTENTION THAT APPELLANT WAS DENIED A FAIR TRIAL 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 CHALLENGES.

Appellee indicates that Mr. Jeffers "specifically indicated `it depends on the facts of each case whether or not he would vote for death *or for a recommendation of mercy.*' " (AB37) This information was not yielded by a statement from Mr. Jeffers; rather, it was in response to a leading question propounded by the state:

> MR. TANNER: . . .
> Would you say it depends on the facts of each case whether or not you vote for death or a recommendation of mercy?
>
> MR. JEFFERS: Yes.

(R1906) Contrary to *Thomas v. State*, 403 So.2d 371 (Fla. 1981), Mr. Jeffers clearly indicated that he would not consider mercy in a capital case:

> MR. MOTT: In your view or in your attitude toward the death penalty, do you believe that mercy has any place in a death penalty case?
>
> MR. JEFFERS: No.
>
> MR. MOTT: Do you believe that in a first degree premeditated murder case that whether or not a person has an abusive childhood background or neglected childhood, does that have anything to do, in your opinion, with whether the death penalty would be appropriate?

* * *

MR. JEFFERS: My last answer was no.

(R1908-1909) When asked by the State if he could put aside any impressions created by pretrial publicity and base his verdict entirely upon the evidence at trial, Mr. Jeffers answered, "I *think* I can, yes." (R1905) (emphasis added) This equivocal answer left a reasonable doubt about Mr. Jeffers' ability to be a fair and impartial juror. Additionally, as conceded by Appellee, Mr. Jeffers indicated that he would *not* consider a neglected or abused childhood when evaluating the appropriateness of the death penalty. (AB42) Appellee argues, however, that "upon proper instruction" juror Jeffers would not necessarily ignore the mitigating circumstances of abused or neglected childhood. (AB42) Such a statement is not adequate rehabilitation. *See Price v. State*, 538 So.2d 486 (Fla. 3d DCA 1989); *Lavado v. State*, 469 So.2d 917, 919 (Fla. 3d DCA 1985) overruled, dissenting opinion approved in *Lavado v. State*, 492 So.2d 1322 (Fla. 1986). The standard jury instruction on nonstatutory mitigating circumstances (which was given in this case) reads as follows: "Any other aspect of the defendant's character or record, and any other circumstance of the offense." (R2635) It is difficult to fathom how this jury instruction would persuade, convince or compel a juror who has evidenced an unreceptive attitude towards specific nonstatutory mitigating circumstances to nevertheless fairly consider child abuse, child neglect or other psychological, sociological or socioeconomic circumstances. It should be noted that appellant's specially requested jury instruction on specific nonstatutory

mitigating circumstances was denied. (R2620-2621) As previously noted, Mr. Jeffers indicated that he would not consider mercy in a capital case. (R1908) Under these circumstances, Mr. Jeffers clearly should have been excused for cause.

Ms. Wasko's predisposition to impose the death penalty was revealed in response to an "open-ended" question:

> 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.

(R1062) Efforts to further explore Wasko's views on the death penalty were frustrated by sustained objections. (R1062) In response to the question whether or not she thought that the death penalty just automatically somehow applied, Wasko answered, "no." (R1063) It is important to distinguish this question and answer from a question that would have asked her if *she* personally would have automatically applied the death penalty. In other words, the question was not personal and specific to her, it was a broader question that encompassed and could include the judicial system as a whole. Contrary to Appellee's assertion that there was "absolutely no doubt" about Wasko's ability to be fair and impartial on the issue of appropriate sentence, the record is littered with lingering, reasonable doubt as to Wasko's ability to be fair an impartial. She indicated that she would not consider the defendant's background (R1061), and she clearly indicated that in the case of deliberate, premeditated murder, she would agree that a death sentence would be appropriate. (R1062)

Not only was there reasonable doubt about juror Domeij's ability to be fair and impartial, there was no doubt but that he would be an unfair, partial and biased juror. When frankly asked if he could be objective, impartial and fair in making a sentencing recommendation, juror Domeij candidly answered, "I might have a little difficulty." (R1615) Domeij clearly indicated that he would not be fair in the penalty phase. (R1615, 1617-1618, 1620) Because he was clearly biased and prejudice against the defendant, juror Domeij should have been excused for cause. Appellee suggests that defense counsel should have continued his voir dire of Mr. Domeij, rather than exercising a peremptory challenge. (AB40) There was no need for further voir dire; the record was clear that Domeij was biased and prejudiced. Appellant had no duty to rehabilitate this juror.

Appellee suggests that the cases cited in the initial brief pertaining to a juror's inability to follow the law of insanity or intoxication defenses are not significant or pertinent to the case at bar. (AB41) Appellant presumes that Appellee is, therein, referring to *Moore v. State* 525 So.2d 870 (Fla. 1988), and *Lavado v. State* 492 So.2d 1322 (Fla. 1986). In the case at bar, much of Appellant's voir dire focused on the potential jurors' ability to fairly consider mitigating circumstances. In essence, mitigating circumstances are defenses to the death penalty. Mitigating circumstances constitute the law applicable to a death penalty case. Like the defense of insanity in *Moore v. State*, *supra*, and the defense of intoxication in *Lavado v. State*, *supra*, in the

instant case mitigating circumstances constituted the law applicable to the case. Accordingly, voir dire questions pertaining to jurors' attitudes about mitigating circumstances were proper, and jurors who indicated that they would not consider mitigating circumstances in deciding the appropriate penalty should have been excused for cause.

Appellee argues that Ms. Graham was not subject to a cause challenge and that she would consider circumstances such as *age* in determining the appropriate penalty. (AB42) Actually, Ms. Graham indicated that age was the *only* circumstance that she would consider:

> MR. MOTT: . . . What I would like to know is if a person were convicted of premeditated first degree murder, would there ever be any circumstances in your mind which would justify not imposing the death penalty?
>
> * * *
>
> MS. GRAHAM: Yes.
>
> MR. MOTT: What types of things would you, Miss Graham, think would be important in making that decision?
>
> MS. GRAHAM: Age.
>
> MR. MOTT: Anything else?
>
> MS. GRAHAM: No.

(R1262) Additionally, Ms. Graham expected the defense to rebut the negative impression created by pretrial publicity. (R1478-1479)

Appellee argues that Ann Johnson was "nonequivocal" in answering questions about her ability to be fair and impartial. (AB43) Appellant, to the contrary, continues to emphasize that Ms. Johnson was extremely equivocal and to support that proposition

will rely upon his argument in the initial brief (IB) and record citations therein. (IB45) (R1928) Ms. Johnson could only "*hope*" to be fair and would not have felt comfortable serving as a juror on the case. (R1928) In a very similar case the Third District Court of Appeal found a clear reasonable doubt as to the juror's ability to be fair and impartial. *Gilbert v. State*, 593 So.2d 597 (Fla. 3d DCA 1992). Additionally, Ms. Johnson had been exposed to pretrial publicity about confessions and incriminating statements made by the defendants. (R1925) Clearly, this was extremely prejudicial pretrial publicity. Consequently, juror Ann Johnson should have been excused for cause.

Appellee reports that juror Margaret Daniel indicated that she would consider factors such as age and rough background. (AB45) The record simply does not support this contention. (R1343) The record citation made by appellee reveals that the prosecutor asked questions about age and rough background; however, the record is silent as to any responses to said question. (R1343) Appellant noted this lack of physical or verbal response during his voir dire. (R1344) He also noted it to the trial court. (R1367) Initially, Ms. Daniel indicated that she would not consider childhood as a mitigating circumstance; subsequently, she indicated that she would weigh child abuse or neglect. (R1344) Significantly, Ms. Daniel clearly indicated that she would *not* consider age in determining whether or not the death penalty would be appropriate. (R1344) Because she would not consider age as a mitigating circumstance, there was reasonable doubt about Ms.

Daniel's ability to be fair. Therefore, Ms. Daniel should have been excused for cause.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE ARGUMENT THAT APPELLANT WAS DEPRIVED OF A FAIR AND IMPARTIAL JURY WHERE THE COURT EXCUSED JURORS WHO COULD BE FAIR AND IMPARTIAL.

Juror Heffelfinger indicated that he could personally impose the death penalty in some cases and that *in any event* he would follow the law and put aside his personal beliefs. As appellee observes, Heffelfinger indicated that he would *probably not* recommend death for a sixteen year old *where the life is salvageable*. (AB48) His statement clearly implies Heffelfinger could vote for the death penalty in a case where a sixteen year old's life was *unsalvageable*. Considering the totality of Mr. Heffelfinger's voir dire, he should not have been excused for cause, because he indicated that he could put his personal beliefs aside and follow the law. (R1298)

Mr. Barry Gullin should not have been excused for cause. Although he indicated that he did not support the death penalty, it was clear that Gullin could put his personal opinions aside and follow the law both as to the guilt and penalty phase of the trial. (R1760, 1770-1771) Moreover, appellant requested to clarify any questions about Mr. Gullin's attitude on the death penalty by further voir dire; however, the requests for further voir dire of Mr. Gullin was denied. (R1774) The exclusion of Mr. Gullin denied appellant a fair and impartial juror.

The record does not support excusing Ms. Hudson for cause.

The State's challenge for cause against Ms. Hudson was granted without the state having to articulate grounds therefor. (R1793) In voir dire by the State, Ms. Hudson stated clearly that she would be able to find a person guilty of first degree murder if the evidence supported the verdict. (R1780-1781) Ms. Hudson indicated that she would fairly consider the imposition of the death penalty and base her decision on the evidence she heard in the courtroom. (R1778) Appellee's reference to *Johnson v. State*, 608 So.2d 4 (Fla. 1992) is misplaced, because Ms. Hudson *never* said that she could not fairly consider the issue of the defendant's guilt knowing the that the imposition of the death penalty was possible. Excusing Ms. Hudson for cause on this record denied appellant a fair juror.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE ARGUMENT THAT THE APPELLANT WAS DENIED A FAIR TRIAL BECAUSE THE TRIAL COURT UNDULY RESTRICTED APPELLANT'S VOIR DIRE.

Appellant relies upon a general principal of law announced long ago:

> The examination of jurors on the voir dire in criminal trials is not to be confined strictly to the questions formulated in the statute, but should be so varied and elaborated as the circumstances surrounding the jurors under examination in relation to the case on trial would seem to require, in order to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice. (citations omitted)

Pope v. State, 94 So. 865, 869 (Fla. 1922). Clearly, it is proper to voir dire potential jurors regarding their attitudes toward the

law applicable to the case. *See* *Moore v. State*, 525 So.2d 870 (Fla. 1988); *Lavado v. State*, 469 So.2d 917, 919 (Fla. 3d DCA 1985) *overruled, dissenting opinion apprv'd* in *Lavado v. State*, 492 So.2d 1322 (Fla. 1986). Therefore, in a capital case it is proper to voir dire potential jurors about their attitudes toward mitigating circumstances. The trial court repeatedly sustained objections by the state to voir dire questions propounded by appellant to explore the jurors' attitudes about the death penalty and mitigating circumstances. Such voir dire questions were clearly and simply designed to obtain a fair and impartial jury, whose minds were free of all interests, bias, or prejudice. In the instant case, it cannot be gainsaid that a potential juror who would not *consider* circumstances such as age, child abuse, child neglect, and other pertinent psychological sociological or socioeconomic factors as mitigating circumstances would be terribly unfair to appellant.

The voir dire of Ms. Wasko was unduly restricted. The question that was not permitted was directed at Ms. Wasko's personal view of whether or not the death penalty should be applied in every deliberate, premeditated murder. (R1062) The question that was permitted was a more general and less personalized question. (R1063) The question allowed was: "Do you think in a premeditated murder situation, the death penalty just automatically applies." (R1063) Significantly, Ms. Wasko was not asked, "Would *you* automatically impose the death penalty in a case of premeditated first degree murder?"

Appellee accuses appellant of trying to get jurors to

"negatively commit without the benefit of the law or the court's instructions." (AB53) As the voir dire of Ms. Lee reveals, appellant was not trying to get the jurors to commit to anything; rather, appellant was repeatedly asking jurors whether or not they would *consider* certain mitigating circumstances in evaluating whether to recommend life or death as a penalty. (R1081)

Appellant's voir dire questions to Mr. Olson, as with the other jurors, were clearly designed to determine whether or not the juror would *consider* (not commit to) certain mitigating circumstances:

> MR. MOTT: Would you, in your consideration of whether death is an appropriate penalty, would you consider the age of the person charged or accused as being pertinent?
>
> MR. OLSON: Age.
>
> MR. TANNER: If Your Honor please, I would again object. Perhaps --
>
> THE COURT: Rephrase the question, if you can.
>
> MR. MOTT: Would the age of the person who is accused have a bearing on your decision whether or not death is an appropriate penalty?
>
> MR. TANNER: If Your Honor, please, I would again object. That's one of the standard potential mitigating factors. This jury is being asked questions out of context.
>
> THE COURT: Right. Objection sustained.

(R1085) The above question was proper in that it was an effort to explore the potential juror's attitude about a law (to wit: the mitigating circumstance of age) applicable to the case. In support of the trial court's ruling, appellee argues that the only pertinent inquiry in this regard was whether the juror would follow

the instructions of the court and abide by the law. (AB53-54) Clearly, such a restricted voir dire would be tantamount to no voir dire at all. *See Lavado, supra*. Taking into consideration the broad and vague nature of the standard jury instructions on non-statutory mitigating circumstances,[2] theoretically, Appellee's argument would restrict Appellant's voir dire questions pertaining to non-statutory mitigating circumstances to questions such as:

> In deciding whether to recommend the death penalty or a life sentence, would you consider any other aspect of the defendant's character or record, and any other circumstance of the offense?

Obviously, such a question would be of limited use in determining what jurors could be fair and impartial. It is much more reasonable and fair to allow questions in voir dire that pertain to specific statutory and nonstatutory mitigating circumstances that are, in good faith, supported by the law and the facts. It is especially unfair to limit and restrict the voir dire questions to a jury instruction when the jury instruction does not mention specific factually and legally applicable nonstatutory mitigating circumstances. (R2635, 2620-2621)

As noted in Point III above, excusing Mr. Gullin for cause, over appellant's objection and without allowing further voir dire, was error.

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[2]It was especially unfair and unreasonable to restrict appellant's voir dire to questions limited to whether or not the jurors would follow the courts instructions. The standard jury instructions on non-statutory mitigators was given to this jury. The standard instruction reads: "any other aspect of the defendant's character or record, and any other circumstances of the offense."

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR CHANGE OF VENUE.

Appellee contends that the Appellant has failed to make a sufficient showing that the jurors that tried the case were actually biased or prejudiced against the Defendant. (AB55) The record shows that at least three jurors had been so tainted by pretrial publicity that there was a reasonable doubt about their ability to be fair and impartial. Juror Peggy Marley indicated that because of pretrial publicity she could not be a fair juror. (R1998, 2009-2010) When asked if she could presume the defendants innocent Ms. Marley replied:

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

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

> 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's last answer clearly implies that the pretrial publicity would influence her during the course of the trial. She clearly stated that she would put aside the impressions created by pretrial publicity *after* the case had been presented. As a result of her exposure to pretrial publicity, Ms. Marley had concluded that a crime had been committed. (R2042)

When asked if he had been so influenced by pretrial publicity that he could not be a fair juror, Mr. Marriott answered: "I don't *think* so." (R2021) Because of pretrial publicity, Mr. Marriott had formed an opinion that a crime had been committed. Initially he stated that his opinion was not fixed; however, later in his voir dire he clearly indicated that his opinion that a crime had been committed was a fixed opinion. (R2026, 2061-2062) Juror Marriott had discussed the case with his wife and expressed the opinion that the case was a "horrendous deal." (R2061)

Because of TV pretrial coverage of the case, juror Stewart indicated that she *knew* that a crime had been committed. (R2009) She had come to a firm, fixed assumption that a crime was committed as a result of pretrial publicity. (R2053)

As to each of the above jurors, there was clearly a reasonable doubt about their ability to be fair and impartial jurors. In the case at bar, as in *Ortiz v. State*, 543 So.2d 377 (Fla. 3d DCA 1989), the responses to crucial voir dire questions were sufficiently equivocal to leave a reasonable doubt about the ability to be fair and impartial jurors. Accordingly, Appellant's motion for change of venue should have been granted.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT WAS DENIED A FAIR TRIAL WHERE HE WAS TRIED WITH A CO-DEFENDANT WHOSE INCRIMINATING STATEMENTS WERE OFFERED AGAINST APPELLANT AT TRIAL.

The statements made by Appellant's co-defendant and admitted at trial over objection were extremely prejudicial to Appellant at

both the guilt and penalty phase of the case. On its cross-examination of Dr. Krop, the State brought out evidence of statements made by the co-defendant which implicated and incriminated the Appellant on crucial issues such as premeditation and aggravating circumstances. (TT879-882) The co-defendant's confessions and admissions added substantial weight to the State's case in a form not subject to cross-examination by Appellant. Accordingly, Appellant was thereby deprived of his Sixth Amendment right of cross-examination. This record indicates a clear and flagrant violation of *Bruton v. U.S.*, 391 U.S. 123 (1968).

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE ARGUMENT THAT APPELLANT'S DEATH SENTENCE IS DISPROPORTIONAL AND THAT THE EVIDENCE DID NOT SUPPORT THE FINDINGS OF HEINOUS ATROCIOUS AND CRUEL NOR COLD, CALCULATED AND PREMEDITATED

In support of the trial court's finding of the aggravated factor of "Heinous Atrocious and Cruel" (HAC), Appellee argues that Ms. Van Ness labored under the fear that she would be murdered. (AB66) In contradiction to this argument, Appellee later argues: "the evidence also showed that the victims were, for the most part, `unsuspecting like lambs' at least up until the point they began to plea for their lives, although Michelle Van Ness was, nevertheless terrorized. (AB80) Even the prosecutor, at trial, characterized the victims as "unsuspecting like lambs." (TT592-593) It should be noted, there was no evidence that Ms. Van Ness was conscious after being shot, no evidence to show she suffered any pain, and no evidence to show that she was tortured. The shooting came as a

total surprise to everyone. (TT347) Appellee's argument is largely unsupported assertions. Appellee argues that "Michelle *must have* listened and joined in, as well, as the victims in the cooler pleaded for their lives, imploring the Farina brothers not to kill them . . . ." (AB68) Yet, the testimony of Derrick Mason, who was at Ms. Van Ness's side and whose arm she was holding, testified Michelle said nothing. (TT112-113, 122) While in the cooler, Ms. Van Ness said nothing, but she was scared and she wept. (TT112-114, 122) Ms. Van Ness appeared to lose consciousness immediately upon being shot. (TT126-127)

Contrary to torturing anyone, Appellant repeatedly assured the victims that no one would be hurt, if they co-operated. (TT118-119, 337-338) By reports from all of the witnesses, Appellant was congenial and to some extent attended to the personal comforts of the victims. (TT115, 118-119, 346, 371, 374, 376, 387) Appellant did *not* shoot anyone, nor did he encourage the co-defendant to shoot anyone. (TT118-119, 353, 386) *See James v. State*, 453 So.2d 786 (Fla. 1984). Accordingly, Appellant's actions were not conscienceless or pitiless, nor were they unnecessarily torturous.

Additionally, there is insufficient evidence on this record to prove heightened premeditation. John Henderson testified that he thought that Appellant said no one would be shot. (TT421) Henderson did not know anyone was going to be shot. (TT422) Moreover, the ultimate decision to shoot the victim was a last minute decision made by Jeffery Farina. (TT847-848, 880-881) Accordingly, the trial court's finding that the murder was cold,

calculated and premeditated is not supported by the evidence.

CROSS APPELLEE'S ANSWER
POINT I

THE TRIAL COURT PROPERLY PROHIBITED THE STATE FROM INTRODUCING VICTIM IMPACT EVIDENCE AT THE PENALTY PHASE.

The introduction of "victim impact evidence" in the penalty phase of Appellant's trial would violate the clear limits on aggravating circumstances imposed by §921.141 Fla. Stat. *See Grossman v. State*, 525 So.2d 833 (Fla. 1988). The recent addition of §921.141 (7) Fla. Stat., does not alter existing state law limiting aggravating circumstances to those specifically listed in §921.141 (5), because the legislature did not add "victim impact" to the exhaustive list of aggravating circumstances. Victim impact evidence continues to be prohibited by Florida law. Victim impact evidence in irrelevant to the statutory aggravating factors. Thus, it continues to be inadmissible as irrelevant, not withstanding the passage of §921.141 (7).

Payne v. Tennessee, 111 S.Ct. 2597 (1991) does not authorize victim impact evidence in Florida. Moreover, *Payne* continues to prohibit the admission of a victims' family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence. *Payne*, at 2611 n.2. The majority in *Payne* recognized that the Court did not hold that victim impact evidence must be admitted, or even that it should be admitted. *Payne*, at 2612.

Section 921.141 (5), Fla. Stat., specifically limits the prosecution to the aggravating circumstances listed in the statute.

Elledge v. State, 346 So.2d 998, 1002-1003 (Fla.1977); *Provence v. State*, 377 So.2d 783 (Fla.1976). "Victim impact" is not listed as one of the aggravating circumstances. This Court has recognized that the state law limit to statutorily listed aggravating circumstances precludes the introduction of victim impact evidence, for reasons which underlie the fundamental construction of Florida's capital sentencing scheme. In *Grossman v. State*, 525 So.2d 833, 842 (Fla.1988) this Court held:

> Florida's death penalty statute, section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute, section 921.141 (5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. (Citations omitted)

In hastily passing the "victim impact law," the legislature failed to amend §921.141 (5), which continues to demand that aggravating circumstances be limited to those set forth therein. Victim impact is not set forth therein. Therefore, victim impact evidence and argument remain legally irrelevant to the sentencing process.

Section 921.143, Fla. Stat., does not allow victim impact evidence in capital cases. Although §921.143 allows the victim or next of kin to speak at sentencing, this Court in *Grossman*, *Supra*, specifically held that §921.143 does not apply to capital cases. *Grossman*, at 842. The reasoning of *Grossman*, that §921.143 does not authorize the introduction of victim impact evidence as it is

irrelevant to any statutory aggravating circumstance, equally applies to the new §921.141 (7). Such a reading of subsection 7 is also consistent with well-established principals of statutory construction. The legislature is presumed to be aware of prior interpretations of a statute. *Burdick v. State*, 594 So.2d 267, 271 (Fla.1992). The legislature is also presumed to have *at least tacitly approved* the prior interpretation. *Burdick* at 271. Therefore, it must be presumed that the legislature was aware that this Court had consistently held that the prosecution is limited to aggravating circumstances listed in §921.141 (5). Additionally, it must be presumed that the legislature at least tacitly approved of that interpretation of the law. Such an interpretation is also consistent with the general rule of statutory construction that any ambiguities in a criminal statute must be construed in a manner most favorable to the accused. *Perkins v. State*, 576 So.2d 1310, 1312 (Fla.1991).

Section 921.141 (7), Fla. Stat., violates the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Florida Constitution. Because the legislature did not add victim impact as an aggravating circumstance, and because Florida, unlike the State of Tennessee, is a "weighing state," the introduction of victim impact evidence and argument in a Florida capital sentencing proceeding violates constitutional provisions and Florida law. While Florida law lists and limits aggravating factors to those set forth in §921.141 (5), the applicable law reviewed by the United States Supreme Court in *Payne*

v. Tennessee, 111 S.Ct. 2957 (1991), set no such limits. Unlike the State of Florida, the State of Tennessee's capital sentencing scheme is very broad. It provides no specific limits on aggravating circumstances, and sets no real evidentiary limits on the penalty phase. In pertinent part, the Tennessee statute provides:

> In the sentencing proceeding, evidence may be presented as to any matter that the Court deems relevant to the punishment... . Any such evidence which the Court deems to have probative value on the issue of punishment may be received regardless.

T.C.A. 39-13-204 (c) (1982). Tennessee -- unlike Florida -- is *not* a weighing state. In a weighing state aggravating factors must be carefully defined. *See Espinosa v. Florida*, 112 S.Ct. 2926 (1992). In Florida, the consideration of matters not relevant to aggravating factors renders a death sentence violative of the Eighth Amendment. *Sochor v. Florida*, 112 S.Ct. 2114 (1992). In *Sochor*, the Court explained:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. *See Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process `creates the possibility ... of randomness,' *Stringer v. Black*, 508 U.S.\_\_\_,\_\_\_,112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a `thumb [on] death's side of the scale,' id., at ___, 112 S.Ct. 1137, thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty,' id., at 117 L.Ed. 2d 367, 112 S.Ct. 1130.

Sochor, at 2119. By passing §921.141 (7), the legislature has

invited sentencing juries and judges to consider evidence and argument favoring death which it has not defined as an aggravating factor and which itself is not defined. Accordingly, the statute violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I Section 16 of the Florida Constitution.

Section 921.141 (7), Fla. Stat., is unconstitutional because it violates Article I Sections 2, 9, 16, 17, and 21 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The admission of victim impact evidence and argument would render Florida's capital sentencing statute unconstitutional under state and federal constitutions, because it leaves the jury and judge with unguided discretion.

The Florida Constitution requires that victim sympathy evidence and argument be excluded from consideration whether death is an appropriate sentence and provides broader protection than the United States' Constitution for the rights of the capital defendant. This Court has found significant the disjunctive wording of Article I, Section 17 of the Florida Constitution, which prohibits "cruel *or* unusual punishment." *Tollman v. State*, 591 So.2d. 167, 169 (Fla.1991). *Tollman*, explicitly holds that a punishment is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. Victim impact evidence clearly runs afoul of this constitutional prohibition. The existence of this evidence is totally random. Should the imposition of the death penalty hinge upon the number of relatives

and friends of a deceased victim? Should the imposition of the death penalty hinge upon the availability and co-operation of victim impact witnesses? Should the imposition of the death penalty hinge upon the character of victim impact witnesses (rich or poor, educated or uneducated, articulate or inarticulate)? Clearly the answers to these questions are negative. That is why subsection 7 is unconstitutional.

Victim impact evidence and arguments also violate the Due Process Clause of Article I, Section 9 of the Florida Constitution. The *Tollman* Court states that Article I, Section 9 holds "that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties." *Tollman*, at 169. Accordingly, victim impact evidence violates Article I, Sections 9 and 17 in capital cases, even if it is permitted in non-capital cases.

The admission of victim impact evidence and argument violates Article I, Sections 9 and 17 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Also, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry which the courts have required to guide and regulate the choice between death and life sentences. Additionally, such evidence can not be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance

which the courts have painstakingly achieved in the area of capital sentencing. Finally, victim impact evidence invites the jury to impose a capital sentence on the basis of race, class and other clearly impermissible ground.

By its very nature, victim impact evidence focuses on grief-stricken relatives expressing their extreme sorrow, sense of loss, and anger over their loss. Obviously, such evidence would be offered in extremely inflammatory and emotional context. Witnesses would likely relate somatic and psychological symptoms of distress attributed by them to the murder, such as physical ailments, effects on pregnancy, lack of appetite, insomnia, nightmares, paranoia, extreme depression, and a multitude of other personal horrors that would serve only to inflame the passions of the jurors and the court. Such circumstances have no bearing on the gravity of the crime or the character or the background of the defendant. Moreover, victim impact evidence unlawfully interferes with consideration of legitimate mitigating circumstances. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Unintended physical, emotional and psychological impact on relatives and friends of the deceased do not increase the moral culpability of the killer beyond that which he or she already bares for committing the murder. Allowing such evidence would undoubtedly make the entire capital sentencing system freakish and arbitrary and thus violate Article I, Sections 9 and 17 and the Eighth and Fourteenth Amendments to the United States Constitution.

In *Payne v. Tennessee*, 111 S.Ct. 2597 (1991) the United States

Supreme Court ruled:

> We thus hold that if the state chooses to permit the admission of victim impact evidence and prosecutorial evidence on that subject, the Eighth Amendment erects no *persay* bar. A state may legitimately conclude that evidence about the impact of the murder on the victim's family is relevant.

Payne, at 2609. The Court also stated that even this generally permitted evidence may be so "unduly prejudicial" that it violates the Due Process Clause of the Fourteenth Amendment. *Payne*, at 2608. There is nothing in *Payne* that permits evidence concerning such unlimited and undefined evidence as that designed to show "uniqueness as a human being" and "loss to the community." This goes way beyond the scope of *Payne* and violates the Eighth and Fourteenth Amendments.

Section 921.141 (7) Fla. Stat., states, *inter alia*: "such evidence shall be designed to demonstrate the victim's uniqueness as a human being and the resultant loss of the community." This language puts absolutely no limits on *who* can testify or *what* they can testify about. The phrase "loss to the community" contains no definition of "community" nor limits on its membership. This recklessly vague and over-broad language could lead to anyone testifying or even to death sentencing by petition or public opinion poll. The phrase "uniqueness as a human being" places absolutely no limit on the evidence. This statue is clearly unconstitutionally vague and over-broad; it fails to meet the higher standard of capital cases imposed by Article I, Sections 9 and 17 and the Fifth, Sixth, Eighth and Fourteenth Amendments.

To be valid a statute must be definite in its meaning; this is especially true in the case of a criminal statute. *Locklin v. Pridgeon*, 30 So.2d 102 (Fla.1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. *D'Alemberte v. Anderson*, 349 So.2d 164 (Fla. 1977). Subsection 7 fails any constitutional standard of clarity. The term "community" contains a wide variety of meanings. It can mean geographic community or it can mean people with preconceived common interests; it can mean a religious community, professional community or an ethnic community. For example, Funk and Wagnalls Standard College Dictionary, (1973) defines "community" thusly:

> A group of people living together or in one locality and subject to the same laws, having common interests, characteristics, etc.: a rural *community*; religious *community*. The public; society in general.

Even within the concept of geographic community, the term can range in meaning from a small neighborhood up to a "community of nations." When applied to a community of interests, the term can mean virtually anything, including common hobbies, jobs, sports, political beliefs, religion, race, or ethnic background. The term "community" is commonly used in connection with racial or ethnic groups. Phrases such as "Black Community," "Hispanic Community," "Asian Community," are widely used. Accordingly, the terms of subsection 7 are vague and over-broad, and therefore Section 921.141 (7) is unconstitutional.

The introduction of victim impact evidence undermines the constitutionality of the entire capital sentencing scheme in the

State of Florida. The admission of this type of evidence leave's judge and jury without any guidance as to how the evidence is to be used or applied. This evidence does not constitute an aggravating circumstance. Under the Florida capital sentencing scheme, the jury is told they are limited to statutory aggravating circumstances. They are told to weigh the aggravating circumstances against the mitigating circumstances. Clearly, victim impact evidence is not mitigating evidence. Consequently, neither the judge nor the jury is given any guidance or direction as to how victim impact evidence is to be applied or weighed. The failure to sufficiently guide the discretion of the sentencer, with the possibility of arbitrary and discriminatory results, is a fault which is constitutionally prohibited. *See* *Furman v. Georgia*, 92 S.Ct. 2726 (1972). Guidance of the judge's and jury's discretion is critical to the constitutionality of the Florida capital sentencing scheme. *See* *Proffitt v. Florida*, 96 S.Ct. 2960, 2969 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973).

A frequent ground for reversal of a capital case is a jury instruction which fails to sufficiently define an aggravating circumstance. *Espinosa v. Florida*, 112 S.Ct. 2926 (1992); *Shell v. Mississippi*, 111 S.Ct. 313 (1990); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988). Section 921.141 (7), gives absolutely no guidance or direction as to what purpose or function victim impact evidence is to play in the Florida capital sentencing procedure. This is a Constitutional flaw far greater than those addressed in *Espinosa*, *Shell* and *Maynard*. Accordingly, Subsection 7 is unconstitutional

and the trial court properly refused to admit victim impact evidence.

The trial court properly restricted the State's use of victim impact evidence, because the use of such evidence would have violated the *Ex Post Facto Clauses* of the Florida and United States Constitutions. The offense in question took place on May 9, 1992. Chapter 92-81 Laws of Fla., adding Section 921.141(7), Florida Statutes to permit victim impact evidence went into effect on July 1, 1992, well after the offense alleged herein. In *Miller v. Florida*, 482 U.S. 423, 430 (1987), the Court held a law is *ex post facto* if "two critical elements [are] present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" (quoting *Weaver v. Graham*, 450 U.S. 24 (1981)). Both elements are present here. The law took effect since the date of the alleged crime and adds a powerful reason for imposing death as a punishment which was not permitted to be considered at the time of the offense. The previously well-recognized exclusion of such evidence in a number of cases because of its inflammatory, nonstatutorily aggravating nature is stark recognition of the new law's substantial disadvantage. *See Grossman v. State*, 525 So.2d 833 (Fla.1988) (holding similar victim's rights statute unlawful to apply to capital sentencing); *Booth v. Maryland*, 107 S.Ct. 2529 (1987) (declaring such evidence violative of the eighth amendment), *overruled*, *Payne v. Tennessee*, 111 S.Ct. 2597 (1991).

In *Combs v. State*, 403 So.2d 418 (Fla. 1981), and *Valle v. State*, 581 So.2d 40 (Fla. 1991), this Court permitted the use of later created aggravators in narrowly tailored circumstances. But those lines of cases do not apply here, because the court reasoned that the new aggravator added nothing new to the decision whether death was appropriate, and may have inured to the benefit of the defendant. For instance, in *Combs*, there was a conviction of premeditated murder, so the later created aggravator of cold, calculated premeditated added nothing new to the decision whether death was appropriate, according to the Court.

Here, however, there is plain and unequivocal preexisting law from the United States Supreme Court and the Florida Supreme Court which excluded victim impact evidence and argument because of its inflammatory, irrelevant and nonstatutory nature. *See Booth*, *Supra* and *Grossman*, *Supra*. The substantial change now permitting the consideration of such evidence in the life or death decision offers "*new*" matters which are plainly not to the benefit of the defendant.

In *Talavera v. Wainwright*, 468 F.2d 1013 (5th Cir. 1972), the court struck down the retrospective application of a new rule making it harder to obtain a severance as violative of the *Ex Post Facto Clause* of the United States Constitution. The Court stated:

> We think it sufficient to repeat without lengthy citation what is now an axiom of American jurisprudence: The Constitution prohibits a state from retrospectively applying a new or modified law or rule in such a way that a person accused of a criminal offense suffers any significant prejudice in the presentation of his defense.

Id. at 1015-1016. The application of the statute at issue here is

devastating in its effect on the presentation of the defendant's penalty defense. It shifts the focus of the penalty phase away from the aggravating and mitigating evidence to sympathy for the deceased. It is far more prejudicial to a penalty defense than the application of stricter standards for obtaining a severance is to a guilt phase defense.

The Florida Supreme Court has adopted the *Miller* test for a violation of the *Ex Post Facto Clause* of the Florida Constitution. *See Dugger v. Williams*, 593 So.2d 180, 181 (Fla.1991). The Court in *Williams* went on to explain that a law may be *ex post facto* even if it is procedural in nature.

> It is too simplistic to say that an *ex post facto* violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect. Where this is so, an *ex post facto* violation also is possible.

Id. at 181.

This statute clearly diminishes "a substantial substantive right" as evidenced by its invitation for the judge and jury to consider that which the sentences were previously prohibited from considering in imposing death. The application of this statute to the defendant would have violate both the Florida and Federal Constitutions. Accordingly, the trial court properly precluded the use of victim impact evidence.

CROSS APPELLEE'S ANSWER
POINT II

THE TRIAL COURT DID NOT ERR IN SEVERING HENDERSON AND RESTRICTING THE TESTIMONY OF THE CO-DEFENDANTS.

Appellant herein relies on his arguments in Point VI of his Initial Brief and Reply Brief.

CROSS APPELLEE'S ANSWER
POINT III

THE TRIAL COURT PROPERLY GRANTED JUDGEMENTS OF ACQUITTAL NON OBSTANTE VERDICT AS TO THE KIDNAPPING CHARGES

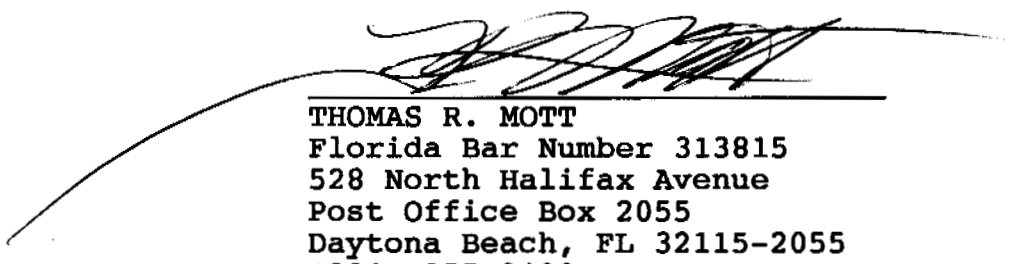
In arguing that this Court should recede from *Faison v. State*, 426 So.2d 963 (Fla. 1983), Cross-appellant implicitly concedes the correctness of the trial court's judgements of acquittal as to the kidnapping charges based upon *Faison*, *Supra*. Moreover, Cross-appellant gives no reason for this Court to recede from *Faison*. *Faison* is good, well-reasoned law. The trial court made the factual and legal finding that in the instant case the confining, abducting or imprisoning was inconsequential or inherent in the nature of the other felonies, by granting the judgements of acquittal as to the kidnapping counts. (R2120-2121) *See Faison*, *supra*. Such findings are not the proper subject of appellate review; the State has no right to appeal a judgement of acquittal in a criminal case. *State v. Brown*, 330 So.2d 535 (Fla. 1st DCA 1976). Even if the State had the right to appeal this issue, there has been no showing that the trial court abused its discretion. The trial court's ruling was legally and factually sound. (R2120-2122).

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.
3. As to the Cross-Appeal, affirm the trial court's rulings as to all points and declare Ch. 92-81 Laws of Florida and §921.141(7) Fla. Stat., unconstitutional as argued in Point I.

Respectfully submitted,



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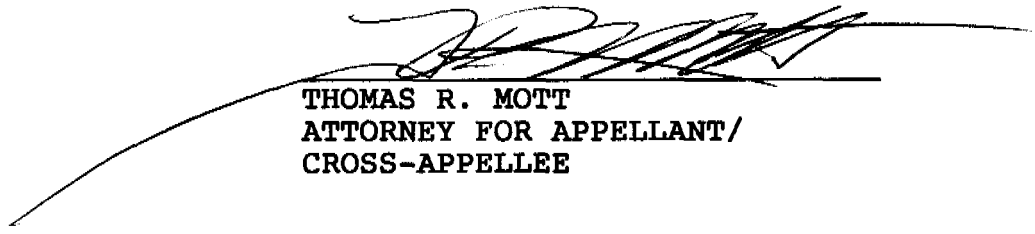
CERTIFICATE OF SERVICE

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 32083-0221, on this 21st day of February, 1994.



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