IN THE SUPREME COURT OF FLORIDA

JEFFREY ALLEN FARINA,	)	
	)	
Defendant/Appellant,	)	
	)	
versus	)	Supreme Ct. Case #93,907
	)	Circuit Ct. Case #92-32128CFAES
STATE OF FLORIDA,	)	
	)	
Plaintiff/Appellee.	)	

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DIRECT APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
VOLUSIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF TYPE AND SIZE

I CERTIFY that this brief has been prepared using "Times New Roman" in type size 14.

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*** References to record -**

The references to the record on appeal used in this brief, unless otherwise noted, are in parenthesis. The Roman numerals refer to the volume number of the record and the following number(s) refer to the page number(s), i.e., (VI,252-57) refers to volume six, pages 252 through 257 of the record on appeal. References to the exhibits of the parties are in parenthesis with references made to the party admitting the exhibit and the exhibit number, i.e., (State's 9) refers to exhibit number 9 introduced into evidence by the State.

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STATEMENT OF THE CASE AND FACTS

This is the direct appeal of a death sentence. In 1992, 16-year-old Jeffrey Farina, his 18-year-old brother (Anthony) and 20-year-old John Henderson[1] were charged with crimes involving the robbery of a Taco Bell restaurant in Daytona Beach, Florida. Jeffrey and Anthony, tried together, were each found guilty of first-degree murder, three counts of attempted first-degree murder, armed robbery, armed burglary and conspiracy to commit first-degree murder. (VI,674) Six consecutive life sentences and a death sentence were imposed. (VI,674) On direct appeal, all judgments and non-capital sentences were affirmed but the death sentence was reversed and a new penalty phase required due to jury selection error. (VI,674-91); ***Farina (Jeffrey) v. State***, 680 So.2d 392 (Fla.1996); ***Farina (Anthony) v. State***, 679 So.2d 1151 (Fla.1996) On remand, the case was re-assigned to the Honorable C. McFerrin Smith, III. (VI,692)

SEVERANCE: Both defendants sought severance due to the potential use of co-defendants' statements. (VI,787-89) The court opined that it "did not have jurisdiction to overrule" any motions resolved in 1992, including a motion to sever (I,163; II,230) In denying severance, Judge Smith rejected arguments that a new, separate analysis was required as to whether use of statements made by one defendant

[1]John Henderson pled guilty as charged and was sentenced to life.

would be unfairly prejudicial to the other in the context of one penalty hearing for two defendants. (II,197-98; V,613; VI,607;787-89; VII,1018) Counsel expressly argued that a "clean slate rule" and de novo review under ***Preston v. State***, 607 So.2d 404 (Fla.1992) applies to new penalty phase hearings. (III,392)

THE STATEMENTS: Two days after the robbery in 1992, a three-hour conversation between Jeffrey, Anthony and John Henderson was secretly tape-recorded while the defendants were alternately confined in the rear of a police car. During the 1992 trial, the state played taped portions of that conversation. (State's 58&59) Neither Anthony nor Jeffrey raised in their direct appeal the denial of their motions to suppress their statements. Anthony unsuccessfully contested the denial of cross-examination under ***Bruton v. United States***, 391 U.S. 123 (1968).

Before this penalty phase, Jeffrey moved to suppress his statements on grounds different than raised in 1992. (IV,597; VII,987-91) A state motion to strike the suppression motion based on the "law of the case" doctrine (VII,993-1014) was granted. (IV,589-97; VII,1015) The judge concluded that he could not change any rulings made in 1992: "Well, whatever Judge Orfinger precluded is still precluded. I have no authority to reverse Judge Orfinger. The Supreme Court had that authority and apparently didn't do it. I'm not going to take that authority. So whatever Judge Orfinger precluded is still precluded. It's the law of the case. Let's move on."

(XIX,1703) The judge ruled that all evidence presented during the guilt phase in 1992 could automatically be presented to this jury: "Nobody is going to be asked to stipulate to admissibility, because it's already in. It has been admitted. It's a historical matter. . . . . I don't have anything to do. They are in evidence. They are available for either side to use for handling, publishing to the jury." (XVI,1196) The judge would not consider the present relevance of any evidence that had been admitted in 1992: "That evidence is carved into stone, unless and until an appellate court says otherwise." (XIX,1693)

Jeffrey renewed his objection and motion for severance before the state published parts of the defendants' conversation. (XVIII,1645-50) The judge ruled, "I previously ruled that it was law of the case." (XVIII,1649) The taped excerpts were then published during the state's direct-examination of its lead detective. (XVIII,1651-55; State's 58&59) On cross-examination, Jeffrey sought to publish other relevant parts of the conversation "in accordance with Section 90.108 of Florida Statutes . . . so the jury may hear the context of the conversations and the conversation following. Under the rule of completeness." (XVIII,1659) The state objected because that did not occur at trial in 1992. The judge ruled, "I previously indicated I thought I was *bound* by the evidence that was presented in the first trial. But I will take the request under advisement in between now and the time we

reconvene at a later time, maybe tomorrow or Friday. If you come up with any law that indicates that I should expand beyond what is on the original trial, I will certainly consider it. But until we come up with specific authority, I find myself *bound* by the admissions of evidence in the first trial." (XVIII,1659-60)

The next day the judge clarified his ruling: "All I meant to be saying yesterday, and I think it's a correct statement, is that the - at the time the evidence was offered at trial, the defense had the opportunity to request the whole tape being played under the doctrine of completeness or anything else. To the extent that that was waived or not done at the trial level, the defendants waived it at trial." (XIX,1691) The judge reasoned that "the doctrine of completeness by definition was reopening a trial ruling. And *I don't think I have any authority to do that* under the mandate that I got under the Supreme Court. I am only here to conduct the sentencing hearing. I'm not here as an appellate court over the trial rulings or trial decisions." (XIX,1692)

Anthony objected to all co-defendants' statements made when he was not present and moved for severance. (XIX,1693) Judge Smith explained, "And I am again just relying on the mandate from the Supreme Court that told me to redo what Judge Blount did the first time. And that was a joint trial." (XIX,1694) The judge ruled that "the defendants are *bound* by that ruling in this trial, unless and until the Supreme Court reverses that ruling or says otherwise. I am not going to change any of

the orders . . . to the extent that he excluded portions of the tape for the reasons stated in his order. They are still excluded." (XIX,1696)

Accordingly, Jeffrey was only permitted to play the statements he made in Anthony's presence. (XXII,2144-58) During deliberation the jury asked to again hear the edited conversation. (XXII,2416-22) During the Spencer hearing, the conversation between John Henderson and Jeffrey, which the jury did not hear, was introduced. (XIV,2442-50;2457-63; Defense 7) There, Jeffrey explained to John Henderson that he was responsible for the homicide and that, had he thought of wearing masks, no one would have been hurt. The employees would have been tied and left, unharmed. The conversation shows the influence that the adult co-defendants had on Jeffrey and his immaturity. (Defense 7)

CONSTITUTIONALITY OF DEATH PENALTY: The court denied motions claiming that Florida's death penalty denies free speech (I,64-69; VI,790-91; VII,945), is cruel and unusual punishment, denies Due Process and violates the separation of powers doctrine. (I,69-119; VI,695-735;835-37; VII,942) A motion to preclude the death penalty for a 16-year-old offender based on violations of international law and the state and federal constitutions was denied after extensive argument and evidence. (IV,448-504; VI,693-94; VII,1019) Motions contesting the constitutionality of §§921.141(5)(h) &(i), Fla. Stat., based on vagueness, denial of

notice, Due Process and violation of separation of powers were denied. (VI,740-77; II,221-29,243-49; VII,943-44) Jeffrey also contested the validity of his underlying convictions based on jury selection error that was raised on direct appeal in 1992 but not addressed in the opinion. (VI,736-39; VII,1021)

VICTIM IMPACT EVIDENCE: Both defendants contested use and the constitutionality of victim impact evidence and asked for a timely determination as to whether the prejudicial effect of such evidence outweighed its probative value. (II,202-21;311; VI,781-84;826-28; VII,947) The court granted a request for a proffer (VII,948) that was to be written, live or oral. (II,214) To comply, the state simply identified its witnesses as "friends that the victim grew up with, . . . potentially people from school she attended, a church member, but nothing outside the ordinary." (III,347) The defense wanted a more detailed proffer and argued that, due to the number of the witnesses listed, the testimony may be redundant. (III,350) The court ruled, "Yes. Well, that's something that we will have to address at an appropriate time during the procedures, I guess. But right now, we're, I think, too early for that." (III,350)

Of nineteen people who testified for the state, only four were non-victim impact witnesses, to wit: the lead detective (XVI,1290-1347; XVII,1423-76); the first officer at the scene (XVI,1315-47); an evidence technician (XVII,1356-99), and a

firearms expert (XVII,1400-21). Three Taco Bell employees who were also victims testified, although in a non-victim impact format, to wit: Mason, (XVI, 1260-88), Gordon (XVII,1478-1515) and Robinson (XVIII,1525-50) Objections to the victim impact evidence were renewed prior to it being presented. (VIII, 1555) The court refused to instruct the jury that victim impact evidence could not be used to find statutory aggravating circumstances. (XVIII,1569) The state then presented twelve victim impact witnesses, seven one day, five the next, whose testimony can fairly be summarized as follows:

> **Hannah Glidden** is a waitress and college student who knew the homicide victim (Michelle Van Ness) since the first grade. Michelle was Ms. Glidden's best friend and a wonderful person who loved God. She was a spiritual leader. They passed notes in school and Michelle taught her what real friendship was. (XVIII,1572-74)
>
> **Ashley Lefebvre,** a 17-year-old Publix cashier, attended school with Michelle. Michelle was very popular and used to babysit Ashley and her brother. Michelle's mother was devastated by her death. When Ashley went swimming in their pool, Mrs. Van Ness would just hug her. Ashley, at eleven-years-old, had never thought about life or death until Michelle died. Her death made Ashley realize that it could also happen to her. (XVIII,1575-78)
>
> **Louis Mora,** a 24-year-old coffee shop employee, was Michelle's boyfriend. Michelle was an amazing girl, truthful, honest, friends with everyone and without an enemy in the world. They met at school. He knew her for three years. They dated for two years before she died. Michelle was his first relationship. After she died, he could no longer trust anyone.

He flunked college for two years after Michelle's death. (XVIII,1579-81)

Debbie Wingard taught Michelle since elementary school. Michelle was a good student and caring young lady who reached out to young students. Michelle wanted to be a pediatrician. She genuinely cared about children. She was unselfish. Ms. Wingard's son was deeply affected by Michelle's death. Her class was returning from a school function the night Michelle was shot and they saw her truck at the restaurant. All were concerned. The students went to the hospital. They attended her funeral. Ms. Wingard once saw Michelle in class indicating that she would go to heaven if she died. Students still ask about Michelle. (XVIII,1582-88)

Steve Mahnke is Michelle's uncle. She was his parents' only granddaughter. Her death devastated the family. When Michelle attended family functions she was bubbly and full of life - the type of person that could go far. When she died, her parents lost part of their lives. It has not been the same since she died. Her parents are now loners. Once-joyous holidays are filled with tears. Mr. Mahnke noted that it soon would be Mother's Day, the anniversary of Michelle's death, and he asked, "Do you think my sister can ever have a good Mother's Day?" (XVIII,1589-91)

Tara Setzer, Michelle's cousin, was sixteen when Michelle was killed. [Tara breaks down here and her mother reads Tara's prepared statement]. Tara's life changed after Michelle died. Michelle's mother said that her joy was stolen and Tara agreed. Tara no longer gets close to people because she may lose them. Tara's two-year-old is named after Michelle. Tara will tell her how important and special her namesake was. Tara was to write memories about Michelle but she has forgotten many details. She recalls spending nights at her grandparent's house. She passed notes to Michelle in school and still has them. They talked on the phone for hours. Tara

> has reminders of Michelle in her house. Tara no longer remembers her voice or what made her laugh. She will never forget how Michelle looked in the hospital. She did not move. She was hooked to machines. Her hair was shaved. Tara thought that, if the machines were disconnected and the tape taken off her eyes, Michelle would open her eyes and be okay. But she died a few hours later. Tara thinks about her every day and still can not tell her goodbye. Her hardest thing was not telling Michelle how much she loved her. (XVIII,1594-97)
>
> **Bonnie Van Ness**, Tara's mother, finished reading Tara's statement. She then testified that she knew Michelle since birth. Michelle was a loving and caring person who brought joy to everyone's life. Michelle and Tara spent hours on the phone. When Michelle died, the Mahnke's stopped smiling. Their joy was stolen since Michelle's death. Michelle cared about children and wanted to be a pediatrician. (XVIII,1598-99)

Court adjourned for the evening. The next morning, the defense renewed (XVIII,1601) the objection (VI,781-84) to the constitutionality of victim impact evidence, the motion (VII,826-28) requesting a proffer and determination as to whether the prejudice of the evidence outweighed its probative value and argued that, "After what was presented yesterday, it's getting to the point that it's extremely prejudicial and it's confusing to the jury - - - it's denying the right to a fair trial and Due Process under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (XVIII,1601-02) The court ruled, "Anything - of course, I will make

the same ruling of course. Anything else that we need to do before we call the jury in?" (XVIII,1602) Thereafter, the state presented five more victim-impact witnesses as follows:

> **Arthur Mahnke,** is Michelle's grandfather. He lives in Texas. He knew Michelle her entire life. Mother's Day is no longer a holiday, but instead a reminder of Michelle's death. The family will never be the same. They lost a wonderful girl and society lost a gifted person who dreamed of being a doctor and helping others. He called her "princess" or "Shelly." The family lost her and future generations. They go on living but the broken hearts will never heal. Treasured memories of lost loved ones do not replace hurt and emptiness. He visited her family twice a year and brought her presents. She loved pickles, candy, bananas, cookies and small gifts. She liked tomatoes and potato salad. They spent birthdays and holidays together. She was gifted in math. For Christmas in 1991, her father gave her a rabbit named Einstein and he built it a cage with her father. Michelle used her math skills to teach youngsters and spent hours on the phone helping class-mates. She loved playing tennis. He played tennis with her and her boyfriend Christmas of 1991. That was the last time they played. He still plays tennis and thinks of her laughter and vitality. During a Carribean cruise when she was twelve they made many friends. The hurt her death caused is indescribable. They can no longer phone her and thank her for her gifts or tell her they love her. Some day they will do so in Heaven. (XVIII,1604-07)
>
> **Dorothy Mahnke** is Michelle's grandmother. When little, Michelle melted into her when held. Michelle's family moved to Florida because it was safer than Texas. The Mahnkes were to follow when they retired. On one visit Michelle placed a "for sale" sign in their yard to expedite the move. She still has that sign. She will never get to see Michelle have children or graduate or go to college. She is

missed. Michelle's ears were pierced when she was 8-years-old. That gave Mrs. Mahnke the courage to do it also. It is devastating not to have a granddaughter. She will see Michelle in heaven. (XVIII,1607-10)

Connie Van Ness is Michelle's mother. Michelle was born February 17, 1975, in Houston. She was adorable. She had a strong, sweet personality. They came to Daytona thinking it would be safe. Michelle was a strong, sensitive, caring child. She played t-ball and was a tomboy. She was also dainty and liked to dance. She was a cheerleader. She loved to learn and loved school. She was a perfectionist. She loved helping others. She liked socializing. Her brother was her best friend. She received his truck when he entered the Army and had to learn how to drive a standard transmission. She was constantly on the phone helping others. She loved the beach and a good tan. She was on the honor role and had real direction in her life. Michelle bought her boyfriend a steering wheel. Michelle was not only her daughter but also her friend. She misses Michelle very much and should not have to. When she sees other mothers and daughters at the mall, her heart breaks anew. She will never get to see her daughter graduate or have children. On May 7th Michelle gave her a Mother's Day card because Michelle was going to the beach with her boyfriend on Mother's Day. That night they had a special talk. On May 8th Michelle went to school, came home and went to work. She called and got permission to work late and go to the beach Saturday. The last thing she said to her was, "I love you." She will never forget answering the door that night, talking to police, going past Taco Bell and seeing Michelle's truck in the parking lot and the yellow crime scene tape. She died a thousand deaths. It can never be erased from her mind. Michelle died on Mother's Day without getting a chance to say goodbye to her. Michelle had much to give her family and the world. Mrs. Van Ness is thankful she still has a wonderful son. (XVIII,1611-16)

Larry Van Ness is Michelle's father. She was a shy, clinging

child without much hair at birth. She sucked her thumb. The braces worn on both legs for a year never affected her ability to move. She was different from other children. She talked little but learned quickly. She liked milkshakes. She quickly learned the names of relatives. She threw fits and could not be left with babysitter. She was stubborn and could outlast the best nursery attendants. For 6 years she was content to be with family. She attended Sunday school and church activities and wanted to learn. She became very social and was on a mission to interact with everyone. She asked why the sky was blue, what are stars made of, who is God, where is Heaven and why could she not see things. She wanted to play t-ball like her brother and received her mother's permission before asking him. She became a celebrity as a girl who could hit, throw and run. She played one season and became a cheerleader. Her mother worked at church and was always there when needed. Michelle was an honor roll student, a member of the National Honor Society from the seventh grade on and in Who's Who. Soon he could no longer answer her homework questions. She tutored people. She was an environmentalist trying to save whales, plastic, aluminum and such. She cried with him when her brother joined the Army. She loved people but disagreed with them. She put an Army shirt on her teddy bear. He sees it every morning. When Michelle had her appendix out she dressed the bear in a dressing gown and mask. She loved creatures - stuffed animals and cows - and had pictures of her brother. The entire community was affected by her death. He was in Washington when called by his hysterical wife and told that Michelle had been shot in the head. He hurried to Daytona and was told by a cab driver what had happened. She was ghostly white in the hospital, not moving with IV's in her. He learned that a bullet penetrated her brain stem. On Mother's Day he told her how much he loved her while holding her hand and saw a tear form in her eye. She died at 10:00 on Mothers Day surrounded by her father, mother and brother. Since then, their lives have not been the same. He never thought he would have to pick out a casket for his child, or

> bury her. The family was ripped apart. Holiday gatherings are now reminders that Michelle is gone. Strangers told him they knew Michelle. Fifteen hundred people went to the funeral. He can no longer go into the chapel at the school where her body rested because it reminds him of her in the casket. Over 200 people were at the hospital for 36 hours until she died. The prosecutor told him not to let anger consume him. Michelle would want them to get on with their life. (XVIII,1617-34)
>
> **Sean Van Ness** is Michelle's brother. His relationship with Michelle was just starting to bloom when he joined the Army. He visited Michelle after basic training and would not have gotten through but for her. He was promoted to E-3 and would still be in the Army but for her death. She called him "Bubby." No one will ever call him that again. He saw her for 60 days the last two years he was in the Army. After her death he was honorably discharged. He has held three jobs. He went through phases of alcohol, tobacco and credit card abuse since her death. His parents had a hard time. He did not think they would stay together. He has a house on five acres that she has not seen. She has not heard his favorite song or seen his horse or dog. She does not know he is a team rider. He is reminded of her when others talk of their sisters. He wonders if she would approve of his dates. He did not want to testify. Writing this was the hardest thing he ever did. When told that Michelle could not survive his family signed a do not resuscitate order. Later he heard the code blue and a lot of crying. He knew Michelle was gone. The machines were disconnected and he got to see her again. He and his father said goodbye and pulled the sheet up over her. He misses her every day. (XVIII,1634-40)

After this testimony the state played, over objection and motion for severance, the cassette tape containing excerpts of the conversation between the defendants in the rear of the police car. (XVIII,1643-50) The tape began with laughter between jovial

defendants. (State's 59; XVIII,1651) Jeffrey Farina was denied the ability to timely show the context of his laughter and his statements. (XVIII,1558)

EXCLUSION OF DEFENSE EVIDENCE - Jeffrey waived parole and appeal of a life sentence and asked that the jury be given that sentencing option. The state objected. (XXIII,2288;2319-22) The judge ruled that "whether the defendant is eligible for parole after twenty-five years or not is technically not a relevant issue at this case." (XXIII,2320) The judge also ruled that he had no authority "to modify the statutory system that we have." (XXIII,2320)

The court took compulsory judicial notice of international agreements that condemn the death penalty for child offenders (VII,876-77) but deemed them "irrelevant for presentation as factual matters for consideration by the advisory jury." (VII,981) The court later rejected the argument that the state questioning of Anthony's clergy witnesses, over objection, to show that a death penalty imposed in accordance with man's law does not violate God's law (XIX,1839-42; XXII, 2190), opened the door to rebuttal by showing that, as part of man's law, international treaties forbid executing juvenile offenders. (XIX,2190-91)

Also deemed irrelevant as "what is inherently a PR document by the Department" was a brochure disseminated (http://www.dc.state.fl.us/) by Florida Department of Corrections that corrects misconceptions about Florida prisons.

(XXII,2188-89; XXIII,2298; Def. K) Also excluded, due to objections by Anthony's counsel, were Jeffrey's prison records. (XXII,2177-82; Def. J) The express ruling required that all references to death row be deleted from the documents, but the scope of the ruling was so vast that it resulted in summaries being used rather than the complete records. (XXIII,2287-88; Def. 18,19&20)

JEFFREY FARINA: Copious evidence shows that, for sixteen years, Jeffrey Farina led a Nomadic existence in a dysfunctional setting devoid of any positive adult role models. It greatly impaired his development. (XX,2070-73) Specifically, Jeffrey's 18-year-old, pregnant mother met his 59-year-old father in a Milwaukee bar. (XX,1936-37) They wed April 28, 1973. (XX,1937) Anthony was born seven months later on November 20, 1973, and Jeffrey on July 27, 1975. (XX,1990-91; Def. 13&14) Recurrent episodes of violence culminated when, wielding a butcher knife, Jeffrey's mother chased his father from the house for hitting Anthony with a crutch. (XX,1939-43) Jeffrey was five-years-old in 1980 when he was hit by an automobile and received a head injury and a broken leg. He began suffering epileptic seizures. (XX,1943;1953-54;1993)

The summer he turned 6 Jeffrey, his mother, and Anthony drove from Wisconsin to St. Petersburg with Dennis Konkel. They lived on the beach, slept in the car or under a tarp and received social security. (XX,1943-46) Around this time

Anthony was sexually molested by one of his mother's male friends. (XX, 2001) Jeffrey's mother began dating James Brant, a mechanic where she worked. (XX,1948-49) Brant, an alcoholic Viet Nam veteran, had severe mental disorders. (XX,1858;2067) His inconsistent use of lithium, combined with his consistent use of alcohol, caused angry outbursts and aggressive behavior. (XX,1952;XXI,2137) Brant moved in and they lived in a Tampa motel. (XX,1949)

Jeffrey was 7 when Brant took them to Ohio and left them there with Jeffrey's uncle. (XX,1950) Katrina was born on May 9, 1983. Jeffrey's mother notified Brant that she had given birth to his child, they began seeing each other again and were married in November, 1983. (XX,1950-52) Policemen knew Brant as a "volatile, hostile person." (XX,1857) He was large and scary with a reputation for violence: "It wasn't just myself. I mean, his reputation was among the community, especially in the law enforcement area. If you just – you know that you can predict that you may have potential trouble at some residences. That was one. And I don't think that I was alone in that. I think the majority of police felt that way." (XX,1868)

People saw Brant abuse the Farina children and would not let their children visit. (XIX,1769;1788-90) They saw Brant kick his dog, throw it down stairs and hit the children without provocation. (XIX,1772) Brant would explode "for little piddly things . . . just for looking at him wrong." (XIX,1768) Jeffrey was timid and afraid of

him. (XIX,1772) Brant was often investigated. (XX,1855-66; Def.4) Judgments show that in 1986, when Jeffrey was 11, Brant was convicted of child abuse for beating Anthony. (Def.1,2&5) Anthony was placed in foster care and Jeffrey's mother divorced Brant due to his abuse of her. (XIX,1716; XX,1957-59)

In 1989, 13-year-old Jeffrey, his mother, her boyfriend "Chuck" and Katrina lived in a trailer park in Wisconsin where they met Tina O'Neil. (XX,1960-61) Anthony returned to their household and began living with them again during this time. (XX,1877) Every day starting before noon, Tina and Jeffrey's mother drank whiskey and used Primatene until they passed out. (XX,1892;1902-04) Jeffrey and Anthony cared for Tina's four children when she was too drunk to do so. (XX,1905) Chuck drank beer and constantly argued with Jeffrey's mother. (XX, 1878-79) Profanity was common. (XX,1879) Jeffrey's mother made Jeffrey and Anthony steal so she could return the stolen merchandise for refunds. If they balked, she would say, "you don't love me or you don't love Katrina. If you don't do this, you are not taking care of Katrina."(XX,1893)

Jeffrey never finished a year in the same school he began. (XX,1961) In gross understatement, his mother recalled that they moved "a lot." (XX,1960) Just counting states and not individual moves, between 1989 and 1991, they moved from Wisconsin to Florida, to Wisconsin, to Illinois, to Florida, to Illinois, to California and to Florida.

(XX,1880-81) Their trip to California was typical. With no preparation, 9 people with 3 dogs drove from Illinois to California and, once there, they all lived in a one-bedroom trailer. (XX,1886-87) Their earned income came from Anthony and Jeffrey collecting bottles and aluminum to sell for recycling. (XX,1888)

Jeffrey was fifteen and living in Daytona in 1991 when his mother met Barry Bankston, another boyfriend, and let him move in. (XX,1983) Jeffrey and Anthony refused to go with them to Georgia and, two weeks later, the boys had to send her money to return to Daytona after Bankston deserted her. (XX,1983-85) They learned on Christmas, 1991, that Bankston had sexually molested Katrina. (XX,1997-98) Certified judgments show that Bankston was convicted of seven felonies, including the sexual abuse of Katrina. (XX,2011; Def.8&9). Jeffrey blamed himself for Katrina's abuse and he seemed to change. (XX,1986)

They were kicked out of a trailer in early 1992, so they moved into a one bedroom motel efficiency at the Rollies Court Motel. (XX,1986-87) Jeffrey stayed there while Anthony, Katrina, Jeffrey's mother and her new boyfriend (Van Griffith)[2] drove to get Anthony's fiancee (Tammy Renwick) and two children in Illinois. (XX,2894) Tammy had lived with Anthony in Illinois and Daytona and recalled the

[2] Jeffrey's mother ultimately married Van Griffith, who was later convicted of robbery and kidnapping in Illinois. (XX,1998)

filthy living conditions the Farinas experienced. Jeffrey's mother had indiscriminate sexual liaisons with biker-types who would typically be naked in the trailer where they all lived. (XIX,1734) There was partying, bar hopping and drug usage. (XIX,1719) Tammy never saw Jeffrey go to school but did see his mother encourage the boys to steal. (XIX,1720;1735)

JUST BEFORE THE TACO BELL ROBBERY in 1992, Jeffrey was sixteen-years-old, working full time under the name of "Buddy Chapman" in Daytona preparing salads at a local restaurant. (XIX,1811) He was a well-liked, hard working child who rode a bicycle to work and escorted women employees to their cars at night. (XIX,1813-14) He lived with his mother, Katrina, Anthony, Tammy, Tammy's two children and John Henderson in a single-bedroom motel room. (XVII,1466-67;XX,1890) Anthony had planned to commit the Taco Bell robbery with a person[3] other than Jeffrey for several weeks. (XXI,2143)

On May 8, 1992, Jeffrey and his family went to a K-Mart and purchased, among other things, a box of .32 caliber bullets, clothesline and gloves. (XVII, 1427-32) That evening around midnight Jeffrey, Anthony and John Henderson sat in a car parked behind the closed Taco Bell when Van Ness and Mason walked by to empty

[3] Anthony explained *at the Spencer hearing* that he planned to rob the Taco Bell with an ex-employee of Taco Bell and that Taco Bell was chosen because, having worked there, they knew how the safe operated. (XIV,2476-77)

trash into a dumpster. (XVI,1264-65) Jeffrey approached them from behind and put a gun in Mason's back - Anthony held a knife to Van Ness' back. (XVI,1265) They all entered the Taco Bell where two other employees were working. (XVI,1266) Anthony was doing all of the talking and was definitely in charge of the robbery. (XVI,1268; XVII,1487;1513; XXI,2143)

Jeffrey held the gun on three employees while Anthony took the manager (Gordon) to get the money. (XVI,1266) When they returned Gordon and Van Ness asked and were allowed to smoke. (XVII,1483) While they smoked Jeffrey tied the male's hands behind their back and intentionally[4] did not tie them too tightly. (XVI,1267-68; XVIII,1530) Van Ness was crying and afraid even though they were not being treated roughly and were reassured that no one would be hurt if they co-operated. (XVI,1268;1278; XVII,1487;1496; XVIII,1542)

The employees were taken to a walk-in refrigeration unit and Jeffrey and Anthony stepped outside. (XVI,1279; XVIII,1548) The employees heard them talking but could not tell what was being said. (XVI,1279) Jeffrey had realized that Anthony was recognized and Anthony was telling Jeffrey that it was now his call and

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[4] Jeffrey told Anthony while in the rear of the police car that he had tied the two boys who had gotten loose, adding, "I tied them up. I didn't - I wasn't sure how to tie them up. I didn't want to tie them up too tight, you know. You know, what we should have done, you and me both should have worn masks or something." (XVIII,1655-56; XXI,2155; State's 58)

to take over. (XXI,2094;2142) Jeffrey's response was, "I'll shoot them." (XXI,2108; XIV,2493) Anthony went inside the cooler and told the employees to enter the freezer compartment as "one more precaution." (XVI,1488; XVII,1512) They had not been abused and did not expect violence. (XVI,1277; XVII,1542)

As soon as they entered, Jeffrey shot Robinson once in the chest, Mason once in the face and then the gun misfired. He shot Van Ness once in the head and, when the gun misfired again, he got the knife from Anthony and stabbed Gordon in the head and back as she crouched in a corner. (XVI,1271; XVII,1488-90;1530-34) The shooting happened very quickly. (XVII,1507; XVIII,1548-49) At first, neither Robinson nor Mason realized they had been shot. (VI,1279; VIII, 1536) Van Ness immediately fell and lost consciousness when she received the single gunshot to her head, which inflicted fatal brain injury. (XVIII,1541)

After the Farinas left, Mason and Robinson untied themselves and called 911. The police responded immediately. (XVI,1272;1316-19) Anthony was identified as a suspect and, later that afternoon, the Farinas and John Henderson were arrested at a service station by their motel. (XVII,1423-27;1448-51) Jeffrey cooperated with law enforcement following his arrest. (XVII,1462) Most of the money taken from Taco Bell was recovered. (XVII,1376-77) While sitting in the rear of the police car, he told Anthony that he thought that Kim (Gordon) was the person who was going to die and

that he was sorry that Michelle was dead, but there was nothing he could do about it now. (State's 58) He at first did not recall shooting anyone in the face. (State's 58) In his conversation with John Henderson that the jury did not hear, John called Michelle Van Ness a "bitch" and Jeffrey told him that she was not a bitch, that she was a very nice person. Jeffrey told John that, "If we'd of had masks, we'd of just tied them up real tight and just left them." (Def. 7) The conversation shows that Jeffrey does not clearly recall what happened, his immaturity and acceptance of responsibility, genuine remorse and the effect the adult co-defendants had on him. (Def. 7)

The trial court followed the jury's unanimous recommendation and imposed the death penalty based on five aggravating factors, to wit: 1) prior conviction of a felony involving the use or threat of violence (the contemporaneous crimes); 2) capital felony committed during the commission of a robbery merged with capital felony committed for pecuniary gain; 3) capital felony committed to avoid lawful arrest; 4) capital felony was especially heinous, atrocious or cruel; and, 5) capital felony was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. §§ 921.141(5)(b),(d),(e),(f),(h) & (i), Fla. Stat. (1991). (VIII,1092-93) The court found extensive mitigation, including two statutory mitigating factors of the defendant's age of sixteen (§ 921.141(6)(g), Fla. Stat.) and no significant history of prior criminal activity. (§ 921.141(6)(a), Fla. Stat), a dysfunctional family, an abusive

childhood, and an ability to perform well in prison. (VIII,1094-95) This appeal follows.

SUMMARY OF THE ARGUMENTS

Point I: The trial court erroneously concluded that it was "bound" by rulings made in 1992. Several rulings were based solely on misapplication of the "law of the case" doctrine and they taint the jury recommendation by denying a fair hearing and Due Process under the state and federal constitutions. A court believing that it is "bound" does not fairly and independently consider the merits of legal arguments to make timely, proper rulings. Discretion is not properly exercised by concluding there is none. Blindly misapplying the law of the case doctrine, the court erroneously denied severance, limited the defense presentation of evidence and refused to hear a proper motion to suppress illegally gathered evidence. These summary rulings were erroneous and they prejudiced this Defendant. The death sentence is invalid and it must be reversed.

Point II: Jeffrey Farina waived all parole eligibility, any appeal of a life sentence and all *ex post facto* claims attending imposition of a life sentence without parole eligibility under the new statute. The judge refused to give the jury that sentencing option because he believed that parole eligibility was irrelevant and he did not think he had the authority to change statutes that were in effect in 1992. The judge's ruling was wrong. The death sentence must be reversed and a life sentence without parole eligibility imposed.

Point III: Over timely objection, the trial court instructed the jury on the HAC factor and then found that it applied based solely on the mental anguish experienced by the victim. This was error. Under Florida's limiting construction set forth in ***State v. Dixon***, infra, it is improper to apply the HAC factor unless it is shown that the defendant intended that the victim suffer unnecessary pain or mental anguish. The evidence here shows just the opposite. The use of this vague statutory aggravating factor prejudiced the defendant by distorting the weighing process and injecting arbitrariness into his death sentence. Accordingly, the death sentence must be reversed and a new jury recommendation obtained unless this Court orders a sentence of life imprisonment without parole.

Point IV: Over objection, the trial court allowed 15 people to give victim impact testimony. Victim impact evidence became a feature of this penalty phase to the extent that it likely influenced the jury to recommend the death penalty based on sympathy and emotion. A recommendation so tainted by the excessive presentation of victim impact evidence is unconstitutional under our state and federal constitutions. This Court has never approved the extent of victim impact evidence presented here. This Court should take this opportunity to set firm procedural guidelines for the use of victim impact evidence so that such error never recurs.

Point V: At 16-years-old, Jeffrey Farina was a "child" under state, federal and international law. As shown by numerous treaties, international law condemns state execution of children. The United States has entered into treaties that preclude executing a child offender. Florida law otherwise mandates that this sixteen-year-old offender be sentenced to life imprisonment without parole in accordance with his waiver because a death sentence is disproportionate.

Point VI: The right to free speech includes the reciprocal right of others to hear. The death penalty forever forecloses the future communication of all people with the defendant on all topics. Under well-established first amendment law, a statute that so substantially interferes with the right to speech must be no broader than necessary to achieve a legitimate purpose. Despite timely objection, the state has not here shown what purpose is furthered by executing infant offenders, nor has the state shown that the same interest cannot be satisfied by other less drastic means. This death sentence is thus unconstitutional.

Point VII: The defense sought to introduce information relevant to the question of whether a sentence of life imprisonment or the death penalty should be imposed and to counter the position(s) advanced by the state. The trial court ruled that the information was irrelevant. The exclusion of this material denied a fair trial and Due Process under our state and federal constitutions.

Point VIII: The defendant challenged the propriety of the underlying murder conviction based on issues that occurred during the trial in 1992. The errors were presented in the appeal in 1992 but not addressed by this Court. Those errors taint the convictions and preclude imposition of a death sentence.

Point IX: Florida's death penalty system is unconstitutional due to the arbitrary and capricious way in which the standards for imposing death penalty vacillate in violation of principles of state and federal constitutional law. The substance of the sentencing criteria changes by judicial fiat without notice and in violation of the requirements of heightened Due Process that must attend imposition of the death penalty. For those reasons, Florida's death penalty is unconstitutional.

Point X: The standard jury instruction tells the jury that, to be considered, the mitigating evidence must "outweigh" the totality of the aggravating factors, which themselves must first be "sufficient" to justify the death penalty. A legal standard of "sufficient" fails to objectively set a measurable standard that can consistently be applied. Requiring that mitigation "outweigh" the aggravating considerations in order to be considered against imposition of the death penalty restricts the consideration of relevant mitigating evidence and otherwise unconstitutionally places the burden of persuasion on the defendant as to the ultimate issue to be decided contrary to the state and federal constitutions.

POINT I: THE TRIAL COURT'S ERRONEOUS BELIEF THAT IT WAS "BOUND" BY THE RULINGS MADE IN 1992 TAINTED THIS JURY'S RECOMMENDATION AND DENIED DUE PROCESS AND A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The doctrine of law of the case requires that trial judges carefully follow all *express* holdings of an appellate court after an appeal, even in death cases. Florida law is clear, however, that the doctrine must not to be blindly applied to a new penalty phase proceeding. This comports with federal precedent holding that state rules "may not be applied mechanistically to defeat the ends of justice." ***Green v. Georgia***, 442 U.S. 95, 97 (1979), citing ***Chambers v. Mississippi***, 410 U.S. 283, 302 (1973). Several critical rulings here were based solely on blind application of the law of the case doctrine. The rulings were wrong and this defendant was greatly prejudiced by them.

As used in this brief, "denied Due Process" involves the following analysis:

> [T]he Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. (citations omitted).

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985). Once it is determined that the Due Process Clause applies, "the question remains what process is due." ***Loudermill***, id, citing ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972). The

highest Due Process standards attend the death penalty. *See* ***Board of Regents v. Roth***, 408 U.S. 564, 570-71 (1972) ("It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'"); ***Rummel v. Estelle***, 445 U.S. 263 (1980) ("sentence of death differs in kind from any sentence of imprisonment, no matter how long . . ."). Due process requires that litigants be heard at a meaningful time in a meaningful way.

Thus, Due Process requires that all claims raised *before* a death sentence is imposed be fully and fairly litigated. ***Lankford v. Idaho***, 500 U.S.110 (1991); ***Beck v. Alabama***, 447 U.S. 625 (1980). As part of Due Process, judges presiding over remanded penalty proceedings must use de novo review to "properly apply the law and not be bound in remand proceedings by a prior legal error." ***Preston v. State***, 607 So.2d 404, 409 (Fla.1992), quoting ***Spaziano v. State***, 433 So.2d 508, 511 (Fla.1983), *aff'd*, 468 U.S. 447 (1984). Of course, a trial judge must, after remand, carefully follow all express holdings. *See* ***Brunner Enterprises, Inc. v. Department of Revenue***, 452 So.2d 550, 552 (Fla.1984) ("all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings"). That said, however, a trial judge presiding over a new penalty proceeding is not "bound" to make the same ruling that was made six years earlier to resolve legal questions that

have never been expressly presented to nor addressed by an appellate court. When, as here, issues arise that have never been expressly reviewed by an appellate court, the trial judge's duty is to entertain and attempt to timely, correctly resolve them on the merits.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976), quoting ***Armstrong v. Manzo***, 380 U.S. 545 (1965) Due Process presumes an unbiased judge. ***Tumey v. Ohio***, 273 U.S. 510, 535 (1927) A bias is conclusively shown here by the oft-stated belief of this judge that the court was "*bound*" to follow rulings made in 1992 irrespective of a change in law, facts or legal merit of the argument being made. A judge inhibited by the belief that he is "bound" is not presiding in a meaningful manner and the litigants are not being given a *meaningful* opportunity to be heard. This court's refusal to independently consider and neutrally rule on legitimate legal issues presented *prior to imposition* of this death penalty restricted the presentation of mitigating evidence and unfairly prejudiced the defendant, thereby denying Due Process and fundamental fairness. U.S. Const., Amend. V, VI, VI, VIII & XIV; art. I, §§ 2, 9, 16, 17 & 22, Fla. Const.; ***Hitchcock v. Dugger***, 481 U.S. 393 (1987). Such error cannot be deemed harmless, and in any event it was not harmless.

RULINGS ON EVIDENCE: While confined in a police car soon after these crimes, these defendants discussed their plight and what had happened. The police secretly recorded that conversation. Taped excerpts of that conversation were played during trial in 1992. Jeffrey Farina[5] did not raise on his appeal issues concerning use of that evidence. ***Farina (Jeffrey) v. State***, 680 So.2d 392 (Fla. 1996) After remand, Jeffrey moved to suppress his taped statements. (VII,987-91) The judge struck the motion as law of the case (XVII,1015) despite argument that a "clean slate" rule applies under ***Preston***, supra, and that different grounds were being presented than were heard by the trial judge in 1992. (IV,585-97)

The motion to suppress was meritorious. The police freely admitted that, two days after his initial arrest, Jeffrey Farina, as a 16-year-old juvenile, was taken from the juvenile detention facility to the police department for "booking" and was confined in the rear of a police car for three hours in direct, unsupervised contact with two adult inmates. (XVIII,1643;1648-50) As alleged in the suppression motion, § 39.038(5), Fla. Stat. (1991) requires that, after a juvenile's arrest, law enforcement officers prevent "regular sight and sound contact between the child and adult inmates

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[5] Anthony argued that presenting Jeffrey's statements violated the Sixth Amendment and ***Bruton v. United States***, 391 U.S. 123 (1968). This Court saw no ***Bruton*** violation because Jeffrey's statements to his brother coincided with Anthony's own admissible statements. ***Farina (Anthony) v. State*** 679 So.2d at 1157. This Court noted that ***Bruton*** error would be harmless anyway. Ibid.

or trustees . . . ." The conduct of the police here was unlawful. Statements seized from a child in this manner are not knowingly and voluntarily made to police who violate the law to create and intercept them. Compare, ***Mesa v. State***, 673 So.2d 51 (Fla. 3d DCA 1996) with ***U.S. v. Henry***, 447 U.S. 264 (1980). Illegal state action taints the interception of these statements. The government's use of illegally seized evidence denies Due Process. ***Taylor v. Alabama***, 457 U.S. 687 (1982); art. I, §§ 2, 9, 16 & 22, Fla. Const., U.S. Const., Amend. IV, V, VI & XIV.

Strict application of the law of the case doctrine is discouraged in capital cases due to the compelling interests involved and "substantive due process requirements." *See* ***Preston v. State***, 444 So.2d 939, 942 (Fla.1984) (law of the case doctrine does not prevent, in capital case, reviewing a motion to suppress previously approved by appellate court). A trial court has the power to hear a motion to suppress which presents a basis other than that previously ruled upon. *See* ***State v. Tamer***, 475 So.2d 918 (Fla. 3d DCA 1985) (trial court had power to grant motion to suppress on grounds other than those reviewed on direct appeal). Here, the court struck the motion to suppress as law of the case even though the prior ruling was not reviewed by this Court. The erroneous application of the law of the case doctrine enabled the government to use illegal evidence.

The suppression and severance motions were timely renewed and again denied

during the penalty phase. The court explained, "I previously ruled that it's law of the case." (XVIII,1645-51) After selected statements from the defendants' conversation were played during the state's direct examination of its lead detective (XVIII,1651-55), the defense sought to timely play during cross-examination other relevant parts of the conversation in accordance with § 90.108, Fla. Stat. (XVIII, 1659) A state objection was sustained because that did not happen in 1992. The judge would not permit *any* other parts of the conversation to be played because "I find myself ***bound*** by the admissions of evidence in the first trial." (XVIII,1659-60) The judge explained that, ". . . at the time the evidence was offered at trial, the defense had the opportunity to request the whole tape being played under the doctrine of completeness or anything else. To the extent that that was waived or not done at the trial level, the defendants waived it at trial." (XIX,1691) This was error. § 90.108 entitles a party as a matter of fairness to timely play parts of a conversation that have been kept from a jury. ***Larzelere v. State***, 676 So.2d 394, 401 (Fla.1996); ***Christopher v. State***, 583 So.2d 642, 646 (Fla.1991); ***Sweet v. State***, 693 So.2d 644 (Fla. 4th DCA 1997). Jeffrey Farina was arbitrarily denied that statutorily created opportunity to fairly explain his statements due to blind misapplication of the law of the case doctrine.

The unfairness worsened. Jeffrey was precluded from playing for the jury his conversation with John Henderson that occurred in Anthony's absence based on strict

application of the law of the case doctrine - "to the extent that the Judge in this case has previously excluded *any* material, that's law of the case and I'm *bound* by it. And I have no intention of overturning that which was previously done." (XIX,1695) The judge candidly acknowledged that, though asked, he had not listened to the taped conversation. (XIX,1713) The judge rejected express arguments that the sentencing issues are different than guilt issues at trial. Jeffrey's conversation with the adult defendants is very relevant in the sentencing context – though perhaps not in a guilt or innocence context -- for it shows their influence on Jeffrey; his immaturity; his compassion, remorse and acceptance of responsibility. His statements show he played no real part in planning the robbery:

> John Henderson: It wouldn't have been bad if we'd — if you all had of worn masks, man.
>
> Jeffrey Farina: Um-hm. If we would of had masks, we would have just locked them – tied them up real tight.
>
> John Henderson: Left them in the cooler.
>
> Jeffrey Farina: No, I wouldn't even have put them in the cooler. I would have just tied them up real tight and left them. You know? We would have all left. If we would have had masks.

(Defense 7).

The conversation showed that Jeffrey Farina was an immature child, the product of abuse, and a person being greatly influenced by adult co-defendants.

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. Bellotti v. Baird, 443 U.S. 622, 635, 99 S.Ct. 3035, 3044, 61 L.Ed.2d 797 (1979).

Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to educational and mental problems, may be less culpable than defendants who have no such excuse." ***California v. Brown***, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Excluding this evidence was ***NOT*** an exercise of sound judicial discretion where this judge had not even reviewed what he was excluding nor considered its context because he felt that the evidence "is carved into stone, unless and until an appellate court says otherwise." (XIX,1693) *See* ***Castro v. State***, 547 So.2d 111, 115 (Fla.1989) ("Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase."

The arbitrary, strict application of the doctrine of law of the case defeated the fairness of this hearing. The court's repeated references to being "bound" by the law

of the case doctrine and comments that he "lacked jurisdiction" to change rulings made in 1992 show that this error is not isolated nor a slip of the tongue. It was instead an intentional, conscious decision that pervaded the court's rulings throughout the proceedings to deny Due Process and a *meaningful* opportunity to be heard. *See* ***Lachance v. Erickson***, 522 U.S. ___, 118 S.Ct. 753, 756 (1998) ("core" of due process is notice and a meaningful opportunity to be heard).

Both defendants sought severance when the case was remanded. The judge initially reasoned that "I don't have any jurisdiction to overrule" prior rulings and that "I guess that would also include a Motion to Sever." (I,163) Both defendants argued that guilt was not an issue and that a severance was needed to achieve a fair, individualized sentencing for each defendant. (II,229-34) The court was referred to ***Franqui v. State***, 699 So.2d 1332 (Fla.1997) and ***Preston v. State***, 607 So.2d 404 (Fla.1992) and asked to exercise de novo review, to listen to the tapes to determine their *present* relevance and to rule on severance in the context of a penalty phase without deference being given to a prior order. (III,384-93) The state responded that the denial of severance in 1992 was reviewed in Anthony Farina's appeal by this Court and that it was binding as law of the case. (III,396) The court denied severance. (VII,1018) When the motion for severance was renewed, the judge stated, "And I am again just relying on the mandate from the Supreme Court that told me to redo what

Judge Blount did the first time. And that was a joint trial." (XIX,1694) This was not a duly-considered ruling. The record conclusively shows that these rulings were based on the court's stated, erroneous belief that it was "bound" by rulings made in 1992. This is precisely the type of "mechanistic" application of a rule that violates "the ends of justice." ***Green v. Georgia***, 442 U.S. at 97; ***Chambers v. Mississippi***, 410 U.S. at 302. The judge's conclusion and ruling weres wrong and a denial of fundamental fairness, Due Process, a fair trial and a reliable sentence. U.S. Const., Amend. V, VI, VIII & XIV; art. I, §§ 2, 9, 16, 17 & 22, Fla. Const..

The joint trial interfered with Jeffrey's right to contemporaneously place his statements in context after they were arranged, edited and published by the state. Those statements *should* have been suppressed in the first place because they were illegally obtained. Anthony's statements, especially those made to his mental health expert, should not have been presented in Jeffrey's penalty phase. The joint trial limited Jeffrey's ability to present mitigating evidence of his own and to meet the state's evidence against him. He was unfairly exposed to evidence relevant only to Anthony and then arbitrarily, unfairly denied the ability to address it.

Further, the tactics used by Anthony's defense attorney, while valid, unfairly prejudiced Jeffrey. For example, Anthony presented witnesses to prove Anthony's conversion to Christianity while in prison. This prejudiced Jeffrey when, on cross-

examination, the prosecutor questioned Reverend Davis about the Bible, specifically, verses in Romans, to show that judges and prosecutors, but not defense attorneys, are ordained by God. (XIX,1838) Over a relevancy objection, Reverend Davis agreed with the prosecutor's questions that there is nothing in the Bible that is "inconsistent with the government's responsibility to uphold the law and bring the punishment . . ." (XIX,1841) Later, Pastor McCollum, also called by Anthony, was questioned by the prosecutor about Romans to show that "rebellion against authority is also rebellion against God." (XX,1932) The pastor agreed that there is nothing inconsistent about the government imposing the death penalty and religious beliefs, for in Romans, "the ruler holds no terror for those who do right, but for those who do wrong. You want to be free from fear of the one in authority and do what is right and He will command you. For ***he*** [the prosecutor] is God's servant to do you good. If you do wrong, be afraid, for ***he*** does not bear the sword for nothing. ***He*** is God's servant, an agent of wrath to bring punishment to the wrongdoer." (XX,1933) (emphasis added). This line of questioning, which presents this prosecutor as an agent of God - but not the defense attorneys - who only does good and who is to be feared if the death penalty is not imposed per man's law, is highly improper and constitutes fundamental error that denied Due Process and a fair trial because its sinister effect could never be cured by any cautionary instruction. *See* ***Pait v. State***, 112 So.2d 380, 385 (Fla.1959); ***Meade***

v. State, 431 So.2d 1031 (Fla. 4th DCA 1983).

Another example of inconsistent tactics occurred in the presentation of the respective prison records of these defendants. Jeffrey's counsel tried to introduce (XXI,2109) Jeffrey's unedited prison records (Def. "J") to show that Jeffrey had maintained exemplary behavior and adapted well to prison life while confined. (XXII,2179-80) The fact that his confinement was on death row was relevant and properly subject to cross-examination. *See* ***Valle v. State***, 581 So.2d 40, 45 (Fla. 1991) (defendant opens the door to behavior on death row by presenting evidence that he has positively adapted to prison life since conviction). Anthony's counsel wanted all "death row" references deleted from Jeffrey's records and his objection (XXII,2177) was sustained (XXII,2179) even though Anthony had presented evidence that Anthony had been "housed" on death row for the last five years. (XX,2114) The court noted that "it would be a stretch of the imagination to think that common logic wouldn't tell the jury that it was a death row situation" (XXII, 2180) but required that the records be edited over the intervening weekend. Ultimately, because it was impractical to delete all references to death row from the records (XXIII,2287-88), summaries of Jeffrey's prison records showing that Jeffrey had been imprisoned for six years with NO disciplinary reports (Def.18,19 & 20) were introduced instead of his complete prison records showing that he was monitored and

graded twice daily and had never received any bad mark.

A third example of conflicting tactics occurred in the use of the sentences for the contemporaneous felonies committed by the defendants. Jeffrey chose not to introduce his six consecutive life sentences and instead waived *ex post facto* issues and all appellate rights of a life sentence without parole. (Def. "O") The judge ruled that this was an irrelevant topic for consideration by the jury. (Point II, infra). Anthony did not make such a waiver and instead introduced his six consecutive life sentences to show that he probably would not get out of prison if sentenced to life. (Def. 22) To some, seeing that a person already has six life sentences suggests that no additional punishment is imposed by another life sentence. Conversely, others believe that, with seven life sentences, truly the person would never be released. Both approaches are valid tactical choices that should be available without unnecessary interference by a co-defendant. While these matters alone do not dictate a separate proceeding for each defendant, they warranted timely judicial consideration in determining the severance question.

The automatic, mechanistic denial of severance under these facts based on arbitrary application of the law of the case doctrine was fundamentally unfair and it denied Due Process. "Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause." ***Clemons v. Mississippi***, 494 U.S. 738, 746

(1990). When a state offers evidence to support imposing the death penalty, fundamental fairness and Due Process require that the defendant be allowed to fully address and explain that evidence. ***Skipper v. South Carolina***, 476 U.S. 1, 5, n.1 (1986). As here, when a defendant is denied the ability to respond to evidence used by the state and denied the ability to fully litigate valid issues before sentencing by a judge who has concluded that he is without jurisdiction to vary from rulings that occurred in a separate proceeding six years prior to this penalty phase, the defendant is denied "his fundamental constitutional right to a fair opportunity to present a defense." ***Crane v. Kentucky***, 476 U.S. 683, 687 (1986).

This judge erroneously concluded he had no power to rule. This is a "defect affecting the framework within which the trial proceeds, rather than an error in the trial process itself." ***Arizona v. Fulminante***, 499 U.S. 279, 310 (1991) As such, the error is not subject to harmless error analysis. It was not harmless in any event. If this Court declines to order a life sentence without parole, the sentence must be reversed and remanded for a new penalty phase.

POINT II: THE TRIAL COURT'S ERRONEOUS REFUSAL TO INSTRUCT THE JURY THAT A LIFE SENTENCE WITHOUT PAROLE WAS THE ALTERNATIVE SANCTION TO THE DEATH PENALTY DENIED FUNDAMENTAL FAIRNESS AND DUE PROCESS.

Jeffrey Farina, in open court, upon the advice of counsel and in writing, waived all parole eligibility and any appeals of a life sentence, and asked that his jury be given the option of life imprisonment without parole eligibility as the alternative to the death penalty. The state objected. The trial judge ruled:

> In my opinion it's an issue, if he wants to waive *it's a sentencing issue, not a jury advisory opinion issue*. I understand that under the base for the argument and my conclusion is *that's purely an issue for the sentencing judge* in the final sentencing phase, rather than for the jury's determination. Because *whether the defendant is eligible for parole after 25 years is technically not a relevant issue at this case*, and I understand it was discussed in jury selection but we discussed it hopefully in a way that the jury understood that that was not an aggravator or a mitigator and it's not going to be listed in one of the aggravators or mitigators.

(XXIII,2320). The court ruled that it had no authority to change the statutory sentencing scheme and concluded parole eligibility was irrelevant for the jury's consideration, even though it was discussed during voir dire. (XXIII,2320) This ruling was clear error that denied Due Process, fundamental fairness and a reliable sentencing determination. U.S. Const., Amend. V, VIII, XIV; article I, §§ 2, 9, 16, 17 & 22, Fla. Const..

The trial court's conclusion that Jeffrey's waiver of parole was not a relevant sentencing issue for jury consideration was simply wrong. The topic of parole eligibility was more than just "discussed" in voir dire. The state developed a theme that these defendants would only serve 19 years before being released if a life sentence was imposed. It became a focal point. (IX,116; X,167;211-35;258-59;266-69;271-72; XI,337-38;345;362-63; XII,622;625) The thinly-veiled argument raised the issue of the defendant's future dangerousness. Due Process and fundamental fairness compel that defendants be allowed to address this issue. *See* ***Simmons v. South Carolina***, 512 U.S. 154, 169 (1994) ("[b]ecause truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention."). Accurate information about parole eligibility in the context of a death penalty sentence is highly relevant and "would likely have an impact on jurors' decision making." ***Brown v. Texas***, 522 U.S. ___, 118 S.Ct. 355, 357 fn.2 (1997); ***O'Dell v. Netherland***, 521 U.S. 151 (1997). The exclusion of information concerning parole ineligibility based on lack of relevance denied Due Process. A state objection to the waiver of parole eligibility is disingenuous. There is no rational basis for a state to want parole eligibility for a defendant for whom it seeks the death penalty.

The Florida Legislature has eliminated parole if a life sentence is imposed in lieu of the death penalty. § 775.082(1), Fla. Stat. (1997). Since that is the lawful alternative sentence to the death penalty, there is a liberty interest in having a jury given that option because it is less severe than the death penalty. ***Hain v. State***, 852 P.2d 744, 753 (Okl.Cr.1993), cert. denied, 511 U.S. ___, 114 S.Ct. 1402 (1994). *Cf.* ***Beck v. Alabama***, 447 U.S. 625 (1980). This rationale is consistently applied by Oklahoma:

> As was the case in Hain v. State, 852 P.2d 744 (Okl.Cr.1993); Salazar v. State, 859 P.2d 517 (Okl.Cr. 1993); and Allen v. State, 821 P.2d 371 (Okl.Cr.1991), the trial in the present case was conducted after the effective date of 21 O.S.Supp.1990, Section 701.13(E), which added the additional punishment of life without parole to the sentencer's consideration of punishment options in capital cases. In all of these cases, we found that error occurred when the jury was not instructed on the life without parole option, notwithstanding the fact the statute was not in effect at the time the crime was committed. Based on the analysis found in the above referenced cases, we find that the second stage of the present case must be reversed and remanded for a new sentencing trial.

Bowie v. State, 906 P.2d 759, 765 (Okl.Cr.1995).

There is no legitimate concern that this defendant could successfully in the future recant waiving parole eligibility, his appeal and all *ex post facto* protections where the waiver was so openly, intentionally and voluntarily done with the advice of counsel for a rational purpose. As argued to the trial court, it is doubtful that *ex post*

facto precluded a sentence of life without parole because defendants have no vested interest in parole eligibility prior to it being conferred when the sentence is imposed. *See* ***California Department of Corrections v. Morales***, 514 U.S. 499, 115 S.Ct. 1597, 1609 (1995) ("speculative and attenuated possibilities" of increasing the measure of punishment by modifying the frequency of parole hearings do not implicate the Ex Post Facto clause.). However, this Court in ***Hudson v. State***, 708 So.2d 256 (Fla.1998), in dicta after first noting that the issue was "procedurally barred," noted that the life without parole eligibility statute "cannot be applied retroactively." ***Hudson***, 708 So.2d at 262.

Assuming, *arguendo*, that *ex post facto* concerns clouded a sentence of life without parole eligibility, they were totally dispelled by the knowing, voluntary and intentional waiver by the defendant. In Florida, affirmative defenses such as *ex post facto* are often waived by defendants. Fairness and Due Process required that the jury be provided this valid option of life imprisonment without parole, especially where the prosecutor developed the theme during jury selection that a life sentence meant that Jeffrey Farina would be released from prison in 19 years. This accurate information concerning the ineligibility of parole and, indeed, the waiver of an appeal following a life sentence, was relevant and the court should have permitted its presentation to the jury. The death sentence must be reversed.

POINT III: USE OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR WAS IMPROPER AND PREJUDICIAL WHERE THE EVIDENCE SHOWED THAT THE DEFENDANT DID ***NOT*** INTEND FOR THE VICTIM TO UNNECESSARILY SUFFER.

As written, § 921.141(5)(h), Fla.Stat. ("HAC" factor), is unconstitutionally vague because it fails to genuinely limit the class of persons eligible for the death penalty. ***Espinosa v. Florida*** 505 U.S. 1079 (1992). The subjective language fails to provide a principled distinction between those who receive the death penalty and those who do not because "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" ***Maynard v. Cartwright***, 486 U.S. 356, 364 (1988). In ***Smalley v. State***, 546 So.2d 720,722 (Fla.1989), this Court stated that the same language is unconstitutionally vague in other states but not here because a narrowing construction is used to review use of the HAC factor "so that it has a more precise meaning [in Florida] than the same phrase has in Oklahoma." A narrowing construction must be sufficiently definite to allow consistent application. A vague standard in the sentencing decision creates an unacceptable risk of randomness. Randomness results in the arbitrary and capricious sentencing process prohibited by ***Furman v. Georgia***, 408 U.S. 238 (1972).

The narrowing standard in ***State v. Dixon***, 283 So.2d 1, 9 (Fla.1973) seems clear and capable of being consistently applied - for HAC to apply, the defendant must have *intended* that the victim unnecessarily suffer physical pain and/or mental

anguish. Thus, even where it is undisputed that a victim suffered greatly, this Court routinely disapproves the HAC factor if there is no proof that the defendant *intended* that the victim suffer unnecessary pain or mental anguish. *See* ***Donaldson v. State***, 722 So.2d 177, 186-87 (Fla.1998) (not HAC where defendant did not intend that two teenage girls who were forced into house at gunpoint and held for hours experience unnecessary pain or prolonged suffering); ***Cheshire v. State***, 568 So.2d 908, 912 (Fla.1990) (not HAC where victim shot within minutes of seeing another person shot and killed by defendant); ***Amoros v. State***, 531 So.2d 1256, 1260-61 (Fla.1988) (not HAC where cornered victim shot three times after trying to flee); ***Lewis v. State***, 377 So.2d 640 (Fla.1979) (not HAC where victim repeatedly shot while trying to flee); ***Williams v. State***, 622 So.2d 456, 463 (Fla. 1993) ("While the record reflects that the manner in which the victims were was heinous, atrocious, and cruel, the State in this instance failed to prove beyond a reasonable doubt that Williams knew or ordered the particular manner in which the victims were killed."); ***Teffeteller v. State***, 439 So.2d 840, 846 (Fla.1983) ("The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm.").

Applying the same limiting construction, it is clear that the HAC factor does not apply under the instant facts. In finding the factor here, the judge did not (and, indeed,

could not) find that Jeffrey Farina *intended* to inflict unnecessary pain or mental suffering upon Ms. Van Ness because the evidence presented affirmatively disproved such an intent. Instead, the court applied the HAC factor based on "the cruel nature of this case . . . the mental and emotional cruelty [suffered by Ms. Van Ness] rather than any physical torture." (XVIII,1093) A victim's suffering can only be considered when the defendant *intends* that the victim unnecessarily suffer. ***Williams v. State***, 622 So.2d 456, 463 (Fla.1993). ***Teffeteller***, *supra*. The duress suffered by Ms. Van Ness was a necessary component of the robbery, where property was taken by force, violence, assault or putting in fear. There was nothing over and above the "fear" necessary to commit the robbery until an instant before the homicide occurred. Certainly, there was no intent to cause great duress.

This erroneous use of the HAC factor distorted the weighing process and thus denied Due Process and a reliable sentence. U.S. Const., Amend. V, VIII, XIV; art. I, §§ 2, 9, 16, 17 and 22, Fla. Const..

"In a weighing State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." ***Richmond v. Lewis***, 506 U.S. 30, 46 (1992). The presence of a vague aggravating consideration unconstitutionally places a thumb on the death side of the

scale and injects arbitrariness into use of the death penalty. *See* ***Stringer v. Black***, 503 U.S. 222, 229-32 (1992); ***Espinosa v. Florida***, supra. When, as here, it cannot be said beyond a reasonable doubt that the error did not contribute to the recommendation, a new recommendation is required.

For example, in ***Bonifay v. State***, 626 So.2d 1310 (Fla.1993), a clerk was shot twice in the body. The defendant soon approached the injured clerk, who begged for his life. Bonifay told him to shut up and then shot him twice in the head, causing unconsciousness and, ultimately, death. A unanimous court held that the HAC factor did not apply because "the record fails to demonstrate any intent by Bonifay to inflict a high degree of pain or to otherwise torture the victim." ***Bonifay***, 626 So.2d at 1313. A new jury recommendation was required because it could not be said beyond a reasonable doubt that the error did not affect the jury recommendation. Accord, ***Archer v. State***, 613 So.2d 446 (Fla. 1993); ***Donaldson***, supra; ***Omelus v. State***, 584 So.2d 563, 566-67 (Fla.1991).

Similarly, in ***Jones v. State***, 569 So.2d 1234 (Fla.1990), this Court required a new recommendation from a jury that was erroneously instructed on the HAC factor. There, near-instantaneous deaths were followed by the defendant's sexual activity with the corpse of one of the victims. Noting that "[e]vents occurring after death are irrelevant to the atrocity of the homicide, regardless of their depravity or cruelty,"

Jones, 569 So.2d at 1238 (citations omitted), this Court required a new jury recommendation. *See* ***Herzog v. State***, 439 So.2d 1372, 1380 (Fla.1983) (not HAC where intoxicated woman was gagged, smothered with a pillow until unconscious, then dragged into another room where she was strangled to death with telephone cord, and then her body was placed in a garbage bag, placed in the trunk of a car and set on fire).

Here, the stabbing of Ms. Gordon after Ms. Van Ness lost consciousness was very likely weighed by this jury under the HAC umbrella. The fact that the trial judge, who was specially trained in the death penalty, erroneously considered the HAC factor conclusively demonstrates the prejudice. The evidence and all reasonable inference drawn therefrom, even when viewed in a light most favorably to the state, fails to even suggest that Jeffrey Farina intended that Michelle Van Ness unnecessarily suffer pain or mental anguish. No one was abused or unduly threatened prior to the shooting. Jeffrey intentionally tied the male employees loosely. The employees were repeatedly reassured that no one would be hurt if they cooperated. None of the employees were verbally abused or inappropriately touched. The women employees were allowed to smoke when they asked. The sudden shooting took everyone by surprise. Neither Mason nor Robinson realized they had been shot. Ms. Van Ness received a single gunshot wound to the head and immediately lost

consciousness. There were simply no acts of torture or an intent to cause unnecessary mental anguish, pain or suffering that separates the shooting of Ms. Van Ness from other first-degree homicides.

The "precise" limiting construction this Court uses to control the HAC factor prevents its application unless the victim's murder was "***both*** conscienceless ***and*** unnecessarily torturous to the victim." ***Richardson v. State***, 604 So.2d 1107, 1109 (Fla.1992)(emphasis in original). *See* ***Cochran v. State***, 547 So.2d 928, 931 (Fla.1992) ("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."). The undisputed facts here do not come close to supporting the HAC factor. Because this vague consideration was improperly weighed by the trial judge and jury over specific objection and because it likely effected the jury's recommendation, the death sentence must be reversed and a new jury recommendation required if this Court declines to order imposition of a life sentence without parole.

POINT IV:

REVERSIBLE ERROR OCCURRED WHEN THE VICTIM IMPACT EVIDENCE BECAME SUCH A FEATURE THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS AND A RELIABLE JURY RECOMMENDATION.

When the death sentence was appealed in 1992, the state cross-appealed the total exclusion of victim impact evidence. This Court ruled that, "on remand, the State should be allowed to present victim impact testimony that comports with the dictates of decisions from the United States and Florida Supreme courts." ***Farina***, 680 So.2d at 399. The ruling was, indeed, the law of the case. Thus, for two days, the state presented over objection the testimony of fifteen of the victim's family members and friends, guided solely by the following instruction:

> Ladies and Gentlemen of the jury, you will now be presented with evidence concerning Michelle Van Ness. Now, this evidence is permitted by law to demonstrate Michelle Van Ness' uniqueness as a human being and the result of loss to the community members by her death.

(XVIII,1572) The court refused to instruct the jury, then or ever, that victim impact evidence "is not to be used to find or weigh aggravating circumstances." (XVIII,1567-69) The court refused to give a more complete instruction after the victim impact evidence was finished. (XVIII,1640) It is respectfully submitted that the extent of victim impact testimony presented here caused reversible error.

After the state presented seven victim impact witnesses, whose testimony[6] was emotional and cumulative, the defense renewed (XVIII,1601) the objection (VI,781-84) concerning the constitutionality of this type evidence, the motion (VII,826-828) requesting a proffer as to whether the prejudice of such evidence outweighed its probative value under § 90.403, and additionally argued that, "After what was presented yesterday, it's getting to the point that it's extremely prejudicial and it's confusing to the jury - - - it's denying the right to a fair trial and Due Process under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (XVIII,1601-02) The court ruled, "Anything - of course, I will make the same ruling of course. Anything else that we need to do before we call the jury in?" (XVIII,1602)

Thereafter, the state presented the highly emotional, redundant testimony of five more witnesses. The victim impact testimony was featured. This error was not harmless because the extent of this evidence, combined with the absence of the requested jury instructions, likely influenced the jury to recommend the death penalty based on inflamed emotion and sympathy for the victim and her family.

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[6] A synopsis of all of the victim impact testimony is set forth in the Statement of the Case and Facts, supra at pages 7-13.

In the abstract, "victim impact" evidence does not necessarily violate the Eighth or Fourteenth Amendments. ***Payne v. Tennessee***, 501 U.S. 808 (1991). In Florida, such evidence is authorized by § 921.141(7), Fla. Stat., which states:

> **(7) Victim Impact evidence**. - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

The potential unfair prejudice that attends this evidence has been recognized by the courts. In that regard, "unfair prejudice" is the type of evidence that would logically tend to inflame emotions and which would tend to distract jurors and the court from conducting an impartial and reasoned sentencing analysis:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Jones v. State, 569 So.2d 1234, 1239 (Fla.1990). *See* ***Urbin v. State***, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty, noting, "Although this legal precept – and

indeed the rule of objective, dispassionate law in general – may sometimes be hard to abide, the alternative – a court ruled by emotion – is far worse."). Particularly when presiding over a capital trial, judges are cautioned to be "vigilant [in the] exercise of their responsibility to insure a fair trial." ***Bertolotti v. State***, 476 So.2d 130, 134 (Fla.1985).

It is respectfully submitted that, as argued below, the incomplete jury instruction combined with the misuse of victim impact evidence here denied Due Process and a fair and reliable sentencing proceeding. art. I, §§ 2, 9, 16, 17 and 22, Fla. Const.; U.S. Const., Amend. V, VIII, XIV. The requested instruction (that victim impact evidence is not to be considered an aggravating circumstance) was a correct statement of law and giving that type of instruction contemporaneously with the introduction of victim impact evidence has been upheld. *See* ***Alston v. State***, 723 So.2d 148 (Fla.1998).

The bulk of the state's penalty phase evidence, both content wise and time wise, was victim impact evidence. Out of nineteen total witnesses, three were themselves "victims" and twelve others testified about the effect Ms. Van Ness' death had on them, on her family and community, and why she was, to them, a unique person. This type evidence generally qualifies as victim impact evidence:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family

> members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. Therefore, we find this testimony relevant.

Bonifay v. State, 680 So.2d 413, 419-20 (Fla.1996).

That said, however, an abuse of discretion in presenting this type evidence occurs where the victim impact evidence becomes excessive and is allowed to become a feature over objection. To date, the use of victim impact evidence has been very carefully monitored by trial courts that were vigilant to guard against the possibility of improper influences impacting on the sentencing determination. *See* ***Alston v. State***, 723 So.2d 148 (Fla.1998) (approved where victim's mother testified); ***Benedith v. State***, 717 So.2d 472 (Fla.1998) (approved where victim's sister testified); ***Davis v. State***, 703 So.2d 1055 (Fla.1997)(approved where written statement of victim's mother introduced); ***Hauser v. State***, 701 So.2d 329 (Fla. 1997) (approved where victim's mother and grandmother testified); ***Moore v. State***, 701 So.2d 545 (Fla.1997) (approved where victim's daughter testified); ***Cole v. State***, 701 So.2d 845 (Fla.1997) (approved where teacher of victim testified); ***Burns v. State***, 699 So.2d 646, 652-53 (Fla.1997) (approved where victim's father testified in addition to "a fellow officer of the victim who made a brief reference to the victim's wife"); ***Consalvo v. State***, 697 So.2d 805 (Fla.1996) (approved where victim's brother

testified); ***Willacy v. State***, 696 So.2d 693 (Fla. 1997) (approved where victim's son and two daughters testified); ***Damren v. State***, 696 So.2d 709, 712-713 (Fla.1997) (approved where victim's wife and daughter read prepared statements to the jury); ***Branch v. State***, 685 So.2d 1250, 1253 (Fla.1996) (approved where trial court allowed photograph of victim taken several weeks before she was murdered); ***Bonifay***, 680 So.2d 413, 419-20 (Fla. 1996) (approved where victim's wife testified; ***Windom v. State***, 656 So.2d 432, 438 (Fla.1995) (approved where one police officer testified about the impact of three victims' death on their family and on school children). There are NO cases upholding the presentation of victim impact evidence, over objection, by the victim's mother, father, brother, grandmother, grandfather, cousin, aunt, teacher, boyfriend, best friend, close friends and acquaintances. Under the law of the case doctrine, this trial court was required to permit *some* victim impact evidence, but the state was not by this Court's ruling given a blank check to indiscriminately make victim impact testimony the focal point over objection.

The admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. ***State v. Maxwell***, 647 So.2d 871 (Fla. 4th DCA 1994), *Aff.*, 657 So.2d 1157 (Fla.1995). Trial courts should monitor victim impact evidence closely and prevent it from becoming a feature to the extent that it denies a fair proceeding. Just as a judge may not, without first hearing it, enter "a blanket order

forbidding its admission without regard to the character of the evidence that the State intended to present to the jury," ***State v. Johnston***, 24 FLW D666, 667 (Fla. 2d DCA March 12, 1999), neither should a judge make a blanket ruling that all such evidence is admissible, as occurred here.

Though timely asked, this trial court did not require a sufficient proffer of the victim impact evidence so that a reasoned determination could timely be made as to whether the unfair prejudice of this evidence outweighed its probative value. (II,202-21;311; VI,781-84;826-28; VII,947). When the defense predicted that this inherently prejudicial testimony would be redundant, the court ruled, "Yes. Well, that's something that we will have to address at an appropriate time during the procedures, I guess. But right now, we're, I think, too early for that." (III,350). The court did not explain why doing it before the penalty phase was "too early for that," nor did the court stop the torrent of highly emotional and inflammatory testimony when it was presented and then objected to during the proceedings. As predicted by the defense during the pre-penalty phase hearings, the testimony was cumulative and the sheer number of witnesses that the court allowed made it a feature.

An analogous situation occurs with collateral crime evidence, which is relevant to prove identity, plan, motive, etc. In ***Williams v. State*** 110 So.2d 654, 662 (Fla.1959), this Court ruled that, while evidence of unrelated criminal activity may be

relevant to prove a defendant's guilt, "we emphasize that the question of the relevancy of this type of evidence should be cautiously scrutinized *before* it is determined to be admissible." (emphasis added). *See also* ***State v. Johnston***, 712 So.2d 1160 (Fla. 2d DCA 1998) ("trial judges must scrupulously examine the probative and prejudicial value of [victim impact] evidence *before* permitting its introduction." (emphasis added). The danger of William's Rule evidence, as with victim impact evidence, is that it tends to distract jurors from the task at hand and invites a verdict for reasons other than impartial application of the law to the facts. *See* ***Davis v. State***, 276 So.2d 846 (Fla. 2d DCA 1973) (fundamental error for state to make feature of Williams Rule evidence); ***Green v. State***, 228 So.2d 397 (Fla. 2d DCA 1969) (absence of limiting instruction on proper use of Williams Rule evidence that was made a feature of the trial was prejudicial error).

There are real advantages to requiring a pre-penalty phase ruling on the admissibility of victim impact evidence. If evidence is excluded, the state can timely seek discretionary review and demonstrate why the court abused its discretion by excluding it. *See* ***State v. Johnston***, 24 FLW D666 (Fla. 2d DCA March 12, 1999); ***Wike v. State***, 698 So.2d 817 (Fla.1997) (state failed to preserve for appeal the exclusion of victim impact testimony from the victim's parents). Such a procedure would enhance the ability of the state to schedule the testimony of the witnesses and

avoid the trauma[7] to witnesses who prepare to testify and then must be excluded by the court because the previous testimony has shifted the focus of the proceedings or become unfairly prejudicial. A live proffer would enable the judge to determine the ability of the witness to testify without breaking down, as occurred here with Ms. Setzer. (XVIII,1593-94)

It is respectfully submitted that this death penalty must be reversed becausee the presentation of excessive victim impact evidence likely effected this jury's recommendation on the basis of emotion and sympathy. This Court should take this opportunity, as it did in ***Grossman v. State***, 525 So.2d 833, 841 (Fla.1988), to establish a procedure to be followed for using victim impact evidence to prevent this error from recurring. Doing so will greatly enhance the fairness of the proceedings and benefit all parties concerned by allowing the informed, intelligent and considerate scheduling and presentation of witnesses in accordance with constitutional and statutory law.

POINT V: CAPITAL PUNISHMENT OF THIS 16-YEAR-OLD CHILD OFFENDER VIOLATES INTERNATIONAL LAW AND THE CONSTITUTION OF FLORIDA AND THE UNITED STATES.

"The international human rights movement is premised on the belief that

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[7] Several witnesses here testified that they did not want to testify and that preparing their testimony was the hardest thing they had ever done. (XVIII,1594; 1638)

international law sets a minimum standard . . . for the treatment of human beings generally." ***DeSanchez v. Banco Central De Nicaragua***, 770 F.2d 1385, 1397 (5th Cir. 1985). An international standard expressly condemns state execution of child offenders.[8] This was noted by the Organization of American States in Resolution 3/87, Case 9647, where the Inter-American Commission on Human Rights found that the United States violated Articles I and II of the American Declaration of the Rights and Duties of Man when Texas executed two 17-year-old offenders:

> The Commission finds that this case arises, not because of doubt concerning the existence of an international norm as to the prohibition of the execution of children but because the United States disputes the allegation that there exists consensus as regards the age of majority.

Resolution 3/87, Case 9647, paragraph 56. (VI,778-79) The United States, alone, is the only civilized nation that executes children below eighteen years of age.

> The death penalty for juvenile offenders is an almost uniquely American pastime. This practice appears to have been abandoned everywhere in large part due to the express provisions of the United Nations Convention on the Rights of the Child and of several other international treaties and

[8] Convention on the Rights of the Child, Article 37(a); International Covenant on Civil and Political Rights, Article 6(5); American Convention on Human Rights, Article 4(5); Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Safeguard 6; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 17.2; Fourth Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Time of War, Article 68.

> agreements. For example, the U.N. Convention (Article 37(a)) provides that "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." ***The United States is literally the only country in the world that has not yet ratified this international agreement***, in large part because of the American desire to remain free to retain the death penalty for juvenile offenders.

V. Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1973-October, 1998," page 7 (emphasis added).

The United States has signed and ratified the International Covenant on Civil and Political Rights ("ICCPR"). Article 6 (5) states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." When the ICCPR was ratified the United States tried to reserve a "right, subject to Constitutional restraints, to impose capital punishment on . . . persons below eighteen years of age." 138 Congressional Record, §4781-01, §783-84 (daily edition, April 2, 1992). This attempted reservation of a right to execute child offenders has been found to be invalid because it is at odds with the object and purpose of the ICCPR:

> The Special Rapporteur shares the views of the Human Rights Committee and considers that the extent of the reservations, declarations and understandings entered by the United States at the time of ratification of the ICCPR are intended to ensure that the United States has only accepted what is already the

> law of the United States. He is of the opinion that the reservation entered by the United States on the death penalty provision is incompatible with the object and purpose of the treaty and should therefore be considered void.

Paragraph 140, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61. *See* William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?," 21 Brook.J.Int'l.L. 277, 318-19 (1995); Ved P. Nanda, "The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights," 42 DePaul L.Rev. 1311, 1331-32 (1993). Historically, the reservation of a right to disregard an integral part of a treaty is invalid. *See* Restatement (Third) of the Foreign Relations Law of the United States § 313 (1987). Execution of child offenders is also proscribed by these agreements as cruel and unusual punishment.

Our independent states are necessarily precluded from violating the terms of valid international agreements. Article VI, Section 2 (The Supremacy Clause) of the United States Constitution makes "as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." ***Baldwin v. Franks***, 120 U.S. 678, 683 (1887). In that regard, "[t]he word 'treaty' has more than one meaning. Under international law, the word ordinarily refers to an international

agreement between sovereigns, regardless of the manner in which the agreement is brought into force." ***Weinberger v. Rossi***, 456 U.S. 25, 29 (1982). The ICCPR is at the very least a compact between the United States and other governments not to execute child offenders. As such it supercedes conflicting state statutes irrespective of the Supremacy Clause. ***United States v. Belmont***, 301 U.S. 324 (1937). If the United States can enter into international treaties that prevent states from killing birds within their boundaries, and it has, ***Missouri v. Holland***, 252 U.S. 416 (1920), it surely can enter into international treaties that prevent states from killing children within its boundaries.

There can be no doubt that Jeffrey Farina was a "child" when he committed this offense. A 16-year-old is a child under internationally accepted definition. *See, e.g.,* The Convention on the Rights of the Child; "Report of the Third Committee on Agenda Item 108, U.N. GAOR, 44th Session, Annex, Agenda item 108, at 15, U.N. Doc. A/44/736 (1989). A 16-year-old is a child under Florida law. § 39.01(10), Fla. Stat. (1997). A 16-year-old is a child under federal law. 18 U.S.C. § 5031.

Capital punishment of a 16-year-old child offender violates current minimum international standards of human rights and customary international law. The United States has recognized that customary international law sets a minimum standard of conduct to be followed and applied by the courts of civilized nations when properly

raised and timely presented:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their deter-mination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900). A review of ***Paquete*** is instructive. The United States seized two privately owned fishing vessels, "The Paquete Habana" and "The Lola," as prizes during the Spanish-American War. The seizure of fishing vessels as prizes of war was not covered by either statute or treaty between the United States and Spain, though treaties existed between other countries. The Court reviewed the historic treatment of fishing boats during times of war and, noting the practice of "civilized" nations, held that by general consent of civilized nations of the world it is established international law that coast fishing vessels, with their implements and supplies, cargoes and crews, are exempt from capture as prize of war. ***Paquete***, 175 U.S. at 708. Likewise, state execution of 16-year-old children is repugnant to civilized nations by a clear international consensus.

The United States government solely has the power to enter into agreements with other nations and its actions must necessarily transcend the ability of a state to violate international agreements. A state has the power to punish criminal conduct, protect society and protect the interests of its citizens within the bounds of express agreements made by the United States and the international standards of human rights recognized by civilized nations. An international treaty that excepts from its control the customary practices of its independent states would eviscerate all agreements made by any country that has local governments. An international treaty setting forth a minimum standard of human rights is an evolving standard of decency that must be recognized by the courts.

Rather than execute the children within its boundaries, every state is historically compelled to protect them under the doctrine of *parens patriae*:

> The concept of parens patriae is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the 'royal prerogative.' (Citations omitted). These powers and duties were said to be exercised by the King in his capacity as 'father of the country.' Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics,' and as the superintendent of 'all charitable uses in the kingdom.' In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States.

Hawai v. Standard Oil Co. of California, 405 U.S. 251, 257 (1972) (footnotes omitted). Thus, historically and for sound moral reason, children of civilized nations are protected by the state governments. As guardians of fundamental rights of its people, the courts of civilized states must recognize the international illegality of state execution of infant offenders:

> [P]reference for legislative treatment cannot shackle the courts when legally protected interests are at stake. As people seek to vindicate their constitutional rights, the courts have no alternative but to respond. Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.

Satz v. Perlmutter, 379 So.2d 359, 360 (Fla.1980). ***Perlmutter*** is apt here because it involves legislative inaction. A claim exists that the ICCPR is not enforceable because it is not "self executing." *See* ***Igartua De La Rosa v. U.S.***, 32 F.3d 8, 11 fn.1 (1st Cir. 1994). Assuming but not conceding[9] that some provisions of the ICCPR may not be self-executing, the "not self-executing" argument cannot forestall recognition of fundamental rights protecting human life:

> We think it appropriate to observe here that one of the exceptions to the separation of powers doctrine is in the area of constitutionally guaranteed or protected rights. The

[9] Using a similar separation of powers analysis, the Constitutional power of the President to recognize basic human rights on behalf of the United States in his dealings in foreign policy cannot be thwarted by partisan inaction by the Legislative branch in failing to pass "enabling" legislation.

> judiciary is in a lofty sense the guardian of law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it. . . . When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.

Perlmutter, 379 So.2d at 360-361, quoting ***Dade County Classroom Teachers Ass'n v. Legislature***, 269 So.2d 684, 686 (Fla.1972).

Capital punishment for this child offender is otherwise barred by art. I, §§ 2, 9, 16 & 17, Fla. Const. and the Eighth and Fourteenth Amendments. It is cruel and unusual punishment under international law and thus disproportionate under Florida law. ***Tillman v. State***, 591 So.2d 167, 169 (Fla.1991). Florida has determined that, consistent with ***Thompson v. Oklahoma***, 487 U.S. 815 (1988), fifteen-year-old offenders are ineligible for the death penalty. ***Allen v. State***, 636 So.2d 494 (Fla.1994). The holding in ***Allen*** was based primarily on Florida law. This Court has not yet decided this question for sixteen-year-old offenders under Florida law. *But see* ***Stanford v. Kentucky***, 492 U.S. 361 (1989).

The death penalty for this 16-year-old offender is disproportionate under the facts established below. In that regard, except for the jury recommendation, the facts in ***Hegwood v. State***, 575 So.2d 170 (Fla.1991) are far more egregious than here

because three people died there. In ***Hegwood***, a 17-year-old youth killed three Wendy's employees during an armed robbery in Ft. Lauderdale. The same statutory aggravating factors that exist here were also found there. ***Hegwood***, 575 So.2d at 173, fn.8. Essentially the same mitigation supported a life sentence.

Since ***Furman v. Georgia***, this Court has never approved imposition of the death penalty for a 16-year-old offender. It should not do so here. Despite the deplorable conditions in which he was raised and urging by his mother, Jeffrey Farina had no significant prior criminal history. His performance in prison in the six years since his arrest establishes that he will adapt well to imprisonment and a structured environment. He can be safely kept in prison for the rest of his life, without parole, and there counsel other inmates who will be released. The jury recommendation was here tainted by over-presentation of victim impact evidence, and further tainted by improper consideration of Florida's especially heinous, atrocious or cruel statutory aggravating factor, over timely and specific objection. Because the evidence clearly showed Jeffrey Farina did not intend for Van Ness to suffer unnecessary pain or mental anguish, there was no evidentiary support to instruct the jury on the HAC factor. The statutory aggravating factors are entitled to little weight because they involve the same aspect of the crime. The "avoid lawful arrest - witness elimination" finding is the same as the CCP factor, and the "prior violent felony" if valid at all is

entitled to negligible weight here.

Further, the jury did not have available to it the option of sentencing Jeffrey Farina to life without parole, a consideration that was highlighted by the state during jury selection. The trial judge erroneously concluded that the rulings made by a circuit judge six years before this penalty phase could not be changed, which denied Jeffrey Farina a truly meaningful opportunity to be heard. The prejudice caused by the cumulative errors here compel reversal of the death sentence. For the foregoing reasons, if this Court declines to hold that state execution of all sixteen year old offenders is unconstitutional and a violation of international law, this Court should reverse the death sentence and remand with directions that Jeffrey Farina be sentenced to life without parole in accordance with his waiver.

POINT VI:
THE DEATH PENALTY VIOLATES THE RIGHT TO FREE SPEECH UNDER THE FEDERAL AND STATE CONSTITUTIONS.

This argument is based on the state and federal constitutional rights guaranteeing free speech. art. I, § 4, Fla. Const.; U.S. Const., Amend. I & XIV. Courts must vigilantly protect free speech:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of the courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of 'sober second thought.'

McClesky v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (citations omitted). The focus of this argument is on an aspect of free speech that is unappreciated - the contemporaneous, reciprocal right of others to hear.

At a minimum, the First Amendment to the United States Constitution and art. I, § 4 protect communication, that is, the exchange of thought and ideas between people. *See* ***Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.***, 425 U.S. 748, 756-57 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to

the communication, *to its source and to its recipients both*. This is clear from the decided cases.") (emphasis added). The analysis used to determine the constitutionality of a law not expressly regulating speech but which has an incidental effect on free speech is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 379 (1968) (emphasis added). Pertinent here is the distinction made by Justice Harlan between regulation that incidentally interferes with speech and legislation that imposes a sanction which has the "incidental" effect of totally precluding it on all topics to all audiences:

> I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction upon expression, imposed by a regulation which furthers an 'important or substantial' governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

O'Brien, 391 U.S. at 388, 389 (Harlan, J., concurring).

The death penalty is broader than is necessary to satisfy any legitimate state interest. In ***U.S. v. National Treasury Employees Union***, 513 U.S. 454 (1995), the Court struck a law that precluded compensating government employees for public appearances and written articles: "Although §501(b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity." ***Treasury Employees***, 513 U.S. at 468. A strict standard of review was used due to the chilling effect the ban had on all future communication between all potential audiences on all subjects:

> We normally accord a stronger presumption of validity to a congressional judgment than to an individual executive's disciplinary action. The widespread impact of the honoria ban, however, gives rise to far more serious concerns than could any single supervisory decision. In addition, unlike an adverse action taken in response to actual speech, *this ban chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future audiences in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the government.*

Treasury Employees, 513 U.S. at 468 (footnotes and citations omitted) (emphasis added). The same standard controls here.

It is beyond cavil that the death penalty ends a person's ability to speak and express thought - totally, absolutely and irrevocably. It has the same impact on the reciprocal right of society to hear what could have been said and expressed. *See* ***Procunier v. Martinez***, 416 U.S. 396, 409 (1974) ("The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him. In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.").

The death penalty is a law that causes total censorship of protected communication. Because the death penalty absolutely precludes *ALL* future speech to *ALL* potential audiences on *ALL* potential topics, the Government has a greater burden than that used to review legislation that causes mere incidental interference with exercising the right to communicate. "The Government must show that the interests of both potential audiences and a vast group of present and future audiences in a broad range of present and future expression" are outweighed by the interest furthered by death penalty legislation. ***Treasury Employees***, 513 U.S. 468. To date, the government has not identified what interest is furthered by state execution of sixteen-year-old child offenders.

Prior challenges to the death penalty have focused on Due Process rights of the individual defendant that are necessary to guarantee reliability in the fact-finding determination, on the arbitrary and capricious imposition of the sanction based on ill-defined and vague criteria, and on the method of the punishment as being cruel and/or unusual. The impact of the death penalty on communication and expression under the First Amendment has not been expressly addressed. It is axiomatic that, to be decided, a constitutional issue must first be fairly presented below, even in areas involving fundamental matters such as first amendment protections. ***Younger v. Harris***, 401 U.S. 37 (1971).

The state has failed to identify *any* interest sufficient to justify totally denying all future audiences of the ability to communicate with a person on topics protected by the First Amendment and art. I, § 4. To assume that a sanction is necessary as punishment presupposes the answer that is constitutionally required to be supplied and proved by the government. A court is not the entity that must be persuaded what an evolving standard of decency should be. ***Stanford v. Kentucky***, 429 U.S. 361, 378 (1989). That said, it is a court's duty to weigh the value of legislation that substantially interferes with the exercise of constitutional rights. If the death penalty served no rational basis, it would have been eliminated prior to now under the Equal Protection clause of the Fourteenth amendment.

In that regard, the analysis used in ***Dallis v. Stanglin***, 490 U.S. 19 (1989) applies. Thus, assuming that the government can articulate a rational basis for the death penalty in general and, more specifically here, for juveniles, the court must then determine whether the interest is advanced by a statute that is no broader than necessary to advance the legitimate government interest identified by the state. ***Stangling***, supra. The government has not identified any interest that is furthered by executing juvenile offenders contrary to international minimum standards of human rights and decency. The state has not shown that a less severe punishment for juveniles does not satisfy its legitimate interest.

The effect on communication here is not mere incidental restriction or moderate regulation. It is instead the absolute preclusion on all topics by all people for all time. In that respect, the impact of death penalty is a type of prior restraint of all communication and expression of ideas. It forecloses areas of societal interest in research, the arts, political speech and the exercise of religion. The heavy burden that the death penalty places on communication cannot be reconciled with First Amendment analysis and it is thus unconstitutional. The State has not met its burden of justifying this burden on future speech. The death penalty is thus unconstitutional under art. 1, section 4 and/or the First and Fourteenth Amendments.

POINT VII:
THE EXCLUSION OF DEFENSE EVIDENCE DENIED DUE PROCESS AND A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." ***Chambers v. Mississippi***, 410 U.S. 284, 301 (1973). "Although this quotation refers to 'witnesses', the principle obviously includes other forms of evidence as well." ***Vannier v. State***, 714 So.2d 470, 471 (Fla. 4th DCA 1998). The erroneous exclusion of evidence offered by the defense to meet the evidence and arguments of the state denied Due Process and a fair trial. U.S. Const., Amend. V, VI, XIV; art. I, §§ 2, 9, 16 & 22, Fla. Const.

Prior to the penalty phase, judicial notice of the treaties and international agreements condemning capital punishment for juveniles was taken, but the court ruled that, "While the matters contained within the various judicial notice requests may or may not be appropriate for the court to consider in determining questions of law raised either prior to or at the re-sentencing as legal argument addressed solely to the court, *they are not to be argued or mentioned before the jury or presented as evidence at the penalty phase*. (VII,981) (emphasis added). The ruling was error. The information is relevant because it tends to prove whether life imprisonment or the death penalty should be imposed. A capital penalty phase present sentencing issues that are not part of any other trial.

During voir dire, the prosecutor asked questions comparing "God's" law to man's law. (XIII,777). Later, he questioned Anthony's clergy witnesses about the Bible to show that capital punishment imposed in accordance with man's law does not violate God's law. (XIX,1838-41; XX,1932-33). Prior to resting, Jeffrey proffered the provisions of the treaties that condemned capital punishment of juveniles and argued that the state had opened the door to introduce those specific provisions of valid treaties entered into by the world's major governments to show that execution of 16-year-old children is denounced by man's law. (XXII,2190) The court replied, "I will rule the same. [The] Supreme Court has to make that determination, rather than the trial court." (XXII,2191) The preclusion of this relevant information denied Due Process, fundamental fairness, and the right to present relevant information under Article I, §§ 2, 9, 16, and 22 and the Fifth, Sixth, and Fourteenth Amendments. ***Green v. Georgia***, 442 U.S. 95, 97 (1979); ***Chambers***, supra, 410 U.S. at 302.

At its official web site, the Florida Department of Corrections "encourages the copying and circulation" of information (http://www.dc.state.fl.us/) that it also disseminates in its brochure. (Def. "K") The specific portion of the brochure sought to be introduced (XXII,2185) concerned Nine Misconceptions about Florida Prisons, *viz*: 1) Inmates don't work. 2) Why don't inmates grow their own food? 3) Why don't inmates do some work to help communities? 4) Inmates have cable television

and satellite dishes. 5) Most inmates are released early because of prison overcrowding. 6) The Department of Corrections determines how long inmates serve in prison. 7) Inmates still aren't serving most of their sentences. 8) Prisons are air conditioned. 9) Inmates who get life sentences don't really stay in prison for life." (Def."K") In short paragraphs spanning three pages, the Florida Department of Corrections addresses each of these concerns and gives statistics and examples of why these common perceptions are unfounded.

Jurors have virtually no knowledge of what imprisonment in Florida is like. The fact that 83% of Florida's inmates work in construction, academic or vocational programs such as training guide dogs, recycling eye glasses, assisting the Division of Blind Services or growing food to contribute to their upkeep is relevant to decide whether a youthful inmate should be executed or imprisoned for the remainder of his life in a Florida prison. It was error to exclude it. ***Green v. Georgia***, 442 U.S. 95, 97 (1979); ***Chambers v. Mississippi***, 410 U.S. 283, 302 (1973) While such information is irrelevant in the context of non-capital cases, it is the heart of the issue in a penalty phase. To exclude all evidence as being irrelevant and not a jury issue was an abuse of discretion. The death sentence must therefore be reversed.

POINT VIII:
THE CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 2, 9, 16 AND 22.

The prior death sentence was vacated "because we find that the trial court erroneously excused for cause a prospective juror who was qualified to serve." ***Farina v. State***, 680 So.2d 392, 393 (Fla.1996). Relief was thus granted to address the unconstitutional *exclusion* of a juror. The appeal also challenged the improper *inclusion* of biased jurors that decided the guilt of the defendant in a manner inconsistent with Due Process and a fair trial. (Points II, III & IV, Initial Brief of Appellant, Case 80,985). Those errors were not addressed in the opinion. This Court may take judicial notice of its own records.

After remand, Farina contested the validity of the murder conviction based on the juror issues not ruled upon by this Court. (VI,736-39; VII,1020) A biased fact finder is a structural defect that denies a fair trial and an impartial jury. U.S. Const., Amend. V, VI & XIV; art. I, §§ 2, 9, 16 & 22, Fla. Const.. A biased finder of fact is not subject to harmless error analysis. ***Rose v. Clark***, 478 U.S. 570, 577-78 (1986); ***Patton v. Yount***, 467 U.S. 1025 (1984); ***Irvin v. Dowd***, 366 U.S. 717, 727 (1961). *See* ***Tumey v. Ohio***, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge.").

As set forth in the Initial Brief of Appellant in Case 80,985 with the pertinent record citations, six months after the incident occurred in 1992, a jury was selected

amidst pervasive pretrial publicity that was shown in voir dire to have caused jurors to form opinions about the crime and the defendants. The judge did not conscientiously perform his judicial function to assess juror bias, as shown by his statements that the sequestered voir dire was an "idiotic" procedure to which he agreed "only" to avoid reversible error. He dubbed sequestered voir dire a "fishing expedition" and repeatedly, openly ridiculed counsel as conducting a "fishing expedition" each time jurors were separately questioned. The judge characterized the voir dire as a "charade" and referred to it as "one-at-a-time crap." This judge's words and actions refute the presumption of a conscientious performance of judicial duty to genuinely assess the extent of juror bias and to insure a fair trial by an impartial jury. Rather than minimize prejudicial influences, this judge fostered them. One juror remarked "You're making it very difficult for the jurors to be unbiased." The local newspaper quoted the judge referring to defense counsel as, "You've seen how cooperative those ---holes are."

Over objections and exhausted challenges, the judge allowed Mr. Nice to be a juror after stating that he could give the defendants a fair trial, "if they deserve one." This qualification to his oath as a juror and the overall manner in which the judge conducted voir dire defeats any presumption of correctness in the trial court's determinations of bias for all jurors. *See* ***Patton v. Yount***, 467 U.S. 1025, 1036 (1984)

(The question is one of historical fact: "Did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed."). Selection of an impartial jury requires more than listening for a juror to state the mantra noted above. There was ample reason to suspect that the jurors could not set aside the information read and opinions formed. *See* ***James v. State***, 24 FLW D934 (Fla. 3d DCA April 14, 1999).

The underlying conviction for first-degree murder was thus obtained in contravention of Due Process and a fair trial by impartial jurors. U.S. Const., Amend. V, VI & XIV; art. I, §§ 2, 9, 16 & 22, Fla. Const.. Accordingly, the death sentence and the underlying conviction for first-degree murder must be vacated and the matter remanded for retrial.

POINT IX:
FLORIDA'S CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

All arguments expressly made and denied below (II,271-74;283-309;348-50) are reasserted here. Discretion in the use of capital punishment "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." ***Gregg v. Georgia***, 428 U.S. 153, 189 (1976). To have a valid death penalty, a state must "channel the sentencer's discretion by 'clear and objective' standards and then 'make rationally reviewable the process for imposing a sentence of death.'" ***Godfrey v. Georgia***, 446 U.S. 420, 428 (1980). The statutory considerations governing use of the death penalty must be narrowly drawn and sufficiently definite to genuinely limit the class of persons eligible for the death penalty. ***Zant v. Stephens***, 462 U.S. 862, 877 (1983). Florida's capital punishment system operates in an arbitrary and capricious manner contrary to the above principles in violation of the state and federal constitutions. U.S. Const., Amend. V, VI, VIII, XIV; art. I, §§2, 9, 16, 17 & 22, Fla. Const..

Capital punishment in Florida is not limited in a meaningful way because "limiting" constructions of the statutory capital sentencing considerations are created by this Court on an ad hoc basis so that the substance of the statutes change by judicial

fiat. Opposite results thus occur in the same[10] case. Opposite results thus occur in different[11] cases under the same material facts. Such erratic use of the death penalty based on standards (limiting constructions" that vacillate and change at whim is arbitrary, capricious and unconstitutional.

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10 Compare ***Raulerson v. State*** 358 So.2d 826 (Fla.1978) (approving HAC factor) with ***Raulerson v. State***, 420 So.2d 567, 571 (Fla.1982) (rejecting HAC factor in same case); ***King v. State***, 390 So.2d 315 (Fla.1980) (approving "great risk to many" factor) with ***King v. State***, 514 So.2d 354, 360 (Fla.1987) (rejecting "great risk" factor in same case); ***Proffitt v. State***, 315 So.2d 461 (Fla.1975) ("HAC" factor and death sentence approved) with ***Proffitt v. State***, 510 So.2d 896 (Fla. 1987) ("HAC" factor not found and death sentence disapproved); ***Songer v. State***, 365 So.2d 696 (Fla.1978) (death sentence affirmed) with ***Songer v. State***, 544 So.2d 1010 (Fla.1989) (death sentence rejected because case not among the most aggravated and least mitigated).

11 Compare ***Alford v. State***, 322 So.2d 533 (Fla.1975) (three people killed in different rooms of house supports "great risk" factor) with ***White v. State***, 403 So.2d 331, 337 (Fla.1981) (six people killed in different rooms of house does *not* support "great risk" factor); ***Simmons v. State***, 419 So.2d 316, 319 (Fla.1982) ("The finding that the victim was murdered in his own home offers no support for the [HAC] finding.") with ***Perry v. State***, 522 So.2d 817,821 (Fla.1988) ("vicious attack . . . within the supposed safety of Mrs. Miller's home. . . adds to the atrocity of the crime."); ***Pope v. State***, 441 So.2d 1073, 1077-78 (Fla.1983) (the defendant's mindset never at issue for HAC factor) with ***Santos v. State***, 591 So.2d 160, 163 (Fla.1991) (not HAC because there was "no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims."); ***Johnson v. State***, 465 So.2d 499, 507 (Fla.1985) ("[CCP] factor focuses more on the perpetrator's state of mind than on the method of the killing.") with ***Provenzano v. State***, 497 So.2d 1177, 1183 (Fla.1986)("if the murder was committed in a *manner* that was cold and calculated, the aggravating circumstance . .. is applicable.").

Florida's Legislature enacted §921.141, Fla. Stat., to establish the substantive[12] criteria that govern Florida's death penalty. It is now a truism that parts of the statute are unconstitutionally vague. ***Espinosa v. Florida***, 505 U.S. 1079 (1992). Vague laws fail to provide guidance of what is to be accomplished and therefore invite erratic enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." ***Grayned v. City of Rockford***, 407 U.S. 104, 109 (1972). The erratic use of Florida's death penalty is a product of the vagueness condemned in ***Grayned***, supra. *See* ***Papachristou v. City of Jacksonville***, 405 U.S. 156 (1972); ***Kolender v. Lawson***, 461 U.S. 352, 358-59 (1983); ***Smith v. Goguen***, 415 U.S. 566, 574 (1974).

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[12] Establishing penalties is purely a matter of substantive law to be performed by the legislature. ***Smith v. State***, 537 So.2d 982 (Fla.1989) (sentencing guidelines). By defining the substance of the vague sentencing factors and altering the meaning of unambiguous statutes, this Court creates substantive law without due process in violation of the separation of powers doctrine. The rational basis required to justify the death penalty does not come through reasoned legislative determination by representatives elected by the people. *Cf.* ***Stanford v. Kentucky***, 492 U.S. 361, 377-79 (1989) (inquiry of court is not what the law should be, but whether a rational basis supports what the legislature says it is).

Our constitutions require that sentencing factors be precise and rigid, yet this Court has defended imprecision in the standards for applying the capital sentencing factors. *See, e.g.*, ***Magill v. State***, 428 So.2d 649, 651 (Fla.), cert. denied, 464 U.S. 865 (1983) (" There can be no mechanical litmus test established for determining whether this or any aggravating factor is applicable."). This Court's rejection of objective, "mechanical litmus tests" to apply the statutory factors fosters erratic use of the death penalty and invites the substance of the statutory considerations to change in the face of emotionally compelling facts.

Capital substantive law now comes from this Court's decisions through creation and modification of its limiting constructions and not by the legislative process. The creation of substantive law on an ad hoc basis by judicial decision denies fair notice[13] and Due Process. Further, it violates Article II, Section 3 of the Florida Constitution (the separation of powers doctrine) when this

[13] Strict compliance with notice requirements is constitutionally required in the context of capital sentencing. Cf. ***Cafeteria Workers v. McElroy***, 367 U.S. 886, 895 (1961)("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); ***Morrissey v. Brewer***, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). *But see* ***Vining v. State***, 637 So.2d 921, 927 (Fla. 1994) (adequate notice given by publishing §921.141 in Florida Statutes).

Court provides the meaning of the vague statutory terms and/or alters the meaning of unambiguous statutory language. The acquiescence of the legislature does not give courts the power to create substantive law. ***Chiles v. Children A, B, C, D, E, and F, etc.***, 589 So.2d 260 (Fla.1991).

This Court's limiting constructions are not solely applied to vague statutory language. For example, this Court once expressly said that a defendant's age is *always* properly considered under §921.141(6)(g), Fla. Stat..[14] *See* ***State v. Dixon***, 283 So.2d 1, 10 (Fla.1973) ("the Legislature has chosen to provide for consideration of the age of the defendant – whether youthful, middle aged, or aged – in mitigation. The meaning of the Legislature [sic] is not vague, and we cannot say that such a consideration is unreasonable *per se*."). Now, however, with no intervening change in the statute's wording, this unambiguous language means something very different. *See* ***Campbell v. State***, 679 So.2d 720, 722 (Fla.1996) ("Chronological age standing alone thus is generally of little import, warranting no special instruction."). The change in substance occurred with no corresponding change in a statute expressly found to be neither vague nor unreasonable. Such

[14] "Mitigating circumstances **shall be** … the age of the defendant at the time of the crime." (emphasis added).

arbitrary change in substantive law violates well-established principles of judicial restraint and statutory construction that attend non-capital litigation and which are conspicuously absent in capital case jurisprudence.

Florida's capital punishment system has a history of such erratic use of the statutory factors governing use of the death penalty. The frequent modification of the standards for applying the statutory factors violates ***Godfrey v Georgia***, 446 U.S. at 433 (1980). Sentencing factors must have a rational basis as determined by a legislature and those factors must then be consistently applied in the capital sentencing process. ***McClesky v. Kemp***, 481 U.S. 279, 305 (1987). Florida's capital sentencing scheme fails both requirements.

Section 921.141(5)(h), Fla. Stat. (the HAC factor) authorizes imposing the death penalty if "the capital felony was especially heinous, atrocious or cruel." It applies to virtually any murder and it fails to genuinely limit the class of persons eligible for the death penalty in violation of state and federal constitutions. U.S. Const., Amend. VIII, XIV; art. I, §§2, 9, 16, 17 & 22, Fla. Const.; ***Maynard v. Cartwright***, 486 U.S. 356 (1988); ***Godfrey***, supra.

In ***Dixon***, supra, this Court while explaining the meaning of the statutory aggravating factors created a limiting construction for the HAC factor when Justice Adkins wrote the following:

> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one that is *accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim*.

Dixon, supra at 10. These terms are as vague and subjective as the terms they supplement. The emphasized language above creates a broad and nebulous umbrella encompassing religion, race, nationality of the perpetrator and/or victim and the exercise of constitutional rights as indications of being "conscienceless." *See* ***Pope v. State***, 441 So.2d 1073, 1077-78 (Fla.1983). The effect of the jury's unconstitutional consideration of such factors is undetectable because only the judge prepares written findings specifying the basis of the court's reasoning. The vast, generic universe of additional things that arguably can properly be considered has no corresponding rational basis as determined by the Legislature. The limiting construction invites erratic, ad hoc application of the HAC factor without notice of what things support the factor.

The evolution of death penalty jurisprudence in Florida has come to resemble an accordion. For instance this Court has held that being killed in a home is,

and is not, an additional act justifying application of the HAC factor[15]. But the HAC factor is not consistently found when a person is killed in their home. *See* ***Proffitt v. State***, 510 So.2d 896, 897 (Fla.1987) (HAC not found for man stabbed in his home – but it was the first time case tried). This Court often[16] notes that HAC is shown by the mere presence of "defensive" injuries without any showing that the perpetrator intended for the victim to unnecessarily suffer. The Legislature may well have a different conclusion about the meaning of defensive wounds for, if they exist, then logically the victim struggled and more force was needed to accomplish the premeditated murder. A premeditated intent to kill does not end when victims defend themselves.

If a victim's defensive wounds are a rational basis upon which to impose the death penalty, that determination should be expressly made by the Legislature rather than divined by a court under the rubric of that being an additional something that

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[15] *Compare* ***Simmons v. State***, 419 So.2d 316, 319 (Fla.1982) ("finding that the victim was murdered in his own home offers no support for the [HAC] finding.") *with* ***Troedel v. State***, 462 So.2d 392, 398 (Fla.1984) ("fact that the victims were killed in their home sets the crime apart from the norm."); ***Perry v. State***, 522 So.2d 817, 821 (Fla.1988) ("attack was within the supposed safety of Mrs. Miller's own home, a factor we have previously held adds to the atrocity of the crime.").

[16] *See* ***Lamb v. State***, 532 So.2d 1051, 1053 (Fla.1988) (noting defensive wound and citing three other cases with same holding); ***Shere v. State***, 579 So.2d 86, 96 (Fla.1991); ***McKinney v. State***, 579 So.2d 80, 84 (Fla.1991).

makes a murder more heinous. Does a person with defensive wounds suffer more? This Court has two lines of cases dealing with victim suffering. One holds[17] that a victim's suffering and anticipation of death justifies the HAC factor based solely on the *victim's* perception and expressly not on what the perpetrator intended. A different line of cases[18] holds that suffering and anticipation of death cannot be considered because the defendant's intent is paramount. The co-existence of these opposing legal standards for applying a statutory capital sentencing consideration is unconstitutional.

Likewise § 921.141(5)(i), Fla. Stat., (the "CCP" factor) authorizes the death penalty if the "capital felony was a homicide and was committed in a cold, calculated

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[17] *See, e.g.,* ***Hitchcock v. State***, 578 So.2d 685, 692 (Fla.1990) ("That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's."): *Same* ***Pope***, supra; ***Mills v. State***, 462 So.2d 1075, 1081 (Fla.1985); ***Stano v. State***, 460 So.2d 890 (Fla.1984), cert. denied, 471 U.S. 1111 (1985).

[18] *See* ***Omelus v. State***, 584 So.2d 563, 566 (Fla.1991) (HAC factor cannot be applied vicariously if defendant did not intend that victim suffer); ***Teffeteller v. State***, 439 So.2d 840, 847 (Fla.1983) ("fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm."); ***Porter v. State***, 564 So.2d 1060, 1063 (Fla.1990) (HAC factor rejected where crime "was not meant to be deliberately and extraordinarily painful."); ***Amoros v. State***, 531 So.2d 1256, 1260 (Fla.1988) (HAC factor rejected where victim shot three times after making "a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door.").

and premeditated manner, without any pretense of moral or legal justification." This vague factor has been widely applied contrary to its stated legislated purpose, which was "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). The limiting constructions created by this Court permit ad hoc use[19] of the CCP factor far afield from what the Legislature intended. It was found here under facts that do not support it.

One application of the limiting construction of the CCP factor depends solely on the "manner of the killing," ***Caruthers v. State***, 465 So.2d 496, 498 (Fla.1985), ***Rose v. State***, 472 So.2d 1155 (Fla.1985) and disregard the state of mind of the defendant. However, another application of the limiting construction states that the CCP "factor focuses more on the perpetrator's state of mind than on the method of killing." ***Johnson v. State***, 465 So.2d 499, 507 (Fla.1985); ***Banda v. State***, 536 So.2d 221 (Fla.1988). The vacillation in the two standards results in arbitrary application of this factor.

The CCP factor requires more premeditation than that needed for first-degree

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[19] *See e.g.*, ***Duest v. State***, 462 So.2d 446 (Fla.1985) (killing during robbery without more); ***Herring v. State***, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984) (killing during robbery after clerk made threatening move); ***Phillips v. State***, 476 So.2d 194 (Fla.1985) (CCP where defendant reloaded before firing final shot).

murder. ***Porter v. State***, 564 So.2d 1060, 1063-64 (Fla.1990) ("Since premeditation already is an element of capital murder in Florida, section 921.141(5)(i) must have a different meaning; otherwise, it would apply to every premeditated murder."). How much more premeditation is needed is not clear. One line of cases holds that the CCP factor is proved merely by the passage of time in which a defendant could have, but did not necessarily in fact, form "heightened" premeditation. *See* ***Swafford v. State***, 533 So.2d 270, 277 (Fla.1988) ("This aggravating factor can be found when the evidence shows such reloading, Phillips v. State, 476 So.2d 194, 197 (Fla.1985), because reloading demonstrates more time for reflection and therefore "heightened premeditation."). Another line of cases requires that the facts show that the killing actually was the product of a calculated plan to kill. ***Rogers v. State***, 511 So.2d 526, 533 (Fla.1987).

One limiting construction authorizes CCP if a gun[20] is brought to the scene by the defendant. Another does not. In ***Lloyd***, the defendant brought a pistol to the victim's house, demanded money and ordered the victim into the bathroom where the victim was shot twice, the fatal shot being fired in contact with her head. The CCP

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[20]*Compare* ***Swafford v. State***, 533 So.2d 270 (Fla.1988), ***Lamb v. State***, 532 So.2d 1051 (Fla.1988) and ***Huff v. State***, 495 So.2d 145 (Fla.1986) (bringing gun proves CCP) *with* ***Amoros v.State***, 531 So.2d 1256 (Fla. 1988), ***Hamblen v. State***, 527 So.2d 800 (Fla.1988) and ***Lloyd v. State***, 524 So.2d 396 (Fla.1988) (bringing gun to scene does not prove CCP).

factor was rejected because, while there was a "suspicion that this was a contract killing," such was not proven beyond a reasonable doubt. ***Lloyd***, 524 So.2d at 403 (Fla.1988).

One limiting construction considers whether a victim is taken to a remote area before being killed. Another does not. [21] One line of cases uses the doctrine of transferred intent to find heightened premeditation. Another rejects it. *Compare* ***Provenzano v. State***, 497 So.2d 1177, 1183 (Fla.1986)("Heightened premeditation necessary for this circumstance does not have to be directed toward the specific victim") *with* ***Amoros v. State***, 531 So.2d 1256, 1261 (Fla.1988) ("We reject the supposition that Amoros' threat to the girlfriend can be transferred to the victim.").

The existence of all these opposing limiting constructions is arbitrary and unconstitutional. The instant death sentence that is based in large part on the use of this unconstitutional factor must be reversed and the matter remanded for a new penalty phase if this Court declines to order a sentence of life imprisonment.

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[21] *Compare* ***Preston v. State***, 444 So.2d 939 (Fla.1984) (clerk taken one-and-a-half miles and then stabbed to death; CCP rejected) and ***Cannady v. State***, 427 So.2d 723 (Fla.1983) (hotel auditor taken to remote location and shot; CCP rejected) with ***Card v. State***, 453 So.2d 17 (Fla.1984) (CCP found because, by taking clerk to wooded area "appellant had ample time during this series of events to reflect on his actions and their attendant consequences.").

POINT X: FLORIDA'S STANDARD JURY INSTRUCTION REQUIRING THAT THE DEFENDANT MUST PROVE THAT THE MITIGATION "OUTWEIGH" THE AGGRAVATION IN ORDER TO RECEIVE A LIFE SENTENCE IS UNCONSTITUTIONAL.

Prior to the penalty phase, defense counsel contested the constitutionality of Florida's death penalty statute and the standard jury instruction requiring that, for a sentence of life imprisonment, the defendant must prove that the mitigation "outweighs" the aggravating circumstances. (VI,695-733). The court rejected this argument as well as proposed language that would have corrected the problems. (VII,942;XII,2193-2205;XIII,2280). The objection to the standard jury instruction was renewed before the jury retired to deliberate. (XVIII;2416). The error denied Due Process and a fair jury recommendation contrary to art. I, 2, 9, 16, 17 and 22, Fla.Const., and Amend. V, VI, VIII, and XIV, U.S. Const..

Specifically, in pertinent part, Section 921.141(5), Fla.Stat. (1995) requires that the jury decide whether a sentence of life imprisonment or the death penalty is appropriate based upon the following matters:

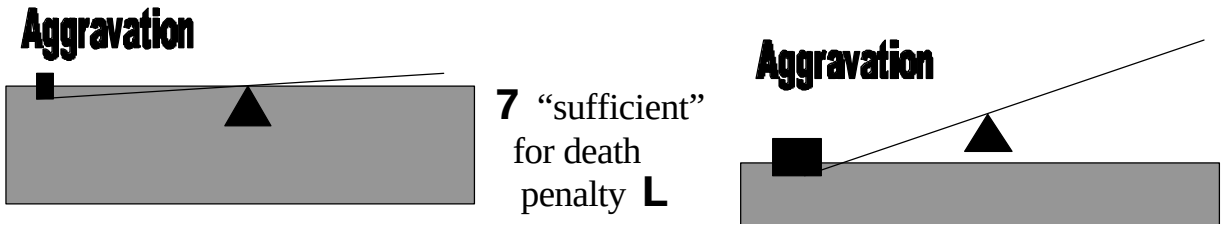
> (a) whether *sufficient* aggravating circumstances exist as enumerated in subsection (5);
> (b) whether *sufficient* mitigating circumstances which *outweigh* the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

The standard jury instruction follows the statute, in that the jury is told that it

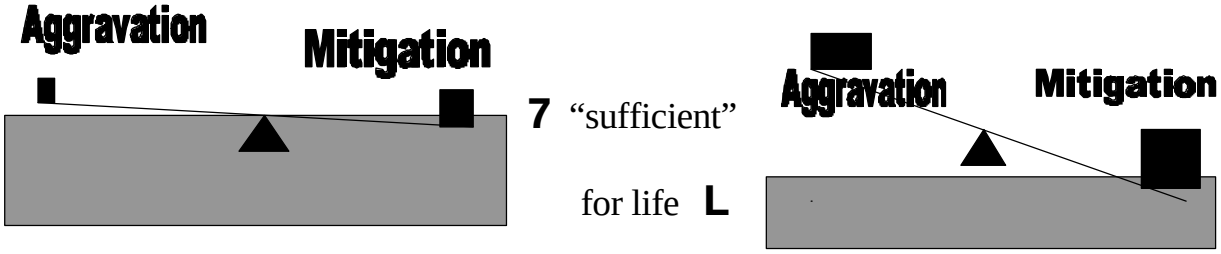
must determine "whether *sufficient* aggravating circumstances exist to justify imposition of the death penalty and whether *sufficient* mitigating circumstances exist to *outweigh* any aggravating factors found to exist," and that, "should you find *sufficient* aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that *outweigh* the aggravating circumstances." Florida Standard Jury Instruction in Criminal Cases, Penalty Proceedings-Capital Cases F.S. 921.141.

An illustration of the above language is useful to demonstrate and visualize the problems with the standard instruction. A jury ideally begins its weighing analysis at equilibrium. Assuming that the grey area at right is the area in which there are "sufficient" factors for the death penalty to be imposed, the bar of the scale would be perfectly horizontal to the that threshold level at which the death penalty is statutorily authorized. However, the term "sufficient" is a wholly subjective term stating no real standard whatever. "Sufficient" to some may be a very slight burden, resulting in a very low threshold requiring little aggravation to justify imposing the death penalty, and to others, "sufficient" to impose a death penalty may require far greater aggravation to prove that the death penalty is justified.

A legal standard of "sufficient" arbitrarily allows a different, subjective amount of aggravation in each case to determine whether the death penalty is to be imposed:



The above illustrations show the arbitrariness of the term "sufficient" as a legal standard. The problem with the "outweigh" language is depicted below where, in the same respective "sufficient" illustrations, the amount of mitigation needed for a life sentence to be imposed also arbitrarily varies from case to case:



The "outweigh" standard requires that the weight of the mitigation exceed that of the aggravation needed to justify a death sentence. Thus, when mitigation exists, unless it exceeds the level of aggravation, a death sentence is required even though the aggravation no longer justifies the death penalty. This is arbitrary and it results in the burden of persuasion being on the defendant.

Under the statute and case law, the existence of valid statutory aggravating circumstances does not necessarily justify imposition of the death penalty - there must be "sufficient" aggravation. However, once a jury finds sufficient aggravation to justify a death sentence, a defendant must then present mitigation "outweighing" that aggravation and persuade the jury that death is not appropriate. Under these instructions, given over objection, there is a "reasonable likelihood that the jury applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," ***Boyde v. California***, 494 U.S. 370, 380 (1990), because the mitigating evidence cannot be given weight to offset the propriety of the death penalty until it is arbitrarily found to "outweigh" the totality of the aggravation that has been presented. This effectively prevents relevant mitigating evidence from entering into the weighing process in violation of Due Process, art. I, Section 2, 9, 16, 17 and 22 of the Florida Constitution and the fifth, eighth and fourteenth amendments to the United States Constitution. *See* ***Penry v. Lynaugh***, 492 U.S. 302, 317-318 (1989); ***Eddings v. Oklahoma***, 455 U.S. 104, 113-114 (1982); ***Lockett v. Ohio***, 438 U.S. 586, 604 (1978).

Further, the burden of proof (persuasion) is unconstitutionally shifted to the defendant as to the ultimate question of which sentence is to be imposed. The prosecutor here argued over immediate objection that the state did not have the burden

of proving that death is the appropriate sanction. (XXIII,2349). In ***Addington v. Texas***, 441 U.S. 418 (1979), the United States Supreme Court held that, to comport with Due Process under the Fourteenth Amendment, a state must prove by clear and convincing evidence the grounds for a civil commitment. *See* ***Cooper v. Oklahoma***, 517 U.S. __, 134 L.E.2d 498, 515 (1996) ("The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty."). In a capital case, which involves deprivation of life, the state must prove the grounds for the death penalty beyond a reasonable doubt. This includes a burden of proof as to the ultimate propriety of imposition of the death penalty. Here, over objection, the prosecutor affirmatively argued to the jury that, "our burden is not to prove beyond a reasonable doubt that these young men should be sentenced to death." (XXIII, 2349). Placing the final and ultimate burden on the defendant to prove that a life sentence is the appropriate sanction denies Due Process and fundamental fairness. ***Mullaney v. Wilbur***, 421 U.S. 684 (1975). The jury recommendation based on this instruction, which was timely subject to specific objection, is invalid. If this Court declines to order a sentence of life imprisonment without parole eligibility, the death sentence must be reversed and the matter remanded for a new penalty phase.

CONCLUSION

Based upon the foregoing, Appellant asks that the death penalty be REVERSED and, if a sentence of life imprisonment without parole eligibility is not imposed, to remand for a new penalty phase and jury recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to Jeffrey A. Farina, #725254, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 25th day of May, 1999.

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