**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC 04-1610**

**ANTHONY FARINA,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA**

# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Anthony Farina's motion for post conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal concerning the 1998 trial proceedings shall be referred to as "1998 Trial ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. Anthony Farina will be referred to as Anthony Farina, Anthony or Farina. Jeffrey Farina will be referred to as Jeffrey Farina or Jeffrey. All other references will be self-explanatory or otherwise explained herein.

## REQUEST FOR ORAL ARGUMENT

Anthony Farina has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Anthony Farina, through counsel, respectfully request this Court grant oral argument.

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## STATEMENT OF CASE

Anthony Farina and his brother, Jeffrey Farina, were charged by indictment with one count of first degree murder, three counts of attempted first degree murder, armed robbery, burglary and conspiracy to commit murder. Anthony and Jeffrey plead not guilty to all charges and requested a jury trial. They were tried

together and convicted on all counts. The trial court sentenced them to death for the murder of Michelle Van Ness and to six consecutive life sentences on the remaining counts. The jury recommendation as to Anthony was seven to five in favor of death; the recommendation for Jeffrey was 9 to 3 in favor of death. The trial judge sentenced the Farina brothers to death. This Court reversed the death sentences and remanded for a new penalty phase proceeding due to error in jury selection. Farina (Anthony) v. State, 679 So. 2d. 1151(Fla. 1996); Farina (Jeffery) v. State, (680 So. 2d 392, 396-99 (Fla. 1996).

Once again, the Farinas were tried together over defense objection and sentenced to death. This time, the state presented, over defense objection, extensive victim impact testimony, had a witness read portions of the Bible suggesting biblical law required the jury to impose a death sentence, repeatedly misstated the law and facts and made improper arguments during closing argument. The jury recommendation for death changed from the seven to five vote in the initial penalty phase to a vote of twelve to zero.

Anthony Farina filed a timely Notice of Appeal. Appellate counsel filed a brief raising twelve issues[1]: 1) the State improperly used peremptory challenges to strike African-American jurors; 2) the trial court erred in denying a motion in limine to exclude a tape of a conversation between Anthony and Jeffery; 3) the trial court erred in denying a motion to suppress the

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1 Two of the claims were raised in a supplemental brief which related to the fundamental disparity of Anthony's death sentence in light of this Court's opinion

conversation; 4) the trial court erred in denying his motion to sever Anthony's resentencing from Jeffery's resentencing; 5) the trial court erred in admitting victim impact evidence, in allowing the victim impact evidence to become a feature of the trial and refusing to give a limiting instruction; 6) the trial court erred in finding the HAC aggravator; 7) the trial court erred in finding the CCP aggravator; 8) the trial court erred in finding the avoid arrest/witness elimination aggravator; 9) Anthony's death sentence is not proportionally warranted; 10) Florida's death penalty is unconstitutional because a) the statutory aggravating factors in §921.141 do not genuinely limit the class of persons subject to the death penalty and are unconstitutionally vague and arbitrary, both facially and as applied; b) the requirement that a defendant must prove that "sufficient mitigating circumstances exist which outweigh the aggravating considerations found to exist" is unconstitutonally vague and arbitrary; c) requiring the defendant to prove sufficient mitigating circumstances exist that outweigh the aggravating circumstances violates due process; d) the statutory aggravating factors are applied by juries, judges and this Court in an arbitrary, capricious manner which violates due process, equal protection and cruel and/or unusual punishment; e) the failure to require the state to provide notice of the statutory aggravating factors used to justify the imposition of the death penalty violates due process, denies effective assistance of counsel and the right to prepare a meaningful defense; f) because the substance of the statute is defined on a case by case basis by the court and not the legislature; g) the failure to require a finding by the jury as to what aggravators were found and weighed denies meaningful appellate review; g) death by electrocution constitutes cruel and unusual punishment; 11) Anthony is entitled to a new sentencing proceeding in light of the actual shooter's life sentence;

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reversing Jeffery's death sentence during the pendency of Anthony's appeal..

12) death is disproportionate compared to cases where the triggerman received life. This Court affirmed Anthony's sentence but reduced Jeffrey's sentence to life because Jeffrey, the undisputed triggerman, was 16 years old at the time of the offense.[2] Farina (Anthony) v. State, 801 So. 2d 44 (Fla. 2001); Farina (Jefferey) v. State, 763 So. 2d 302, 303 (Fla. 2000). In Anthony's case, this Court held: 1) the trial court's ruling accepting the state's reasons for striking the African-American jurors was not clearly erroneous; 2) Anthony's taped statement was properly admitted into evidence as proof of his intent at the time of the offense; 3) the trial court appropriately struck Anthony's motion to suppress; 4) the trial court did not abuse its discretion in refusing to grant Anthony's motion to sever Jeffery's statements as a violation of his right to confront witnesses against him and the right to an individualized sentencing process because the jury could differentiate between the defendants; 5) the trial court did not err in admitting victim impact evidence , did not allow the evidence to become a feature of the trial and gave an appropriate limiting instruction; 6) the HAC aggravator was properly found because it focuses on the victim's perception rather than the perpetrator's; 7) the CCP aggravator was supported by evidence that the robbery was planned, the brothers purchased bullets for the weapon and Anthony and Jeffrey discussed the shooting of the employees after they were placed in the cooler but before Jeffrey shot them; 8) the avoid arrest/witness elimination aggravator, which requires proof that the sole or dominant motive for the killing was to avoid arrest, was proven based on the fact that the brothers knew the victims, the victims did not resist and that

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2 Anthony was 18 years old at the time of the offense with an undisputed emotional age of 14, a factor which was given only moderate weight by the trial court.

Jeffrey shot the victims with the intent to kill them; 9) 11) and 12)[3] that Anthony's death sentence is proportional because he was equally culpable as Jeffrey, and Jeffrey's life sentence is irrelevant to Anthony's proportionality analysis since Jeffrey was 16 years old and that Anthony's death sentence is proportional in comparison to other capital cases; 10) Florida's death penalty statute is constitutional. Farina (Anthony) v. State, 801 So.2d 44 (Fla. 2001). Justice Anstead, dissenting, urged reversal of Anthony's death sentence:

3 This Court addressed issues 9, 11 and 12 together.

> While I agree with almost all of the court's analysis, I cannot agree that the defendant here is not entitled to have a new sentencing before a judge and jury that, unlike the judge and jury here, are informed and able to fully consider the critical fact that the codefendant and actual killer has received a life sentence for the same murder.
>
> The majority fails to consider that both brothers received a death recommendation by the *same jury* and were sentenced to death by the *same judge, before* our decision in *Brennan.* Hence, the sentencing jury and judge were operating under the misconception and false assumption that *both* Jeffery and Anthony would be put to death for their participation in this crime, while in reality it turns out that the more culpable of the two , the actual killer will not be put to death. Such patent disparity has consistently resulted in this Court either reducing a codefendant's sentence to life or directing a new sentencing proceeding where the sentencing jury and judge are properly informed of this critical factor. We should do no less here.

Farina, 801Farina v. Florida, 536 U.S. 910 (2002)

The postconviction court summarily denied Claims I, II, IV- XI and XIII as procedurally barred and/or without merit and partially denied Claim III as procedurally barred, by order dated August 8, 2003. [4] Vol. III, p. 478. The postconviction court did not rule on the amended claims prior to the evidentiary hearing. The evidentiary hearing was held December 8, 2003.

Trial counsel, William Hathaway, testified that his theory of defense in Mr. Farina's case was that Anthony was not the active participant, he did not fire the gun and he did not "wield" the knife. Vol. I, p. 30. He also believed that Anthony had additional mitigators which did not apply to Jeffrey. Id. He further stated that he would have liked to call Jeffrey as a witness at trial but

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4 The lower court's order was not included in the Record on Appeal. The cite is to a later Order wherein the lower court references the August 8, 2003 Order. Counsel has filed a Motion To Correct Record with this Court but as of the filing of this

was prevented from doing so because of Jeffrey's status as a co-defendant. Vol. I, p.31. Trial counsel stated that if he could, he would have presented testimony from Jeffrey supporting his theory. He agreed that he would have, if Jeffrey had been available as a witness, presented testimony from Jeffrey establishing that Jeffrey was in control during the robbery, that the shooting was his idea and not Anthony's, that he alone stabbed the victim without Anthony's help, and, that no one, including Anthony, could have stopped him from killing on that day. Vol. I, p.31-32.

Trial counsel conceded that it was important to present evidence that Jeffrey was the hot-tempered, aggressive brother and that Anthony was "laid back" and passive. Vol. I, p.32-33. Counsel also conceded that prior to trial he reviewed a 1992 law enforcement interview of Susen Griffith, Jeffrey and Anthony's mother, where Ms. Griffith told law enforcement that Jeffrey was the more hot-tempered and violent of her two sons. Vol. I, p. 33-34

Susen Griffith testified that Anthony was "more of a follower." Vol. I, p. 43. Jeffrey, on the other hand "had a very short fuse and a temper." Id. Ms. Griffith described an incident where Jeffrey "punched the door and busted the window" when he was at school. Id. He used so much force that he broke "the bone in his hand." Vol. I, p. 48. She also said that Jeffrey would punch the walls or other things when he got mad but that Anthony was not violent like that. Vol. I, p. 44. Jeffrey's anger problem was severe enough that he was in counseling at the recommendation of school authorities. Vol. I, p.47-48. She also said that Jeffrey was the leader of the two boys. Id. She also confirmed that the gun belonged to Jeffrey. Id. Anthony, unlike Jeffrey, never showed an interest in guns and knives. Vol. I, p. 45. Further, Anthony never owned a gun. Id.

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brief, this Court has not ruled on the Motion.

Katrina Bergenty, Jeffrey and Anthony's sister, testified that Jeffrey had a shorter temper and was the leader between the two brothers. Vol. I, p.50-51.

Tina O'Neill, a family friend, described Jeffrey as having a "dark side," where he would become very angry, pick fights with Anthony and usually win the fights. Vol. I, p.55-56. Ms. O'Neill also confirmed that Jeffrey was frequently suspended for fighting at school and she had often seen him punch holes in doors and walls. Vol. I, p.57-58. Anthony, to her knowledge, did not get in trouble at school for fighting. Vol. I, p. 58. Ms. O'Neill also confirmed that Jeffrey was the leader of the two. Id. She also confirmed that it was common knowledge within the household where Jeffrey lived that he had a gun and that, in fact, her husband saw him with the gun intending to commit suicide. Vol. I, p.64, 66. Ms. O'Neill also confirmed that Jeffrey owned knives, Vol. I, p. 67, and that Anthony did not. Vol. I, p.70.

Jeffrey Farina testified that the Florida Supreme Court vacated his death sentence on appeal and imposed a life sentence because he was sixteen years old at the time of the crime. Vol. I, p.74. Jeffrey explained that the family moved into the Rollie Motel a few months prior to the crime. Id. Jeffrey had actually rented the motel room under the name Buddy Chapman. Id. Jeffrey used the name and identity of Buddy Chapman because "it was easier to function with an identity that stated I was 20 than as a sixteen year old." Vol. I, p. 75.

Jeffrey described his relationship with Anthony as different from a typical older/younger brother relationship. Id. The decision making was shared by the brothers. Further, Jeffrey made a number of significant decisions for Anthony, including a decision in 1991 to refuse to move to Georgia with their mother. Vol. I, p. 75-76. Jeffrey also helped Anthony get a job and would help Anthony "straighten" out any problems at work, either by fixing the problem himself or talking

to Anthony's boss to help resolve problems. Vol. I, p. 77. Jeffrey admitted that he was violent and had a bad temper in 1992. Vol. I, p.94. Anthony, however, was more passive and considered "laid back." Vol. I, p. 95.

Jeffrey also admitted that in 1992 he bought a gun, in part to protect himself and the family from the "crack dealers and prostitutes" that also lived at the Rollie Motel. Vol. I, p. 79. Jeffrey described his near suicide attempt with the gun in early 1992, approximately two to three months prior to the Taco Bell robbery and shooting. Jeffrey explained that he "didn't care whether [he] lived or died. And I'm not sure what was everything in my mind, but it was something that I thought hard about." Vol. I, p. 81. Jeffrey also said that he slept with the gun every night, envisioning himself as the protector of his family, including protecting his older brother, Anthony. Vol. I, p. 82.

Jeffrey conceded that Anthony had approached him about committing a robbery and had asked to borrow a knife. Vol. I, p. 82. Ultimately, Jeffrey and Anthony prepared for the Taco Bell robbery together, buying the rope, gloves and bullets. Vol. I, p. 83. However, the details of the robbery, including the roles the brothers would play, were not planned. Id.

On the night of the robbery, Jeffrey described a fateful conversation the brothers had while sitting outside the Taco Bell in their car, waiting for the Taco Bell to close. Anthony told Jeffrey that he didn't want to go through with the robbery, that he didn't think they could get in and he wanted to turn back. Vol. I, p. 84. Anthony further said, "I don't think we should do, this, let's go home." Vol. I, p.108. Jeffery told Anthony that he'd come all this way and "he wasn't turning back with nothing." Vol. I, p.84-85. At that point, Jeffrey felt that he was in charge. Vol. I, p. 85. Jeffrey described the robbery. He explained that he had the gun and Anthony had a knife. Vol. I,

p. 86. When they were tying up the victims, Anthony held the gun briefly, but then Jeffery took the gun back. Vol. I, p. 87. Jeffrey was the one who asked the victims to move to the cooler. Id. He also described the brothers' discussion about the fact that Anthony had been recognized. In response to Anthony's concern, Jeffrey said, "I'll shoot them." Vol. I, p. 88. Jeffrey described that at the time of the shooting the victims "didn't mean anything" to him and that no one, including Anthony, could have stopped him from killing. Vol. I, p. 89. Jeffrey confirmed that Anthony was in the cooler, behind Jeffrey, during the murder and attempted murders. Vol. I, p. 90. He also confirmed that after the gun misfired, he took the knife from Anthony and stabbed Kimberly Gordon. Id. At no point did Anthony touch Ms. Gordon during the stabbing. Vol. I, p. 90-91. Jeffrey further confirmed that Anthony was not the mastermind of the robbery. Vol. I, p. 95.

After the robbery, Jeffrey remained in charge, making a number of decisions for the brothers. Jeffrey directed Anthony to go to Park's because Jeffery decided to dispose of the remaining portion of rope, and the gun, gloves and knife at Park's. Vol. I, p. 91. Jeffrey also decided the "story" they would tell their mother to explain how they got the money. Vol. I, p.92 .

Jeffrey also testified that he did not testify for his brother at trial because his attorney advised him against it. Vol. I, p. 95. Jeffrey also testified that his testimony at the postconviction hearing was consistent with what he had told Dr. Krop in 1992. Vol. I, p. 115.

Dr. Clifford Levin, a psychologist retained by Anthony's trial counsel, also testified. Dr. Levin was accepted as an expert in forensic psychology. Vol. I, p. 123. Dr. Levin evaluated Anthony in 1992 and 1998. Id. Dr. Levin diagnosed Anthony with the dominant feature of Dependent Personality Disorder and some features of an Antisocial Personality Disorder. Vol. I, p. 124,

162, 169-170. Dr. Levin explained that he diagnosed Anthony with a Dependent Personality Disorder based on Anthony's immaturity, his immature personality, his tendency to defer to others, and lack of a sense of self. Vol. I, p.125. At the time of the offense, Anthony was functioning at the level of a 14-year-old. Id.

Dr. Levin testified that, in preparation for the post conviction hearing, he was able to review Dr. Harry Krop's report on Jeffrey and also to interview Jeffrey at the Marion correctional Institute. Vol. I, p. 126. Prior to this time he had been unable to interview Jeffrey or review his file due to attorney client privilege.

Dr. Levin testified that Dr. Krop determined that Jeffrey suffered from brain damage caused by a head injury from a car accident which occurred when he was five. Vol. I, p. 127. Dr. Krop also determined that Jeffrey developed an explosive personality, causing him to fly into a rage and be very aggressive. Id. Dr. Krop's report also revealed that Dr. Krop found Jeffrey to be "pseudomature" in that he appeared to be a mature, responsible person who could manage his actions but was impulsive and immature in the way he carried out his actions. Id.

Dr. Levin also determined, based on Dr. Krop's report, his interview with Jeffrey and other family members, that Jeffrey's relationship with Anthony was one of interdependence and aggression. Vol. I, p. 128. "There were periods of time when [Jeffrey] was very physically assaultive of [Anthony]." Id. Jeffrey was a "very volatile young man." Id.

Dr. Levin also confirmed that Jeffrey's statements to him were consistent with Jeffrey's statements to Dr. Krop in 1992. Specifically, Jeffrey's description of himself and the events in 1992 were consistent with Dr. Krop finding Jeffrey to have impulse control problems, violent temper outbursts and an underlying depression where he did not care about what might happen to

him in his life. Vol. I, p. 129.

Dr. Levin testified that the new information he received from his interviews with Jeffrey, the family members, and Dr. Krop's report, lended new credibility to his earlier finding that Anthony had a passive and dependent personality to the extent that Dr. Levin believed Anthony was an extremely passive and dependent person. Vol. I, p. 130. Dr. Levin further concluded that Anthony was under the substantial domination of Jeffrey, based on years of the brothers living together with Jeffrey's violent temper and outbursts and aggressive behavior. Vol. I, p. 131-132. The court denied Mr. Farina's Motion To Vacate Judgement of Conviction by Order dated April 8, 2004 and filed April 12, 2004. (Vol. III, p. 478-495). Farina timely filed a Motion For Rehearing April 21, 2004. The court denied the Motion for Rehearing by Order dated July 8, 2004 and filed July 12, 2004. (Vol. III, p. 506-508). This appeal follows.

## SUMMARY OF ARGUMENT

1.The lower court erred in summarily denying a portion of Claim III, finding that consideration of Jeffrey's life sentence as newly discovered evidence was procedurally barred because this Court had considered it in its proportionality review and that "Jeffrey's sentence would be irrelevant as a matter of law in any re-sentencing for Anthony." The lower court also erred and made erroneous factual findings in denying the remainder of Claim III, finding that the testimony from the defense witnesses does not exculpate Anthony and that the testimony of the state witnesses and victims at trial disproves Anthony's claim that his brother was the more violent and aggressive of the two brothers and was the leader.

2.The lower court erred in finding that Anthony's amended claims were

procedurally barred because he failed to comply with Florida Rule of Criminal Procedure 3.851 when the lower court had specifically ordered that Anthony could amend his motion for postconviction relief and the State failed to object to the introduction of testimony on the amended claims.

3.The lower court erred in denying Claim V, that trial counsel rendered ineffective assistance of counsel in failing to adequately investigate and present evidence that Anthony Farina acted under the domination of Jeffrey Farina and that Jeffery Farina's history of aggression and violence, coupled with Anthony's dependent personality disorder, resulted in Anthony deferring and submitting to Jeffrey.

4. The lower court erred in denying the following claims without an evidentiary hearing because they were properly pled, presented facts upon which relief could be granted and were not procedurally barred:

A. Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar prohibiting counsel from interviewing jurors violates Anthony Farina's rights under the the United States Constitution.

B. Counsel's failure to make adequate objections to the substance of the victim impact testimony violated Anthony Farina's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

C. The newly discovered evidence of his co-defendant's life sentence, which the sentencing judge and jury did not hear, warrants a new sentencing where

the finder of fact can reweigh the mitigating and aggravating factors (This claims is also argued in Argument I).

D. Trial counsel rendered ineffective assistance in voir dire in that counsel failed to strike prejudiced jurors and failed to use all peremptory challenges.

E. Trial counsel rendered ineffective assistance of counsel by failing to understand capital jurisprudence and trial court rendered counsel ineffective by failing to provide funds for co-counsel and expert assistance.

5. The lower court erred in denying the following claims that raised legal issues: A. Florida's capital sentencing scheme is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of death, for violating the constitutional guarantees prohibiting cruel and unusual punishment, execution by electrocution is unconstitutional, the death penalty statute fails to provide a meaningful, comprehensible standard of proof and fails to ensure adequate guidance to jurors, that the aggravators are applied in a vague and inconsistent manner, and that the felony murder rule creates an unconstitutional presumption of death.

B. The Florida statute setting forth the aggravating factors, specifically the HAC, CCP and prior violent felony aggravator is facially vague and overbroad in violation of Anthony Farina's rights under the United States Constitution. Further, the jury instructions failed to cure the arbitrary and vague nature of the statute and the state failed to prove the aggravators beyond a reasonable doubt and to the extent that counsel failed to preserve these issues he rendered ineffective assistance.

C. Anthony Farina's death sentence relies upon an unconstitutionally vague aggravator, murder in the course of a felony, and to the extent that trial counsel failed to object to the jury being instructed on this aggravator, rendered ineffective assistance of counsel.

D. Anthony Farina's death sentence relies upon an unconstitutionally vague aggravator, cold, calculated and premeditated, which did not apply to his case and that the instructions given to the jury were erroneous.

E. The jury was misled by comments and instructions which diminished the jury's sense of responsibility under Caldwell v. Mississippi, 472 U.S. 320 (1985) and to the extent that counsel failed to object, he rendered ineffective assistance of counsel.

F. Florida's sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) and the role of the jury fails to satisfy the requirements of the Sixth, Fourteenth and Eight Amendments.

6. Cumulative error deprived Anthony Farina of his right to a fair trial and resulted in his death sentence.

## STANDARD OF REVIEW

The standard of review is de novo. Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 2000).

### ARGUMENT I

**THE LOWER COURT ERRED IN SUMMARILY DENYING PART OF CLAIM III REGARDING NEWLY DISCOVERED EVIDENCE OF JEFFREY'S LIFE SENTENCE AND ERRED IN DENYING ANTHONY FARINA'S CLAIM THAT THE NEWLY DISCOVERED EVIDENCE WARRANTS A NEW PENALTY PHASE. THESE RULINGS VIOLATE ANTHONY FARINA'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

**A. The lower court erred in finding that Anthony Farina's claim of newly discovered evidence of his brother's life sentence was procedurally barred.**

Anthony Farina raised the claim that the newly discovered evidence of his sixteen-year-old brother's life sentence, in light of the undisputed fact that his brother was the actual killer, coupled with the newly discovered testimony of his brother about facts leading up to and during the crime, was of "such nature that it would probably produce a [life sentence] on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The State argued this claim has "no factual basis" as evidenced by this Court's rejection of it on direct appeal, and, because this issue was raised on direct appeal, it is procedurally barred. Vol. III, p. 481. The lower court "partially agreed with the state." Id. In doing so, the lower court misapprehended Anthony Farina's argument and applied an incorrect legal analysis.

Specifically, the lower court held: "First, the issues of the *proportionality* of the death sentence in light of the co-defendant's life sentence and the victim impact evidence were raised and rejected on direct appeal. *Farina, supra* at 52-53;55-56. Therefore, this portion of the claim is procedurally barred. Even if it were not, the supreme court specifically held, *inter alia*: 'when a defendant is sixteen years of age, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating factors as a matter of law. In this context then,

Jeffrey's less severe sentence is *irrelevant to Anthony's proportionality review* because the aggravation and mitigation in their cases are per se incomparable.' Id., at 56." (Order Denying Motion To Vacate Judgement, Vol. III, p. 481). (emphasis added).

In his Motion For Rehearing, Anthony Farina alerted the lower court to the fact that it had misapprehended his argument and misapplied the law. Specifically, Farina argued that proportionality review is separate from and does not impact the analysis the lower court is required to conduct in assessing a newly discovered evidence claim. (Motion For Rehearing, Vol. III, p. 497) The lower court is required to assess whether the claim of Jeffrey's life sentence is a fact which a new sentencing jury should be able to consider and, if it considers it, whether the evidence would probably produce a life sentence on retrial. Id. This analysis is particularly critical in light of the United States Supreme Court's emphasis on jury determination of punishment and the importance of a capital jury having all the facts necessary to make an informed sentencing decision. Id. Further, this argument is in keeping with the United States Supreme Court's holding that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2965-2964, 57 L.Ed.2d 973 (1978).

The State, in its Response To Motion For Rehearing, reasserted its argument and stated that the lower court had correctly decided the claim was procedurally barred because it had been decided on direct appeal. Vol. III, p. 502. The State further argued the claim was "frivolous," and "flies in the face of common sense to suggest that the res judicata procedural bar (which Farina

completely ignores) does not apply to this claim." Vol. III, p. 503.

The lower court ruled in its Order Denying Motion for Rehearing that "whether a proportionality review is undertaken or new evidence is considered, the result is the same. Both require consideration of the weight of aggravating and mitigating circumstances. Again, as the Florida Supreme Court held: 'when a defendant is sixteen years of age , his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating factors as a matter of law. In this context then, **Jeffrey's less severe sentence is irrelevant to Anthony's proportionality review** because the aggravation and mitigation in their cases are per se incomparable.' Id., at 56 (sic) As the sentences are per se incomparable, **Jeffrey's sentence would be irrelevant as a matter of law in any resentencing for Anthony**." Vol. III, p. 506. (Emphasis added) The lower court's ruling was a misapplication of law and the relevant standard dictated by this Court and the Federal courts and violated Anthony's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Farina's newly discovered evidence claim presented to the lower court is separate and distinct from this Court's proportionality review undertaken on Anthony's direct appeal. A newly discovered evidence claim is properly raised in a post-conviction motion. Richardson v. State, 546 So.2d 1037 (Fla. 1989). The 1984 amendment to Florida Rule of Criminal Procedure 3.850 replaced the writ of error coram nobis. Id. at 1038, 1039. "The writ of error coram nobis is only concerned with questions of fact, . . . and the trial court is best equipped to make factual determinations. The procedure logically places fact questions in the trial court first, where they belong." Id. (Internal citations omitted). Florida Rule

of Criminal Procedure 3.851, which applies to capital proceedings, is an extension of Florida Rule of Criminal Procedure 3.850.

Under Florida and federal law, there are two requirements needed for relief based on newly discovered evidence.

> First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Hallman, 371 So. 2d [482], 485 [(Fla. 1979)[*abrogated on other grounds*, Jones v. State, 591 So. 2d 911(Fla. 1991)]. Second, "the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. Id.

Scott v. Dugger, 604 So. 2d 465, 468 (Fla.1992). *See also* Robinson v. State, 707 So.2d 688, 691 n.4 (Fla. 1998); Jones v. State, 591 So. 2d 911, 914-915 (Fla. 1991).

In determining whether the newly discovered evidence would probably produce a life sentence at retrial, the post conviction court must consider the evidence adduced at the penalty phase and whether there is a probability that the cumulative effect of it with the new evidence, **from the point of view of its possible effect on the jury, might raise in one juror a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.** (emphasis added). See Kyles v. Whitley, 514 U.S. 419, at 434 (1995). Further, the analysis should not hinge on the number of jurors voting for death: " if there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that the jury would change its recommendation." Bertoletti V. Dugger, 883 F.2d 1503, 1519 n.12 (11th Cir. 1989). "The

assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency." Strickland v. Washington, 466 U.S. 668 at 695, 104 S.Ct. 2052 at 2068(1984).

Proportionality review undertaken by this Court is a comparison of all Florida death penalty convictions to ensure only the most aggravated and least mitigated murders receive death. It is also an analysis of whether the death penalty is appropriate as a matter of law in a given case. "Proportionality review requires a discrete analysis of the facts, entailing a qualitative review by this Court of the underlying basis for each aggravator rather than a quantitative analysis. . . . It is not a comparison between the number of aggravating and mitigating circumstances." (Anthony) Farina v. State, 801 So. 2d 44 (Fla. 2001).

This Court has described the source and nature of its proportionality review:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of circumstances in a case, and to compare it with other capital cases*. Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990) . . . The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against cruel and unusual punishments. Art. I, § 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover,

> proportionality review in death cases rests at least in part on recognition that death is a uniquely irrevocable penalty, requiring a more intense level of judicial scrutiny or process than would lesser penalties. Art. I, § 9, Fla. Const. . . . Thus, proportionality review **is a unique and highly serious function of this Court**, the purpose of which is to foster uniformity in death-penalty law.

Urbin v. State, 714 So. 2d 411, 416-417 (*quoting* Tillman v. State, 591 So.2d 167, 169(emphasis added, citations and footnote omitted.) Thus, the distinction between proportionality review and a lower court's analysis of the effect of newly discovered evidence can be summarized as follows: 1) proportionality review by this Court focuses on whether the facts of a case legally rise to the level of a death penalty case in and of themselves and compared with other death penalty cases; 2) newly discovered evidence claims, on the other hand, are fact based inquiries wherein the lower court must ask, in light of **all the facts in the case**, whether the highly relevant, newly discovered fact of the actual killer's life sentence, and the additional testimony presented at the postconviction hearing, would cause a reasonable juror to change their recommendation and vote for a life sentence on retrial. The lower court's analysis cannot be performed according to the law without considering the fact that the jury never heard that the actual killer now has a life sentence. The lower court failed to apply the correct law and explicitly found that Jeffrey's life sentence was "irrelevant as a matter of law." This finding was erroneous, violated Anthony's Fifth, Sixth, Eighth and Fourteenth Amendment rights and should be reversed by this Court. This Court should grant Anthony a life sentence or, in the alternative, remand his case for a new penalty phase before a new jury that can be instructed that the actual killer received a life sentence.

**B.The Lower Court Made Clearly Erroneous Factual Findings and Erred as a**

**Matter of Law When it Ruled The New Facts Do Not Warrant a New Penalty Phase Proceeding**

The lower court, after finding that Jeffrey's new life sentence was "irrelevant," proceeded to analyze the "second" part of "Ground I." Vol. II, p. 481.[5] The lower court characterized this claim as the new evidence showing the substantial domination of Jeffrey over Anthony. Id. The lower court stated that the testimony of the mother, brother, sister or psychologist does not exculpate the defendant. Id. The court further found that the testimony of the victims at the 1998 trial was credible and "clearly contradicts the defense claim" that Jeffrey dominated Anthony. Id. The lower court based its decision rejecting Jeffrey's testimony by quoting from the victims' 1998 trial testimony stating that because Anthony did most of the talking they thought he was in charge. The lower court stated that "if there was any reason for the victims to contrive their testimony to prejudice one brother over the other, it would be contrived against Jeffrey." Vol. III, p483. The lower court's finding was clearly erroneous and neglected to mention and analyze all the facts presented, including but not limited to, Jeffrey's newly discovered life sentence, testimony from trial counsel about statements made to

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5 Because the lower court incorrectly found part of this claim to be procedurally barred, i.e., Jeffrey's life sentence, its analysis is inherently flawed and should not

law enforcement by Jeffrey and Anthony's mother prior to the first trial, and testimony referencing statements made by Jeffrey to his psychologist shortly after his arrest but also prior to the first trial.

1.Jeffrey Farina's Testimony

Jeffrey Farina testified that he and Anthony acted as equals, rather than as older and younger brothers, and that Jeffrey often took a dominant role in their family (Vol. I, p. 75-76). Jeff made major life decisions for Anthony, found him a job, and helped Anthony with his work (Vol. I, p. 75-77). Jeffrey saw himself as the protector of his family, and bought a gun and slept by the door with the gun in furtherance of that role. (Vol. I, p. 79, 81-82).

Jeffrey also testified to incidents evidencing his emotional instability around the time of the robbery. He described himself as quick to anger: "One minute I could be laughing and joking and the next minute I could just be ready to start swinging on people"(Vol. I, p. 94 ). He also described his near suicide in the time frame leading up to the robbery: "At one point I had the gun loaded and to my head, and I'm not sure what was going through my mind at the time, but I was very close to pulling the trigger."(Vol. I, p. 80). He further stated: "I just, I didn't care whether I lived or died. And I'm not sure what was everything in my mind, but it was

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be upheld on appeal.

something that I thought hard about." (Vol. I, p. 81).

Shortly thereafter, Anthony asked Jeffrey if he could borrow a knife for a robbery that he was planning with another person, and Jeffrey said no (Vol. I, p. 82). Ultimately, Jeffrey became involved in plans to commit this robbery. "I don't know who first brought it up that me and him would do it" (Vol. I, p. 82-83). To prepare for the robbery, Jeffrey and Anthony bought gloves, rope, and bullets for Jeffrey's gun (Vol. I, p. 83). The brothers did not discuss what their respective roles would be during the robbery (Vol. I, p. 83).

The night of the robbery, Anthony, Jeffrey, and J.C. Henderson drove to the Taco Bell (Vol. I, p. 84). After watching the restaurant for a while, Anthony told Jeffrey, "I don't think we should do this, let's go home" (Vol. I, p. 108). Jeffrey responded, "I came all this way and I wasn't turning back for nothing." Jeffrey testified that, at that point, he felt that he was in charge because, "at that point he wanted to go home and if I would have said, okay, let's go, we would have went home and not went through with it" (Vol. I, p. 85).

After they entered the Taco Bell, Anthony took the active role in obtaining the money and talking to the victims only because he knew the restaurant's procedures (Vol. I, p. 85). Even though Anthony seemed to have the active role, Jeffrey was in charge (Vol. I, p. 85). Jeffrey told Anthony to put the money in different bags,

and Anthony complied with Jeffrey's directions (Vol. I, p. 86). After the boys secured the victims in the cooler, they went to the manager's office (Vol. I, p. 87). Anthony told Jeffrey that the victims could recognize him and asked Jeffrey what they should do (Vol. I, p. 88). Again, Jeffrey took charge, telling Anthony that he would shoot the victims (Vol. I, p. 88). Anthony responded that it was Jeffrey's decision (Vol. I, p. 88). Jeffrey testified that, at that point, Anthony could not have stopped him (Vol. I, p. 89).

Anthony moved the victims to the freezer and then left the freezer, standing behind Jeffrey (Vol. I, p. 89). Anthony remained behind Jeffrey as he fired six shots (Vol. I, p. 90). The gun misfired, so Jeffrey "turned around and took the knife from [Anthony] and handed him the gun." (Vol. I, p. 90, 104). Jeffrey testified that he then "turned around and stabbed Kimberley" (Vol. I, p. 90, 104). Anthony was behind Jeffrey the whole time and never touched Kimberly or the other victims (Vol. I, p. 90-91, 104).

After leaving the restaurant, Anthony again turned to Jeffrey for direction, asking him "[W]hat were we going to do now" (Vol. I, p. 91). Jeffrey told Anthony to drive to Park's Seafood, where he could dispose of the rope, gloves, gun, and knife (Vol. I, p. 91). Anthony complied (Vol. I, p. 91). Jeff also made a decision regarding how they would explain the robbery money to their mother and, again,

Anthony complied with Jeffrey's direction (Vol. I, p. 92).

Jeffrey definitively testified that Anthony was not the mastermind behind the murder or the robbery (Vol. I, p. 95).

2.Dr. Levin's Testimony

Dr. Levin testified that he evaluated Anthony in 1992 and 1998. Dr. Levin diagnosed Anthony with a dependent personality disorder and found him to have the emotional maturity of a fourteen year old child (Vol. I, p. 123-125). In 2003, Dr. Levin was once again retained and this time was asked to consider additional information which was not previously available: an interview with Jeffrey Farina and Dr. Harry Krop's confidential evaluation of Jeffrey Farina.(Vol. I, p. 126). Based on the new information, Dr. Levin concluded that :

> Anthony had a pattern of deferring to his brother in order to maintain peace. This is a very volatile, Jeffrey is a very volatile young man and Anthony's behavior was a way to pacify and try to avoid conflicts with his brother because his brother tended to precipitate that within the family.

(Vol. I, p. 128). Based on the new information, Dr. Levin described Anthony's psychological profile as that of:

> a deferring person, not incapable of

making independent thought, he clearly made some independent thoughts in planning this robbery, but someone who was the more passive and extremely passive kind of personality,

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(Vol. I, p. 130). Based on this information, Dr. Levin opined:

> there was substantial domination of Jeffrey over Anthony. It was based on years of living together with a pattern of Jeffrey being an explosive personality, Anthony deferring to this type of aggressive behavior and dominance in that regard. It was my opinion that, although Anthony was very much involved with the robbery and the events leading to the murder of Michelle Van Ness, that the actions would not have been – the murder and attacks on the victims would not have taken place if Anthony was alone.

(Vol. I, p. 121-122).

Dr. Levin further testified that Jeffrey's testimony and interview with him was consistent with what he had told Dr. Krop in 1992 when both brothers faced the death penalty. Specifically, Jeffrey's description of himself and the events in 1992 were consistent with Dr. Krop finding Jeffrey to have impulse control problems, violent temper outbursts and an underlying depression where he did not care about what might happen to him in his life. Vol. I, p. 129.

Dr. Levin's evaluation of Anthony and Jeffrey's relationship and Jeffrey Farina's testimony and life sentence, constitute newly discovered evidence which could not have been discovered by Mr. Farina or his counsel at the time of the penalty phase.

3. Trial Counsel's Testimony

Susen Griffith, Anthony and Jeffrey's mother, testified at the post conviction hearing that Jeffrey was the more violent of her sons. Trial counsel admitted that prior to trial he reviewed a 1992 law enforcement interview of Susen Griffith, Jeffrey and Anthony's mother, where Ms. Griffith told law enforcement that Jeffrey was the more hot-tempered and violent of her two sons. Vol. I, p. 33-34. While not newly discovered evidence, trial counsel's testimony supported a finding that the presentation of Jeffrey's violent temper as proof of Jeffrey's dominion over Anthony was not a recent fabrication but the true history of the Farina brothers since the beginning of these proceedings.

4. The Lower Court's Ruling

The lower court fails to include the above cited facts in its analysis, other than to state that the court does not believe the testimony of the brother, sister, mother and psychologist "exculpate the defendant." Vol. III, p. 481. Exculpatory is defined as "tending to clear from a charge of fault or guilt." Webster's Encyclopedic Unabridged Dictionary of the English Language 676 (3d ed. 1996) This finding evidences that the lower court did not understand the nature of Anthony's claim and possibly misunderstood Florida and

federal law as it relates to mitigation.[6] Anthony has never disavowed his involvement in the robbery and murder. Rather, Anthony's claim is that Jeffrey's violent personality, explosive temper and dominion over Anthony lessens Anthony's moral culpability as it relates to mitigation in sentencing and the testimony rebuts the statutory aggravators of CCP and HAC. Florida law has long recognized domination by another as mitigation. Fla. Stat. 921.141(6)(e) ("The defendant acted under extreme duress or the substantial domination of another person.") Further, while the domination has to be substantial to meet the statutory mitigation, the domination doesn't have to be substantial to be considered as a mitigator by the finder of fact. The level of domination may determine the weight of the mitigation but, regardless of the weight, it is still a fact that should be allowed to be considered by a sentencing jury. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Further, the lower court did not

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6 The trial court later opines that Jeffrey's testimony is not credible because he has a clear motive to fabricate and that in 1998 the victims had no motive to contrive their testimony to prejudice one brother over the other. The lower court's ruling completely ignores trial counsel's testimony stating that Susen Griffith's statement that Jeffrey was the more violent of her two sons was consistent with a previous statement he reviewed that Griffith made to law enforcement in 1992. Further, the lower court also ignores Dr. Levin's testimony stating that Jeffrey's interview and testimony are consistent with what Jeffrey told Dr. Krop in 1992. The lower court also completely ignores the uncontroverted testimony about Jeffrey's troubled and violent past contrasted with Anthony's laid back, passive nature. Finally, the victims did have a motivation to prejudice Anthony. Specifically, Anthony wasn't the shooter, therefor, he was less likely to get the death penalty. The first jury only voted seven to five in favor of death for Anthony, while the vote for Jeffrey was nine to three. In order to succeed in achieving a death sentence for Anthony, it would have been important to the prosecutor to be able to argue that the non-shooter was the leader and therefor equally involved in the deaths.

consider Jeffrey and Dr. Levin's testimony in conjunction with Jeffrey's life sentence because the court had decided that Jeffrey's life sentence was "irrelevant as a matter of law."

The lower court also denied, as barred or without merit, Anthony's sub claim that in light of the newly discovered evidence, including the testimony of Jeffrey and Dr. Krop, his sentence is arbitrary, capricious, disproportionate, disparate and invalid under the Eighth and Fourteenth Amendments to the United States Constitution. Vol. III, p. 483 The lower court stated that the claim is denied because this Court found it to be without merit and it is barred because it could have been raised on appeal but was **not** raised. This internally inconsistent ruling is wrong as a matter of law. Anthony Farina's sub claim is that, in light of the newly discovered evidence, his death sentence is capricious, disporportionate, arbitrary and invalid under the Federal Constitution. This claim could not have been raised on appeal because the newly discovered evidence of Jeffrey's testimony and Dr. Krop's report was not available to be reviewed by this Court. Further, it couldn't be barred for failure to raise it on appeal if it was raised on appeal and denied on the merits as the lower court stated. This portion of the lower court's ruling denying Anthony's claim is an internally inconsistent ruling that should be set aside by this Court and this Court should consider the merits of his claim.

Because the lower court's analysis misapprehends Florida and Federal Constitutional law as to what constitutes mitigation, fails to address how the new evidence raises reasonable doubt as to the existence of the statutory aggravators, and because the lower court ruled that Jeffrey's life sentence was per se irrelevant, the lower court misapplied the law and failed to recognize essential facts. Its ruling should be reversed by this Court and Anthony should be given a life sentence, or in the alternative, a new penalty proceeding where the sentencing jury can hear

testimony about Jeffrey's violent and explosive temper, its effects on his ability to dominate Anthony, and Jeffrey's life sentence.

**5.** The lower court erred in finding that there is no probability that the newly discovered facts would produce a life sentence.

As the lower court extensively detailed in its 1998 sentencing order, without the benefit of considering the newly discovered evidence presented at the hearing, Anthony Farina's case is clearly one of the most mitigated, and more mitigated than Jeffrey's. Justice Anstead of the Florida Supreme Court summarized the lower court's findings:

> [The] trial court found that Anthony had actually demonstrated more mitigation than Jeffery. For example, the record reflects without dispute that Anthony was sexually and physically abused repeatedly as a child. FN5. As noted by the majority opinion, the judge found three statutory mitigating factors (no significant history of criminal activity, Anthony was an accomplice in capital felony committed by Jeffery and his participation was relatively minor, age of eighteen at the time of the crime) and fifteen nonstatutory mitigating factors (abused and battered childhood, history of emotional problems, cooperation with the police, involvement in Christianity and Bible study courses while in prison, good conduct in prison, remorse for what happened, assertion of a positive influence on others, no history of violence, abandonment by his father, poor upbringing by his mother, lack of education, good employment history, and amenability to rehabilitation).
>
> The record reveals a horrendous childhood for both the Farina brothers. Their father was approximately forty years older than their mother and when he left the mother when the boys were still preschool age, he also abandoned the boys completely and had no contact with them. The mother was an alcoholic who would move on a whim (over twenty moves in Anthony's eighteen years; from Wisconsin to Illinois to Florida to Illinois to California to Florida, etc.), took up with a series of men who did nothing to support the family, and offered no guidance to the boys. From a young age the boys were often supporting the family and various adults and young children who were living with them by whatever jobs they could get, by scavenging for recyclable materials to sell, or by

> shoplifting at the mother's request (actually, the testimony was that the mother forced the boys into shoplifting by telling them that they would do it if they loved her and their young sister). Various relatives, social workers, and law enforcement officers also reported that the boys lived in deplorable conditions (dog feces on the floors of the living quarters, filth and squalor, no decent food). Sometimes they shared a one-room hotel room or trailer with as many as ten to fifteen people.
>
> Anthony was physically abused by one of his stepfathers and placed in a state facility for eighteen months because of the abuse. His mother never visited or called him during that time. Anthony was also sexually abused as a young boy and as a result developed an inability to control his bowels. While Anthony has no formal record of criminal activity, he has committed a number of petty crimes including shoplifting and using illegal drugs (marijuana and crack). Despite all of this, it appears that Anthony had a good employment history, albeit at low-paying jobs. Both boys received an erratic education and Anthony never finished one year of school in the same school.

Farina v. State, 801 So.2d 44, 57-59 (Fla.2001)(Anstead, J., concurring in part and dissenting in part).

The newly discovered evidence provides additional substantial mitigation and negates or lessens the aggravating weight of at least three aggravating factors. The newly discovered evidence establishes that Anthony Farina acted under extreme duress or the substantial domination of Jeffrey Farina (112-13). § 921.141(6)(e) Fla. Stat. Additionally, the newly discovered facts cast doubt on the Court's finding that "Anthony was the mastermind behind the plans...", a fact which it considered in giving little weight to the finding that Anthony was an accomplice to the capital felony under Florida Statute 921.141(6)(d). The newly discovered evidence of Jeffrey Farina's testimony also establishes that at least three of the aggravating circumstances on which the sentencing jury was instructed and that this Court found can no longer be constitutionally applied

to support Anthony Farina's death sentence or that they should carry minimal, if any, weight. The aggravating element of cold, calculated and premeditated focuses on the intent of the killer. In the penalty phase, premeditation is a "heightened premeditation" which distinguishes the aggravating circumstance from the element of first-degree premeditated murder. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). Calculated means that the killer had a "careful plan or prearranged design to commit the *murder*"; a "careful plan or prearranged" plan to *kill*, not a careful plan to commit another crime during which a killing also takes place. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987)(emphasis added); Hardwick v. State, 461 So.2d 97 (Fla.1984); Valdes v. State, 626 So.2d 1613 (Fla.1993); Jackson v. State, 648 So.2d 85, 89 (Fla.1994); Pomeranz v. State, 703 So.2d 465 (1997). In essence, cold, calculated, and premeditated applies only to "murders more cold-blooded, *more ruthless*, and *more plotting* than the ordinarily reprehensible crime of premeditated first-degree murder." Porter v. State, 564 So.2d 1060, 1064 (Fla.1990)(emphasis added). The cold, calculated and premeditated aggravator applies only when four elements are met, each of which must be satisfied by the *killer's intent*. Id. Jeffery Farina's testimony established that Anthony Farina did not have the intent required for this aggravating element to apply. Anthony did not have a "careful plan or prearranged design to commit the murder". Jeffrey's testimony established his dominance and the fact that Anthony did not make the decision to kill, let alone calmly and cooly reflect upon such a decision. Anthony had a prearranged plan to commit the robbery, but he did not have a prearranged plan to commit the murder. Moreover, Anthony did not have the mental and emotional capabilities to stop Jeffrey from carrying out his decision to kill.

The avoiding arrest aggravating element likewise focuses upon the intent of the *killer*. Newly

discovered evidence of Jeffrey Farina's testimony establishes that Anthony Farina never intended that a killing occur and did not know that a killing would occur until moments before it happened, so Anthony could not have intended that the killing occur to avoid arrest. Likewise, as Anthony had absolutely no intent to kill, he had no intent to torture Michelle Van Ness or cause her pain and torment before she died. Thus, the heinous, atrocious or cruel aggravating element can be accorded little, if any, weight.

Most compelling however, is the new evidence that Jeffrey Farina, the actual killer, received a life sentence for his actions. Both brothers received a death recommendation by the same jury, operating under the false belief that both Jeffrey and Anthony would be put to death for their participation in this crime. Faced with the 12-0 death recommendation of this misinformed jury, the lower court was obligated to sentence Anthony Farina to death, based on the grave importance the State of Florida has given the jury's role as the sentencer. See Tedder v. State, 322 So.2d 908, 910 (Fla.1975); Smith v. State, 515 So.2d 182, 185 (Fla.1987), cert. denied, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); Grossman v. State, 525 So.2d 833, 839, n. 1 (Fla.1988). It is that same significance given to the sentencing jury that requires a new penalty phase, during which a jury can hear and weigh Jeffrey's life sentence in determining the appropriate sentence for Anthony.

In 1972, the United States Supreme Court held that the death penalty violated the Eighth and Fourteenth Amendments because it was applied in a manner that was arbitrary and capricious. Furman, 408 U.S. 238 (1972) To cure the arbitrary and capricious application of the death penalty, the United States Supreme Court has mandated that the sentencing jury consider "any aspect of a defendant's character or record and any of the circumstances of the offense".

Lockett v. Ohio, 438 U.S. 586, 604 (1978).

> Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.
>
> It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner. We have long recognized that "(f)or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43 (1937). *See also* Williams v. Oklahoma, 358 U.S. 576, 585, 79 S.Ct. 421, 426, 3 L.Ed.2d 516 (1959) Williams v. New York, 337 U.S., at 247, 69 S.Ct., at 1083. [FN37] Otherwise, "the system cannot function in a consistent and a rational manner." American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures s 4.1(a), Commentary, p. 201 (App. Draft 1968).
>
> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Gregg v. Georgia, 428 U.S. 153, 189-90 (1976). Anthony Farina's death sentence, based on the jury's false assumption that the actual killer would also receive the death sentence, is wanton, arbitrary, and capricious, and violates the Eighth and Fourteenth Amendments. The lower court's finding that the newly discovered evidence would not produce a life sentence on retrial is erroneous and a violation of Anthony Farina's Fifth, Sixth, Eighth and Fourteenth Amendment rights. The cure for this Constitutional violation is a life sentence or remanding this case for a

new penalty phase, during which the sentencing jury can consider *all* of the circumstances of the murder of Michelle Van Ness, including Jeffrey's life sentence.

7.Conclusion

Given the extensive mitigation that exists in Anthony Farina's case, additional evidence that: Anthony acted under the substantial domination of his brother at the time of the murder, the facts that both the robbery and "the murder and attacks on the victims would not have taken place if Anthony was alone", and the fact that the actual killer will only serve a life sentence for the murder, a reasonable juror would probably conclude that the aggravating circumstances do not outweigh the mitigating circumstances and that life is the appropriate sentence for Anthony Farina (R.112-13). Accordingly, Anthony Farina respectfully asks this Court to vacate his death sentence or remand his case to the lower court for a new sentencing proceeding.

## ARGUMENT II

**THE LOWER COURT ERRED IN DENYING ANTHONY FARINA'S AMENDED CLAIMS ON NEWLY DISCOVERED EVIDENCE AND INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN FAILING TO PRESENT TESTIMONY ABOUT JEFFREY'S VIOLENT TEMPER FINDING THAT THE CLAIMS WERE WAIVED.**

The lower court ruled that Anthony Farina's Amendment to Claims III and V were waived.[7] The court found that Anthony Farina failed to meet the requirements of Florida Rule of Criminal Procedure 3.851(f)(4). The court also found that the amendments were not argued at the evidentiary hearing and "no objection was voiced." Vol. III, p. 493. This finding is erroneous and

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7 The lower court also ruled on the merits. However, in order to preserve this issue for appeal, Anthony Farina argues that the lower court's finding of a waiver was

an abuse of discretion because the lower court granted Anthony Farina the right to amend his motion in its Scheduling Order dated September 30, 2003 (hereinafter Order). Further, the amendments were argued and testimony was presented at the evidentiary hearing on the amended claims. In addition, the State failed to voice an objection to the lower court prior to or during the presentation of the evidence at the hearing on grounds the claims were waived. So, it is the State, not the defense who has waived this issue for appeal.

Florida Rule of Criminal Procedure 3.851(f)(4) provides:

> A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added. . . . If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed.

While it is true that Anthony Farina did not file a motion to amend under this rule with good cause shown, it would have been pointless and moot because the **lower court granted leave to amend by written Order**. The Order provided:

> Counsel for Farina must file any new or amended post-conviction claims they intend to raise in this matter no later than November 3, 2003 and serve a copy of any such amended motion on counsel for the State. The State shall have twenty days from the filing of any such amended post-conviction motion to file its response, a copy of which shall be served on the Court and counsel for Anthony Farina.

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erroneous.

Order, p. 2 , Vol. , p. . [8] Relying on the Order, Anthony Farina amended Claims III and V and filed his amended claims on November 3, 2003 as instructed by the lower court. He did not add any additional claims.

The State filed a response to the Amendment asking the lower court to strike the amendment for failure to comply with the rule, but neglected to acknowledge that the court had already granted the right to amend. Vol. III, p. 441-442. The Court never ruled on the State's motion to strike, nor did the State object to this failure at any time prior to or during the evidentiary hearing. It is the State who has waived the right to object by failing to object prior to the taking of testimony at the evidentiary hearing. Farina was under no duty to file an objection to his own presentation of evidence. The State should not be allowed to sit back and play "gotcha" in a capital proceeding, particularly when it is the State who failed to lodge the appropriate objection to the testimony and presentation of evidence. That is exactly the game the State is attempting to play in Anthony Farina's case. This Court should not allow this type of gamesmanship.

Anthony Farina relied in good faith upon the lower court's Order granting him leave to amend. Based on that Order, Anthony Farina did not need to comply with the requirements of Fla. R. Crim. Pro. 3.851(f)(4) **as they relate to seeking leave to amend because the lower court had already granted leave to amend**.

Anthony Farina presented witness testimony on the claims and also argued the merits of the amended claims in his written summation. Vol. III, p. 454-458. The State, in it's written

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8 As noted previously, the Scheduling Order is not officially part of the record at the time of the filing of this brief. Appellant's Motion to Correct the Record is still pending with this Court.

summation, did not argue that the amended pleadings were not properly filed but merely referred back to the lower court's August 8, 2003 order finding the claim to be procedurally barred and belatedly asked the court to treat the testimony as a proffer. Vol. III, p. 471; August 8, 2003, Order, p. 6. [9]

Regardless, the lower court did provide a merits ruling. As to Claim III, the lower court found it to be essentially identical to the original claim and merely refers to its ruling on Claim III. Vol. III, p. 493. As to Claim V, ironically, the lower court references the testimony presented at the evidentiary hearing in making its ruling. Vol. III, p. 494.

Anthony Farina respectfully requests that this Court disregard any procedural bar or waiver found by the trial court; find that the State in fact waived this issue by failing to object at the evidentiary hearing; and address the lower court's merits ruling as argued in Argument I and III of this brief. [10]

## ARGUMENT III

**THE LOWER COURT ERRED IN DENYING ON THE MERITS ANTHONY FARINA'S AMENDED CLAIM V, INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF JEFFREY'S DOMINATION OF ANTHONY AND ADEQUATELY CHALLENGE THE STATE'S CASE. THE COURT'S RULING WAS ERRONEOUS AND IN VIOLATION OF ANTHONY FARINA'S RIGHTS UNDER**

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9 As noted, this document is not a part of the Record on Appeal at the time of the filing of this brief.

10 In light of the fact that the lower court found no significant difference between Claim III as originally filed and Claim III as amended, Farina relies on Argument I of this brief as to Claim III of his amended 3.851 motion.

**THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

The lower court ruled that Anthony Farina failed to establish deficient performance or prejudice in his claim that trial counsel was ineffective in failing to investigate and present, inter alia, testimony that Jeffrey was the more aggressive, violent brother and dominated Anthony. Vol. III, p. 494. This ruling was erroneous.

Anthony Farina was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the penalty phase proceeding of his capital trial in violation of the Sixth, Eighth and Fourteenth Amendments. Trial counsel failed to adequately investigate and present mitigating evidence and to adequately challenge the state's case. As a result Anthony Farina's death sentence is unreliable and this Court should reverse the lower court's ruling and grant Anthony a life sentence or remand his case for a new penalty phase proceeding.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Strickla State v. Reichmann, 777 So.2d 342, 348 (Fla.2000) Williams v. Taylor, 529 U.S. 362, 376-78 (2000) Wiggins v. Smith, 123 S.Ct. 2527, 2537 (2003) Stephens, 748 So.2d at 1033-34 (emphasis added) quoting Strickland, 466 U.S. at 688. Prejudice is a cumulative analysis. "[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raise[ed] a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Williams, 529 U.S. at 399.

**A. Counsel's failure to investigate and present evidence that Anthony Farina acted under the domination of Jeffrey Farina was deficient performance, and Anthony Farina's death sentence is the resulting prejudice.**

With investigation, counsel could have presented witnesses, including Tina O'Neill and the boys' mother Susen Griffith, who knew the brothers close in time to the robbery/murder and who could testify that, despite their differences in age, Jeffrey Farina had always been dominant over Anthony and was by far the most aggressive of the two brothers. The failure to present this testimony deprived Anthony Farina of effective assistance of counsel.

Bill Hathaway testified that, during the course of his representation of Anthony, he was aware of the fact that Jeffrey was the more violent and aggressive of the two brothers (Vol. I, p. 34). He also testified that prior to the 1998 trial, he reviewed a 1992 interview by law enforcement of Susen Griffith (Vol. I, p. 37). In that interview, Ms. Griffith told law enforcement that Jeffrey had a hot temper and was the more violent of her two sons. Id. Mr. Hathaway testified that Ms. Griffith also told him that Jeffrey was the more violent of the two, and that Jeffrey had an interest in guns and knives (Vol. I, p. 34). It was important to him to show that Jeffrey was more aggressive and violent and that Anthony was more laid back and

passive (Vol. I, p. 32-33). Mr. Hathaway also admitted that it was crucial to his theory of defense to show that Jeffrey was more aggressive and Anthony was the more passive of the two brothers (Vol. I, p. 32-33). No explanation was given for counsel's failure to present this testimony.

Ms. Griffith testified at the hearing that Anthony was "easy going and a follower" and Jeffrey had a "short fuse and a temper." (Vol. I, p. 43). She further testified that Jeffrey "punched a door and busted a window" at school, (Vol. I, p. 43), and that she took him to get counseling because of his violent outbursts (Vol. I, p. 46-47). Jeffrey owned a gun and had a fixation with knives and that, to Ms. Griffith's knowledge, Anthony never owned a gun or a knife (Vol. I, p. 44). Ms. Griffith was available as a witness, and testified at the penalty phase for Jeffrey Farina, but Mr. Hathaway failed to question her about the fact that Jeffrey was the more dominant and aggressive brother (Vol. I, p. 46) . Counsel's failure to present this testimony, which was consistent with his theory of defense, was deficient performance.

Tina O'Neill, a long time family friend, also testified at the hearing about Jeffrey's violent temper and dominance. Ms. O'Neill described Anthony as quiet (Vol. I, p. 55). She described Jeffrey as having a "dark side", where he would get angry and "deliberately pick fights" with Anthony (Vol. I, p. 55-56). She agreed that Jeffrey

was aggressive and violent (Vol. I, p. 55-56). Jeffrey was suspended from school "quite a bit" for picking fights (Vol. I, p. 57). She considered Jeffrey to be the leader of the two (Vol. I, p. 58). Ms. O'Neill testified at the 1998 penalty phase for for Jeffrey. Ms. O'Neill's testimony at the hearing was, like Ms. Griffith's, consistent with Mr. Hathaway's theory of the case. Counsel's failure to present Ms. O'Neill's testimony to the sentencing jury regarding Jeffrey's violent nature and dominance over Anthony was deficient performance.

It is unrefuted in the record that, throughout their lives, Jeffrey was often violent and picked fights with Anthony. Further, Jeffrey was hot-tempered and aggressive while Anthony was passive and laid back. This evidence, had it been presented, would have established non statutory mitigation that Anthony Farina acted under the domination of his brother at the time of the crime or even the statutory mitigating circumstance that Anthony Farina acted under extreme duress or the substantial domination of Jeffrey Farina. § 921.141(6)(d)(e) Fla. Stat. It would also have provided the Court additional evidence to consider when finding that "Anthony was the mastermind behind the plans...", a fact which it considered in giving little weight to the finding that Anthony was an accomplice to the capital felony under Florida Statute 921.141(6)(d).

Counsel's failure to investigate and present this type of mitigating evidence

prejudiced Anthony Farina. Had counsel effectively presented evidence of Jeffrey Farina's dominant, violent and aggressive nature contrasted with Anthony's passive and dependent nature to the jury and the sentencing court, he could have established additional statutory or non-statutory mitigators or provided the Court with additional information as to the weight to be given mitigation evidence. The balance of aggravating and mitigating circumstances would be different and Mr. Farina likely would have received a life sentence.

The lower court's factual ruling is two fold. First, the court states that the witness' testimony was "incredible" and refuted by the victims who stated Anthony did all or most of the talking. This is clearly erroneous on several levels. First, defense witness Susen Griffith testified in a manner that was consistent with what she had told law enforcement in 1992 — when she had a motivation to lie on behalf of Jeffrey. The other witness testimony was not shown to be inconsistent with any prior testimony although the State argued that other statements presented Jeffrey in a more positive light. Further, the State's argument that Susen Griffith's trial testimony about Jeffrey not being violent or explosive after the school ordered him to undergo counseling, Vol. III, p. 472, fails when one realizes that defense counsel could have impeached Ms. Griffith with her 1992 statement to law enforcement. Second, simply because the victims said Anthony did most of the

talking doesn't refute that Jeffrey was in charge. The fact remains that during the course of the crime, much like during the course of the brothers' lives, Jeffrey was the more aggressive and violent brother. Jeffrey was ultimately and totally in charge when he fired his gun into the victims' heads. Jeffrey was ultimately and totally in charge when he stabbed the victim with his knife. The facts of the crime themselves corroborate the testimony of Ms. O'Neill and Ms. Griffith when they described Jeffrey as hot tempered, violent, aggressive and dominant over Anthony. To find that their testimony is not credible because the victims said that Anthony did most of the talking is illogical and unjust.

The lower court's legal analysis is also flawed. The lower court ruled that Anthony "failed to establish either deficient representation or prejudice." Vol. I, p. 494. As to deficient performance, Anthony Farina has established that the witness testimony was consistent with the attorney's theory of defense that Jeffrey was the more dominant and aggressive brother and the more culpable defendant. Trial counsel conceded that he would have wanted to present that testimony. The witnesses were available to testify as evidenced by the fact that they actually testified at the trial. Further, trial counsel admitted that he knew that Susen Griffith believed Jeffrey was the more aggressive and violent of her two sons as evidenced by her 1993 statement to law enforcement. Reasonably competent defense counsel

would have presented this testimony at Anthony's capital trial. The State has offered no explanation, through argument, testimony, or reference to the record, as to why trial counsel's failure to present this testimony was reasonable strategy or not deficient performance. The lower court's finding that Anthony failed to establish deficient performance is erroneous.

Anthony's Farina has also established prejudice. The lower court's finding as to this prong is also erroneous.[11] Anthony's case is compelling. He was only 18 years old and five months at the time of the crime; he was not the actual shooter; his childhood was marred by sexual abuse, neglect and poverty; since his incarceration he has been a model prisoner; he has expressed sincere remorse for his actions on that day; and, the actual killer has now received a life sentence. At least one Justice on his direct appeal argued this Court should grant him a life sentence before hearing the additional testimony at his post conviction proceeding. This Court is required, under

**THE LOWER COURT ERRED IN SUMMARILY DENYING ANTHONY FARINA'S CLAIMS**

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11 As argued previously, because the lower court ruled that Jeffrey's life sentence was irrelevant as a matter of law, any prejudice analysis by the lower court is inherently flawed under Strickland and its progeny which require a reviewing court to evaluate **all the evidence** presented at trial and **all the mitigation available**, both that presented at trial and at the postconviction hearing.

**WITHOUT AN EVIDENTIARY HEARING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

Although the lower court granted an evidentiary hearing on some claims, the court erroneously summarily denied the others. Fla. R. Crim. P. 3.850; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual matters. A post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986).

This Court has clearly indicated the need for mandatory evidentiary hearings on initial rule 3.850 motions. In his concurring opinion in Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998), Justice Wells stated "the rule should be amended to require that an evidentiary hearing is mandated on initial motions which assert ineffective assistance of counsel, Brady, or other legally cognizable claims which allege an ultimate factual basis." Subsequently, Justice Pariente, in a special concurring opinion in Gaskin v. State, 737 So. 2d 509, 519 (Fla. 1999), reiterated her agreement with Justice Wells that "the better practice would be to require trial courts to hold evidentiary hearings on the initial 3.850 motion in death penalty cases...".

In response to this Court's concerns, the rule was amended. "[T]he trial court shall . . .schedule an evidentiary hearing . . . on claims listed by the defendant as requiring a factual determination." Fla. R. Crim. Pro.(f)(5) (*amended* 2001) ("Most significantly, [this] subdivision

requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. This Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process." ). Mr. Farina's Motion for Postconviction relief falls under the new rule as it was filed April, 2003.

Mr. Farina pled substantial serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. An evidentiary hearing is warranted on several of his claims.

The court below summarily denied Mr. Farina relief on Claims I, II, IV and V. (Order on Defendant's Motion To Vacate Judgement of Conviction and Sentence with Special Leave to Amend, p. 2-7) The Court partially summarily denied Claim III. (Order on Defendant's Motion To Vacate Judgement of Conviction and Sentence with Special Leave to Amend, p. 4-5) These claims, on which Mr. Farina is entitled to an evidentiary hearing, are addressed below.

**A. The rules prohibiting trial counsel from interviewing jurors after the trial to determine if misconduct exists violates Anthony Farina's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendment.**

Mr. Farina's 3.851 motion stated that the Florida Rules of Professional Responsibility 4-3.5(d)(4) which prohibit a lawyer from initiating communication with any juror regarding their deliberations is unconstitutional as applied because an incarcerated defendant cannot interview jurors whereas a defendant who is not in custody can interview the jurors. Further, the Rule is also unconstitutional on its face because it inhibits free speech and freedom of association, and restricts access to the courts and the ability to allege and litigate claims. The lower court ruled that the claim was procedurally barred because it should have been raised on direct appeal and that the claim is without merit.

The rule is unconstitutional facially and as applied in Anthony's case, in part, because of the gross disparity in the sentencing recommendations of the two juries. In 1992 the jury recommended death by a mere seven to five majority. In 1998, **based upon the same aggravating factors**, the jury recommended death by a vote of twelve to zero. The difference between the trials was the extensive victim impact evidence, and the improper biblical references and prosecutorial misconduct as argued in Farina's State Habeas. Farina should be allowed to interview the jurors in his capital case to determine if the victim impact evidence, biblical references and prosecutorial misconduct influenced their verdict. Appellant recognizes that this Court has held this claim has no merit and is properly raised on direct appeal but raises it herein to preserve it for federal review.

**B. Counsel failed to make adequate objections to the presentation of inflammatory victim impact evidence in violation of Payne v. Tennessee.**

Mr. Farina's 3.851 motion alleged that counsel failed to make adequate objections to highly inflammatory and unduly prejudicial victim impact evidence presented in this case. Anthony Farina alleged that counsel's failure to adequately object to the various "letters and testimony" violated Anthony Farina's Due Process and effective assistance of counsel rights under the Fifth, Sixth and Fourteenth Amendments. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed 2d 720 (1991). Farina alleged that the type of evidence presented by the State was improper and counsel's failure to effectively and timely object rose to the level of ineffective assistance of counsel. Farina also alleged that due to the great weight that must be given to a jury's sentencing recommendation it cannot be said that there is no reasonable probability that this "extra thumb" affected the sentencing court's decision. Deficient performance and prejudice are present.

The lower court, agreeing with the state, ruled that the issue is procedurally barred because it was raised on direct appeal and found to be without merit. Farina concedes that portions of the issue were raised on direct appeal and denied by this Court. Farina raises the issue, however, to preserve it for federal review and to the extent it is raised in his State Habeas, argues that he was entitled to an evidentiary hearing for trial counsel's failure to adequately object to the substance of the victim impact testimony.

**C. Trial counsel rendered ineffective assistance during pretrial and voir dire of his capital trial in violation of the Sixth, Eighth and Fourteenth Amendments**

Anthony Farina alleged in his 3.851 motion that trial counsel was ineffective during pretrial and voir dire. Anthony Farina alleged that trial counsel knew or should have known about the intense pretrial publicity, that counsel was not given adequate time or resources to prepare for trial, that he repeatedly asked for co-counsel but that the court never ruled on his motion, and that counsel failed to use all of his peremptory challenges. The lower court, agreeing with the State, ruled that as to all improper rulings by the court, the claim is procedurally barred and the claim is insufficiently plead. With more time and the assistance of co- counsel, counsel could have more effectively argued the case and handled the challenges to the numerous adverse court rulings. The trial court erred in denying this claim without an evidentiary hearing and considering it when determining the cumulative impact of counsel's ineffective assistance (V3, 431). Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999). As to Anthony's claim of inadequate attorney performance as it relates to jury selection and the failure to peremptorily strike four jurors whose cause challenges were denied, the lower court ruled the claim did not sufficiently plead prejudice and is therefor denied. This was error.

This claim alleged specific facts which were not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced Mr. Farina.

Anthony Farina argued in his initial 3.851 motion that trial counsel was ineffective during the penalty phase portion of his trial in failing to suppress the tapes and, the lower court rendered him ineffective in failing to provide co-counsel. The lower court denied the claims finding they were procedurally barred because they were raised on direct appeal and rejected. This was error.[12]

The trial court should have scheduled an evidentiary hearing on these claims because they involved strategy or a lack of informed strategy by trial counsel and were not conclusively refuted by the record. The trial court erred in denying this claim without an evidentiary hearing and considering it when determining the cumulative impact of counsel's ineffective assistance.

**E. Conclusion**

The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where claims are factual matters. As a result, a post-conviction court "shall schedule an evidentiary hearing . . . on claims listed by the defendant as requiring a factual determination." Fla. R. Crim. P. 3.851(f)(5)(A)(i). Even so, the trial court erroneously denied Anthony Farina an evidentiary hearing on many of his most crucial claims of ineffective assistance of counsel for which he plead factual bases which were not refuted by the record and entitled him to relief. The trial court erred.

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12 This argument does not pertain to the Amended Claim III issues which were

## ARGUMENT V
## THE LOWER COURT ERRED IN DENYING ANTHONY FARINA'S LEGAL CLAIMS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

### A. Florida's capital sentencing statute is unconstitutional on its face and as applied for failing to prevent the arbitrary and capricious imposition of death and violates cruel and unusual punishment

Anthony Farina argued in his 3.851 that Florida's death penalty statute is unconstitutionally vague and arbitrary, both facially and as applied. Farina argued that the Florida death penalty statute's standard of proof, that the aggravating circumstances outweigh the mitigating circumstances, fails to provide constitutionally adequate guidance to a jury; the aggravators are applied in a vague and inconsistent manner; that felony murder aggravator creates an unconstitutional presumption of death in every felony murder case in violation with the Eighth Amendment, and to the extent that counsel failed to litigate these issues, counsel rendered ineffective assistance.

The trial court ruled that these claims were or should have been raised on direct appeal and, are alternatively, without merit. Farina concedes that all but one of these claims, the felony murder claim, were raised on direct appeal and this Court denied the claims. The claims are reraised herein to preserve the issues for federal review.

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argued supra.

As to the felony murder claim, Farina concedes that the sentencing court did not apply the felony murder aggravator. However, the jury was instructed on the felony murder aggravator. Farina argues that the felony murder aggravator violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Richmond v. Lewis, 113 S.Ct. 528 (1992); Furman v. Georgia, 408 U.S. 238 (1972). To the extent that trial counsel failed to litigate this issue, Farina argues he was provided ineffective assistance of counsel.

**B. Florida death penalty statute is facially vague and overbroad and the jury instructions did not cure the invalidity**

Farina argued that the Florida death penalty statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Farina further argued that the CCP, prior violent felony and HAC aggravators are vague and overbroad, that the state failed to prove the aggravators beyond a reasonable doubt and to the extent counsel failed to litigate these issue, Farina was rendered ineffective assistance of counsel. The State argued that the claims could have or should have been raised on direct appeal and alternatively they lack merit. The lower court agreed with the state finding that the claims were raised on appeal and, alternatively, rejected the claims on the merits. Appellant concedes that these claims were raised on direct appeal and therefor are not cognizable in a 3.851. However, they are raised herein to preserve the issues for federal review.

**C. Farina's death sentence rests upon an unconstitutional automatic aggravator in violation of Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger, and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution**

Farina alleged that the jury was instructed and the court found that the murder was committed during the course of a robbery and that the felony murder aggravator is

unconstitutional on its face and as applied and acts as an automatic death sentence. Farina also alleged that counsel objected to this instruction but to the extent counsel failed to propose a constitutionally adequate alternative instruction, counsel was ineffective. The State argues that this claim has no basis in fact because the sentencing court did not find that aggravator.

Farina concedes that the sentencing court did not find that aggravator but argues that the jury was instructed on the aggravator and this contributed to the jury's finding of a death sentence. Farina's sentencing jury is presumed to have found this aggravator established. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). Under these circumstances, the erroneous instruction presumably tainted the jury's recommendation and, in turn, the judge's death sentence in violation of the Eighth and Fourteenth Amendments. Espinosa, 112 S.Ct. 2926. Farina's jury was inadequately guided and channeled in its sentencing discretion.

The lower court found, however, that as to the jury instruction claim, this issue could have been or should have been argued on appeal and is procedurally barred and, alternatively, is without merit. Farina concedes this claim is more properly raised on direct appeal but raises it herein to preserve the issue for federal review.

**D.Farina's death sentence rests upon an unconstitutionally vague aggravator, CCP, and, that as a matter of law, CCP did not apply to his case and the jury instructions did not cure the error in violation of the Eighth and Fourteenth Amendments to the United States Constitution**

Farina argued that the trial court improperly instructed the jury on the cold, calculated and premeditated aggravator inviolation of Espinosa v. Florida, 112 S.Ct. 2926 (1992); Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). The State argued this claim was procedurally barred because "it was or should have been" raised on direct appeal.

The lower court agreed with the state, finding that the claim was procedurally barred as it was raised on direct appeal, and, alternatively had no merit as the facts support a finding of the CCP aggravator.

Farina concedes this claim was raised on direct appeal and denied on the merits, but raises it herein to preserve it for federal review.

**E. Farina's jury was improperly instructed on the heinous, atrocious and cruel aggravator in violation of " Espinosa v. Florida, Stringer v. Black, Maynard v. Cartwright, and Hitchcock v. Dugger, in violation of the Eighth and Fourteenth Amendments to the United States Constitution**

Farina argues that the jury was not instructed that they must find beyond a reasonable doubt that he "intended" his actions to be heinous, atrocious and cruel and that the HAC jury instruction is unconstitutionally vague. The state argued that the claim is procedurally barred because it could have or should have been raised on appeal. The lower court agreed with the State finding the claim procedurally barred as it could have or should have been raised on appeal.

Farina concedes the claim was raised on direct appeal and denied by this Court on the merits. Farina raises it herein to preserve the issue for federal review.

**F. Farina's jury was misled by questions, comments and instructions that unconstitutionally diluted the jury's sense of responsibility in sentencing in violation of "**

Farina argues that his jury was misled by comments by the State and the trial court which lessened the jury's sense of responsibility and failed to explain the Tedder standard. The instruction the trial court gave was: "Now, as you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge, However, your advisory sentence

must be given great weight by the court in determining what sentence to impose upon the defendants and it is only under rare circumstances that the court could impose a different sentence." Vol. XXVIII, p.2401.

The State argued that the claim is procedurally barred as "it was or should have been raised on direct appeal." Vol. III, p. 489. The lower court agreed with the state finding the claim was or should have been raised on direct appeal and alternatively ruled the claim was without merit. Farina concedes that the claim should have been raised on direct appeal. It is raised herein to preserve the issue for federal review.

**G.The Florida death penalty statute is unconstitutional as applied under the Fifth, Sixth, Eighth and Fourteenth Amendments in light of " Ring v. Arizona**

Farina argued that: 1) failure to provide notice of the statutory aggravators and failure to prove them beyond a reasonable doubt violates due process under the Fifth Amendment and the jury guarantees of the Sixth Amendment; 2) Florida's death penalty scheme, wherein the trial judge is the actual sentencer and the jury merely makes a recommendation, is unconstitutional under the Sixth Amendment and Ring v. ArizonaBottoson v. Moore, 833 So. 2d 693 (Fla. 2002)King v. Moore, 831 So.. 2d 143 (Fla. 2002)

**THE LOWER COURT ERRED IN DENYING ANTHONY FARINA'S CLAIM THAT CUMULATIVE ERROR VIOLATED HIS RIGHT TO A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

The lower court ruled that Anthony Farina's cumulative error claim is nonspecific and therefor denied. The court erred. Farina argued in his claims that "the allegations and factual matters

asserted elsewhere in this motion are fully incorporated herein by specific reference" Vol. II, p. 304. Farina also asserted that when all the errors, including those asserted on appeal and in his 3.851 motion are considered as a whole, the cumulative effect of those errors denied him a fair trial. The claim sufficiently alleged specific factual matters to allow the State to respond and to put the lower court on notice by referring to all factual allegations plead in the 3.851 motion. The lower court should have analyzed all the evidence, that presented at trial and at the hearing, and considered any error deemed harmless on appeal, and ruled on Anthony Farina's claims. The lower court's finding that the claim was insufficiently pled is error and should be reversed by this Court. This Court should conduct its own analysis and grant Anthony Farina a new sentencing proceeding.

## CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Farina relief on his 3.851 motion. This Court should order that his convictions and sentences be vacated and remand the cases for a new trial, penalty phase, an evidentiary hearing, or for such relief as the Court deems proper.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of May, 2005.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in a

Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

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