IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-935

ANTHONY FARINA,

Petitioner,

v.

JAMES V. CROSBY,
Secretary,
Florida Department of Corrections,

Respondent.

and

CHARLIE CHRIST,
Attorney General,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

MARIE-LOUISE SAMUELS PARMER
FLORIDA BAR NO. 0005584
ASSISTANT CCRC

DAVID BASS
FLORIDA BAR NO. 0920290
ASSISTANT CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. These claims demonstrate that Mr. Farina was deprived of the rights to fair, reliable, and individualized trial and sentencing proceedings, and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Mr. Farina is referred to as both Mr. Farina and Anthony. His brother is referred to as Jeffrey. The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PCR." –post conviction record on appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Farina has been sentenced to death. The resolution of the issues involved in this action will therefore 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 involved and the stakes at issue. Mr. Farina, through counsel, urges the Court to permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Farina's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Farina. "[E]xtant legal principles...provided a clear basis for **...** compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions which were ruled on in direct appeal, but should now be revisited in light of subsequent case law in order to correct errors in the appeal process that denied fundamental constitutional rights. As this petition demonstrates, Mr. Farina

is entitled to habeas relief.

PROCEDURAL HISTORY

Anthony Farina and his brother Jeff 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. Both Farinas plead not guilty to all charges and requested a jury trial. The Farinas 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 was seven to five in favor of death.[1] Their convictions were affirmed on appeal but this Court reversed the death sentences and remanded for a new penalty phase proceeding due to an error in the jury selection proceeding. 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 and sentenced to death. This time, however, 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, and repeatedly misstated the law and facts and made improper arguments during closing argument. The jury recommendation for death Anthony 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[2]: 1) the State improperly used

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[1] The recommendation for Jeffery was 9 to 3 in favor of death.

[2] Two of the claims were raised in a supplemental brief which related to the

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 conversation; 4) the trial court erred in denying his motion to sever Anthony's re-sentencing from Jeffery's re-sentencing; 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 proportionably 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; b) the requirement that a defendant must prove that "sufficient mitigating circumstances exist which outweigh the aggravating considerations found to exist" is unconstitutionally 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

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fundamental disparity of Anthony's death sentence in light of this Court's opinion reversing Jeffery's death sentence during the pendency of Anthony's appeal..

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; 12) death is disproportionate compared to cases where the triggerman received life. This Court affirmed Anthony's sentence but reduced Jeffery's sentence to life because Jeffery, the undisputed triggerman, was 16 years old at the time of the offense.[3] Farina (Anthony) v. State, 801 So. 2d 44 (Fla. 2001); Farina (Jeffery) 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 judge appropriately struck Anthony's motion to suppress; 4) the trial judge did not abuse his 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 Jeffery discussed the shooting of the employees after they were placed in the cooler but before Jeffery shot them; 8) the avoid

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[3] Anthony was only 18 years old at the time of the offense, a factor which was given only moderate weight by the trial court. Expert testimony established Anthony had the emotional maturity of a fourteen-year-old. ROA Vol. III, 358-59.

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 Jeffery shot the victims with the intent to kill them; 9) 11) and 12)[4] that Anthony's death sentence is proportional because he was equally culpable as Jeffery, and Jeffery's life sentence is irrelevant to Anthony's proportionality analysis since Jeffery 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:

[4] 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 Farina v. Florida, 536 U.S. 910 (2002)

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Farina's death sentence. This Court has jurisdiction, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Farina's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1 Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969) Brown v. Wainwright, 392 So.2d

1327 (Fla. 1981)Way v. Dugger, 568 So.2d 1263 (Fla. 1990)Downs v. Dugger, 514 So.2d 1069 (Fla. 1987)Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987)Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965);

By his petition for a writ of habeas corpus, Mr. Farina asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. FARINA'S CONVICTIONS AND SENTENCES.

1. Introduction.

Appellate counsel had the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984).

To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result". Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

In order to grant habeas relief based on ineffectiveness of appellate counsel, this Court must determine "whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Pope v. Wainwright, 496 So.2d 798, 800 (Fla. 1986).

This Court has explained the procedure to be followed when a petitioner alleges ineffective assistance of appellate counsel for failing to raise a preserved evidentiary issue:

> With regard to evidentiary objections which trial counsel made during the trial and which appellate counsel did not raise on direct appeal, this Court evaluates the prejudice or second prong of the Strickland test first. In doing so, we begin our review of the prejudice prong by examining the specific objection made by trial counsel for harmful error. A successful petition must demonstrate that the erroneous ruling prejudiced the petitioner. If we do conclude that the trial court's evidentiary ruling was erroneous, we then consider whether such error is harmful error. If that error was harmless, the petitioner likewise would not have been prejudiced.

Jones v. Moore, 774 So.2d 637, 643 (Fla. 2000). Absent a timely objection, petitioner must demonstrate fundamental error in order to prevail on an ineffective assistance of appellate

counsel claim. Fundamental error is defined as error that reaches "down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Kilgore v. State, 688 So.2d 895, 898 (Fla.1996)(*quoting* State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991)).

"Obvious on the record" constitutional violations occurred during Mr. Farina's trial which "leaped out upon even a casual reading of the transcript," yet appellate counsel failed to raise those errors on appeal. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to raise the meritorious issues addressed in this petition prove his advocacy involved "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence in the outcome is undermined". Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); Barclay v. Wainwright, 444 So.2d 956, 959 (Fla.1984); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

2. Appellate counsel's failure to raise a claim of prosecutorial misconduct based on the prosecutor's introduction of biblical authority to impose the death penalty evidence of ineffective assistance of counsel. constitutes

During the trial, Mr. Farina called Reverend James Perry Davis to testify that since Mr. Farina's conviction for murder, Mr. Farina sincerely accepted religion into his life, studied the Bible, joined Reverend Davis' church, and expressed a desire to "minister" to other inmates. At no time during the witness' direct examination, did defense counsel elicit from Mr. Davis any testimony that would lead a juror to believe that religious law usurped Florida Death Penalty jurisprudence. During cross examination, the prosecutor introduced the following testimony to the jury which expressly instructed the jurors to reject aspects of United States and Florida Death Penalty law

and follow Biblical law.

> Mr. Tanner [State]: You formed some pretty strong opinions about these young men. And I believe there's sincerely hell. I want to ask you, did you rely just upon your observations and experience, or did you put any thought or evaluation into how they stacked up according to the Bible?
> Davis: By the Bible's word, that and my emotion, because they were repentant to me for the crime that they had committed. And I saw signs of that in their actions and in their verbalization, and in their emotions and in their feelings. And to me that's the way I can look at something and tell whether it's what it says it is, if it appears to be that, you know.
> State: But as a man of God, you certainly don't make real serious judgements or considerations without holding up your opinion to maybe God's standard and his word? Is that part of ...
> Davis: I'm definitely not God.
> State: What I'm asking you is you put heavy reliance upon the Bible, don't you?
> Davis: Yes, I do.
> State: **What is the Bible to you?**
> Davis: **It's the infallible word of God**, inspired word of God that God gave to us as our . . .
> State: But from my understanding of the Bible, is men actually wrote the words down and **you say it's the word of God?**
> Davis: **Inspired by the Holy Spirit, right**.
> State: Are you familiar with the Book of Romans? Do you know who wrote it?
> Davis: Paul, Apostle Paul.
> State: **What happened to Paul ultimately?**
> **Davis: Paul was killed ultimately.**
> **State: By the Roman government?**
> **Davis: Uh-huh.**
>
> . . .
>
> State: And even though Paul was a prisoner of the Roman government, he wrote a very significant book called the Romans; did he not?
> Davis: Yes, he did.
> State: Are you familiar with the first of seven verses of Romans thirteen?
> Davis: Yes. About honoring authority, submitting to authority. **The judge and the prosecutor and the defense attorneys all work for God and are ordained by God as being the authority and in**

the positions that they are and if they . . . God is the one that allows them to be there.
State: **Well, I don't want to say that defense attorneys aren't saved. But they're not the authorities, are they, they are defense lawyers versus the prosecutor?**
Davis: **Right**.
State: Your honor, **may I hand him something to help with his memory as well**?
Mr. Hathaway [Anthony Farina's Defense counsel, hereinafter Defense]: Your honor, I don't know what he's tendered to the witness.
State: **Romans**.
Davis: **It's a copy of the Bible, scripture out of the Bible**.
State: **What does Romans one and two say about authority under God's law**?
Defense: Perhaps he can show the relevancy of this. I don't know why we are referring to this at this time. . . . **Relevance objection**.
State: Your honor, I will link it up when I lay the foundation. I believe you will see the relevancy as we . . .
Court: To this witness' testimony, not just a philosophical or religious discussion?
State: No, sir.
Court: This is specific testimony?
State: Yes. It will relate directly to this witness' testimony.
Court: Connect it up. And, Mr. Hathaway, if it's not properly connected up, go ahead and renew your objection.
Davis: Read verse one and two?
State: Yes, sir.
Davis: **Everyone must submit himself to the governor of authorities for there is no authority except for which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authority is rebelling against what God has instituted. And those who do so will bring judgement on themselves.**
State: **The next verse deals with the prosecutor; does it not? What does it say?**
Davis: **For the rulers hold no terror for those who do right, but for those who do wrong**. Do you want to be free from fear that the one in authority and do what is right and you will –jumps over here–he will command you.
State: And the next verse?
Davis: **Where he is God's servant to do your good, but if you do wrong, be afraid for he does not bear the sword for nothing. He**

is God's servant and agent to wrath, to bring punishment to the wrongdoer.
State: And the next?
Davis: Therefore, **it is necessary to submit to the authorities not only because of the possible punishment, but also because of your conscience**.

. . .

State: **Is there anything in scripture that you find that says the laws and the government should excuse crimes because someone is repentant?**
Davis: **Specifically the law and government, no.**
State: Tells us Christians forgive one another?
Davis: Yes.
State: **But that's not inconsistent with the government's responsibility to uphold the law and bring the punishment which – and the word of the Lord, that you have just read, that bring judgement on themselves; is that correct?**
Davis: That's correct.

. . .

State: . . . **[W]hen Christ was on the cross there was a condemned felon beside him that repented and accepted Christ; is that right?**
Davis: **That's right.**
State: **But he didn't take that felon off the cross or forgive the death penalty, did he?**
Davis: **No**
State: **He said he would see him in paradise.**
Davis: **Yeah**.

. . .

State: **Christ died for sinners?**
Davis: **Yes.**
State: **And Paul died because of Christ?**
Davis: **Yes.**
State: **Is there anything inconsistent with that. That these men face the death penalty for the murder of a seventeen-year-old-girl?**
Davis: **No.**

(ROA, Vol. XXIV, p. 1836-1845) (emphasis added).

During closing argument, the prosecutor chose as his final statement to the jury: "**They have brought this judgement upon themselves** by their choices, and your recommendation to [the

trial court] should be a recommendation that they pay the ultimate penalty for their crimes." (Trial, Vol. XXVIII, 2366)(emphasis added). Petitioner concedes that trial counsel failed to object to this comment, but maintains the improper comment is important to the Court's analysis of the prosecutor's intentional improper conduct and constitutes fundamental error.[5]

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[5] The prosecutor developed his improper religious theme starting with the first juror and continuing throughout Anthony Farina's trial. Farina concedes counsel failed to object to the religious comments during jury selection. However, Petitioner argues that the comments rise to the level of fundamental error or, in the alternative, the cumulative effect of these comments combined with all the other improper comments argued in this Petition, rise to the level of fundamental error and violated Anthony Farina's right to a fair trial under the Due Process Clause of the Federal and Florida Constitutions and appellate counsel's failure to raise these issues constitutes ineffective assistance of counsel and violates Anthony Farina's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Further, the State's comments in jury selection highlight the intentional and pervasive nature of the misconduct and are relevant to this Court's analysis of Farina's claim.

> By way of example, the State told prospective jurors that:
> "[J]urors are obligated and expected, *if they serve on a jury*, to follow [the judge's instruction on the law], even if they don't agree with the instructions. *But you're not required, or expected, to abandon deeply held religious, moral, and conscientious, or other beliefs*. In other words, if the conflict is so great that you say, I would like to follow the Judge's instructions, I want to be respectful, but on this issue I couldn't follow that instruction. I couldn't do this. *That's perfectly legitimate.* There's nothing wrong with it. That doesn't mean you're doing anything improper or disrespecting the Court."

(1998 Trial, Vol. XVIII, p. 882). This comment essentially told the jurors that it is "perfectly legitimate," *as a seated juror*, to use religious beliefs as a basis to reject the law. The State also told the jurors that a juror is required to follow the law but as the trial judge explained, a juror doesn't have to "abandon deeply held religious, moral, conscientious beliefs." (Trial Vol. XVII, p. 703).

At the close of the evidence, defense counsel renewed all previously made objections and the trial court made a finding that Mr. Farina's counsel was "deemed to have renewed all [his] motions and objections." (Trial, Vol. XXVIII, p. 2342). Therefor, petitioner's first hurdle has been met in that the complained of evidentiary issue, the cross examination of Reverend Davis, was preserved for appellate review.

The trial court's ruling was erroneous, prejudiced Mr. Farina and created harmful error. The State's cross-examination and appellate counsel's failure to raise it on appeal, violated Mr. Farina's First, Fifth, Sixth, Eighth and Fourteenth Amendment rights to freedom from Government established religion, due process, the right to effective assistance of counsel, right to an individualized sentencing decision and protection against cruel and unusual punishment and the corresponding provisions of the Florida Constitution. The State's cross examination of Reverend Davis shocks and offends the concept of fundamental fairness embodied in the due process clause of the United States and Florida Constitutions.

The State, presented itself as an "authority" placed in a position of power by God. The State then proceeded to tell the jury, through the witness's reading of the Bible, that, 1) the Book of

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The State *sua sponte* discussed the Christian concept of salvation, calling it "fire insurance," because no matter how someone dies they still go to Heaven if they're "saved." (Trial Vol. XVIII, p. 974-975).

The State also had the following exchange with a juror:

State: You don't believe that the State's authority to take a life in appropriate circumstances conflicts with your understanding of your Christian beliefs?

Juror: No. In fact, Jesus said give to Caesar what's Caesar's, and obey the law according to how you're supposed to. (Trial Vol. XV, p.141).

This comment dovetailed the State's theory of the Bible's command to

Romans as contained in the Bible is the "inspired word of God," 2) that Romans teaches us that the prosecutor and Judge are "authorities" established by God, but defense counsel, who may or may not be "saved," is against the authorities and anyone who is against the authorities is against God; 3) that God gives power and unquestioned legitimacy to the "authorities" to punish wrongdoers who "bring this judgement upon themselves," and everyone must "submit to the authorities" because of their "conscience;" 4) that the Bible, and therefor God, does not recognize repentance as justification to temper the authorities punishment of wrongdoers, in other words, repentance should not be recognized as legal mitigation by any God fearing juror, nor should any juror consider mercy if the authorities are seeking death; 5) and that there is no inconsistency between Christ's failure to forgive the "felon" on the cross and his acquiescence in the crucifixion of the "felon," and the judge and jurors imposition of the death penalty on Anthony Farina because "[Mr. Farina has] brought this judgement upon [himself]."

It has long been the law in Florida that a prosecutor's comments, presentation of evidence or closing argument before a jury "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolletti v. State, 476 So. 2d 130, 134 (Fla. 1985). *See also* King v. State, 623 So.2d 486, 488-489 (Fla. 1993) (Barkett, J., specially concurring) (fundamental error exists when prosecutor tells jury they would be cooperating with evil and be involved with evil if they recommended a life sentence; when prosecutor tells jury he and his staff felt death penalty was appropriate; when prosecutor

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submit to "the authorities."

tells jury about slanderous attacks against police officers by defense counsel). [6]

This Court has clearly held that, "Without question, trial judges and attorneys should refrain from discussing religious philosophy in court proceedings." Ferrell v. State, 686 So. 2d 1324, 1328 (Fla. 1996). [7] This Court explained its rational, quoting an opinion by the Supreme Court of California reversing a death sentence wherein the prosecution invoked biblical authority for support of imposition of death,

> 'What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority' . . . The primary vice in referring to the Bible and other religious authority is that such argument may 'diminish the jury's sense of responsibility for its verdict and . . . imply that another, higher law should be applied in capital cases, displacing the law in the court's instruction . . . The prosecutor here invoked the Bible to demonstrate the legitimacy of capital punishment, and even implied that defendant deserved death under God's law.. . This was

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[6] Farina does not concede that he must proceed under a fundamental error analysis. However, if this Court should determine that the issue was not properly preserved, then Farina argues that the prosecutor's comments amount to fundamental error as determined in Romine and other cases cited.

[7] In some instances, this Court has declined to find fundamental error sufficient to reverse a capital murder conviction when the prosecutor referenced the Bible in closing argument absent defense objection. Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996)Bonifay v. State, 680 So.2d 413, 418 (Fla. 1996); *see also* Street v. State, 636 So. 2d 1297 (Fla. 1994)Street v. State, 636 So. 2d 1297 (Fla. 1994). However, the Bonifay Court also announced that the use of arguments which use references to divine law or invoke religion "can easily cross the boundary of proper argument." Bonifay at 418, n. 10. It is not clear how fleeting or mild the prosecutor's Biblical references were in Bonifay. However, it is unlikely that the comments were as extensive, intentional and egregious as they are in Mr. Farina's case. Further, unlike in Bonifay, in the instant case, defense counsel raised a timely objection requiring a harmless error analysis.

improper. (Internal citations omitted)

People v. Walsh, 6 Cal. 4th 215, 24 Cal.Rptr.2d 421, 448-450, 861 P.2d 1107, 1135-1136 (Cal. 1993), *cert. denied*, 513 U.S. 836, 115 S.Ct. 116, 130 L.Ed.2d 62 (1994) *See also*, Lawrence v. State, 691 So.2d 1068, 1074, n.8 (Fla.1997) (cautioning prosecutors "that arguments invoking religion can easily cross the boundary of proper argument and become prejudicial.")

The lower Florida courts have not failed to reverse convictions when the prosecution has made improper biblical references less egregious than in Mr. Farina's case. The Fourth District Court of Appeal found fundamental error and reversed a manslaughter conviction when the prosecutor stated: "There, ladies and gentleman, is a man who forgot the fifth commandment, which was codified in the laws of the State of Florida against murder; Thou shalt not kill." Meade v. State, 431 So.2d 1031 (Fla. 4th DCA 1983), *review denied*, State v. Meade, 441So. 2d 633 (Fla.1983). The Meade court held that the State did not "confine itself to quoting the Bible or referring to principles of divine law. The excess appellant points out here is that by identifying the Florida statute on murder with the Fifth Commandment, the State could have conveyed to the jury that all killing is against the law, when in fact under certain circumstances killing is excused." Id. at 1033. *See also* Harper v. State, 411 So. 2d 235 (Fla. 3d DCA 1982)(prosecutor's comments to jurors about Biblical teachings is improper appeal to emotion).

Meade describes exactly the type of "excess" that occurred in Mr. Farina's case; the prosecutor presented tenets of biblical law that conveyed to the jury that mitigation and mercy play no role in Florida's capital sentencing scheme and that, regardless of the weight of the evidence, the jurors should submit to the prosecuting authorities and vote for death. The prosecutor, through

the witness, told the jurors that God had ordained him as an "authority" to seek death in Mr. Farina's case, that the jurors should submit to authority because of their conscience, and that divine law does not recognize individual mitigating circumstances.

Not only does this argument violate Florida statutory law, but it also violates Mr. Farina's Federal and Florida constitutional right to due process, right against cruel and unusual punishment, the right to an individualized sentencing process, and protection from arbitrary and capricious imposition of the death penalty.

The Florida legislature has carefully crafted the state's death penalty statute, expressly describing the aggravating and mitigating circumstances to be applied. Fla. Stat. § 921.142(6) and (7). The Statute limits the standardless jury sentencing which the United States Supreme Court found to be unconstitutional in previous statutes. The previous unbridled discretion created a substantial risk that death sentences would be imposed in an arbitrary and capricious manner. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972).

Defense counsel offered appropriate, reasonable and relevant testimony through Reverend Davis about Mr. Farina's faith and desire to minister to other inmates. Florida Statute § 921.142(7)(h) provides that mitigating circumstances "shall be" the "existence of any . . . factors in the defendant's background that would mitigate against imposition of the death penalty." This portion of Florida's statute is in keeping with the United States Supreme Court requirement that death penalty schemes must allow a sentencer to consider in mitigation, any aspect of the defendant's character or record that is proffered as a basis for a life sentence. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978); *see also* Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821

(1987) (death sentence unconstitutional where sentencing judge refused to consider nonstatutory mitigating factors); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986) (exclusion of evidence about defendant's adjustment to incarceration violates Roberts (Harry) v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993 (1977)Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976)Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001(1976)Romine v. Head, 253 F.3d 1349 (11th Cir. 2001)Roberts (Harry) v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993 (1977) (holding mandatory death penalty statute unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976) (same) and Carruthers v. State, 272 Ga. 306, 528 S.E.2d 217(2000)Id. at 309. "Language of command and obligation from a source other than Georgia law should not be presented to a jury." Id.

The Supreme Court of Pennsylvania held use of biblical authority as a basis to urge a jury to sentence a capital defendant to death constitutes per se reversible error and may subject prosecutors to disciplinary proceedings. The prosecutor's closing argument, "As the Bible says, 'and the murderer shall be put to death,'" constituted per se reversible error and violated due process because the jury was essentially told that "an independent source of law exists for the conclusion that the death penalty is the appropriate punishment," and the prosecutor "interjected religious law as an additional factor for the jury's consideration." Commonwealth v. Chambers,

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[8] Eberhart v. State, 47 Ga. 598 (1873)Eberhart v. State, 47 Ga. 598 (1873) is a Reconstruction-era Georgia Supreme Court opinion in a capital murder case which contains a tirade against mercy. The Eleventh Circuit has condemned its use by prosecutors "on at least

528 Pa. 558, 586, 599 A.2d 630(1992). The court further stated, "Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law." Id. at 586-587. The prosecutor's misconduct in Mr. Farina's case was equally if not more egregious than in all the cases cited and the trial court's failure to sustain defense counsel's timely objection added to the prejudice and constitutes reversible error. The prosecutor's use of the Bible was planned and intentional as evidenced by his handing the witness a copy of Romans. The language the prosecutor instructed the witness to read was inflammatory, appealed to passion and prejudice, and usurped clearly established Florida statutory and Federal and Florida constitutional law. Further, the prosecutor improperly referred to the Bible to denigrate defense counsel, suggesting they weren't "saved" and explaining to the jury that, unlike the prosecutor, they were not "the authorities" working on behalf of God, that they were in essence, not officers of the court. Personal attacks on defense counsel are improper. Brooks v. State, 762 So. 2d 879, 904-905 (Fla. 2000) *See e.g.* Del Rio v. State, 732 So. 2d 1100 (Fla. 3d DCA 1999); Fryer v. State, 693 So.2d 1046 (Fla. 3d DCA 1997); Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988). The prosecutor's disparaging comment in this case was entirely unnecessary, irrelevant, unprofessional and improper.

Where a prosecutor oversteps bounds of propriety or fairness in his argument or presentation of evidence, it is the trial judge's responsibility to sustain the objection and rebuke the prosecutor in

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seven occasions." Romine at 1367.

front of the jury. Deas v. State, 161 So. 729 (Fla. 1935); *accord* Blanco v. State, 7 So. 2d 33 (Fla. 1942); *accord* Harper v. State, 411 So.2d 235 (Fla. 3rd DCA 1982). When a prosecutor has,

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

Edwards v. State, 428 So.2d 357, 359 (Fla. 3rd DCA 1983)Eagle v. Linaham, 279 F.3d 926, 943 (11th Cir. 2001)

Petitioner concedes that appellate counsel raised the claim that the court erred in admitting over defense objection the victim impact evidence, that the evidence became a feature of the trial and that the court failed to give the requested jury instruction. Farina (Anthony) v. State, 801 So. 2d 44, 52 (Fla. 2001). However, petitioner asserts appellate counsel was ineffective in failing to raise the issue that the substance of portions of the victim impact testimony was inadmissible and for conceding at oral argument that the substance of what the victims said was not objectionable.

(Oral Argument, Exhibit A, p.2-3).

Victim impact evidence is admissible in a capital sentencing proceeding. *See* Art. I, § 16, Fla. Const.; § 921.141(7), Fla. Stat.(2000). The Supreme Court of the United States has ruled that "if the State chooses to permit the admission of victim impact evidence . . . the Eighth Amendment erects no *per se* bar." Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991)(emphasis in original). However, the Payne court never suggested that victim impact evidence may be used without limit or constraint, but rather held that when victim impact "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."Penry v. Lynaugh, 492 U.S. 302, 319-328, 109 S.Ct. 2934, 2947-2952, 106 L.Ed.2d 256(1989)California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934(1987)Gholson v. Estelle, 675 F.2d 734, 738(CA5 1982)Payne court — evidence the substance of which was designed to inflame the passions, sympathy and emotions of the jurors in violation of the Due Process Clause of the United States Constitution and the corresponding provisions of the Florida Constitution. The testimony strayed far beyond a "quick glimpse of the life petitioner chose to extinguish." Payne v. Tennessee, 501 U.S. at 830 (O'Conner, J. *concurring*). By way of example, Deborah Wingard, testified about a "famous chapel" incident involving Ms. Van Ness where shortly before her death she was the only chapel attendant to raise her hand to the minister's question of, "If you died today, do you know where you would go?" Trial Vol. XXIII, p. 1585. This was offered as proof that Ms. Van Ness was "in heaven right now." Id. The same witness was allowed to testify that Ms. Van Ness was caring

because she was a "Christian young lady. And when you are a Christian, you have a special love for people. I think God created in her a very special unique love for young children." Id. at 1587.

Ms. Van Ness's uncle told the juror's, "Do you think my sister can ever have a good Mother's Day. Can't forget. You can't forget." Id. at 1589. Bonnie Van Ness, the victim's aunt, described Michelle Van Ness in the hospital room before she died: "She didn't move. She couldn't talk. She couldn't do anything. . . . I couldn't stay in her room. I had to leave. Seeing her like that was horrible. She was hooked up to so many machines, some of her hair had been shaved. But the thing that bothered me most was that her eyes were taped shut. I remember thinking if someone would just take the tape off, she would open her eyes, and everything would be okay. That didn't happen. Michelle died a few hours later." Id. at 1596-1597.

Ms. Van Ness's father's testimony was particularly troubling. It was presented in the form of a "private" letter to Mr. Tanner, the prosecutor, which Mr. Van Ness read aloud to the jury. It included multiple references to God, including how Michelle would ask questions as a child such as , Who is God? Id. at 1620, and the fact that the Van Ness's raised their children in a "loving, Christian environment." Id. at 1621. It included a comparison of discipline techniques in the Tanner family with the Van Ness family, referring to Mr. Tanner and Mr. Van Ness as the "big guy" disciplinarian. Id. It included an improper Golden Rule argument when Mr. Van Ness, describing how he first heard of the shooting, told the jury, " Think of yourself, Mr. Tanner, at 4:30 in the morning half asleep, half awake wondering who is calling and why." Id. at 1626. Mr. Van Ness also described how his daughter appeared in the hospital, with "tubes and machines hooked to every part of her body." Id. at 1627. He described her dying moments; "I remember telling Michelle how much I loved her. And I remember holding her left hand connected to the

tubes and looking at her taped eyes. Crying to Michelle to fight, that her mother and I loved her so much. And I remember a tear formed in her right eye while I was telling her how much we loved her. You see, I *believe* Michelle heard me for that brief second and *tried* to tell me, daddy, it will be alright." Id. at 1628.(emphasis added) Mr. Van Ness continued, in his open letter to Mr. Tanner, thanking "God for his grace and mercy" and expressing that it was the family's "love of God" that enabled them to continue on with life. Id. at 1630. Mr. Van Ness also impermissibly broached the Golden Rule again when he told the jury that, "Until you lose a child, it's impossible for you to know how I feel." Id. at 1631. He then concluded his open letter to Mr. Tanner:

> Finally, *Mr. Tanner, you said to me, your prayer was that I accept the healing God wants to offer me* and that I should not let my personal anger over this event overcome my recovery. Although I said to you that I don't understand and you can't possibly understand, and you agreed. . . . Mr. Tanner, I don't want the anger I feel of this murder of my daughter to continue to claim me as a victim. Today, in this Court, at this moment, I will tell you I'm willing to overcome it for two reasons. First, because Michelle's Mother's Day card reminds me that all we need is family and that family can withstand all. And, secondly, because *I believe you're correct about Michelle's wishes for us, her family*. I too believe Michelle would be saying to each of us here and to those who are hurting elsewhere, get up, get on with your life, living your life in such a manner so that you see her again . . ." Trial, Vol. XXIII, p.1633.

As much as the loss of a child is painful and horrible to imagine, and as sad as the death of Michelle Van Ness was, a court should not allow and a prosecutor should not encourage a capital juror to make a sentencing decision based on emotion, anger, sympathy, religious beliefs or inflamed passions. It is inconceivable that this jury could not have not been overcome with emotion, sympathy, passion and anger based on the substance of the victim impact testimony.

The descriptions of Ms. Van Ness in the hospital (photos of which would have been inadmissible due to their prejudicial effect substantially outweighing their probative value) hooked to tubes, with her eyes taped shut, did not show her uniqueness to the community or loss to her family. The invoking of God as an integral part of the family's life and the description of Ms. Van Ness's final chapel where she is proved to be in heaven, and Mr. Van Ness's letter to Mr. Tanner, describing the prosecutor's counseling of the father, urging him to accept God's healing, and telling the listener, you can't know how it feels to be in my shoes even though you are trying, violated the principles of Payne. Combined with the prosecutor's closing argument, infra, and cross examination of Reverend Davis, supra, the victim's impact evidence was so prejudicial that it tainted the jury's recommended sentence. Brooks v. State, 762 So.2d 879, 899 (Fla. 2000).

Appellate counsel was ineffective in failing to raise to this Court the issue that the substance of the testimony was itself unduly prejudicial and was wrong to concede at oral argument that none of the testimony in and of itself was objectionable or unduly prejudicial. Reasonable appellate counsel would have raised the argument that the substance of the testimony itself, as identified above, deprived Mr. Farina of a fair trial under the Due Process clause of the United States Constitution and the corresponding provisions of the Florida Constitution.

Appellate counsel was also ineffective in failing to raise a claim of error and violation of federal due process when the prosecutor engaged in improper argument when he compared the lives of the Farina brothers with that of the victim, in violation of Humphries v. Ozmint, 397 F. 3d 206, 235 (4CA 2005)Hall v. Catoe, 601 S.E. 2d 335 (S.C. 2004)State v.

Koskovich, 776 A.2d 144 (N.J. 2001)State v. Muhammad, 678 A.2d 164 (N.J. 1996)Payne and the Due Process Clause of the United States Constitution. The failure to raise this argument to this Court constitutes ineffective assistance of appellate counsel under the Sixth Amendment to the Federal Constitution.

4. Appellate counsel's failure to raise a claim of prosecutorial misconduct based on the prosecutor's improper misstatement of the law and facts during closing argument constitutes ineffective assistance of counsel.

Appellate counsel failed to raise a claim of prosecutorial misconduct when the prosecutor repeatedly misstated the law and facts of the case over defense objection during closing argument which constituted error which the state could not have proven harmless on direct appeal. Appellate counsel also failed to raise a claim of fundamental error when the prosecutor improperly appealed to emotion and religion and misstated the law absent defense objection. This contributed to the error argued supra in Claims I and II and cumulatively rises to the level of fundamental error.

It has long been the law in Florida that a prosecutor's comments, presentation of evidence or closing argument before a jury "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." Bertolletti v. State, 476 So. 2d 130, 134 (Fla. 1985); King v. State, 623 So.2d 486 (Fla. 1993). As a general rule, this Court has held that failing to raise a contemporaneous objection when an improper argument is made during closing argument waives the claim for appellate review absent fundamental error. Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000). Fundamental error is defined as error that reaches into the validity of the trial itself so that a sentence of death could

not have been obtained without the assistance of error. Id.

Where a prosecutor oversteps bounds of propriety or fairness in his argument or presentation of evidence, it is the trial judge's responsibility to sustain the objection and rebuke the prosecutor in front of the jury. Blanco v. State, 7 So. 2d 33 (Fla. 1942); *accord* Harper v. State, 411 So.2d 235 (Fla. 3rd DCA 1982). In the instant case, the trial court's repeated failure to sustain defense counsel's objections and reprimand the prosecutor gave the imprimatur of the court on the state's closing argument and aggravated the prejudicial effect further rendering the proceedings fundamentally unfair. Edwards v. State, 428 So.2d 357, 359 (Fla. 3rd DCA 1983).

During closing argument, the prosecutor made the following improper arguments and misstatements of the law and facts. The prosecutor told the jury, "our burden is not to prove beyond a reasonable doubt that these young men should be sentenced to death." Trial Vol. XXVIII, 2349. Defense counsel objected and the trial court stated,

> I'm not sure I heard the entire statement. I understand all three of you may be paraphrasing instructions, and I'm going to give you some leeway in paraphrasing the instructions. If the paraphrasing gets to the point of being erroneous and misleading, I'll sustain the objection; but I don't think I'm going to – I'm not going to require counsel to simply quote the instructions without paraphrasing. There is some leeway in there, and I didn't hear the remainder of Mr. Tanner's statements. So on these points . . . I think the objection may be premature, so if it becomes erroneous or misleading, please renew your objection. But for now I think he's in the middle of it, and it may clarify. Defense counsel: Is the objection overruled, Your Honor? The Court: I'm reserving ruling on it until I've heard the rest of the statements that the objection is being made to.

ROA Vol XXVIII, 2349.

Undeterred and uncontrolled by the trial judge, the prosecutor continued later in his argument, telling the jury: "**We have another recognized mitigator**,

and that is if the defendants were under extreme mental or emotional disturbance. There was no testimony of that. In fact, each of the psychologists said each of the defendants knew what they were doing, **were competent and sane**, and had no significant mental disorder to be classifiable as an extreme or mental or emotional disturbance." ROA, Vol XXVIII, 2358. The defense objected, alerted the trial court to the specific nature of the objection, i.e. statutory mitigation does not involve sanity, competency or the ability to know right from wrong. Id. The Court, instead of sustaining the objection and rebuking a seasoned and knowledgeable prosecutor who either knew better or should have known better, simply stated: "Mr. Tanner, can you rephrase it and make sure it's clarified." Id.

The prosecutor also misled the jury claiming Jeffrey told Anthony, "He didn't get the knife in deep enough." ROA XXVIII, 2361. [9] The court, in response to counsel's objection, stated: "Well, I've already instructed the jury to rely on their own recollection of the evidence. And I can't, every item of evidence, to control counsel's version of how they remember the evidence. I will be glad to intervene, but otherwise I'm going to have to rely on the jury to remember what

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[9] The actual quote the prosecutor appears to be referring to is from the taped statements in the car:

> Unidentified Voice: When it happened I felt nothing. Now I'm sorry Michelle died, you know, but there's nothing that I can do about it. I thought Kim was the one that was going to die. Didn't you?
> Unidentified Voice: I wasn't too sure. The knife didn't go in that far?
> Unidentified Voice: Didn't it?
> Unidentified Voice: It went about like maybe that far.

ROA VOL. XXIII, page 1653

the witnesses said and the evidence." Id. The prosecutor then repeated the misstatement of the facts, saying, "He said he didn't get the knife in far enough." Id. The trial judge's response, and the prosecutor's repetition of the misstatement, indicates the trial court contributed to the error by abrogating its duty to control the attorneys and guide the jurors and thereby added to the prejudicial effect of the prosecutor's repeated misstatements of law and fact.

The prosecutor also engaged in an impermissible "prosecutorial expertise" argument. Brooks v. State, 762 So. 2d 789, 901(Fla. 2000); Pait v. State, 112 So. 2d 380 (Fla. 1959). The prosecutor in the instant case told the jurors, "Even in a case that it appears right off the bat, so to speak, that surely there is a death penalty case, we go through a very laborsome process and we should. It's an orderly process . . . So there's a real control over this. This state doesn't ask jurors to come in and rule upon their emotion. Rule upon, well, I just think it ought to go this way, and a very orderly process followed and that process in this case is the weighing process that will result in a recommendation by you that is just and is the right thing to do." ROA VOL. XXVIII, 2365. This argument was unobjected to. It is, however strikingly similar to the disapproved argument in Roper v. Simmons, 534 U.S. —, 125 S.Ct. 1183, — L.Ed.2d — (2005)Brennan v. State, 754 So.2d 1 (Fla. 1999)Urbin v. State, 714 So.2d 411 (Fla. 1998)Miller v. State, 712 So.2d 451 (Fla. 2d DCA 1998)Brooks v. State, 762 So.2d 879, 899 (Fla. 2000) (unobjected to comments, when viewed in conjunction with objected to comments, can deprive a defendant of a fair penalty phase proceeding). Appellate counsel's failure to raise these issues constitutes ineffective assistance of counsel and denial of due process in violation of the Sixth, Fifth, Eighth and Fourteenth Amendment to the Federal Constitution and the corresponding

provisions of the Florida Constitution.

5.Prejudice.

Appellate counsel's failures to raise the above arguments on direct appeal prejudiced Mr. Farina. At the time of Mr. Farina's appeal, this Court had held that "constitutional errors, with rare exceptions, are subject to harmless error analysis". State v. DiGuilio, 491 So.2d 1129, 1134 (Fla.1986). This Court had also held that harmless error analysis "requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition and even closer examination of the impermissible evidence which might have possibly influenced the verdict." Id. at 1135. Knowles v. State, 848 So.2d 1055 (Fla. 2003)Fitzpatrick v. State, 490 So.2d 938 (Fla.1986)Strickland, 466 U.S. at 688. Appellate counsel failed to do so. Had appellate counsel addressed the errors that occurred when the prosecutor injected biblical law over defense objection, introduced unduly prejudicial victim impact evidence, and misstated the law and facts during closing argument, Mr. Farina would have prevailed under a harmless error standard and the result of the proceedings would have been different. Strickland, 466 U.S. at 688. See Eagle v. Linaham, 279 F.3d 926, 943 (11th Cir. 2001)

APPELLATE COUNSEL'S FAILURE TO RAISE THE CLAIM THAT THE FLORIDA BAR RULE PROHIBITING INTERVIEWING JURORS VIOLATES MR. FARINA'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION DENIED FARINA EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

This Court has held that portions of this claim have no merit, however, it is raised herein to preserve the issue for federal review. Appellate counsel failed to raise on appeal that Florida Bar Rule of Professional Conduct 4-3.5(d)(4) which prohibits counsel from communicating with jurors denied Anthony his rights to a fair trial and equal protection. This Court has held that this issue is appropriately raised on direct appeal. Vining v. State, 827 So. 2d 201, 216 (Fla. 2002); Arbelaez v. State, 739 So.2d 553, 555 (Fla. 1999).

Other states, including Georgia and California, routinely allow capital counsel to contact jurors to see whether improper influences affected their verdict. In the case at bar, in light of the improper religious references by the state, denying Anthony access to interview the jurors deprives him of meaningful appellate and post conviction review and therefor violates his rights to due process, fair and impartial jury, equal protection and effective assistance of counsel under the United States Constitution. Appellate counsel's failure to raise this issue denied Anthony meaningful assistance of counsel.

CLAIM III

THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. FARINA OF A FUNDAMENTALLY FAIR TRIAL AND DIRECT APPEAL GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Farina did not receive the fundamentally fair trial and direct appeal to which he was entitled under the Fifth, Sixth, Eighth, and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Farina's trial, when considered as a whole, virtually dictated the

sentence of death. The errors have been revealed in this petition, Mr. Farina's 3.851 motion, 3.851 appeal, and in his direct appeal.

Had appellate counsel raised as error the prosecutor's introduction of: the Bible as support for the death penalty; the unduly inflammatory and emotional victim impact testimony; instruction that the jury could allow their religious beliefs to trump the law; misstated law and facts in closing argument, including the improper prosecutorial expertise argument and the improper appeal to religion, there is a reasonable probability that the outcome of the appeal would have been different. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)Ray v. State, 403 So. 2d 956 (Fla. 1981)Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994)Stewart v. State, 622 So. 2d 51 (Fla. 5th DCA 1993)Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993)

THE LANDMARK CASE OF ROPER v. SIMMONS ESTABLISHES THAT ANTHONY FARINA'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Preliminary Statement

Retroactive changes in the law involving the fundamental rights asserted below were not established within the time period of his direct appeal or within the time provided under Fla. R. Crim. Pro. 3.851(d)(1). Anthony Farina has filed this claim under Fla. R. Crim. Pro. 3.851(d)(2)(B) and simultaneously filed a copy of the motion with this Court, accompanied by a Motion To Relinquish Jurisdiction. However, the State has argued, in its Objection To Motion

To Relinquish Jurisdiction, that this claim is more properly plead in a state habeas. As this Court has not ruled on Farina's Motion To Relinquish Jurisdiction, Farina, in an abundance of caution, raises this issue in his state habeas. Farina does not concede that this issue should not be raised in a successive 3.851 but Farina is placed in a Catch-22, he must raise the issue in both vehicles in order to avoid a finding of procedural bar. Therefor, he submits the claim to this Court in his state habeas.

B. The United States Supreme Court's landmark, retroactive decision in Roper v. Simmons, coupled with the unique facts of Anthony Farina's case, warrants a reweighing of the aggravators and mitigators and renders Anthony's death sentence unconstitutional.

Age of the defendant at the time of the offense is a mitigating factor. Fla. Stat. 921.141(7)(f). The courts have acknowledged significant changes in death penalty jurisprudence as it relates to age, both as a mitigating factor and as a bar to eligibility for the death penalty.

Ten years ago this Court held Article I, Section 17 of the Florida Constitution prohibits imposition of the death penalty on anyone under the age of **sixteen** at the time of the crime. Allen v. State, 636 So.2d 494 (Fla. 1994). The Allen court relied heavily on Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), in which the United States Supreme Court held that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of first-degree murder committed when he was fifteen years old.

In Urbin v. State, 714 So.2d 411, 418 (Fla.1998), this Court held that ***'the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes."*** Urbin was seventeen years old at the time of his offense, and yet he was afforded relief from his death sentence based on statutory and nonstatutory mitigation related to age and maturity issues even though he was above the age of maturity at which

execution was constitutionally barred. This Court said, "Here the defendant is seventeen, below the age of majority, although above the constitutional line for the death penalty. . . . [C]onsidering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age . . . the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes." Id. 418.

> In Brennan v. State, 754 So.2d 1 (Fla. 2000), this Court relied on its reasoning in Ramirez v. State, 739 So. 2d 568 (Fla. 1999)Roper v. Simmons, ____ U.S. ____, 125 S.Ct. 1183, ___ L.Ed.2d ___ (2005)Eddings v. Oklahoma, 455 U.S. 104, 110-113, 102 S.Ct. 869, 71 L.Ed2d 1 (1982) Roper, Id., at 1195; and
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> > 3. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. Roper, *Id., at 1195.*

Once the diminished culpability of juvenile offenders is recognized, the longstanding touchstones of justification for the death penalty vanish. Deterrence and retribution are lost on the juvenile whether he is chronologically under 18 or like Anthony Farina, 18 years old but functioning as a 14 year old.

In Anthony Farina's case, the Roper decision with its recognition of evolving standards

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[10] This Court relied on the Brennan decision to reverse Jeffery Farina's death sentence and impose a life sentence. (Jeffery) Farina v. State, 763 So. 2d 302, 303 (Fla. 2000)(Jeffery) Farina v. State, 763 So. 2d 302, 303 (Fla. 2000).

[11]While the amount of weight accorded mitigating or aggravating circumstances is normally left to the discretion of the sentencing court, the authority cited here shows that there are limitations on that discretion.

of decency and its **retroactive application**, warrants a reweighing of the mitigating and aggravating factors in Anthony's case. The trial court found extensive mitigation in Anthony's case. Testimony from the 1998 penalty phase provided a virtual checklist of factors in the life of Anthony Farina when viewed alongside the reasoning of Farina v. State, 801 So.2d 44, 58 (2001) Allen v. State, 636 So.2d 494 (Fla. 1994). The weight the trial court gave to Jeffrey's age is in accord with this Court's holding that the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes. Roper mandates that the cut off age for death penalty eligibility is now 17 years of age and younger. Thus, Anthony is now in the same position as Jeffery was at the 1998 sentencing in terms of the age difference between age at the time of the crime and the cut off age for death penalty eligibility. Stated another way, Anthony's age at the time of the crime is barely six months above the cut off age. Accordingly, in light of this Court's instruction in Urbin and the United States Supreme Court's holding in Roper, Anthony is entitled to have his age mitigator reweighed by a new sentencing jury and judge. The right to Due Process, the right to an individualized sentencing, the right to a proportionality analysis of his case by this Court to ensure that his case is the **most aggravated and least mitigated**, and the right against the

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[12] The trial judge found three statutory mitigating factors (no significant prior criminal history, Anthony was an accomplice and was 18 years old at the time of the crime). He found 15 non statutory mitigators, including an abused and battered childhood, history of emotional problems, involvement in Christianity and Bible study, remorse, poor upbringing, lack of education, cooperation with the police, good conduct in prison, assertion of a positive influence on others, no history of violence, abandonment by his father and amenability to rehabilitation. Farina(II),

arbitrary and capricious imposition of the death penalty as recognized by the United States Supreme Court and this Court all warrant reweighing of Anthony's sentence.

Anthony Farina is exactly the type of person designed to be protected by the evolving standards of decency which mark the progress of a maturing society. Roper, citing Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

The above described cases and the changes in Eighth Amendment jurisprudence based on evolving standards of decency, render Anthony Farina's death sentence constitutionally flawed under both the Florida and Federal Constitutions. Anthony Farina is now "closer...to the age where the death penalty is constitutionally barred" and, accordingly, this Court should reweigh the statutory age mitigator in Anthony's case and grant him a life sentence, or, in the alternative, remand his case for a new sentencing where a jury can be told that he is barely six months above the cut off age for death penalty eligibility.[13]

Now that

For all the reasons discussed herein, Mr. Farina respectfully urges this Honorable Court to grant habeas relief in the form of a life sentence, or, in the alternative, a new sentencing proceeding.

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801 So.2d at 58, fn.5.

[13] The prosecutor informed the jury that the cut off age for death penalty eligibility at the time of the Jeffrey and Anthony's trial was 15 and younger.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to all counsel of record on this ____ day of May, 2005.

_____
Marie-Louise Samuels Parmer
Florida Bar No.0005584

_____
David D. Bass
Florida Bar No. 0920290
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)
Counsel for Petitioner

Copies furnished to:

The Honorable C. McFerrin Smith
Circuit Court Judge
101 N. Alabama Avenue
Suite 437
Deland, FL 32724

Rosemary L. Calhoun
Assistant State Attorney
Office of the State Attorney
251 N. Ridgewood Avenue
Daytona Beach, FL 32114

Kenneth Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, Fifth Floor
Daytona Beach, Florida 32118-3951

Anthony Farina
DOC# 684135
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas Corpus, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

_____
Marie-Louise Samuels Parmer
Florida Bar No.0005584

David D. Bass
Florida Bar No. 0920290
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)
Counsel for Petitioner