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 CRIST,
Attorney General,
Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

MARIE-LOUISE SAMUELS PARMER
FLORIDA BAR NO. 0005584
ASSISTANT CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

Any claims not addressed in this Reply are not waived. Petitioner stands on the merits as raised in his Habeas Petition.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF MR. FARINA=S SENTENCE OF DEATH.

In objecting to Farina=s Introduction in his Habeas, Respondent argues that Aappellate counsel is not required to raise every conceivable issue,@ (Response, p. 6), and that Ait is not clear what Farina believes appellate counsel should have done.@ (Response, p. 10). However, Farina has directly alleged in sections I(2), (3) (4) and (5) of his Habeas Petition the specific errors and omissions made by appellate counsel. Respondent=s argument has no merit.

Respondent also suggests that Farina should explain which issues appellate counsel should not have argued and faults Petitioner for failing to explain Ahow an additional 50 pages of argument could have been added to his brief on direct appeal.@ (Response, p. 10). Respondent offers no cites for this argument and Petitioner is unaware of any caselaw which requires a Petitioner to identify arguments which should not have been raised and, indeed, such a requirement would seem to be an exercise in futility. Respondent=s hyperbolic argument that Aan additional 50 pages of argument@ could not

have been added to Petitioner=s brief on direct appeal is misleading. The substance of Farina=s Petition is not 50 pages long, but regardless, had appellate counsel required more space to present argument, he could have petitioned this Court to allow him to exceed the page limit, as, in fact, this Court has done with Farina=s Petition. Respondent=s argument is without merit.

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

Respondent first argues that appellate counsel could not have been ineffective for failing to raise the claim of prosecutorial misconduct based on the prosecutor=s egregious introduction of evidence of biblical authority in support of the death penalty because Athe claim contained in it was not preserved at trial and appellate counsel cannot have been ineffective for raising an unpreserved claim. A (Response, p. 11). As authority respondent cites several cases. Two of them, *Zack v. State/Crosby*, __ So. 2d__, 2005 WL 1578217 (Fla.), 30 Fla. L. Weekly S591 and *Hendrix v. State/Crosby*, 908 So. 2d 412 (Fla. 2005) are clearly distinguishable. Another, *Wright v. State*, 857 So. 2d 338 (Fla. 2003), is an incorrect cite and Petitioner was unable to find the case using traditional research methods, such as typing in the cite on Westlaw. The fourth case, *Rodriguez v. State*, 609 So. 2d 493 (Fla. 1992), while factually closer than *Zack* and *Hendrix* , is also distinguishable.

Zack and *Hendrix* stand for the general proposition that appellate counsel cannot be found ineffective for failing to challenge an *unpreserved* issue on direct appeal absent fundamental error. However, these cases are inapplicable to Farina=s case. In *Zack*, trial counsel failed to renew an objection prior to the swearing of the jury so a claim that the state improperly made a racially motivated peremptory challenge during jury selection was not preserved. In *Hendrix*, the sole habeas issue involved appellate counsel=s failure to raise a shackling claim. A[B]ecause defense counsel never objected to the shackling issue with the trial court, . . . there would be no information in the record as to whether Hendrix was shackled during the trial. . . . As this Court has held, appellate counsel is not considered ineffective for failing to present evidence which was outside of the appellate record on review.@ *Hendrix v. State/Crosby*, 908 So. 2d 412, at 426. In Farina=s case, the complained of error comprised more than six pages of the record on appeal so appellate counsel either knew or should have known of the error. In addition, trial counsel did contemporaneously object, on relevance grounds, to the complained of evidence.

Respondent also cites as authority for his position, *Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992). In, *Rodriguez*, this Court held Rodriguez=s claim that Ait was error to permit the victim=s sister-in-law to offer identification testimony due to the >inherently inflammatory= nature of such testimony, was not preserved by specific objection. The

only objection to the identification testimony was based on relevancy.@[1]

This case is also distinguishable. In Farina=s case, while defense counsel=s objection to the prosecutor=s presentation of biblical authority was, as in *Rodriguez*, on relevance grounds, unlike in *Rodriguez*, the evidence in Farina=s case wasn=t relevant. (ROA, Vol. XXIV, p. 1839). Fla. Stat. 90.401 defines relevant evidence as A[E]vidence tending to prove or disprove a material fact.@ While it is arguable, particularly in light of the egregious, offensive and outrageous nature of the testimony intentionally elicited by the prosecutor, that defense counsel could have been more animated and zealous in his objection, the objection was still sufficient to apprise the trial court of the nature of counsel=s objection. Further, at the time of the objection, the trial court either knew or should have known that the dangerous path the prosecutor was embarking on was one of introducing both irrelevant and unconstitutional testimony. None of the objected to evidence the prosecutor presented to the jurors , i.e. that the Bible considers the judge and the prosecutor as authorities, that the authorities work for God to achieve justice, that defense counsel is against the authorities, that God gives power to the authorities to

[1] Respondent actually misquoted *Rodriguez*, stating that this Court held that a relevance objection is insufficient to preserve a claim that testimony is Ainherently prejudicial.@ (Response at 12). The correct quote is Ainherently inflammatory,@ as noted above.

punish wrongdoers who Abring this judgement upon themselves@, and that everyone, including jurors, must submit to the authorities, was relevant in any way, shape or manner to Farina=s capital trial. Therefore, unlike in *Rodriguez*, where the identification testimony was presumably relevant, the complained of testimony in Farina=s case did not meet even the minimal threshold requirement of relevancy and was on its face irrelevant and unconstitutional.

The fact that Farina argues in his habeas that the testimony violated his rights under Florida law and his rights to federal Due Process, an individualized sentencing process, protection from cruel and unusual punishment and arbitrary and capricious imposition of the death penalty, does not mean that the complained of evidence was relevant. Rather, those arguments go to the weight and effect of the trial court=s error, are an extension of the relevance objection posited at trial and are an essential aspect of this Court=s analysis in assessing the degree of harm to Farina=s right to a fair trial. Farina=s habeas argument is not different or discrete from the objection raised at trial but an extension of the objection.

Respondent=s remarkable second argument as to Farina=s claim is that the Amatters complained of are not error at all,@ (Response at 13), and that Athere is simply no improper argument.@ (Response at 17). As authority, Respondent cites only one case, *Ferrell v. State*, 686 So. 2d 1324 (Fla. 1996), which was also cited by Petitioner.

Respondent attempts to cast the unobjected to, although improper, comments of a well-intentioned judge as more egregious than the prosecutor=s intentional, outrageous and objected to comments in Farina=s case. Respondent argues that Aif there was no fundamental error in *Ferrell*, there can be no error here.@ (Response at 17)

In *Ferrell*, the judge, in response to a juror=s statement, attempted to explain to potential jurors the origins of the phrasing of the commandment, AThou shalt not kill.@ This Court, while declining to reverse, held that,AWithout question, trial judges and attorneys should refrain from discussing religious philosophy in court proceedings.@ *Ferrell v. State*, 686 So. 2d at 1328. This Court also quoted extensively from *People v. Wash*, 6 Cal. 4th 215, 861 P.2d 1107 (Cal. 1993), where the California Supreme Court reversed a death sentence when the prosecutor told jurors that God recognized that people like the defendant must be punished for what they=ve done.

Similar to the California case, although much more egregious, the prosecutor in Farina=s case, from jury selection to closing argument, infused religion into the trial and advocated that Christian Biblical teachings, including teachings related to the state=s authority to take a life, were appropriately considered by sitting jurors, even if they conflicted with Florida law, (TRIAL ROA, Vol. XVIII, 882; TRIAL , Vol. XVII, 703; TRIAL VOL. XVIII, 974-975), that the Bible teaches that God has made the prosecutor an authority, and that to be against the authorities is to be against God. The exact

quotes appear in Petitioner=s habeas and are extensive. In essence, the prosecutor, through Reverend Davis, told the jurors that God establishes the authorities, that the judge and the prosecutor are the authorities but defense counsel is not, that if you rebel or are against the authorities you are against God, and that it is the responsibility of the authorities to do God=s will and punish the wrongdoers, and that people must submit to the authorities in order to bring punishment to those who ABring judgement upon themselves.@ (TRIAL ROA, Vol. XXIV, p. 1836-1845) The prosecutor tied up his Biblical theory of prosecution, when he concluded his closing argument by stating that the A[Farina brothers] have brought this judgement upon themselves.@ (TRIAL ROA, Vol. XXVIII, 2366). To argue that this testimony is not error is facetious and, accordingly, without merit.

Respondent, in the alternative, argues that the error in this case does not rise to the level of fundamental error. Not conceding that this Court need proceed under a fundamental error analysis, Farina asserts, however, as he did in his Petition, that if this Court were to find the objection insufficient, the Prosecutor=s conduct in this case was so egregious, so pervasive, so intentional, and the testimony he elicited so damaging in its content, that it rises to the level of fundamental constitutional error.

> Section 924.33, Florida Statutes (1977), provides an appellate court shall not presume that an error injuriously affected substantial rights of a defendant. However, where the error is of federal constitutional proportions, it must be judged by the federal standard which places the burden on the state to prove beyond a reasonable doubt the error was

> harmless. *White v. State*, 356 So.2d 56 (Fla. 4th DCA 1978) (trial court=s exclusion of a defendant=s own alibi testimony held reversible error even though state presented a Areasonably strong circumstantial web of evidence@ against defendant). *See Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 2d 705 (1967); *Fahy v. Connecticut*, 375 US 85, 86, 84 S.Ct. 229, 230, 11 L.Ed 2d 171, 173 (1963) (AThe question of whether there is a reasonable probability that the evidence complained of might have contributed to a conviction.@). If an erroneous instruction on one theory of intent was elevated to constitutional proportions, the error might, in effect, be presumed harmful until otherwise proved by the state. *See Christian v. State* (felony murder charge based on non-existent crime under an unconstitutional statute held fundamental error and harmless error doctrine not applicable); *Lane v. State*, 44 Fla. 105, 32 So. 896 (Fla. 1902). Even constitutional error may be harmless. Whether the error is harmless can only be determined by a review of the record.

State v. Jones, 377 So. 2d 1163, 1167-1168 (Fla. 1979).

Fundamental error in the penalty phase is deemed as error which causes a juror to vote for a more severe penalty. ATo constitute fundamental error, >improper [evidence introduced during] a penalty phase must be so prejudicial as to taint the jury=s recommended sentence.= *Thomas v. State*, 748 So. 2d 970, 985 n. 10 (Fla. 1999).@ *Fennie v. State*, 855 So. 2d 597, 609 (Fla. 2003).

Anthony Farina was not the actual killer. His brother Jeffrey is the uncontested killer. As noted by Justice Anstead, Anthony had more mitigation than Jeffrey but for Jeffrey being 16 at the time of the crime. *Farina (Anthony) v. State*, 801 So.2d 44, 57 (Fla. 2001) Anthony was sexually abused, physically abused, taken from his parents custody, exposed to street drugs at an early age, frequently moving from state to state,

changing schools at an alarming rate, and generally living in poverty without a meaningful or positive adult role model. *Id*. At Anthony=s initial trial, the jury recommendation was 7 to 5 in favor of death. (The recommendation as to Jeffrey Farina was 9 to 3 in favor of death). At his penalty phase retrial, after the prosecutor told potential sitting jurors they could disregard the law if it conflicted with their own moral beliefs, had a Reverend read from Biblical text which taught the jurors that God made the prosecutor the Aauthority,@ that defense counsel is not the Aauthority@ and may not even be Asaved,@ that the authorities are doing God=s will in punishing wrongdoers, that everyone, including jurors must submit to the Aauthorities@ because to go against the Aauthorities@ is to go against God, and that Anthony Farina has brought a judgement of death upon himself, and that voting for death is consistent with the crucifixion of Jesus Christ, the jury vote was 12 to 0 in favor of death. The facts of Anthony=s case had not changed, but the information in the form of Biblical law given to the jurors was new and it tainted the jury verdict.

This Court has repeatedly made clear that reference to Biblical text is inappropriate in a capital penalty phase proceeding. *Ferrell v. State*, 686 So. 2d 1324, 1328 (Fla. 1996); *Lawrence v. State*, 691 So.2d 1068, 1074, n.8 (Fla.1997) ; *Bonifay v. State*, 680 So.2d 413, 418 (Fla. 1996); *see also Street v. State*, 636 So. 2d 1297 (Fla. 1994). This Court has never reversed a death sentence on these grounds.[2] However, none of the

[2] The lower Florida courts have not failed to set aside convictions on these grounds however. *See Meade v. State*, 431 So.2d 1031 (Fla. 4th DCA 1983), *review*

above cited cases brought before this Court have involved the quantity and quality of objectionable testimony as in this case. The prosecutor=s intentional, blatant appeal to emotion, prejudice and twisting of biblical law to suit his purpose rises to the level of fundamental error. In fact, the prosecutor=s conduct is so outrageous, that this Court should consider whether he should be subject to disciplinary sanctions. *See Commonwealth v. Chambers*, 528 Pa. 558, 586, 599 A.2d 630(1992) (prosecutor may be subject to disciplinary sanctions for introduction of religious teaching in capital case); *see also Carruthers v. State*, 272 Ga. 306, 528 S.E.2d 217(2000). This Court should send a strong message that the introduction into evidence of religious doctrine and teachings in support of a verdict of death is not acceptable in Florida courts **B** particularly when the Government is seeking to execute another human being. If this Court were to hold that the prosecutor=s conduct in this case was acceptable, and did not warrant reversal, then there is no meaning to this Court=s holding that the presentation of Biblical law is inappropriate in a death penalty case and prosecutors will be free to disregard a hollow and toothless principle.

Respondent=s final argument as to this claim is that the Eleventh Circuit=s opinion in *Romine v. Head*, 253 F. 3d 1349 (11th Cir. 2001) is **A**of no value at all in determining

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denied, *State v. Meade*, 441So. 2d 633 (Fla.1983); *Harper v. State*, 411 So. 2d 235 (Fla. 3d DCA 1982).

whether Farina=s appellate attorney was ineffective.@ (Response at 19). However, Respondent fails to acknowledge the striking similarities between *Romine* and the case *sub judice* and Respondent incorrectly implies that the closing argument in *Romine* was preserved by objection B it was not. As to the similarities, religion seeped into every aspect of Farina=s trial as it did in *Romine*: in jury selection, the prosecutor in Farina=s case told jurors that it was okay if their moral and religious beliefs conflicted with the law; he introduced the Bible into evidence by having a Reverend read the testimony to the jurors; he implied defense counsel wasn=t saved; he had the victim=s father read a letter with numerous references to God; and another witness testify about a chapel the victim attended and her belief that the victim was now in heaven. While it is true that the judge in this case did not exhort the jurors to pray, nor did he send a reverend to preach to the jurors while sequestered, there are enough troubling similarities that the Eleventh Circuit=s opinion, while not binding, can certainly be instructive to this Court.

2. Appellate counsel=s failure to raise a claim that the substance of the victim impact evidence was improper and his concession at oral argument that the substance of the victim impact statements in and of themselves were not objectionable, constitutes ineffective assistance of appellate counsel and violates Mr. Farina=s rights under the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Respondent argues that it is inappropriate to attach the transcript of the oral

argument and implies that it is improper to argue an ineffective assistance of appellate counsel claim based on oral argument. (Response at 22). This Court, however, has considered the content of appellate counsel=s oral argument in evaluating an ineffective assistance of appellate counsel claim. *Bertoletti v. Dugger*, 514 So. 2d 1095 (Fla. 1987).

To the extent that Respondent argues that this issue has already been decided adversely to Farina, Farina argues, as he did in his initial brief, that because appellate counsel failed to apprise this Court of the extensive nature of objectionable subject matter in the victim impact testimony the issue was not presented to this Court and therefor has not been decided by this Court.

3. 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.

Respondent misleadingly argues that Petitioner=s claim is based on Aout of context quotations from the record@ and the claims Ahave no basis in fact.@ (Response at 23) Respondent then proceeds to quote, or not quote, selected portions of the prosecutor=s closing argument to suit his own purposes. To the extent that Respondent argues that Petitioner=s claims are based on Aout-of -context@ quotes, and therefor meritless, Farina relies on his initial brief and urges this Court to review the prosecutor=s entire closing argument. Petitioner also notes that Respondent has failed to cite a single case in support of his arguments in this section.

Respondent argues that the prosecutor=s misstatement of fact as to Jeffrey stating that the knife didn=t go in far enough Ais irrelevant insofar as Anthony is concerned.@ Respondent blithely ignores the fact that Anthony and Jeffrey were tried together, that Jeffrey was the actual killer and but for Jeffrey=s killing of the victim in this case, Anthony would not be under a death sentence. To claim that Jeffrey=s statement has no relevance to Anthony, in light of the facts of this particular case, is sheer intellectual dishonesty.

Respondent also misleadingly attempts to quote the Aentirety@ of the prosecutor=s Aprosecutorial expertise argument@ claiming Petitioner quoted it out of context. Respondent conveniently leaves out the beginning and end of the quote. The actual full quote is as follows:

A*You believe the sun is going to shine, and part of the reason we have that security is because we have law. We have good laws.* 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 of first conviction beyond a reasonable doubt, and then the requirements that the state go even further and prove one or more aggravating circumstance. It would support the death penalty, and the legislature is even limited to what we can B what would be aggravating circumstances. And to prove two, that its mostly related, you will only get credit for one. So there=s a real control over this. *This state doesn=t ask jurors to come in and rule on their emotions. 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 that will result in a recommendation by you that is just and is the right thing to do.@ (TRIAL 2364-2365) (Omitted portions of quote in italics). The prosecutor=s claim that the State, which is of course the prosecutor, A go[es] through a very laborsome process@ and that Athis state@ doesn=t ask jurors to rule on their emotion but follows an orderly process, is similar to the prosecutorial expertise argument condemned in *Brooks v. State*, 762 So. 2d 789, 901 (Fla. 2000). Moreover, in Farina=s case, the prosecutor>s improper prosecutorial expertise argument is exacerbated by the fact that he had previously told the jury that he was an Aauthority@ placed in a position by God to punish wrongdoers. The prosecutor=s comment was improper and rises to fundamental error.

Respondent also argues that Farina=s claim that the Afollowing argument was somehow improper@ is Avirtually incomprehensible.@ (Response at 26). The complained of argument reads: A The **immaturity that you may want to ascribe to people below 20 years old does not mitigate** what these two men determined to do and what they carried out. **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. XV, 2366)(emphasis added).

Since Respondent found Farina=s argument Avirtually incomprehensible,@ Petitioner

will simplify the argument just to ensure that it is clear. One, the prosecutor is telling the jury that age is not a mitigator. This is wrong and a misstatement of the law because age is a statutory mitigator, and a particularly weighty one. Two, the prosecutor=s use of the term Athey have brought this judgement upon themselves@ is a direct quote from the Biblical text introduced during the cross of Reverend Davis. The reason the use of a biblical quote is wrong was extensively briefed in Claim I(2) of Petitioner=s Habeas and Reply Habeas and is incorporated herein.

CLAIM IV

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

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.

Respondent distorts Petitioner=s claim trying to cast it as simply a claim that because Anthony Farina was 18 years old at the time of the crime, this Court should apply *Roper* to his case, which of course, does not apply because Roper bars the

imposition of the death penalty only on those 17 years old and younger at the time of the crime. In casting Petitioner=s argument in this light, Respondent fails to acknowledge and address this Court=s precedent on mitigation due to youthful age.

First and foremost, Farina=s claim, as plead in his Motion To Relinquish Jurisdiction, is that because of *Roper* **and this Court=s holding** in *Urbin v. State*, 714, So. 2d 411, 418 (Fla. 1998) (Athe closer the defendant is to the age where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes.@), this Court should send Farina=s case back to the trial court, as requested in his successive 3.851 motion, to allow the judge and jury to reweigh the statutory age mitigator. (The trial judge gave Anthony=s age moderate weight in mitigation and gave Jeffery=s age, which at the time was just months above the age where the death penalty was constitutionally barred, great weight. Anthony=s age at the time of the offense is now just months above the age where the death penalty is barred, and Anthony is now in the same position as Jeffery was at the time of trial and accordingly his age should now be given great weight in mitigation.) In the alternative, this Court should reweigh the age mitigator itself and, finding that the balance of the aggravators and mitigators has changed, either impose a life sentence on Anthony, or remand his case back for a new trial where a jury can consider his age in light of the retroactive change in the law. It is this Court=s holding in *Urbin*, read in conjunction with the United States Supreme Court=s holding in *Roper*,

and the unique facts of this case, which warrant a reweighing of the age mitigator in Anthony=s case.

CERTIFICATE OF SERVICE

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

_____

Marie-Louise Samuels Parmer
Florida Bar No. 0005584
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544

Copies furnished to:

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

Anthony Farina
DOC #684135
Union Correctional Institution
7819 NW 22nd Street
Raiford, FL 32026

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

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

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

_____

Marie-Louise Samuels Parmer
Florida Bar No. 0005584
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, FL 33619