

STATEMENT OF CASE

In November of 1992, the Appellant and his brother, Jeffery A. Farina, were convicted and sentenced to death for the fatal shooting of 17 year old Michelle Van Ness during the May, 1992, robbery of a Taco Bell restaurant in Daytona Beach. Jeffery Farina fired the shot to the head that killed Van Ness. In a penalty phase proceeding without victim impact evidence, the jury had recommended death for the Appellant by a 7 to 5 vote, which the court followed.

On appeal, this court affirmed the conviction but vacated the death sentence and remanded for a new sentencing proceeding. Anthony J. Farina v. State, 679 So.2d 1151 (Fla. 1996). The court ruled likewise for the Appellant's brother, Jeffery Farina. Jeffery A. Farina v. State, 680 So.2d 392 (Fla. 1996).

On remand, the case was reassigned to the Honorable C. McFerrin Smith, Circuit Judge in and for Volusia County, Florida, and new counsel was appointed for Appellant. In pretrial hearings, the lower court denied the Appellant's motion in limine to prohibit the introduction in evidence of a post-arrest statement he made indicating the other employees present during the robbery should have been killed also. (PTR.218)¹ The court refused to hear Appellant's motion to suppress the taped conversation between himself and his brother which the police had illegally

¹January 22, 1998.

obtained, asserting it lacked authority to hear such issues on remand. (PTR.585)² The court denied also the Appellant's motion to sever the proceedings, which resulted in the taped statements of his brother being introduced in evidence against the Appellant, which were misleading and prejudicial because the Appellant had no opportunity to cross-examine Jeffery at trial regarding the context and meaning of these statements. (PTR.600)³ Finally, the court denied the Appellant's motion to exclude victim impact testimony, which had not been introduced in the original proceeding. (PTR.218) The court ordered the State to proffer this evidence, however, but the State never did so and presented extensive victim impact testimony through 12 witnesses during the resentencing proceeding, over objection. (TR.10:1554-1638)

A joint penalty proceeding was held before a new jury on April 6 through 20, 1998. (TR.1-15) By a vote of 12 to 0, the re-sentencing jury recommended the death penalty for each defendant. (DR.3:336) The lower court followed that recommendation, and the Appellant was sentenced once again to death. (TR.2629-36)⁴ The Appellant's brother Jeffrey was also sentenced to death again. Id.

²March 23, 1998.

³April 1, 1998.

⁴May 7, 1998, sentencing.

In imposing the death penalty on the Appellant, the trial judge found five (5) aggravating factors: (1) previous conviction of another capital felony or felony involving the use or threat of violence; (2) capital felony committed to avoid or prevent a lawful arrest or to affect an escape from custody; (3) capital felony committed for pecuniary gain; (4) capital felony was heinous, atrocious or cruel; and (5) capital felony was a homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(b), (e), (f), (g), (i), Florida Statutes (1991). (DR.3:354)

The trial judge found eighteen (18) mitigating factors, as follows: three (3) statutory mitigating factors: (1) no significant history of criminal activity; (2) Anthony was an accomplice in the capital felony committed by Jeffery Farina and Anthony's participation was relatively minor; and (3) Anthony's age (18) at the time of the crime; and fifteen (15) non-statutory mitigating factors, including an abused and battered childhood, history of emotional problems, cooperation with the police, involvement in Christianity and Bible study courses while in prison, good conduct in prison, remorse for what happened, assertion of a positive influence on others, no history of violence, abandonment by his father, poor upbringing by his mother, lack of education, good employment history, and amenability to rehabilitation. Id.

The trial judge concluded that the aggravating factors far outweighed the mitigating factors. Id.

This is an appeal from that sentencing proceeding and the second death sentence imposed upon Anthony Farina.

STATEMENT OF FACTS

On May 8, 1992, Kimberly Gordon was the Assistant Manager of the Taco Bell at Clyde Morris and Beville Road in Volusia County. Also working with her that evening were Van Ness, Derek Mason and Gary Robinson. The Appellant had worked at the store previously and knew Gordon and Mason. (TR.8:1263)

The restaurant closed at midnight, and Mason and Van Ness took out the trash bags from the rear of the store. (TR.8:1264) As they were coming back in, they were approached by Jeffery Farina who had a .32-caliber pistol and the Appellant who carried a knife and a rope. They ordered Van Ness and Mason back into the restaurant and then rounded up the two other employees. (TR.8:1265-6) While Jeffery held the others at gunpoint, Anthony took Gordon to the front of the front of the store and forced her to open the safe and remove the cash register trays, which they took to the rear of the store. Id.

Anthony asked if anyone wanted to smoke a cigarette, and Gordon and Van Ness asked if they could do so. (TR.8:1267) Anthony gave them cigarettes, and while they were smoking, Jeffery tied Mason and Robinson's hands behind their backs while Anthony held the gun. Id. Then Van Ness and Gordon were tied up similarly by Anthony. (TR.8:1268)

Mason asked if he could sit across from the others and Anthony said yes. Id. Anthony told everyone that they were not going to be harmed and if they would just cooperate, everything would be okay. (TR.8:1268;9:1487) When the employees were tied up, they were taken to a walk-in cooler and placed inside. (TR.8:1269;9:1488) Van Ness was crying and was afraid she would be hurt, but Anthony continued to tell every one that no one was going to get hurt. (TR.9:1487) Everyone believed him. Id. They were talking among each other and telling Van Ness that everything was going to be alright. (TR.8:1269-70) At their request, Anthony considered cutting off the refrigeration system to the cooler, but there was a concern that an alarm would sound. (TR.8:1287;9:1495,1504-5)

After the employees were placed into the cooler, Anthony and Jeffery stepped outside. (TR.8:1269;9:1488) After a short time during which the employees could not hear what was going on outside, Anthony returned and, stating there was one further precaution to take, had the employees step back into the freezer section, and then he stepped out. (TR.9:1488;10:1531) A few moments later Jeffery entered the freezer alone and shot Robinson in the chest, then Mason in the lower right face, and Van Ness in the back of the head, in quick succession. (TR.8:1271;9:1488;10:1531) Jeffery also tried to shoot Gordon, but the gun misfired. Id. Jeffery then turned and took Anthony's knife and stabbed Gordon in the back. (TR.8:1271;9:1489;10:1532)

Although Mason testified that Anthony held Gordon's head down while Jeffery stabbed her, neither Gordon herself nor Robinson recalled Anthony doing that. (TR.9:1507;10:1532,1546-7)⁵

The Farinas fled the restaurant after the shootings, but were arrested later that day. (TR.9:1424-5) When arrested, Jeffery had a receipt from K-Mart indicating he had purchased .32-caliber bullets, gloves, and clothesline on May 8. (TR.9:1366-94) The police recovered most of the money that was taken during the robbery.

Van Ness fell unconscious immediately after she was shot. (TR.10:1541) Mason and Robinson managed to untie themselves and called the police. (TR.8:1285) Van Ness never regained consciousness and died two days later. (TR.8:1306,1330).

Anthony did not shoot or stab any of the victims. Prior to the shooting, none of the victims had been tortured or abused by Anthony or Jeffery. (TR.8:1276-8;10:1542-3)

Upon arrest, the Farinas cooperated with the police, consented to the search of their room and led them to areas where evidence was recovered. (TR.9:1366-94).

The Appellant presented extensive mitigation evidence. Anthony's aunt, Mary Grafwallner, testified that Anthony's mother (her sister) married Anthony's father right

⁵Anthony testified that he did not hold Gordon at the May 1, 19

after high school, when she became pregnant. (TR.11:1797) He was much older than her, but appeared to care a lot about the boys during the marriage. Id. As the mother got into her mid-20's, she became unhappy with the marriage, because she wanted to go out and party, have fun and drink, but her husband, being much older, wanted to stay home. (TR.11:1799) When Anthony was 6 or 7 years old, his parents divorced, and the aunt testified that the divorce had a devastating impact upon Anthony and his brother Jeffery. Thereafter, she testified that the boys began to be less open and friendly. (TR.11:1796-1802) After the divorce, the mother was no longer a good housekeeper, and seldom even kept the kitchen clean. Id.

Shortly thereafter, she married James Brant, an alcoholic Vietnam veteran who had serious mental problems. Id. He never went anywhere without carrying a beer with him. Id. During the course of this marriage, Anthony (and Jeffery) were substantially abused and physically beaten when still a small child by Mr. Brant. (TR.12:1855-68,1949-59,2002-4) Dale Heiser, a former Illinois police officer, testified to several abuse investigations. (TR.10:1664-79) At one point Anthony was treated at a hospital for injuries due to the beatings and was removed from the custody of his mother and placed up for adoption by the State of Illinois. Id. Brant was also arrested and convicted in Illinois for cruelty to children as a result of this episode. Id.

Thereafter, life went quickly and even further downhill for Anthony. His mother descended into alcoholism, drug use, indiscriminate sexual liaisons with numerous partners, and living in a continuous series of unclean, overcrowded trailers, apartments and houses. (TR.11:1716-22,1736;12:1876-92) The family moved frequently from town to town and state to state. Id. The children did poorly in school, often missing much of it and never finishing any school year in the same school in which they had started the year. (TR.12:1961)

The mother even compelled her sons, Anthony and Jeffery, to steal cigarettes and other things for her or the family and made the boys feel guilty if they showed any resistance. (TR.11:1735;12:1913) Also, Jeffery would have sudden fits of anger while growing up, due to a early head injury. Anthony was the one who tried to keep Jeffery's thinking right (it was often irrational) and was the level-headed one. (TR.11:1747)

Cindy and Daniel Comfort were family friends and testified to seeing severe and inappropriate physical abuse of Anthony by his stepfather, James Brant. (TR.11:1776-9,1786-1791)

David Sharp, a former police officer in Illinois, was called to the family home on several occasions for domestic disputes and disorderly conduct. James Brant was known to be volatile, hostile, aggressive person who had a reputation for drinking, was

known to suffer from some type of post-Vietnam stress syndrome, and was treated for a bi-polar manic depressive mental disorder. There were many incidents of corporal punishment of the children by Mr. Brant, and he often used the metal end of a belt to beat Anthony and his brother. (TR.12:1855-68)

Tina O'Neal testified that she has known the Appellant's mother since 1989 when they lived in Illinois; that she and the mother drank frequently and heavily; and in the span of only three years (1989-92), the Farinas moved from Wisconsin to Illinois, Illinois to Florida, back to Illinois, then to California, and then back to Florida. The homes in which Anthony and his brother Jeffery grew up involved constant drinking, drugs, partying by adults, frequent arguments and foul language. (TR.12:1876-92) The Farinas were naturally also very poor. Id.

Following his conviction in 1992, Tammy Lewis testified that Anthony's beliefs and attitude toward life changed greatly for the better upon acceptance of Christianity, and he has become a source of inspiration and support to his family and to other inmates. (TR.11:1723-7)

James Perry Davis testified that he is a minister at the Stetson Baptist Church in DeLand who is involved in prison ministry and was a former inmate himself. He helped Anthony with Bible studies since his conviction and believes from what he has

seen and his experience that Anthony's conversion is wholehearted and sincere and that Anthony has helped others within prison. (TR.11:1818-28)

Steve McCullum, a minister from Pastoral Ministries First Baptist in Jacksonville, met Anthony in 1993 when he was employed as a Chaplain for the Department of Corrections at Union Correctional Institute. He believes that Anthony's profession of Christianity was consistent and genuine, that he has been of help to others in prison, and was never a disciplinary problem or troublemaker. (TR.12:1918-26)

Dean Dearborn testified he used to be a counselor at the Guardian Angel Program in Peoria, Illinois, and worked with Anthony for 13 months beginning in August, 1987. Anthony was 13 years old at the time and was there because of the beatings by his stepfather. He testified that Anthony can conduct himself appropriately in a structured environment. During the 13 months he was a resident, his mother never visited him a single time. The home in which Dearborn saw the Farina family lived had mattresses and dog feces on the floor, and usually three or four days worth of dishes in the kitchen with food in various stages of decomposition. (TR.13:2026-35)

Dr. Clifford Levin, a psychologist from Gainesville, testified regarding his psychological evaluation and testing of Anthony. (TR.12:2110) He testified that

Anthony had encountered many emotional blocks to his development, including physical abuse and the neglectful circumstances in which he was raised, and that Anthony had not matured properly. (TR.13:2117-9) In 1992, Anthony as biologically 18 years old, but had an emotional age of not beyond 14 in terms of intellect and reasoning. Id. He had troubles at birth from pneumonia, asthma and ear surgery and did not know his biological father. Id. James Brant moved in when Anthony was 8 years old. Id. Brant suffered from a severe manic depressive illness and was very violent in the home, assaulting the mother in front of the children and assaulting Anthony, for which he was charged and convicted of child abuse. Id.

Anthony's mother also contributed to the disruption in the home. She had great difficulty being a mother, was a heavy drinker, inconsistent in her care of her children, and subjected them to multiple geographical moves, such that Anthony never completed a school year within the same school. The family also lived in substandard housing conditions, and the mother frequently encouraged Anthony and Jeffery as they were growing up to steal things needed by her for the family which she could not afford to buy. (TR.13:2120)

Anthony had difficulty adjusting to school because of the family's instability and the multiple moves and was placed at an early age in emotionally disturbed classrooms from grades 1 through 7. (TR.13:2121) Dr. Levin described Anthony as having very

inadequate verbal skills and a low average intelligence range. He was never able to develop his intellect, academic skills or social skills. **Significantly, however, since the date of his first conviction in 1992, upon re-testing, his verbal intelligence has increased 25 points, a remarkable jump from a very low to a very high average. Id.**

Beginning in his late teenage years, Anthony developed a passive dependent lifestyle which included daily use of marijuana which also retarded his emotional development. (TR.13:2122) He has no profile of mental illness but falls into the dependent personality disorder. He has difficulty making every day decisions without excessive advice and reassurance, and he has extreme difficulty expressing disagreement with others because of fear of loss of support or approval, a pattern of avoiding conflict and avoiding decisions. (TR.13:2124)

When a close relationship ends, he urgently seeks another relationship as a source of care and support and stays very much dependently involved. He has never lived on his own and fears extremely uncomfortable or helpless when alone because of exaggerated fears of being unable to care for himself. (TR.13:2125)

He suffered encopresis into his teen years which is very unusual and commonly associated with sexual abuse. As time went on with his treatment, he gradually indicated several persons in his family had inflicted sexual abuse. (TR.13:2126)

Since incarceration, Anthony has done very well, which is not surprising according to Dr. Levin. (TR.13:2128) He testified Anthony's type of personality conforms to his surroundings. In prison, he is in a highly structured environment, and there were no disciplinary reports. Id.

The prison records impressed Dr. Levin that Anthony has used his time well given his restrictions. (TR.13:2129) He enrolled in multiple Bible study classes and has devoted himself to religion. Id. His letters to his son and the son's mother are full of religious focus, and his faith is also apparent as you talk to him. Dr. Levin believes his faith is a genuine commitment. Id.

At the Spencer hearing on May 1, 1998, Anthony testified that about two or three weeks before the incident, he discussed a robbery plan with his brother. Anthony's motivation was to obtain money, because he did not want his children raised in the same environment he was raised in, and (although wrongfully) he felt this was the means to get them out of that environment. (TR.2474) His girlfriend and his daughter had recently come to Volusia County. (TR.2475) He learned that Jeffery had purchased a firearm while Anthony was away from his home bringing his girlfriend

and daughter back to Volusia County. Id. However this had not been discussed and was not part of the robbery plan. Jeffery had done this on his own.

Anthony and Jeffery planned the robbery. (TR.2476) They decided to be armed in case anyone became hostile and they needed to defend themselves. (TR.2477) While at K-Mart with his mother, his children, girlfriend, and sister, he and Jeffery purchased ammunition, gloves and clothesline for the robbery. (TR.2478)

During the robbery, Anthony offered cigarettes to the employees, because he knew that a cigarette usually calmed him down, and he felt that it would do the same for them. He was trying to comfort them and assure them they would not be harmed and that was his belief at the time. (TR.2487-8)

There was no plan to kill or shoot anyone before the fact. (TR.2490) However, after placing the tied-up employees in the cooler, Jeffery brought up the fact that these people knew Anthony and would be able to identify him and asked what should be done about it. (TR.2491) Anthony told Jeffery he did not know. Jeffery said that I can shoot them. Id. Anthony replied that he could not do that and it would be up to Jeffery to decide. (TR.13:2142;2524) There had been no plan to shoot anyone. (TR.2492) Anthony testified that Jeffery said he was going to shoot them, but in his heart, Anthony did not believe that Jeffery would actually do that, because his brother

was not that kind of person. (TR.2493,2525) He believed that if Jeffery actually faced the people, he would not do it. Id.

After Van Ness was tied up, Anthony turned off the restaurant lights as the signal to the driver (Henderson) that they were coming out. (TR.2498) He thought they were through then. Id. The plan was to place the employees in the cooler to delay the reporting of the crime. (TR.2499) Anthony then moved the employees into the freezer and walked out past Jeffery and was going to the cooler door. (TR.2494) When he was about six feet away from the freezer door, he heard gunshots and turned and saw his brother at the freezer door firing into the freezer area where the employees were. Id.

It was very quick and then the misfire at the end. Id. Anthony did not know who had been shot and did not direct Jeffery in any way as to the shots. (TR.2495) Jeffery turned toward Anthony and obtained the knife which Anthony was holding. Jeffery then turned back toward Gordon, pushed her down and began to stab her. (TR.2496) At that point, Anthony was distraught and exited the cooler. Id. Anthony did not assist Jeffery in the shootings or the stabbing. Id.

SUMMARY OF ARGUMENT

Point One. The State peremptorily excused over objection two black jurors for pretextual reasons to permit the State to purposely exclude two qualified jurors who had clearly indicated their ability to follow the law and who had no opposition to the death penalty nor any bias against any party in this cause. Moreover, the lower court completely failed in its duty to critically examine these challenges.

Point Two. The lower court erred in denying the Appellant's motion in limine to prohibit the introduction of post-arrest statement suggesting the other employees should have been killed also. Since the Appellant did not kill anyone, the statement was not probative of any aggravating factors argued by the State, and improperly introduced issues of lack of remorse and potential dangerousness, and was not harmless error.

Point Three. The lower court erred in failing to hear the Appellant's motion to suppress taped conversations between himself and his brother which were illegally obtained by the police in violation of his right to due process of law. The motion had not been previously argued and was properly filed prior to the commencement of the re-sentencing proceeding.

Point Four. The lower court erred in denying a severance to the Appellant, which resulted in the improper admission of prejudicial and damaging statements made by his Co-Defendant on tape, which the Appellant was unable to explain in context and meaning since the Co-Defendant did not testify during the re-sentencing hearing. The Appellant was denied due process of law.

Point Five. The lower court erred in denying the Appellant's motion to exclude victim impact evidence and impermissibly allowed the State, over objection, to make the victim impact evidence a feature of the re-sentencing proceeding to such an extent that the evidence was highly prejudicial, inflammatory and repetitive, amounted to a non-statutory aggravating factor, and deprived the Appellant of a fair hearing.

Point Six. The lower court erred in finding that the homicide was HAC where there was no physical or mental abuse of the victim prior to the shooting, where she and the other employees were reassured by the Appellant more than once that no one would be harmed if they cooperated, and where she and the other employees were shot quickly, in rapid succession by the Co-Defendant, and upon being shot in the head, the victim immediately lost consciousness which was never regained prior to her death 2 days later.

Point Seven. The lower court erred in finding that the homicide was CCP where there was no prior plan to kill but only to rob the restaurant, where the subject of killing was brought up suddenly during the course of the robbery by the Co-Defendant, who was not encouraged by the Appellant, and where the Co-Defendant committed the homicide without the assistance or direction of the Appellant.

Point Eight. The lower court erred in finding that the homicide was committed for the purpose of avoiding arrest where there was no plan to kill anyone prior to commission of the robbery, where the killing was done by the Co-Defendant acting alone after the robbery had commenced, and where the Appellant did not agree, assist or encourage the Co-Defendant to kill anyone for any reason, and the victim was not taken from the scene of the robbery prior to being shot by the Co-Defendant.

Point Nine. The sentence of death is disproportionate punishment as applied to the Appellant where there are only two (2) valid aggravating factors, i.e., the homicide was committed for pecuniary gain and prior conviction of armed robbery and burglary, where the latter is not entitled to great weight because they are contemporaneous convictions, and where in opposition the lower court found three statutory mitigating factors: (1) no significant history

of prior criminal activity, (2) the Appellant was an accomplice in the homicide committed by the Co-Defendant and his participation was relatively minor, and (3) the Appellant's age at the time of the crime (Anthony was 18 when the crime was committed, but his emotional age was 14), and the court found 15 non-statutory mitigating factors. In addition, the Appellant was the non-shooter, and the lower court did not find that the Appellant's state of mind was sufficiently culpable to rise to the level of reckless indifference to human life, as required by law to warrant imposition of a death sentence for felony murder.

Point Ten. Florida's death penalty should be held unconstitutional for numerous reasons outlined in this section.

ARGUMENT

POINT ONE: THE TRIAL COURT ERRED IN PERMITTING THE STATE TO EXERCISE PEREMPTORY CHALLENGES TO STRIKE TWO BLACK JURORS FOR PRETEXTUAL REASONS.

The Appellant contends that the State improperly used peremptory challenges to excuse two black jurors, to-wit: juror Edwards (TR.8:1102-6) and juror Hilton (TR.8:1122-5). The Appellant timely objected. Id.

This court has long held that the state cannot use peremptory challenges intentionally to exclude a cognizant racial group. Neil v. State, 457 So.2d 481 (Fla. 1984); Thompson v. State, 548 So.2d 198 (Fla. 1989); Bryant v. State, 565 So.2d 1298 (Fla. 1990).

The right of an accused to an impartial jury cannot be fully guaranteed when the peremptory challenge is used to purposefully exclude members of a cognizable racial group, regardless of the race of the defendant. Kibler v. State, 546 So.2d 710, 712 (Fla. 1989).

In State v. Slappy, 522 So.2d 18 (Fla. 1988), cert. den., 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), this court held that "any doubts as to the existence of a 'likelihood' of impermissible bias must be resolved in the objecting party's favor." Id. at 21-22. The State's peremptory challenge of even one black juror can be held sufficient to establish a prima facie case of racial discrimination, thereby requiring the

State to give a specific and racially neutral explanation for the challenge. Jennings v. State, 545 So.2d 945 (Fla. 1st DCA 1989).

The striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors. Slappy, supra, at 21, quoting United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987).

The trial court may not simply accept, at face value, the State's explanation. Rather, the State's reason must be an uncontested fact, supported by the record, or supported by observations of the trial judge placed on the record. Tillman v. State, 522 So.2d 14 (Fla. 1988); Williams v. State, 547 So.2d 179 (Fla. 4th DCA 1989).

In Roundtree v. State, 546 So.2d 1042 (Fla. 1989), the state excused two black jurors because of their views regarding the death penalty although both individuals indicated that they could follow the law and recommend a sentence of death if the circumstances of the case so warranted. The court wrote that it is not sufficient that the state's explanations for his peremptory challenges are facially race neutral. "The state's explanations must be critically evaluated by the trial court to assure they are not pretext for racial discrimination." Id., at 1045. In Roundtree, the court held that the "reasons given by the state for excluding the prospective black jurors in this case were not based on the facts of the case and were unrelated to the parties or the witnesses."

Id. The court held that the proffered reasons were a pretext for racial discrimination and reversed the defendant's conviction and remanded for a new trial.

In the Appellant's case, the State attempted to challenge juror Edwards for cause on the grounds that her son had been convicted of drug charges some years ago, but she felt that he was not guilty. (TR.7:1102) The Appellant objected and the court denied the challenge for cause. (TR.7:1103) The State then exercised a peremptory challenge to strike juror Edwards, alleging the same grounds and also adding that the State believed she would not be open and fair and that her position on the death penalty was hesitant. (TR.7:1104) The Appellant objected that the State's grounds were not sufficient race neutral reasons. (TR.7:1104-5) The trial court sustained the State's challenge without critical examination, stating the court is required to accept the State's explanation if the State's challenge is made "in good faith." (TR.7:1105-6)

The record does not support the State's asserted reason. During voir dire by the court, juror Edwards indicated, in response to the court's question of the jurors as to whether any of their close friends or family had ever been formally accused of committing a crime, the following:

The Court: Okay. Thank you. Yes, ma'am. Ms. Edwards?

Ms. Edwards: Yeah. My son had a drug related charge in North Carolina 4 or 5 years ago.

The Court: And was it handled properly?

Ms. Edwards: As far as I know. I wasn't there. I lived here at the time.

The Court: So you were, kind of, seeing it through his eyes then what he was telling you about it?

Ms. Edwards: I was there for one trial. But the outcome, I think, was pretty reasonable. He was in a group he had no business being in.

The Court: So you didn't see anybody in the system there in North Carolina that was malfunctioning at whatever they were doing in the system?

Ms. Edwards: I can't say I did. (TR.1:75-76)

During voir dire, juror Edwards testified that she had lived in Volusia County for 4 years, having previously resided in North Carolina and New York. Her occupation was a financial advisor at First USA Bank, that she was divorced, and had two adult children, a son and a daughter, who is a chef.

Subsequently, the court specifically questioned juror Edwards as to whether she had any objection to the death penalty and she stated that she had none:

The Court: Ms. Edwards, do you have any religious, moral, conscientious or other objections to the death penalty?

Ms. Edwards: No, sir.

The Court: Would you be able to follow the court's instructions on the laws of Florida as to sentencing and recommend a sentence required by these instructions and the underlying evidence?

Ms. Edwards: Yes, sir.

The Court: You are willing to carefully listen to and evaluate all the matters presented in mitigation and aggravation?

Ms. Edwards: Yes, sir.

The Court: Can you think of any circumstances where you would just automatically refuse to make a recommendation of a life sentence in a case?

Ms. Edwards: No.

The Court: You would listen to the evidence and make a recommendation based on that evidence?

Ms. Edwards: Yes. (TR.1:120-1)

During questioning by counsel for the co-defendant regarding her opinions on the death penalty, she did not indicate any bias one way or the other:

Mr. Henderson: Thank you. Ms. Edwards, have you formed any conclusions about the death penalty?

Ms. Edwards: Not really. I've always had a pro and con. You take a life, you get yours taken. But I go back and I can always say, what's the point of taking that other persons life? That person is gone already, or you can take a persons life, and it's the wrong person.

So, I've never really come to a 100 percent death penalty on it. It's, like, you have to hear, like the rest say, what the circumstances were. Was it self-defense, or -- (TR.2:214-215)

During questioning by Appellant's counsel, juror Edwards also indicated she felt that she could be fair:

Mr. Hathaway: Now, with the exception of those of you who have some reservations about how you can sit in this particular case, do the rest of you feel you do possess that frame of mind that would allow you now to determine the appropriate recommendation to the Court as it pertains to Anthony Farina? That's what we are looking for, frame of mind. Do you feel that way, Ms. Edwards?

Ms. Edwards: Yes. (TR.2:287)

The only questioning by the State Attorney of juror Edwards concerned her son, and nothing regarding her views on the death penalty. Regarding her son, she did not indicate any bias against the State:

Mr. Tanner: Thank you. Ms. Edwards, I certainly don't want to embarrass you, but I would like to ask you just a question or two. You indicated your son had had some troubles years ago. Can you tell us what his current status is? Has he come through those? Is he serving time somewhere?

Ms. Edwards: He's in a camp.

Mr. Tanner: In a camp?

Ms. Edwards: Yes.

Mr. Tanner: Is this a prison camp?

Ms. Edwards: I just know he's in Seminole Johnson Camp. I mean, he was with a group of guys that were supposed to be selling. They never caught them in anything, because he was there with them, as far as I know, they all went to a camp.

Mr. Tanner: Okay. They convicted them of selling dope or drugs?

Ms. Edwards: Yes. (TR.3:332-3)

Contrary to the State's challenge, juror Edwards never testified that she ever felt that her son was not guilty, nor did she indicate any bias against the State. Her answers regarding the death penalty were not hesitant, and it was clear that she could follow the law and could in appropriate circumstances recommend a sentence of death. The State's reasons were not supported by the record, nor did the trial court

question juror Edwards or make any observations of its own on the record to support the State's alleged reasons.

In regards to juror Hilton, the State moved to dismiss her, also a black American, for cause on the grounds that she had come to court 30 minutes late on the preceding day, that she was tentative regarding the death penalty, and that her church had a prison ministry program. (TR.7:1122) The Appellant objected and the court denied the challenge for cause. (TR.7:1123-4) The State then excused juror Hilton with a peremptory challenge based upon the same reasons. Id. The Appellant objected that the reasons were not race neutral and that this was the second black juror stricken from the jury by the State's peremptory challenges. (TR.7:1125) The court again, believing it had to sustain the challenge if it believed the State's challenge was made in good faith, sustained the State's peremptory challenge. (TR.7:1126)

The State's alleged reasons were not supported by the record. During voir dire by the court, juror Hilton, in response to the court's questions to jurors as to whether they had any friends or relatives involved in law enforcement, testified that she had a friend that worked in the State Attorney's Office upstairs and that her best friend worked for the City of Daytona Beach Police Department, but that this would not cause her to pre-judge any witnesses' testimony. (TR.4:680-683) She revealed that she lived in Volusia County for 25 years; she retired as a sergeant after 10 years in the

U.S. Army (field artillery branch); she was married and had no children. (TR.4:686-7;5:727) She was specifically questioned by the court regarding her views on the death penalty, and indicated that she would base her evaluation on the evidence and that she would listen to and follow the law and the evidence:

The Court: Ms. Hilton, do you have any religious, moral, conscientious or other objections to the death penalty?

Ms. Hilton: I would have to be one of those persons that had to hear the whole situation before I could answer a question like that.

The Court: It would depend on the facts of the case?

Ms. Hilton: Depend on everything before I could make a decision like that.

The Court: You would be willing to carefully listen to and evaluate all matters presented in mitigation and aggravation before you decided?

Ms. Hilton: Yes.

The Court: Are there are circumstances that you can think of where you would automatically, without hearing all the details, either refuse to recommend a life sentence, or refuse to recommend a death sentence? Is there any circumstances where you can think you where you would just automatically do one thing or another?

Ms. Hilton: I couldn't automatically give anybody the death penalty. I could probably give them life in prison without hearing it. But I can't automatically say, you've got to die. Because I haven't heard it. But I can probably say, you can go to jail for life if I haven't heard it.

The Court: Okay. Well, I think that may tie into some of the questions the attorneys were talking about, about if you heard no evidence, you know, and that may tie in the questions about the burden of proof and that sort of thing. So the attorneys may go into that in a little bit more detail in their questioning.

But as I understand your answers to my basic questions, without getting into the more finer details than that, you are willing to listen to and evaluate all the facts and legal instructions that are given to you, the evidence, and the law, before you make up your mind about what recommendation you might make?

Ms. Hilton: Yes, sir. (TR.4:692-4)

Subsequently, the State Attorney asked her during voir dire if her church had a prison ministry and whether she was active in it. (TR.5:775-6) She stated that her church did, but that she was not personally involved in that program, her sister was. Id. The State then asked her opinion about persons who say that they have accepted Christianity and are "saved." Id. She indicated that there are many persons that say that, but that does not necessarily mean that they have changed and there are many

hypocrites who state that they have changed while continuing to break all of God's laws. Id. The State then questioned her as to whether if a person were forgiven by God for breaking the law, should that person's punishment be erased under man's law, and she answered no. (TR.5:777) She indicated no hesitancy, in response to the State's pursuit of these religious questions, in being able to apply man's law and separating that from Christian beliefs:

Mr. Tanner: Alright. Will you be able to do that? I know you are a religious person. Will you be able to look in this case and these men under man's law, because that's what we are dealing with here today?

Ms. Hilton: Yes.

Mr. Tanner: And you might forgive them as a Christian, but you would still hold them to man's law?

Ms. Hilton: Yes.

Mr. Tanner: Thank you. (TR.5:777)

In denying the State's challenge for cause, the lower court stated that juror Edwards "clearly indicated she could follow the law." (TR.7:1124) Further, the court was not concerned that she was late on one occasion. Id. This is certainly a problem that can happen to any juror. However, once again, the court did not critically scrutinize the State's alleged reason to peremptorily excuse this black juror, nor did the

court question the juror further or add any comments into the record supporting the State's proffered reasons.

The Appellant submits that the reasons for the peremptory excusal by the State of juror Hilton are not supported by the facts in the record and is unrelated to the facts of the case, to the witnesses or the parties. Further, the court did not sufficiently evaluate the proffered reasons and permitted the State to peremptorily excuse this juror for unsupported reasons, the same as in juror Edwards' case.

The trial court's duty is to critically examine the State's alleged reasons for the peremptory excusal of jurors within a cognizant racial group have been clearly set forth:

The trial court may not simply accept, at face value, the State's rebuttal. Rather, the State's explanation must be an uncontested fact, supported by the record, or supported by observations of the trial judge placed on the record. Williams v. State, *supra*, at 180.

When the State excused juror Edwards with a peremptory challenge, the court accepted on its face the reason given by the State without question stating that it has to do so if the challenge is made in "good faith":

The Court: Well, the basis in the Melbourne decision is whether the -- the challenge is a good faith challenge, and not necessarily whether the court agrees with it, or -- it's the credibility of the challenging attorney. (R.7:1105)

Similarly, when the State challenged juror Hilton, the court once again accepted the State's reasons on its face without any critical evaluation whatsoever:

The Court: Yes. Whether it's pretext. It's the subject of evaluation of the challenging attorneys reasoning. It's a very subjective evaluation. Now, it used to be much less subjective, but now it's supposed to just sustain the challenge if I find that the attorney making it is making it in his or her world of good faith, not whether I agree with it or not.

And I don't think that Mr. Tanner is making a racial-based challenge. So I think on that, my interpretation of the Melbourne case, it's a good faith challenge, so I must sustain it. (R.1126)

The Appellant submits that the challenges of these jurors were for pretextual reasons to permit the State to purposely exclude two jurors of the black race who had clearly indicated the ability to follow the law, and who had no opposition to the death penalty and no bias against any party in the cause. The lower court completely failed in its duty to critically examine these challenges. Overstreet v. State, 712 So.2d 1174 (Fla. 3rd DCA 1998). Accordingly, the court should vacate the death penalty and remand for a new sentencing proceeding.

POINT TWO: THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION IN LIMINE TO PROHIBIT THE INTRODUCTION OF HIS POST-ARREST STATEMENT INDICATING THAT THE OTHER VICTIMS' SHOULD HAVE BEEN KILLED ALSO.

Two days after his arrest, the Appellant and his brother were taken from the jail to the police station to be fingerprinted on first degree murder charges after Van Ness died of her wound. The Appellant and his brother were intentionally held in the back seat of a police car for almost six hours, during which he made the following statement which was surreptitiously recorded by the police:

...should have made it a little more... instead of stabbing them in the back should have sliced their fucking throats and then put something in front of the freezer doors so they couldn't open them... cut the phone lines. (PTR.247)

The Appellant filed a Motion in Limine to prohibit the State from using the statement in the penalty phase on the grounds that it was not relevant to any aggravating circumstances; that arguments as to lack of remorse or potential dangerousness were inadmissible in the penalty phase; and that the prejudice to the Appellant outweighed any probative value. Id. After a hearing, the court denied the motion. (PTR.331)

During the re-sentencing proceeding, the Appellant renewed his objection to the introduction of the statement (TR.10:1645-6), but the court overruled it, and the State played the tape in evidence. (TR.10:1655)

The Appellant contends that the lower court erred in admitting this statement and that the error is not harmless. Kormondy v. State, 703 So.2d 454 (Fla. 1997); Derrick v. State, 581 So.2d 31 (Fla. 1991).

In Derrick, a witness was allowed to testify during the penalty phase over objection that the defendant had told the witness that he killed the victim and that he would kill again. The defendant argued that this testimony was irrelevant to the penalty phase and impermissibly showed lack of remorse and the possibility the defendant would kill again. The State argued the testimony was relevant to show the murder was cold, calculated and premeditated without any pretense of legal or moral justification.

In Derrick, the court held that the testimony was reversible error. The statement was not relevant to show the defendant's guilt because guilt was not an issue in the penalty phase of the trial. The court held "the state must show that the statement is relevant to an issue properly considered in the penalty phase." Id., at 462. The court ruled that the statement could not be construed to support the factor of cold, calculated and premeditated because all the statement did was admit that the defendant had killed the victim. The statement made no reference to a plan to kill the victim nor

to a lack of justification for the murder. The testimony was not relevant to any other aggravating factor. Lack of remorse has no place in the consideration of aggravating factors. See Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). The court held the statement was highly prejudicial because it suggested the defendant would kill again.

In Kormondy, the defendant and two co-defendants broke into the home of Gary McAdams and murdered him with a single gunshot wound to the back of the head. During the incident, McAdams wife was raped by some of the intruders. The wife was not killed or shot when the perpetrators left. Following his arrest, the defendant told a co-defendant in jail that if he got out he was going to kill the victim's wife because she could identify him, and he was also going to kill another individual to whom he admitted shooting the husband. Over objection, the state was permitted to introduce these statements during the penalty phase of the defendant's trial. The sentencing jury recommended death, and the trial court followed the recommendation. On appeal, the state argued that Derrick was inapplicable because Kormondy's statement was not a generalized statement to the effect he would kill an unknown person, but rather related to two specific persons, one of whom was a surviving victim at the scene of the crime. This, the state argued, made the statement relevant to the avoid-arrest aggravator, asserting that it cast light upon the defendant's motivation in

killing the husband. The state further argued it was also proper rebuttal to psychiatric testimony that Kormondy was "impulsive" and could not "think things out."

This court held that the statements in Kormondy were similar to the situation in Derrick and disagreed that the specific nature of Kormondy's statement made it relevant to the avoid-arrest aggravating factor. This court wrote that "in the circumstances attending this case, we cannot find that a statement allegedly made in jail (after the relevant criminal episode) as to a future intent to kill sheds any light on Kormondy's intent at the time of the crime." 703 So.2d at 462. The court noted that the wife was not killed when her husband was shot, nor did Kormondy kill the other witness (Long) despite having opportunities after having confessed to him. This court ruled as follows:

[Kormondy's] sentiment about future killings seems to have arisen after capture. It is simply too prejudicial to allow such speculative evidence to prove Kormondy's intent at the time of the shooting. Id., at 463.

The court also rejected as meritless the state's argument that the testimony was relevant to rebut the mitigating evidence that Kormondy was impulsive and could not think things out. Id. The court noted that this testimony was "highly inflammatory and could have unduly influenced the penalty phase jury" and effectively established a non-

statutory aggravating circumstance not authorized by law, i.e., a dangerousness aggravating factor. Id. The court held as follows:

Testimony that Kormondy said he would kill again, when that testimony is not directly related to proving a statutory aggravating circumstance, is outside of the scope of evidence properly presented by the State during the penalty phase. We find that this evidence in this instance constitutes impermissible nonstatutory aggravation. For this evidence to be admissible at the penalty-phase proceeding, it has to be directly related to a specific statutory aggravating factor. Otherwise, our turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute. Finally, we are unable to say that this evidence about Kormondy's desire to commit future killings, were presented to the jury by an attorney, was harmless beyond a reasonable doubt. Id.

Accordingly, the court upheld the conviction for first degree murder, but vacated the sentence of death and remanded for a new penalty phase proceeding in front of a new jury.

In the Appellant's case, the State similarly argued below that the taped statement was relevant to what the Appellant had intended to do on the night of the crime and that it was probative of the aggravating factors of avoid-arrest and CCP. (PTR.191,197)⁶ The State argued that Kormondy was different from the Appellant's case, because the Appellant's statement was not about killing someone in the future.

⁶January 22, 1998.

(PTR.191) The Appellant contends that his case is similar to the situation in Kormondy.

Nothing that Anthony said in the statement made any reference to what he had intended to do on the night of the incident or that there had been any plan to kill anyone. In fact, the taped statement refers only to things that did not occur that night, i.e., suggesting the other employees' throats should have been cut, or the cooler door blocked, or the phone lines cut.

There was no testimony of any prearranged plan to kill these employees. During the robbery itself, when his brother Jeffery suddenly brought up the issue of subsequent identification, Anthony did not agree or encourage him to shoot anyone. Jeffery entered the freezer alone and shot Mason, Robinson and Van Ness, and when the gun would not fire, got Anthony's knife and stabbed Gordon in the back.

Anthony did not shoot, stab or kill anyone. In light of these facts, Anthony's taped statement two days after his arrest appears to reflect feelings that arose after his capture. Just as in Kormondy, Anthony's statement is dangerously susceptible to be construed by the jury as lack of remorse or as non-statutory aggravation.

The State argued below that the evidence was admissible under the authority of Wike v. State, 698 So.2d 817, on the grounds that in a re-sentencing proceeding, the jury was entitled to hear evidence not only pertaining to aggravating circumstances, but

also evidence relating to the nature of the crime. Unlike Wike, however, the Appellant's statement did not relate to the nature of the crime at all. The Appellant's statement pertained to things that did not occur during the commission of the crime, and therefore is not evidence relating to the nature of the crime.

Anthony's statement is too speculative and too prejudicial to prove his intent at the time that **his brother, Jeffery, shot Van Ness**. The statement was not relevant to show the Appellant's guilt, because guilt was not an issue in the penalty phase. Just as in Kormondy, the statement was not relevant to the avoid-arrest aggravator or to the CCP aggravator, nor was it offered to rebut any mitigation evidence.

The State used the taped statement during closing argument, alleging it proved the avoid-arrest (witness elimination) aggravator. (TR.15:2351)

Just as in Kormondy, the Appellant submits that the admission of his statement was error and that the error was not harmless. The taped statements were played by the State immediately following a day and a half of lengthy and highly emotional victim impact testimony from the deceased's mother, father, brother, grandmother, grandfather, teacher, friends and other relatives. The inflammatory and prejudicial nature of the Appellant's taped statement was only heightened by the manner in which the State introduced it, following the victim impact evidence. The State then rested its case. The Appellant submits that there is more than a reasonable doubt that this

evidence prejudiced the jury in its deliberations against the Appellant, the non-shooter. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ciccarrelli v. State, 531 So.2d 129 (Fla. 1988).

POINT THREE: THE LOWER COURT'S FAILURE TO HEAR AND RULE UPON THE MERITS OF THE APPELLANT'S MOTION TO SUPPRESS THE TAPED CONVERSATIONS DENIED HIM DUE PROCESS OF LAW.

On March 13, 1998, the Appellant filed a motion to suppress the conversations that occurred in the back seat of a police car between the Appellant, his brother, Jeffery, and the Co-Defendant, John Henderson, which was secretly monitored and recorded by the police on May 11, 1992. (PTR.551) (DR.293-8)

The motion alleged that the police intentionally violated several criminal procedure statutes and rules prohibiting the taking of fingerprints of a defendant after arrest without notice and mixing juveniles with adult offenders, in order to unlawfully confine the Appellant, his brother Jeffery (a 16 year old) and the co-defendant Henderson in a police car and tape record their conversations. The motion alleged this misconduct denied the Appellant due process of law, as guaranteed under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and under Article I, Sections 9, 11, 12 and 23 of the Florida Constitution. Id.

The grounds for the motion were based upon information recently obtained in the re-deposition of police investigators Sylvester and Flynt and had not been previously raised in the case. (PTR.553)⁷

The State moved to strike on the grounds that the issues either had been or could have been raised during the original trial proceedings, that the evidence was not newly discovered, and that the rules of procedure do not allow for "post trial" motions to suppress; therefore the claims were untimely and barred. (DR.299-315)

A hearing was held on March 23, 1998, at the conclusion of which, the lower court granted the State's motion to strike and refused to hear the Appellant's motion to suppress. (PTR.563-587) The court believed that error this fundamental as alleged in the Appellant's motion would also require the granting of a new guilt phase trial. (PTR.573) The Appellant asserted that the purpose was limited to exclusion of the evidence from the resentencing proceeding for which the case had been remanded, and for which a new jury who had not heard the prior trial testimony was going to be seated. (PTR.574)

These issues and constitutional claims were not previously argued. (PTR.575)
A review of an order denying a motion to suppress in the prior proceeding, which the

⁷March 13, 1998.

State attached to its motion to strike (DR.305-315) shows that these issues had not been litigated originally, contrary to the State's argument below on remand. The original order deals only with the issues of privacy and the electronic interception of conversations. Id.

However, the lower court ruled that it had no authority to entertain the Appellant's motion, treating the matter as if the Appellant were still in the middle of the first trial proceeding. (PTR.585)

The Appellant contends that the lower court erred. In Preston v. State, 607 So.2d 404 (Fla. 1992), this court established that a "clean slate" rule applies to resentencing proceedings. The trial court is to apply the proper law in such proceedings and "is not bound in remand proceedings by prior legal error." Id., at 408. The court held as follows:

This Court has applied the "clean slate" rule to resentencing proceedings. We have held that a resentencing is a completely new proceeding and a resentencing judge is not obligated to find mitigating circumstances found by the first judge. See King v. Dugger, 555 So.2d 355, 358 (Fla. 1990). See also Teffeteller v. State, 495 So.2d 744 (Fla. 1986) (resentencing shall proceed de novo on all issues bearing on the proper sentence). In King, we held that "a mitigating circumstance in one proceeding is not an "ultimate fact" that collateral estoppel or the law of the case would preclude being rejected on resentencing." King, at 358. Moreover, we have held that a trial judge may properly apply the law and is not bound in remand proceedings by prior legal error.

Spaziano v. State, 433 So.2d 508, 511 (Fla. 1983), aff'd. 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Id. at 409-9

In Preston, this court held that on remand, the trial court is not bound to find only the same aggravating circumstances found by the prior trial court, but may find new or different ones, and the same rule applies to mitigating circumstances. In Spaziano, the court held that the trial court on remand could consider evidence that the original court had erroneously excluded. In Teffeteller, the court held in a death penalty remand proceeding, the trial court has the "discretion" to decide what evidence the new jury will see and hear.

These decisions do not require a trial court on remand to permit prior error to be repeated, but affirmatively require and authorize the trial court to apply the law properly and not to be bound by prior error. This is a good rule of law, which furthers justice and judicial economy. Accord, Griffin v. State, 517 So.2d 669 (Fla. 1997) (a trial court, on remand for re-sentencing, is required to hold a full sentencing hearing to which all due process guarantees attach.); Mills v. State, 24 FLW D112 (4th DCA Dec. 30, 1998).

Nothing in Rule 3.190(c), Fla.R.Crim.P., precludes a defendant from filing a motion to suppress when a case is remanded. When the Appellant's case was

remanded, it was at that point in a pretrial phase again as to the sentencing phase, and the Appellant's motion was filed prior to the new penalty phase trial.

Moreover, Section 921.141(1), Florida Statutes (1992), specifically prohibits the use of evidence secured in violation of constitutional rights in a penalty phase proceeding:

[T]his subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

Nothing in Section 921.141 requires a defendant to file a motion to suppress penalty phase evidence prior to the guilt phase trial commencement.

The lower court should have heard and decided the Appellant's motion to suppress on the merits. The motion raised new issues of police misconduct and the Appellant's right to due process of law. Obtaining incriminating statements by ruse or other police misconduct has been held to violate due process of law. Walls v. State, 580 So.2d 131 (Fla. 1991). This is a separate and distinct issue from the voluntariness of incriminating statements under Miranda.

The term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. Scull v. State, 569 So.2d 1251 (Fla. 1990). "Fairness" is nearly the equivalent of the concept of "good faith," which imposes a standard of conduct requiring both fairness and honesty... As we stated in Haliburton v. State, 514 So.2d 1088

(Fla. 1987), "due process requires fairness, integrity and honor in the operation of the criminal justice system, and in its treatment of the citizens' cardinal constitutional protections." *Id.*, at 1090 (quoting *Moran v. Burbine*, 475 U.S. 412, 467, 106 S.Ct. 1135, 1165, 89 L.Ed.2d 410 (1986) (Stephens, Jay., descending). *Id.*, at 133.

In *Walls*, this court held that a subterfuge created by police to obtain information from a defendant who was incarcerated to be used against the defendant in a psychiatric examination violated due process of law. The court has held in other cases that police activity designed as a subterfuge to circumvent the constitutional rights of an accused violate due process of law. *Malone v. State*, 390 So.2d 338 (Fla. 1980); *State v. Calhoun*, 479 So.2d 241 (Fla. 4th DCA 1985); *Voltaire v. State*, 697 So.2d 1002 (Fla. 4th DCA 1997). In *Calhoun*, the court held that due process of law was violated when the police induced the defendant into believing he would have a private conversation with his brother and taped the conversation. In *Voltaire*, the court held that undercover police officer who obtained incriminating statements by ruse violated due process of law. In reaching its decision, the court quoted Justice Marshall of the United States Supreme Court as follows:

We have recognized that "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover government agents." ...As Justice Marshall points out, the pressures of custody make a suspect more likely to confide in others and to engage in "jailhouse bravado." ...The

State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. 697 So.2d at 1004, quoting United States v. Henry, 447 U.S. 264, 274, 100 S.Ct. 2184, 2188, 2402, 65 L.Ed.2d 115 (1980).

In the case at hand, the State deliberately set up a ruse to obtain incriminating statements by evading fundamental requirements of law that would likely have prevented this. Thus, although the Appellant had counsel, the police deliberately obtained an ex parte order to transport him to the Daytona Beach Police Station to be fingerprinted and booked following the death of Van Ness. (DR.308) No notice was given to the Appellant's attorney, in violation of Rule 3.220(c)(1)(C), Fla.R.Crim.P. (requiring a court order for an accused to be fingerprinted). At the same time, the police placed the Co-Defendant, Jeffery Farina, a 16 year old juvenile in the back seat of the police car for over six hours in the company of the Appellant and the third Co-Defendant, John Henderson, both of whom were adults. This was in violation of Florida Statute 39.038 (1991), which prohibits the police from taking a juvenile to a police station for fingerprinting unless there is "no regular sight and sound contact between the child and adult inmates" and which requires the police "to supervise and monitor the child's activities at all times." As the Appellant's motion showed, the booking and fingerprinting would normally have taken place at the Volusia County Branch Jail where all of the defendants were housed, which would have not required

any transportation. Further, the Daytona Beach Police Department had separate holding cells available to have housed each of the defendants separately, instead of requiring the defendants to remain in the police car for over six hours.

Finally, as in Voltaire, supra, it was not necessary for the State to use the taped statements obtained in the police car, because each defendant had separately confessed to a police officer following his arrest. (DR.307)

The Appellant's motion shows that the police deliberately violated his rights under Rule 3.220(c), his right not to have the juvenile statutes violated by the police, in order to incriminate him, and his right to counsel and due process of law. These were not issues that had previously been raised, and the Appellant filed his motion prior to trial on the resentencing phase.

The lower court should have heard the motion to suppress on its merits. Its failure to do so was not harmless error, for the reasons set forth previously in Point Two above.

POINT FOUR: THE LOWER COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR SEVERANCE, WHICH DEPRIVED HIM OF DUE PROCESS OF LAW AND AN INDIVIDUALIZED SENTENCING PROCEEDING.

The Appellant moved for a severance in re-sentencing proceeding, but the lower court denied the motion after hearing. (PTR.226,259,372) The court also denied Jeffery Farina's motion for severance as well. (PTR.226,372,600)

a. Due Process of Law.

One of the grounds for the motion to sever was the State's intended use of taped statements of the two Defendants discussing the case while in custody in the back seat of a police car, which had been secretly recorded by the police. (PTR.232)⁸ And in fact, the State did play this tape in evidence at trial, over objection. (TR.1653)

Among the statements made by the Co-Defendant Jeffery on this tape, which were admitted into evidence against the Appellant during the joint re-sentencing proceeding, were statements that (a) he shot Michelle Van Ness because "he had a boring day", (b) that he felt nothing when he shot Michelle at the time, and (c) that he thought another victim, Kimberly Gordon, was going to die from the stab wounds. Specifically, Jeffery's statements were as follows:

⁸January 22, 1998.

Jeffery: That guy asked me, and I think I know why it is, a guy asked me why did you shoot them. I said I had a boring day. He was one of the inmates, I knew it wasn't going to get back to the ...

* * *

Jeffery: ...now the psychiatrist I had, asked me what I felt when I pulled the trigger...

I told him the truth, I felt nothing. 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 gonna die, didn't you. (TR.10:1653,2152)

This court held in the first appeal in this case that these taped statements were not inadmissible in evidence for Bruton reasons. 679 So.2d at 1157. This holding was in a guilt phase context. The court did not discuss the penalty phase aspect of the use of the taped statements for re-sentencing purposes in that opinion. However, because this court ruled there was no Bruton violation, the lower court indicated that it was required to permit the evidence in the re-sentencing proceeding. (PTR.386-7)⁹

In the first opinion, this court relied heavily upon the fact that when the tape was made, the two brothers were talking face-to-face throughout the conversations and that "Anthony could have taken issue with Jeffery's statements at any point, but instead

⁹February 23, 1998.

either tacitly agreed with Jeffery's statements or actively discussed details of the crime." 679 So.2d at 1157.

However, the purpose of cross-examination is not always to contradict. It can also be to shed new light on testimony by explanation of the context and meaning of the statement. There was no need for Anthony to take issue with Jeffery when the statements were made, because Anthony understood the context for them and did not disagree. At trial, however, Jeffery did not testify. Anthony was denied his right to bring out by cross-examination of Jeffery the true context and meaning behind Jeffery's taped statements. For example, a close examination of the tape indicates that when Jeffery said he had shot Van Ness because he had a boring day, this was made to an inmate and suggests it was in the context of how Jeffery had protected himself from possible problems in jail. (TR.15:2420) This was not a statement to a law enforcement officer regarding an explanation for the killing. However, Anthony was deprived of his right to cross-examine Jeffery regarding the meaning of that statement. As a result, the State was allowed to present a misleading connotation to the jury of a very aggravating factor, i.e., that the murder of Van Ness was a consciousless and pitiless act for which the Defendants had no remorse.

Similarly, Anthony was denied his right to explore in cross-examination with Jeffery what he meant when he said that he "felt nothing" when he shot Van Ness and

what he meant when he said he thought that the other victim (Kimberly Gordon) was the one that was going to die. Again, the State was allowed to leave a misleading inference with the jury that the murder of Van Ness was consciousless, pitiless, and without remorse, and that the Defendants had thought that they were going to kill other persons.

In this context, with this aggravating testimony admitted equally against Anthony, the Appellant was denied his confrontation rights and his right to due process of law, by being deprived of the opportunity to cross-examine his Co-Defendant regarding these taped statements. The right of confrontation has been held to apply to the sentencing process. Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). In Engle v. State, 438 So.2d 803 (Fla. 1983), this court held that the statements or confessions made by a co-defendant were inadmissible as evidence against the other defendant at the guilt phase of a murder trial and vacated the sentence of death and remanded for a re-sentencing proceeding. This court has held similarly in a long line of cases. See, e.g., Walton v. State, 481 So.2d 1197 (Fla. 1985); Smith v. State, 699 So.2d 629 (Fla. 1997); Franqui v. State, 699 So.2d 1332 (Fla. 1997).

b. Individualized Sentencing Process.

The Eighth Amendment to the United States Constitution requires that in a death penalty proceeding, that the defendant is entitled to an individualized sentencing proceeding. Lockett v. Ohio, 438 U.S. 586, 602-5, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978).

In this case, Anthony Farina did not kill or murder anyone. The trial court found that the Appellant was only an accomplice to the murder and that his role was minor. For the reasons stated above, there is an impermissible likelihood that aggravating factors applicable to the shooter, Jeffery Farina, could have been held against Anthony Farina, the non-shooter, by the jury.

POINT FIVE: THE LOWER COURT ERRED IN DENYING THE APPELLANT'S MOTION TO EXCLUDE VICTIM IMPACT EVIDENCE, IMPROPERLY PERMITTED VICTIM IMPACT EVIDENCE TO BECOME A FEATURE OF THE TRIAL, AND FAILED TO PROPERLY INSTRUCT THE JURY WITH RESPECT TO SUCH EVIDENCE.

The Appellant filed a pretrial motion to exclude victim impact evidence on the grounds that basing the imposition of the death penalty on evidence that is "designed to demonstrate the victim's uniqueness as an individual human being and the resulting loss to the community's members by the victim's death" denies due process, equal protection, and demeans the value of every human life. "Such a procedure evokes an

emotional response from the jurors which escapes meaningful appellate review." (DR.137-139) The Appellant argued that such evidence and Section 921.141(7), Florida Statutes (1992), be declared unconstitutional under Article I, Section 2, 9, 16, 17 and 22 of the Florida Constitution and/or the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Id.

The lower court denied the motion following a hearing on January 22, 1998. (PTR.218) However, since the State had listed 15 victim impact witnesses as Category B witnesses, precluding depositions by the defendants, the court ordered the State to proffer its proposed victim impact testimony at a hearing to be held on March 13, 1998. (DR.266;PTR.208,211-8)

The defense was concerned that the victim impact testimony could become "a feature" of the resentencing proceeding, but the lower court confirmed that it could not let that happen, stating "we also understand that we can't let it become the feature of the trial." (PTR.339) The court had previously stated a similar concern at the hearing on January 22, stating "I can't let that [victim impact testimony] be a runaway feature of the trial." (PTR.211) The court at that time expressed its desire to have the State provide a pretrial proffer of the evidence so that the court could evaluate the propriety of it. The State failed to provide any specific proffer. (PTR.327-337)

During the resentencing proceeding, the Appellant timely renewed his objection to this testimony, but was overruled. (TR.10:1555)

The Appellant also requested a limiting jury instruction to be given at the outset and at the conclusion of the victim impact testimony as follows:

You will now be presented with evidence concerning Michelle Van Ness. You are specifically advised and cautioned, however, that such evidence is not one of or any part of any of the aggravating circumstances which you are permitted to consider and weigh in determining, one, whether the aggravating circumstances outweigh the mitigating circumstances, and, two, in rendering your verdict as to what penalty, death by electrocution or life imprisonment with eligibility of parole after 25 years, is to be imposed for the crime for which the defendant is to be sentenced.

Now this evidence is permitted by law, and it is designed only to demonstrate Michelle Van Ness' uniqueness as an individual human being and the resultant loss to the community's members by her death and may not be considered in any way in rendering your verdict as to what punishment should be imposed on the defendant or defendants, as the case may be. (TR.10:1559)

The court refused to give the requested instruction and gave a substantially altered instruction over objection:

Ladies and gentlemen of the jury, you will now be presented with evidence concerning Michelle Van Ness. Now this evidence is permitted by law and is designed to demonstrate Michelle Van Ness' uniqueness as a human being and the resultant loss to the community's members by her death. (TR.10:1570,1572)

The State next called seven witnesses who presented approximately 30 pages of victim impact testimony for the rest of the day, substantially as follows:

Hannah Glidden. A 22 year old waitress, she testified she went to school with Van Ness from first grade through senior year at Warner Christian Academy, that Van Ness was a wonderful person, loved everybody, touched peoples' lives, made a huge impact on her life and was her best friend. She testified she learned from Van Ness, she was a spiritual helper for her, and that Van Ness loved God and made it easy to be a friend. (TR.10:1556-7,1573-4)

Ashley Lebvre. A 17 year old cashier, testified she knew Van Ness at Warner Christian Academy. She never realized how much Van Ness was thought of until she was gone; then all the classmates, friends, teachers and people from the church pulled together in a way never seen before. She was 11 when Michelle was murdered and she would visit Michelle's mother after the murder and the mother missed Michelle and that Michelle's totally changed the witness' life. (TR.10:1575-7)

Lewis Mora. Van Ness was his girlfriend. She was an amazing, honest and truthful girl, friends with everyone. He met her at Warner Christian Academy. Witness states that her death completely threw him off track, that he flunked out of college for the first two years and now has a serious problem with trust because of losing Michelle and has no way to deal with it every day. (TR.10:1580-1)

Deborah Wingard. She is a teacher and coach at Warner Christian Academy and knew Van Ness in the elementary grades and taught her in seventh, eighth and ninth grades. The witness testifies Michelle was a very good student, very caring and loving young lady who stood out from any other students. The witness could see Michelle right now outside the High School kneeling down and

reaching out to one of the little elementary kids that had some need. Michelle was interested in working with children in the future, possibility being a pediatrician and finding a cure for cancer. What stood out the most about her was that she was very genuine and unselfish. Her son told her that Michelle helped him very much and because of her, he probably had passed one of his classes because she helped him on his projects. Witness states that none of us who ever knew her would ever be the same for having known her and having gone through her loss. They all went to the hospital after they heard she was shot and got in trouble because there was so many of them making so much noise and so concerned about her. The outpouring of the people at the hospital and at her funeral touched very many because they knew her genuineness. The witness now sits in chapel every Friday where everyone went after the death of Michelle. Any time she sits in chapel on Fridays, they all think of Michelle and the students always ask her to this day to tell them about Michelle and what she was like. (TR.10:1582-5)

Steve Mahnke. He was an uncle to Michelle, and testified Michelle was unique in their family because she was his sister's only daughter and his mother and father's only granddaughter. Her loss has devastated their family. They used to see each other on holidays and important occasions, Michelle was all bubbly and full of life and everyone would have liked to have know how far she would have gone, how she would have turned out. She got phone calls all the time from other students. When Michelle died, she took a part of his sister and his brother along with her and it is never going to be the same even though they still come over for a visit. Her parents now are loners, don't want to be around a lot of people and there are a lot of tears flowing. He testified it is devastating to lose an only daughter, and it did not need to happen. (TR.10:1589-91)

Tara Setzer. She is 22 and Michelle was her cousin. She was 16 when Michelle died. Witness reads from a prepared statement indicating that her life since Michelle died has not been the same,

that Van Ness' death stole her joy and the witness can't let herself get close to people anymore because she is scared if she does she will lose them. The witness' mother, Bonnie Van Ness, then reads the remainder of Tara's statement. The statement relates specific instances when the two spent the night together at their grandparents home, in high school, passing notes to each other, being on the phone for hours; recounts daily reminders of Van Ness like pictures, stuffed hearts, handwritten note, and happy memories; and how it's very hard to understand how anything like this could happen. The witness also wrote that what bothered her most was when she visited Michelle in the hospital after she was shot, that her eyes were taped shut, she was hooked up to many machines and some of her hair had been shaved. Van Ness died a few hours later. Not one day has gone by that the witness has not thought about Michelle and she always remembers her lying in the hospital bed. She cannot accept the fact she will never see her again. (TR.10:1592-7)

Bonnie Van Ness. She was the aunt to Michelle Van Ness and testifies this was her brother's baby girl and she was very loving and caring. She brought joy into everyone's life and since Michelle died, she has not seen anybody in the family smile as a group. The whole family joy has been stolen. Michelle was very unique, she loved and cared about children and wanted to go into medicine, becoming a doctor or pediatrician. (TR.10:1598-9)

At this point, the court recessed for the day. (TR.10:1600) The next morning, the Appellant and his Co-Defendant jointly renewed their objections to this testimony and added the following objection:

After what was presented yesterday, it's getting to the point that it's extremely prejudicial and it's confusing to the jury and its -- its denying the right to a fair trial and due process under Article I, Sections Two, Nine, Sixteen, Seventeen and Twenty-Two of the

Florida Constitution. And the Fifth, Sixth, Eighth and Fourteenth Amendment of the United States Constitution. (TR.10:1601-2)

The court denied all objections once again.

The State thereafter put on five more victim impact witnesses covering 35 more pages of the trial transcript, containing highly emotional, repetitive and prejudicial testimony:

Arthur Mahnke, Jr. Michelle Van Ness was his granddaughter and he knew her his entire life. The witness reads a prepared statement that he wrote. Since Michelle died as a result of being murdered, the witness testifies that mother's day for her family means the death of their lovely granddaughter, daughter and sister. Michelle was very close to her parents, her brother and her uncle. Witness testifies their family will never be the same. Witness states they did not just love Michelle, a wonderful gifted young lady, exceptional in math and other subjects, but society lost a person who could have helped contribute for a better world, who wanted to be a doctor and help others. They lost not only their 17 year old Michelle, but they lost their future life, her dream of finding marriage, having children, grandchildren and future generations. Witness states that they go on living, but there is always in the back of their minds what might have been. There is a hole in their heart that will never heal. A life has been taken away that was precious to them. They hold her memory dear to their hearts but the hurt is always there. Witness testifies that they called Michelle Princess and Shelley. She loved fresh tomatoes, potato salad, holidays and birthdays, she was gifted in math and parents would often ask her to help their children with their homework. The witness cannot convey the terrible hurt they carry, they cannot pick up the phone like they used to and call Michelle and tell her Happy Birthday, Merry Christmas, or thank you for the card or gift. (TR.10:1603-7)

Dorothy Mahnke. She was Michelle's grandmother. She testified about how Michelle was when she was growing up and would come to visit. Since her death, she testifies their lives will never be the same, they won't get to see Michelle's children, see her go to college and graduate, fall in love, get married and have children. Michelle could not come to their Golden Wedding Anniversary which their children held for them here. She misses her on holidays and her birthday. Michelle would phone late at night to make sure people got home alright and then would pray before they both went to sleep. She testifies Michelle loved her grandmother's cooking, made a difference in a lot of peoples' lives. It is devastating not to have a granddaughter, and she will meet her in heaven. (TR.10:1607-10)

Connie Van Ness. She was Michelle's mother and wrote a statement which she read to the jury. She testifies Michelle was born in 1975 and they moved to Daytona Beach when she was three. Michelle was always close to her mother from the day she was born, she was a strong, sensitive and caring girl. She loved school and she was a perfectionist. She felt she should know everything before she was supposed to. She strived to help others achieve their best, she loved people, loved to socialize, one of her best friends was her brother, Sean. Michelle was a real social butterfly, always on the phone helping everyone solve their problems. A lot of her friends asked after she died, who will they call now. She was an honor roll student, had real direction in her life, she was fair, she didn't judge anyone by their looks. The mother testified she misses Michelle very much and should not have to be missing her. She was a strong girl with strong beliefs. It breaks her heart now when she goes to the Mall and sees other mothers with their daughters. She never got to see Michelle graduate from high school, go to college, get married, have children, grow into an adult. When she died, a part of the mother's life was taken.

On May 7, Michelle gave her mother an early mother's day card and that night they had a good talk. On Friday, May 8, she went

to work and called that night if it was okay for her to work until closing so someone else could be off Saturday. The last thing she said to her was that I love you. The mother will never forget answering the door in the middle of the night with two police officers. The mother felt she died a thousand deaths that night. As she was driving to the hospital, she saw Michelle's truck in the parking lot and she knew it was not good. Michelle died on Mother's Day and she never got to say goodbye to her beautiful daughter. Mother's Day is hard, she misses Michelle. She had much to give to the world, her family and her friends. She was her mother's little girl no matter how old she was. The mother introduced a series of photographs of Michelle which were introduced into evidence tracing Michelle's life in photographs that she would like the jury to see. (TR.10:1611-16)

Larry Van Ness. He was Michelle Van Ness' father and reads from a paper that he wrote. He recalls that at her birth, she was a beautiful girl, a very tiny baby, forced to wear braces on both of her legs for almost a year. Michelle was different from other children even at birth. During her early years she was very shy. She was quick to learn words and she knew the names of family members and would demand to be held by them or throw a fit if she wasn't. You could not leave Michelle with a babysitter or the church nursery. They were flabbergasted at her desire for learning which they believe drove her from her early shyness to the driven person she was. From then on until she was murdered, the witness testified she was a constant non-stop talk and social interaction. It was almost as if she was on a mission to meet, greet and interact with as many people as possible.

The father recounts many instances when Michelle was growing up and they had to decide things that she could or could not do. He testifies that she excelled in school and spent fourteen years at Warner Christian Academy. She was an honor roll student for the most of it, a member of the National Honor Society and listed in Who's Who in the Southeast Edition. She balanced her act at school with church and social life, always seeking one more friend,

one more problem to do. He remembered asking her to go to bed, and her pleading with him that she had to tutor someone who had a math test tomorrow. He testified she became an environmentalist for causes, such as whales, dolphins, plastic, paper, glass, metal, which the father never understood. Michelle was driven and possessed with a never quit attitude. Her uniqueness was her caring, mentoring, driven, never quitting, possibilities making, a beautiful girl. She was a cheerleader and played volleyball. She constantly offered advice to friends on the phone. She was always a person where you could go when you were hurting or had a problem. She was a person of strong character and patriotism. She and her father had many deep conversations.

The father testifies that when Michelle was shot, he was in Washington, D.C., on business. He immediately packed his bags and flew back to Daytona. When he got to the hospital, he was greeted by many young people and adults from Warner Christian Academy and the church, and they directed him to his wife and family. When he saw Michelle, there were tubes in her nose, a breathing unit in her mouth, needles, tubes and machines hooked to every part of her body, and he was thinking this is not Michelle, they made a mistake. He held her hand, stroked the back of it as much as he could. The IV's and tape that held them were in the way. He talked with her and told her to fight, most of all that he loved her. He repeated this during the next 24 hours many, many times. The doctor explained the bullet had entered Michelle's left ear, penetrating her skull and brainstem. This was causing Michelle to slowly die due to uncontrolled swelling and pressure on the brain. He remembers the morning of May 10 telling Michelle how much he loved her and holding her hand and telling her to fight. He remembers a tear formed in her right eye while he was telling her how much he loved her. He believes Michelle heard him for a brief second and tried to tell him it would be alright. This was once again the counselor coming out in her.

Michelle died around noon on Mother's Day surrounded by her mother, brother and her father. He testified that they held her hand

during her last breath and watched as she fought no more. The father testified their lives have never been the same. He never thought he would have to bury one of his children, pick out a casket for his daughter, what color she would have wanted, what clothes you would bury her in, what funeral home, what plot and a thousand other questions that must be answered. He testified what a beautiful daughter he had. Her death almost broke up their home. He testified it's hard to help your mate when you're so battered, bruised and hurt you can hardly stand up. His family has been ripped apart. Family gatherings and holidays only serve as a reminder of Michelle's absence. Being alone is what he has a preference for. Constantly being asked how you are doing brings little joy, especially by the same people who would tell you I know how you feel, I lost a mother, a father, an uncle. He tells them you don't have a clue until you lose a child, it's impossible for you to know how I feel. The father testified basically we dropped out of life as we knew it and no longer functioned in an extended family environment.

The father testified that the community lost a significant contribution. Numerous strangers came up to him at the funeral and described how they had talked with Michelle and had never been the same again. He testifies there were over 1,500 people at her funeral and the church was overflowing and there was a live video feed set up in the parking lot for those who could not be accommodated inside. The father testified he was born in Daytona Beach and does not know 1,500 people casually, let alone well enough to attend his daughter's funeral. This was in a church where the father grew up from about the age of 5. He testified he can longer bear to see it because when he looks at the pulpit he sees his daughter's casket and flowers. He is sharing these private things he testified so that you can appreciate the uniqueness of his daughter.

The father asked if anyone knew another in this community that if the same thing happened would have 200 plus people for 36 hours in a hospital or 1,500 plus people at a funeral. He testified his

daughter must have belonged to the community for the overwhelming reaction to what it was. The father testified he did not want his anger that he feels for the murder of his daughter to continue to claim him as a victim. He believed Michelle would be telling us who are hurting to get up and get on with their lives, living in such a manner so that you see her again helping others. (TR.10:1617-33)

Sean Van Ness. He was Michelle's brother and reads from a written statement. He states his relationship with his sister was just starting to bloom and he has only begun to realize the extent of his loss. He went into the Army when he was 17 and had to spend his first Christmas away from home at age 18. He testifies he would never have survived that without the help of his sister, Michelle. He remembers all her letters and the love that was written from her heart in them. Her letters still bring a smile to his face and tears to his eyes. He testified shortly after her death he was discharged from the Army, has held 3 jobs and is looking for a career change. He doesn't know what to do and to cope he's used alcohol, tobacco and credit cards. He testified his parents have had a hard time and he did not believe at one time that they were going to stay together but they have. He testified that he realizes that Michelle will never see his new home and five acres, his dog, hear the song that is playing on the radio, and he wonders what his life would be like if she were still here. He recalls being at Halifax Hospital when she was being treated after being shot. The family was gathered and told that she would probably not make it. They heard a code blue in his sister's room and the worst crying he's ever heard and he knew she was gone. Everything was disconnected and we were allowed to see Michelle one last time. One by one each went in. After the family had seen her one last time, Sean and his father did the hardest thing they've ever had to do, they said their goodbyes and together they pulled a sheet over his sister's head and let her rest in peace. He testified that he loves and misses his sister every day. (TR.10:1634-8)

The State at this point concluded the victim impact testimony. The Appellant renewed his request for a special jury instruction. (TR.1640-1) The State objected, and the court declined to give any instruction. Id.

The Appellant contends that the victim impact testimony became a feature of this trial and that it was highly prejudicial and inflammatory. Out of 19 witnesses called by the State during this re-sentencing proceeding, 12 of the witnesses were victim impact witnesses only. Only 7 witnesses (employees, police officers and one firearms expert) testified to the immediate facts of the crime. Moreover, the victim impact testimony dominated the substantial portion of the time during the State's presentation. The State presented its evidence over 2 and 1/2 days, between April 13 and April 15. On April 13, the State called four witnesses: Derek Mason (employee) and police officers Sylvester, Wyles and Youngman. On April 14, the State called FDLE firearm expert Komar, Officer Sylvester, and Kimberly Gordon and Gary Robinson (employees). The State then called seven victim impact witnesses: Glidden, Lebvre, Mora, Wingard, Steve Mahnke, Setzer and Bonnie Van Ness. On April 15, the State continued with victim impact testimony by Arthur Mahnke, Dorothy Mahnke, Connie Van Ness, Larry Van Ness and Sean Van Ness. The State's final witness was Officer Sylvester who played the tape recorded statements of the Defendants in the police car.

The extensive and excessive victim impact evidence deprived the Appellant of a fair trial and due process of law. The evidence amounted to a non-statutory aggravating factor, and the trial court failed to limit the evidence when requested to do so, despite its assurance in pretrial hearings that it would not let this become the feature of the trial.

Victim impact evidence has been called dangerous because it does not relate to aggravating circumstances and appears to be irrelevant; the further danger is that the prejudice may outweigh any probative value. 1997, Florida College of Advanced Judicial Studies, Handling Capital Cases. (PTR.205) The Appellant submits that it is somewhat analogous to Williams Rule evidence, which has similar potential. The courts have ruled in numerous cases involving Williams Rule evidence that the defendant is denied due process of trial where such evidence becomes a feature of the trial, and in such instances, have reversed for a new trial. Bush v. State, 690 So.2d 670 (Fla. 1st DCA 1997); State v. Richardson, 621 So.2d 752 (Fla. 5th DCA 1993); Snowden v. State, 537 So.2d 1383 (Fla. 3rd DCA), rev. denied, 437 So.2d 1210 (Fla. 1989); Travers v. State, 578 So.2d 793 (Fla. 1st DCA), rev. denied, 584 So.2d 1000 (Fla. 1991).

Of course, Williams rule evidence has relevance, yet even so, it is limited by the courts because of its prejudicial potential. Victim impact evidence has no real

relevance, and must be strictly limited by the courts because of its overwhelming prejudicial potential. Even in Payne v. Tennessee, 501 U.S. 808, 115 L.Ed.2d 720, 111 S.Ct. 2597 (1991), the Supreme Court, although overruling Booth v. Maryland¹⁰, was concerned that victim impact evidence could be unduly prejudicial so as to deny due process:

In the event that 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. 501 U.S. at 825.

In the Appellant's case, the victim had approximately a day and a half eulogy (out of 2 and 1/2 days of State testimony). Not even a funeral service for a head of state would have lasted that long.

The Appellant contends that the lower court also erred in denying his request for limiting instructions to the jury regarding its use of this evidence.

The error was not harmless. During his first trial, no victim impact evidence was introduced, and the jury's recommendation of death as to the Appellant was only by a vote of 7 to 5. During the resentencing proceeding, the vote was 12 to 0 unanimous in favor of death, even though the Appellant had presented substantially more mitigating evidence and witnesses.

¹⁰482 U.S. 496, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987).

The Appellant submits that the victim impact evidence introduced by the State is what caused the difference. If left unchecked, as in this case, victim impact evidence has the potential to deprive defendants of an individualized sentencing proceeding, in that it will deflect the jury's attention from the defendant to sympathy for the victim and the victim's family and friends in recommending a penalty to the court. That is what happened here, where the State presented in approximately a day and a half of testimony, 12 witnesses who presented over 67 pages worth of highly emotional, repetitive and prejudicial testimony.

The Appellant requests that this court will vacate the sentence of death and remand this case with instructions to impose a sentence of life without parole for 25 years. Alternatively, the court should order a new sentencing proceeding.

POINT SIX: THE TRIAL COURT ERRED IN FINDING THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL.

The lower court found that the murder of Van Ness was heinous, atrocious and cruel (HAC). (TR.3:357) The Appellant submits that this finding was error.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this court stated:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousness or pitiless crime which is unnecessarily tortuous to the victim. Id., at 9.

This court has noted that the HAC aggravator "is proper only in torturous murders -- those that events extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990).

This court has further held that "an instantaneous or near-instantaneous death by gunfire" does not satisfy the HAC aggravating factor. Robinson v. State, 574 So.2d 108, 112 (Fla. 1991); see also, Maharaj v. State, 597 So.2d 786 (Fla. 1992) (rejecting HAC aggravator despite execution-style killing of victim after interrogating him). "Execution-style killings are not generally HAC unless the state has presented

other evidence to show some physical or mental torture of the victim". Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1996), cert. den., 118 S.Ct. 86 (1997). This court has rejected application of the HAC aggravator where the evidence indicated that the defendant had not intended to cause the victim any prolonged suffering and, in fact, had assured the victims that they would not be killed. See Robinson, 574 So.2d at 112.

In Donaldson v. State, 23 FLW S245 (Fla. April 30, 1998), the minor victims (ages 13 and 15) were forced into the defendant's home at gunpoint and kept their against their will for several hours while the defendant and accomplices interrogated them. The victims were repeatedly assured they were not going to die, but thereafter, their murders occurred quickly by an accomplice who shot both of them in rapid succession. There was no evidence the defendant intended or that the victims' suffered an acute awareness of their impending death or that the defendant intended to cause them unnecessary pain or prolonged suffering. The court held that mere speculation that the victims may have realized the defendant intended to do more than interrogate them is insufficient. This court remanded for a new penalty phase.

Similarly, in Robinson, supra, the defendant kidnapped the victim, drove her to a cemetery and raped her on the hood of his car, following which an accomplice also raped her, and then the defendant killed her by two gunshots to the head and body.

The evidence showed immediate unconsciousness after the first shot to the head and no evidence that the defendant had caused the victim unnecessary and prolonged suffering. The defendant had assured the victim several times that they did not intend to kill her. The court held that the trial court erred in finding that this homicide was HAC.

Similarly, in Hartley, supra, where the victim was abducted, robbed and then murdered quickly by two shots, execution style, the evidence did not support a finding of HAC. The court held that speculation that the victim may have realized the defendants intended more than a robbery when forcing him to drive to a field was insufficient to support this aggravating factor. Id., at 1323.

Similarly, in the case at hand, the victims were rounded up inside the store, taken to the back for security where they were tied up and placed into a cooler. They knew this was a robbery. They were assured several times by the Appellant that no one would be hurt if they cooperated. They were offered cigarettes, allowed to smoke, and were not treated rudely or abusively. The witnesses testified that there was no reason to believe that anyone was going to be harmed. (TR.1227,1496,1541). When the shootings occurred, they were done quickly in rapid succession by the Co-Defendant, Jeffery Farina.

Although Van Ness had been fearful and was crying beforehand, she was reassured by the Appellant and her fellow employees that she would not be harmed.

There is no evidence the Appellant intended or that Van Ness suffered an acute awareness of impending death or that the Appellant intended to cause unnecessary pain or prolonged suffering on her part.

The Appellant submits that the trial court erred in finding that the Appellant subjected Van Ness to "extreme terror and mental torture during her final consciousness", as that is not supported by the evidence. (DR.3:357) The lower court's finding that Van Ness may have suspected the defendants intended to do more than rob them is speculation and impermissible as held in similar cases cited above.

Wherefore, the Appellant submits that the lower court's finding that this murder was HAC as to the Appellant was error.

POINT SEVEN: THE LOWER COURT ERRED IN FINDING THAT THE HOMICIDE WAS COLD, CALCULATED AND PREMEDITATED.

In its sentencing order, the lower court ruled that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (CCP). (DR.3:357) The Appellant contends that this finding was error by the lower court.

The central issue for this aggravating factor is whether prior to the commission of the crime, the defendants had a plan to rob or a plan to kill. Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1996). In Hartley, an initial plan to rob was changed before the crime to a specific plan to kill the victim, because the defendant wanted to prevent retaliation by the victim for an earlier robbery of him which the defendant had committed. In support of these facts, the court found that the evidence showed that the defendant had armed himself with a gun and a getaway vehicle in advance; he did not act out of frenzy, panic or rage; he forced the victim to drive to a remote area where there would be no witnesses; he shot the victim five times execution-style; and he told a witness that he and the other defendants had decided prior to the crime to "get [the victim]." CCP was sustained on these facts.

"A plan to kill cannot be inferred solely from a plan to commit or the commission of another felony. Geralds v. State, 601 So.2d 1147, 1163 (Fla. 1992).

In Barwick v. State, 660 So.2d 685 (Fla. 1995), the evidence showed the defendant had selected a victim and watched for an opportune time. The defendant planned to burglarize, rob and rape the victim. He had selected a knife, gloves and a mask for his face to hide his identity. During a struggle with the victim, she pulled the mask off and the defendant killed her with the knife. The court held that CCP was not supported by the evidence.

In Wyatt v. State, 641 So.2d 1336 (Fla. 1994), the defendant and accomplices robbed a Dominoes Restaurant armed with guns. Two employees were placed in a bathroom, while a third employee was forced to open the safe. After taking the money, Wyatt raped the female employee and then shot all three employees to death. The court wrote that CCP requires evidence of "a careful plan or pre-arranged design to kill" and held the evidence was insufficient to sustain the heightened level of premeditation required for the finding of CCP Id. at 1341.

In Geralds, supra, the defendant planned the crime for a week, interrogating the victim's children regarding when they would leave for and then return home from school; he brought gloves, a change of clothes and plastic ties to the victim's home; he left a car in a secluded location where no one would see it; the defendant bound and stabbed the victim to death. The lower court found CCP. The defendant argued the evidence proved an unplanned killing committed during the course of a burglary and

that a planned burglary was not equivalent to a plan to kill. On appeal, this court concluded the evidence indicated the defendant had obtained information to avoid contact with the victim; that the victim had been bound first, not killed first, which showed a homicide had not been planned; that there was evidence of a struggle prior to the killing and that the murder weapon was one found at the scene and not brought by the defendant. The court held that the state had failed to prove CCP beyond a reasonable doubt.

In the Appellant's case, the evidence at trial showed that the Appellant and his brother planned the robbery of the Taco Bell Restaurant for two to three weeks prior to the incident, but no plan to kill anyone was ever formulated. The Appellant told his brother that he did not want to kill anyone. (TR.13:2141) The motivation for the crime was to obtain money. The reason the Appellant and his brother brought weapons to the robbery was for self defense. (TR.2477)

The plan had been to tie up the employees and leave them in the cooler to delay reporting of the robbery. (TR.2479) Anthony moved the employees farther back into the freezer area, then left walking for the cooler door, intending to leave. It was at that point that Jeffery by himself entered the freezer and began firing rapidly.

The Appellant submits that this was a planned robbery, but not a plan to kill. The decision to kill arose during the robbery on the part of Jeffery Farina, and while

Jeffery at that point demonstrated premeditated intent to kill, that is not sufficient to prove a careful, prearranged plan to kill to justify a finding of CCP against Anthony. See Hartley v. State, supra, at 1323.

The lower court's finding in its sentencing order that the "death of witnesses" was an "integral part" of the Appellant's plan at least as early as the purchase of bullets and other supplies, is unsupported by the evidence. (DR.3:357) There is no such testimony. The evidence is consistent with proof of a robbery plan. Jeffery took his pistol, probably because he had one. Although it is true he bought bullets, it is also likely that any robber who has a choice does not go to a robbery with an unloaded pistol. However, the fact of taking a loaded pistol has never been held sufficient by itself to prove intent to kill prior to the robbery. Moreover, the Defendants' purchased not only bullets, but also rope the day before. The evidence shows the employees were tied first, not killed first. Pursuant to the plan, they were confined in the freezer by Anthony in order to delay their ability to report the commission of the robbery and to give the defendants time to escape from the scene. The lower court's reliance on Anthony's comment "it's your call" when Jeffery suddenly brought up whether the witnesses should be shot when he and Anthony stepped outside the cooler, in order to find a plan to kill on Anthony's part, is unwarranted. The Appellant's comment, if anything, actually proves that there was no prearranged plan to kill.

This case is more similar to Barwick, Wyatt and Geralds, supra. The State failed to show a careful plan or prearranged design to kill, but only that Anthony had planned a robbery. The fact that the Appellant went to the robbery armed is not equivalent to a plan to kill under the cases cited. The Appellant did not kill anyone and did not direct his brother to do so. The evidence presented by the State shows that the intent to kill arose on Jeffery's part during the commission of the robbery and that Jeffery acted alone, although with premeditation, in killing Van Ness and attempting to kill the other victims.

There is insufficient evidence of heightened premeditation on the part of the Appellant required to support the lower court's finding of CCP, and this court should reverse that aggravating factor.

POINT EIGHT: THE LOWER COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED FOR THE PURPOSE OF AVOIDING ARREST.

In its sentencing order, the lower court found that the homicide was committed for the purpose of avoiding arrest. (DR.3:356) The Appellant submits that this factor was not proven beyond a reasonable doubt.

In Geralds v. State, supra, at 1164, the defendant had worked at the victim's home and was known by the victim and her children. The defendant had spoken to the victim and her children one week prior to the burglary and murder and sought information that her husband was going to be out of town and when the children would leave for and return from school. The victim could identify the defendant if she survived the crime. The fatal stabbing occurred during the course of a robbery and burglary of the victim's home. The defendant planned the crime in advance, including bringing gloves, plastic ties and a change of clothes.

In reversing the lower court's finding that the murder was committed to avoid arrest, this court wrote that it has repeatedly held that the witness-elimination aggravating factor is not applicable unless the evidence proves that the only or dominant motive for the killing was to eliminate a witness. Perry v. State, 522 So.2d

817, 820 (Fla. 1988); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Riley v. State, 366 So.2d 19 (Fla. 1978).

In Geralds, the court wrote that "the mere fact the victim knew and could identify the defendant without more, is insufficient to prove this aggravating factor beyond a reasonable doubt." 601 So.2d at 1164. The court held that the trial court erred in finding the avoid-arrest aggravating factor in that case.

Similarly, in Rembert v. State, 445 So.2d 337, 340 (Fla. 1984), the Defendant had robbed a store owner, and the defendant knew the victim prior to the robbery. In the course of obtaining money during the robbery, he hit the victim with a club over the head one or two times, causing the victim to fall unconscious to the floor. The victim died several hours later. This court held that the avoid-arrest aggravator was not proven, despite the fact that the victim knew the defendant. The court noted that the victim was not dead when the defendant left the scene of the robbery, and the defendant would have made sure the victim were dead if witness elimination was the motive.

In the case at hand, the Appellant testified during the Spencer hearing that he was very negative in the prior discussion with his brother, Jeffery, regarding killing

anyone during the robbery. (TR.2515)¹¹ During testimony before the jury, Dr. Levin confirmed that although the question of killing witnesses was brought up before the robbery, there was no decision or plan to do so. (TR.13:2141)

At the scene, Jeffery suddenly raised the issue of whether witnesses should be shot because of possible later identification. This issue was not raised by the Appellant, and the Appellant was not supportive nor encouraging to his brother at that time. Under the pressure of a sudden unexpected turn of events brought about by his brother's question, Anthony did not agree or encourage his brother to kill anyone for any reason, and he did not believe in his heart that his brother would do it. (TR.2525)

The evidence most clearly suggests that the Appellant did not want to eliminate witnesses, probably because he did in fact know them, and that if alone, he would not have done this.

The lower court made much of the fact that before the robbery Anthony entered the restaurant to see who was working and that during the robbery the victims were methodically moved to a small, confined area of the restaurant. (DR.3:356) The only direct testimony is that Anthony never intended to kill anyone. The circumstantial evidence relied upon by the lower court is more consistent with the fact that Anthony

¹¹May 1, 1998, Spencer Hearing.

was planning a robbery and was concerned as to how many people were working, whether he and his brother could control the number of people there, and whether the situation was opportune for a robbery. This also accounts for the fact that the witnesses were tied and kept together in a confined area of the store, i.e., to control the situation, as well as to facilitate escape.

The Appellant submits that the State has not proved the avoid-arrest aggravator as applied to the Appellant beyond every reasonable doubt. Even should this court disagree, it should recognize that this aggravating factor is not very strong against the Appellant and does not deserve the great weight placed upon it by the trial court, nor even moderate weight in his case.

The Appellant respectfully requests that the court will reverse the lower court's finding that the homicide was committed to avoid arrest, as applied to the Appellant.

POINT NINE: THE SENTENCE OF DEATH IS DISPROPORTIONATE PUNISHMENT AS APPLIED TO THE APPELLANT.

In its sentencing order, the trial court found five aggravating factors upon which it relied: (1) prior conviction of a felony involving use of threat or violence, based upon the Appellant's contemporaneous convictions for three counts of attempted first degree murder, armed robbery, and burglary of an occupied structure; (2) homicide

committed for the purpose of avoiding arrest; (3) homicide committed for pecuniary gain; (4) HAC; (5) CCP. (DR.3:354-61)

The court then found three statutory and 15 non-statutory mitigating factors as follows: (1) no significant history of prior criminal activity; (2) the Appellant was an accomplice in the homicide committed by Jeffery Farina and the Appellant's participation was relatively minor; (3) the Appellant's age at the time of the crime (Anthony was 18 when the crime was committed, but his emotional age was 14); (4) the Appellant was not the one who actually killed Van Ness; (5) the Appellant was an abused and battered child; (6) the Appellant had a deprived childhood and poor upbringing; (7) the Appellant has a history of emotional problems; (8) the Appellant's conduct in prison was good; (9) the Appellant was amenable to rehabilitation; (10) the Appellant was cooperative with the police; (11) the Appellant has a lack of education; (12) the Appellant has a good employment history; (13) the Appellant has actively involved himself in Christianity and Bible study courses while in prison; (14) the Appellant is sorry and remorseful for what happened; (15) the Appellant has exerted a positive influence on others; (16) the Appellant used marijuana on a regular basis; (17) the Appellant has no history of violence; (18) the Appellant was abandoned by his father and temporarily abandoned by his mother. Id.

The trial court found that the aggravating factors outweighed the mitigating factors and that death was the appropriate punishment. Id. The Appellant contends that death is a disproportionate penalty under the circumstances of this case.

In Songer v. State, 544 So.2d 1010 (Fla. 1989), the defendant escaped from a work release program. Thereafter, he shot and killed a police officer who approached the car in which the defendant and a companion were sleeping. At trial, the defendant proved substantial mitigation including that he had adapted well to prison life, used the time for self improvement, had shown a positive change in character, and had developed strong spiritual and religious standards. The death penalty was held disproportionate against one aggravating factor. The court vacated the death sentence and remanded to the trial court to impose a term of life imprisonment without parole for 25 years from the date of the original sentence.

In Lloyd v. State, 524 So.2d 396 (Fla. 1988), the defendant entered the home of the victim, a 28 year old woman, with intent to commit robbery. During the course of the robbery, he shot her two times, once to the neck and the second was a contact wound to the top of the head, which was the cause of death. Her 5 year old son was present during the robbery and homicide and testified at trial. The jury convicted the defendant of first degree murder and recommended the death penalty by a vote of 7 to 5. The trial court found three aggravating factors: homicide committed while a

defendant was engaged the attempt to commit robbery, CCP, and HAC. The defendant proved substantial mitigation including: no prior criminal history; that he was only an accomplice to the crime; and that he had been a good husband, father and an employee. This court held that HAC had not been proven, and that there was nothing shocking about the crime that was apart from the norm. This court also held that CCP was not proven, that although there was proof of premeditated murder, there was insufficient evidence of the heightened premeditation and planning required to support a finding of CCP. The court held that the imposition of the death penalty on the one remaining aggravating circumstance was not warranted and reduced the sentence to life imprisonment without eligibility for parole for 25 years.

In Rembert v. State, 445 So.2d 337 (Fla. 1984), the defendant committed a robbery of a store owner for cash in order to make his car payment. The defendant knew the victim before the robbery. During the incident, the defendant took a club and hit the victim (an elderly man) one or two times over the head and left the store with \$40 to \$60. The victim was left unconscious and bleeding on the floor and died several hours later. Upon conviction of first degree murder, the jury recommended the death penalty by a vote of 7 to 5, which the trial court followed. The Supreme Court reversed the trial court's finding of the aggravating factors of avoid-arrest, CCP, and HAC. The court upheld the trial court's finding that the aggravating factor that the

murder had occurred during the commission of a felony had been properly established. The defendant introduced considerable non-statutory mitigating evidence. The Supreme Court vacated the death sentence as unwarranted and remanded for the imposition of life imprisonment without possibility of parole for 25 years.

In Campbell v. State, 571 So.2d 415 (Fla. 1990), the defendant went to the victim's home to commit a robbery. When the victim answered the door, the defendant stabbed the victim repeatedly. During this process, the victim's daughter entered the room and the defendant stabbed her, then returned and stabbed the victim further. The victim died, and the defendant was convicted of first degree murder. The jury recommended death by a vote of 9 to 3 and the trial court found five aggravating factors: prior conviction of a violent felony; homicide committed during a burglary and robbery; commission for pecuniary gain; HAC; and CCP. The trial court found one non-statutory mitigator: the victim's daughter recommended the defendant be sentenced to life imprisonment. The Supreme Court held the CCP was not proven based upon these facts, but upheld the other aggravating factors. The court however held the trial court wrongly rejected the defendant's history of child abuse which included bruises and hospital treatment, and such extensive mistreatment that he was declared a dependant child and removed permanently from his parents' home. The defendant also proved impaired mental capacity, a low IQ (retarded), drug and alcohol

abuse, a third grade reading ability, and borderline personality disorder. The court held that death was disproportionate and vacated the death penalty and remanded the case for the court to evaluate and re-weigh the aggravating and mitigating circumstances in light of the opinion.

In Livingston v. State, 565 So.2d 1288 (Fla. 1988), the defendant robbed a convenience store, during which he shot a female attendant two times, and fired a shot at a second woman inside the store, and thereafter carried off the cash register. He obtained a .38-caliber pistol immediately prior to the robbery during a residential burglary. The defendant confessed on his arrest. The shooting victim died six weeks later. On conviction, the jury recommended the death penalty and the trial court followed that recommendation, finding three aggravating factors: conviction of prior violent felonies; homicide committed during a robbery; and homicide committed to avoid arrest. The trial court found two mitigating factors: the defendant was 17 years of age and the defendant had an unfortunate home life and upbringing. The Supreme Court on appeal held that the avoid-arrest aggravator was not proven beyond a reasonable doubt, which left two aggravating factors and two mitigating factors found by the trial court. The Supreme Court held that the death penalty was not appropriate, particularly in light of the defendant's childhood that had been marked by severe beatings by the mother's boyfriend and other significant mitigating evidence including

the defendant's youth, immaturity, and inexperience. The Supreme Court vacated the death penalty and remanded for imposition of a sentence of life imprisonment without parole for 25 years.

In Terry v. State, 668 So.2d 954 (Fla. 1996), the defendant was convicted of the robbery of a Mobile gas station in Daytona Beach on July 14, 1992, during which he shot and killed the female attendant. The victim's husband, also present on the scene, said the defendant and a co-defendant entered the station wearing masks and with guns. The defendant went to the office where his wife was working (the victim) during which the defendant shot and killed her during the robbery. Upon conviction of murder, the jury recommended the death penalty by a vote of 8 to 4 and the trial court followed the recommendation after finding two aggravating factors: prior conviction of violent felony and commission of a homicide during a robbery. The trial court found no mitigating factors, either statutory or non-statutory.

On appeal, the Supreme Court held the death penalty was disproportionate because the prior violent felony aggravator involved a contemporaneous conviction of the defendant for aggravated assault committed upon the husband during the robbery. Although the court held that the factor had been proven, the court could not ignore the fact that the prior conviction occurred at the same time as the homicide and was therefore entitled to less weight. Compared to other robbery cases cited in the

opinion, the court held that the death penalty was disproportionate and remanded with directions to sentence the defendant to life imprisonment without parole for 25 years.

In the case now before the court, the Appellant contends that the trial court erred in finding as aggravating factors HAC, CCP, and avoid-arrest, as previously argued in this Brief. Further, although the aggravating factor of prior conviction of a violent felony is technically correct, these are contemporaneous convictions which arose at the same time as the homicide, and as a result should not be entitled to great weight. Terry v. State, *supra*; Calvin Johnson v. State, 23 FLW S563, 565 (October 22, 1998) (Fla. 1995). This leaves only one aggravator validly found by the trial court, i.e., homicide committed for pecuniary gain.

Of further importance in this case is that the Appellant is the non-shooter. In such cases, this court has held that the death penalty may not be imposed unless the non-shooter's state of mind was sufficiently culpable to rise to the level of reckless indifference to human life warranting a death sentence for felony murder. Jackson v. State, 575 So.2d 181, 186 (Fla. 1991). In Jackson, this court stated as follows:

In Enmund and Tison, the Court said that the death penalty is disproportional punishment for the crime of felony murder where the defendant was merely a minor participant in the crime and the state's evidence on mental state did not prove beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill. Mere participation in a robbery that resulted in murder is not enough culpability to warrant the death penalty, even

if the defendant anticipated a lethal force might be used, because "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen." Tison, 481 U.S. at 151, 107 S.Ct. at 1684. 575 So.2d at 190.

In its sentencing order, the lower court concluded that the Appellant was a minor participant in the homicide and made no finding that the Appellant had displayed a reckless indifference to human life or that he intended to take the victim's life. (DR.3:358) The lower court focused on the final discussion outside of the cooler in which Jeffery asked his brother what should be done about the witnesses who could identify them. Anthony testified that he told his brother he could not do it and that it was "your call." The lower court believed this was an indication for approval for Jeffery to begin the killing. The Appellant submits that this statement was not approval, but was in fact disapproval and fails to prove that the Appellant had any intent that any one be killed.

In Benedith v. State, 23 FLW S304 (Fla. June 11, 1998), this court reversed the imposition of the death penalty where the evidence did not prove that the appellant was the actual shooter, that he had procured the firearm for use in the robbery, that he possessed the firearm before and during the robbery, that he or the co-defendant never used a firearm previously in a robbery, or that he could have prevented the use of firearm while the robbery was being committed. Accordingly, the death sentence was

vacated and the case was remanded for sentencing to life imprisonment without eligibility of parole for 25 years. See also Jackson v. State, supra.

Similarly, the evidence in the case involving the Appellant shows that he was not the actual shooter; he did not procure the firearm for use in the robbery; he did not possess the firearm before the robbery and only briefly during the robbery; neither he nor his brother had ever used a firearm previously in a robbery; he did not direct or encourage his brother to kill; and he had no real opportunity to have prevented the death of Van Ness by his brother, who entered the freezer alone and rapidly shot her one time to the head after the Appellant was walking to the cooler door.

In addition to the foregoing, there is substantial evidence of mitigation, both statutory and non-statutory, as presented below and found by the lower court in its sentencing order. In light of all of the circumstances, the Appellant submits that the court should vacate the death sentence and remand for imposition of a sentence of life imprisonment without eligibility for parole for 25 years.

**POINT TEN: FLORIDA'S DEATH PENALTY IS
UNCONSTITUTIONAL.**

The Appellant challenged the constitutionality of Florida's death penalty in the proceedings below (DR.1:140), which the lower court denied. (DR.2:256)

As argued below, Florida's death penalty is unconstitutional for the following reasons:

a. The statutory aggravating factors set forth in §921.141(5), Florida Statutes, do not genuinely limit the class of persons subject to the death penalty. See Zant v. Stephens, 462 U.S. 862, 877 (1983). They are vague, overly broad and produce arbitrary, capricious, racially discriminatory and inconsistent imposition of the death penalty contrary to the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. See Lowenfield v. Phelps, 484 U.S. 321, 108 S.Ct. 546, 554 (1988); Furman v. Georgia, 408 U.S. 238 (1972).

b. The requirement that a defendant must prove that "sufficient mitigating circumstances exist which outweigh the aggravating considerations found to exist" to obtain a life sentence pursuant to Florida Statute §921.141(2)(b) and (3)(b), is an unconstitutionally vague and arbitrary standard which fails to articulate a certain standard capable of consistent, reasoned and informed use in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution. See Mullaney v. Wilbur, 421 U.S. 684 (1975).

c. Requiring the defendant prove that "sufficient mitigating circumstances exist which outweigh the aggravating considerations found to exist" as required by Florida Statute §921.141(2)(b) and (3)(b), violates due process by placing the burden of persuasion on the defendant, and use of a mere preponderance standard ("outweigh") to impose the death penalty violates Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Id; Cage v. Louisiana, 498 U.S. 39 (1990).

d. The statutory aggravating factors set forth in Florida Statute §921.141(5), have been and are being applied by the juries, trial judges and by the Supreme Court of Florida in wholly arbitrary, capricious, inconsistent, and racially discriminatory ways contrary to requirements of due process, equal protection and no cruel and/or unusual punishment guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. Furman v. Georgia, supra.

e. The lack of notice as to which statutory factors will be used to justify imposition of the death penalty denies notice under the Fifth and Fourteenth Amendments to the United States Constitution, denies effective assistance of counsel and denies the ability to prepare a meaningful defense under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2,

9, 16, 17 and 22 of the Florida Constitution. See Fuentes v. Shevin, 407 U.S. 67 (1972); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Grayned v. City of Rockford, 407 U.S. 104, 109 (1972).

f. Florida's death penalty is unconstitutional because the substance of the terms of Florida Statute §921.141, is not contained in the legislation and is instead provided, established and/or defined by the Supreme Court of Florida on an a case-by-case basis, without legislative or constitutional authority and in a manner which vacillates without prior notice, contrary to Article I, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Id.

g. The absence of findings by the jury as to what circumstances were found and weighed when the sentencing recommendation was made denies meaningful appellate and/or legislative review and results in a denial of due process and a reliable, consistent death penalty contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution.

h. Death by electrocution constitutes cruel and unusual punishment in violation of Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

For the reasons stated, this court should hold that Florida's death penalty is unconstitutional, both on its face and/or as applied in this case.

CONCLUSION

For the reasons set forth in this Brief, the court should vacate the sentence of death and remand the case for imposition of sentence of life imprisonment without possibility of parole for 25 years. In the alternative, the court should

remand for a new sentencing proceeding before a new jury independent of the Co-Defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to Ken Nunnally, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; and, to Mr. Anthony J. Farina, #684135, P3227S, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083-0221, this _____ day of January, 1998.

Jeffrey L. Dees

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