IN THE SUPREME COURT OF FLORIDA

JOHN BRUCE VINING,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 75,915

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

On June 5, 1989, the State charged John Bruce Vining, Sr. ("Vining") with the first-degree murder[1] and armed robbery[2] of Edna Caruso ("Caruso"). (R2196-97)[3] An Orange County jury found Vining guilty as charged and, using a special verdict form, specified that Vining committed both premeditated and felony murder. (R1653,2502-4) The penalty phase occurred a month later. By an eleven-to-one margin, the jury recommended the death penalty and, again using a special verdict form, a majority found four statutory aggravating factors proven beyond a reasonable doubt, to wit:

1) The crime for which defendant is to be sentenced was committed while he was under sentence of imprisonment.

2) The defendant has been previously convicted of a felony involving the use or threat of violence to some person.

3) The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit the crime of robbery.

4) The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

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[1] Violation of Section 782.04, Florida Statutes (1987)

[2] Violation of Section 812.13(2)(a), Florida Statutes (1987)

[3] (R) refers to the record on appeal of the instant case.

(R2613-14). The Honorable Joseph P. Baker also found the above-listed statutory aggravating factors and sentenced Vining to death on the first-degree murder conviction. (R2188-91,2630-37, Appendix C) Judge Baker sentenced Vining as an habitual offender to life imprisonment on the armed robbery conviction, with a three-year mandatory minimum due to use of a firearm, to run consecutively to the death penalty. (R2190,2638-41)

THE INTERSTATE AGREEMENT ON DETAINERS:

The indictment charging Vining with murder and robbery was returned June 5, 1989. (R2196-97) On July 6, 1989, the Clerk of Orange County received and filed Vining's "Request for Disposition of Indictment" under the Interstate Agreement on Detainers[4] ("IAD"); the clerk distributed copies to the State attorney's office and the assigned judge. (R1689;2200-04) On January 10, 1990, Vining filed a "Motion to Discharge Based on the Interstate Agreement on Detainers" because the State failed to bring him to trial within 180 days from the filing date of his Request for Disposition of Detainers and/or within 120 days of his arrival date in Florida. (R2328-30) After the IAD time within which to try Vining expired, the State sought an extension of time within which to try Vining. (R2333, 2341) Vining's Motion to Discharge was heard and denied on January 16, 1990, (R1661-1721,2343-46) and the state's motion for an extension of time to try Vining was granted on January 24, 1990. (R2417)

[4] Section 941.45, Florida Statutes (1987)

At the hearing on the Motion to Discharge, the State conceded receiving Vining's request and stated that trial had been inadvertently set beyond the parameters prescribed by the IAD: the State contended, however, that the time period had been tolled because Vining had filed pre-trial motions which made him unavailable for trial. (R1675-76) When the court indicated concern about whether the State had actually received the Request for Disposition, the State argued solely that the speedy trial period had been tolled by Vining's act of filing pre-trial motions. (R1674-77) Vining then presented the testimony of the deputy clerk of Orange County who was in charge of inmate mail at the time the Request for Disposition was received. (R1687-93) She testified that she received Vining's request and distributed it to the State attorney's office and to the presiding judge's office via interoffice mail within 48 hours of July 6, 1989. (R1689) Upon questioning by the court, the deputy clerk stated that she had no independent recollection of Vining's request, that what she described was the routine procedure of the clerk's office at that time. (R1693) The clerk's notations on Vining's request indicate that the routine procedure was followed in his case. (R1689)

Following the hearing, Judge Baker denied the Motion for Discharge with a written order which set forth specific findings of law and fact. (R2343-46, Appendix A) The court found that mailing a Request for Disposition by certified mail, return receipt requested, is "jurisdictional" under Section

941.45(3)(b), Florida Statutes (1987). (R2343,"A" para.4-5) Judge Baker found that no record of Vining's Request for Disposition of Indictment was in the State's case file. (R2344,"A" para.11) Judge Baker also noted that he "never opened the court file on defendant, and I don't recall ever even seeing the file, nor had I seen the defendant's request for disposition until the hearing on January 16, 1990." (R2344, "A" para.12) Judge Baker reasoned that, because at arraignment he and State attorney's office calculated the speedy trial date using Fla.R.Crim.P. 3.191, "Obviously neither the undersigned, nor the assistant State attorneys assigned to the same criminal division with me had any actual notice of the request from the defendant[.]" (R2344-45, "A" para.14) (emphasis in original) Judge Baker concluded, "The request for disposition was not served on the court nor on the appropriate prosecuting official in the manner required in Fla. Stat. 941.45, there was no actual notice to the court, to the court's judicial assistant, nor to the appropriate prosecuting official" and denied the motion for discharge. (R2346, "A" para.20)

Thereafter, at the instance of the State (R2357-58), the order was amended to reflect that the State had, in fact, received Vining's request for disposition but ignored it because it had not been properly mailed (R1823,2344, "A" para.11); the written order was also corrected to reflect that Vining's Request for Disposition had, in fact, been properly sent by certified mail, return receipt requested, by Georgia prison officials.

(R2343, "A" para.6) These corrections were discussed by Judge Baker as follows:

> I think [the order] ought to be correct. If it is not, I was trying to make it so by doing this to set out what the chronology was as correctly as I could, so that when and if it is reviewed by an appellate court they would have an accurate, simple and straightforward statement of what happened[.]

(R26-27).

After denying Vining's Motion to Discharge and after jury selection had commenced Judge Baker, at the request of the State, extended the period of time within which to bring Vining to trial, finding that the State had shown good cause to have the speedy trial time under Section 941.45, Florida Statutes (1987) extended because, despite due diligence, "the laboratory reports going to establish the issue of identity in this case were not provided to the State on this essential issue until jury selection in this case on January 23, 1990." (R2417) Two such reports were involved. One laboratory report involved comparison of an exemplar of Vining's hair obtained on September 19, 1989, to hair found on the victim's clothing. (R2341, para 4-5) That report and/or comparison was <u>not</u> used at trial. The other report concerned a comparison of Vining's handwriting, taken December 28, 1989, to the signature on a receipt dated November 19, 1987. (R2341, para 4-6) This comparison was used by the State at trial. (R1274-87)

THE MOTION TO EXCLUDE HYPNOTICALLY TAINTED EVIDENCE:

Being aware that hypnosis affects the admissibility of testimony, the police obtained written statements from four witnesses before subjecting them to a hypnosis/relaxation session conducted by a police hypnotist. (R1738) Lt. Watson of the Orange County Sheriff's Department testified that, using a Chevault's pendulum, he conducted "relaxation" sessions with Joann Ward, Ellen Zaffis, Kevin Donner and Denise Vietta. (R1731-33; 1739-40) Watson testified that he only "hypnotized" Vietta, whereas the others were merely "relaxed" to assist recall:

> Q. (Prosecutor): When you use the pendulum that you have mentioned earlier, does that mean you are placing the person under hypnosis?
>
> A. (Lt. Watson): No.
>
> Q: Can you use the pendulum and not place the person under hypnosis?
>
> A: Yes.
>
> Q: Just because you relax the person, does that mean they are specifically under hypnosis?
>
> A: No.
>
> Q: And you have indicated that you have placed several, I think you said several thousand people, under hypnosis. Do you have a specific intent when you go to do that?
>
> A: Yes.
>
> Q: When you want to relax somebody, is there a specific intent that you have when you are doing that?
>
> A: Yes.

Q: When just relaxing a person, what is the intent there?

A: The intent, as I previously stated, is to eliminate as much as possible the barriers to recall and therefore enhance recall.

Q: All right. You had an opportunity to speak with several of the witnesses, specifically Joann Ward, Ellen Zaffis, Kevin Donner, Denise Vietta, and I think you had an opportunity to meet those people?

A: That's correct.

Q: What was your specific intent when you spoke with Joann Ward?

A: To do -- we were just speaking -- to have her as much as possible relax and as much as possible recall the events -- to recall the events that she was a witness to.

Q: What about Ellen Zaffis?

A: The same thing.

Q: Kevin Donner?

A: Same thing.

Q: Denise Vietta?

A: Initially was relax and recall, and as we got -- appeared to be getting more and more information that might be critical as investigative leads, and seeing no alternatives, we decided that we would attempt hypnosis per se, actually go take this person into hypnosis, knowing full well that we might have a problem with that in the course --

Q: Can you describe to the Court the differences between your techniques that you used on Joann Ward, Ellen Zaffis and Kevin Donner, and the differences between those and Denise Vietta?

> A: Okay. The previous three mentioned was the room, the focus, the rapport, the progress relaxation, and from that standpoint, recall. **Going further from that, and in a lot of cases, it doesn't take very much more, except the suggestion itself, hypnosis induction. A command or a suggestion of going into hypnosis**. Usually the technique that I will use is hands on the things, and my suggestion that the hands rise, and as they do, the person goes into hypnosis. In addition to that, usually counting backwards, or counting forward, depending upon how I feel at the time, and suggesting with each regressing and progressing number the person actually goes deeper and deeper into a stage of complete relaxation and that State would give a title to, or a term, we term, hypnosis. **What the difference is the intent, as far as I'm concerned, and what I am trying to do with the person**.

(R1732-34). Lt. Watson testified that, except for Vietta, none of the witnesses were placed under hypnosis; they were merely relaxed and nothing whatsoever was suggested to them. (R1739)

Joann Ward testified that, after she gave a tape recorded statement and prepared a composite sketch of the person she saw with Caruso, she underwent a session with Lt. Watson; she disclaimed being hypnotized. (R1741-45) Ward said that Watson merely relaxed her. (R1746-47) After the hypnosis/relaxation session, Detective Nazurchuk went to Ward's place of employment, showed her a photographic lineup, and Ward then selected Vining's photograph as depicting the person she saw with Caruso. (R1754-56)

Ellen Zaffis testified that she gave a statement to the

police and, approximately a month later, prepared a composite sketch of the person she saw with Caruso. (R1763-64) The sketch was composed after she met with Watson for the relaxation session. (R1769) Zaffis disclaimed being hypnotized and stated that Watson did not use a string and ball to relax her. (R1765-66) After the hypnosis/relaxation session Detective Nazurchuk showed Zaffis a photographic lineup and Zaffis selected Vining's photograph as depicting the person she saw with Caruso on the day Caruso disappeared. (R1770-71)

Kevin Donner testified that he gave a statement to the police concerning his observation of a gentleman with Caruso on the day Caruso disappeared. (R1115-16) Donner, accompanied by his roommate Ellen Zaffis, thereafter met with Lt. Watson for the relaxation session. (R1116-17) Donner also disclaimed being hypnotized by Watson. (R1117-18) Donner previously stated that he had been hypnotized, but realized that he had not been after discussing the subject with his therapist. (R1124-25)

Denise Vietta did not testify, either at the hearing of the motion to exclude the testimony or at trial. Judge Baker denied the motion to exclude the hypnotically tainted testimony, finding that the witnesses had not been hypnotized as that term is defined in Stokes v. State, 548 So.2d 188 (Fla. 1989). (R1780-83) Vining objected to the presentation of this evidence at trial. (R1083-85) Judge Baker later explained that his perception of what constitutes hypnosis is tempered by his own research into psychiatry, including self-hypnosis, which is the

subject of an article that he is preparing for publication. (R1135-41)

THE MURDER

On December 8, 1987, surveyors discovered the partially decomposed body of a woman lying fully-clothed in a remote grassy area next to a pond in Apopka, Florida. (R933-34, State's 1) It was determined through dental records that the body was that of Edna Caruso, a jewelry salesperson and the owner of "Nail Expressions," a fingernail care business. (R908-17) Caruso had received to the left side of her jaw a possibly fatal gunshot wound and a fatal gunshot wound to the left temple. (R973-75; 981-84) Unconsciousness occurred immediately when Caruso was shot in the temple and she did not regain consciousness before dying. (R992) There were no other injuries. (R987) The medical examiner estimated that death most likely occurred three weeks prior to December 8, 1987. (R987,995) There were no signs of struggle where Caruso's body was found and it appeared that she had been killed elsewhere and transported to the grassy area. (R970-72;993-94) Caruso's jewelry, purse and shoes were not found. (R967)

Joann Ward was employed by Caruso as a nail technician at Nail Expressions. (R999) Ward testified that Caruso sold jewelry on consignment by advertising it with the Nail Expressions telephone number, 682-1181, in the Miami Herald and Orlando Sentinal. (R1004) On October 29, 1987, the following advertisement appeared in the Orlando Sentinal:

> DIAMONDS - MUST Liquidate Remaining Estate. All sizes & shapes available Rings, loose stones, tennis bracelet. Diamonds sold below whole sale. 895-0362/682-1181.

(State's 35, R1416) On November 14, 1987, another advertisement appeared in the Orlando Sentinal:

> DIAMONDS Estate sale from 1/2 ct & up. Must sell. Call 788-6813 or 682-1181.

(State's 34, R1415)

Ward testified that a man came to Nail Expressions on Friday, November 13, 1987, in response to the ads and talked to Caruso for fifteen minutes about jewelry. (R1009-14) Ward described the man as being in his 50's, 5'11" tall, around 175 pounds, thin light-brown hair, long face, loose skin, gold watch and glasses. (R1009-10) The man returned to Nail Expressions the following Monday, November 16, 1987, and again met with Caruso for fifteen minutes; this time Caruso introduced the man to Ward as "George Williams, a man interested in jewelry I have to sell." (R1014-1016) Williams returned to Nail Expressions again Wednesday morning, November 18, 1987, talked to Caruso for fifteen minutes and left. (R1016)

When Ward returned after lunch, Caruso asked Ward to accompany her to meet with Mr. Williams, who had decided to purchase some jewelry but first wanted to have it appraised. (R1019) When they arrived at Albertsons, Ward observed a pistol in Caruso's purse. (R1020-23) Williams arrived driving an older black Cadillac Fleetwood with tinted windows, and Ward saw him

use an inhaler/aspirator. (R1023-24;1045) Williams seemed "startled" that Ward accompanied Caruso, and Caruso explained that because Ward had errands to run they would follow him to the Winter Park Gem Lab. (R1025) Caruso took the pistol from her purse and left it under the front seat of Ward's car before walking with Williams to the Winter Park Gem Lab; Ward went about her own business and was to meet Caruso at her car after the appraisal. (R1026-32)

Ellen Zaffis and Kevin Donner worked as gemologists at the Winter Park Gem Lab in Orange County; they had previously done appraisals for Caruso. (R1073,1151) Caruso had arranged that morning (November 18, 1987) to come to the lab between two and three o'clock to have gems appraised for a prospective buyer. (R1073-75,1153-54) Caruso arrived at the Gem Lab accompanied by a gentleman she identified as George Williams, described by both Zaffis and Donner as being in his 50's, 6' tall, 180-190 pounds, receding hairline, and military-style glasses. (R1075-76,1154) Zaffis talked with Caruso and Williams while Donner performed the appraisal of a 6.03 carat, pear-shaped diamond and a round 3.5 carat diamond; both were appraised at $60,000, total. (R1077-80,1155-56) Williams asked questions atypical of an experienced diamond buyer and, when told that the round diamond was worth $25,000, stated that no woman was worth that much. (R1080-81;1156)

Ward met Caruso and Williams when they returned to Ward's car. Caruso then told Ward that Williams had decided to

buy the stones and that they (Caruso and Williams) were going to the bank to put the money in a safe deposit box. (R1027-31) Ward returned alone to Nail Expressions and never again saw Caruso. (R1033-34) When last seen by Ward and Zaffis, Caruso was wearing a two piece dress, black shoes, black earrings, a gold Rolex watch, an anniversary ring, a solitaire engagement ring, the six carat pear-shaped diamond ring, and she carried a black purse. (R1018;1074-75)

THE CASE AGAINST VINING:

Zaffis and Ward, after the hypnosis/relaxation session with Lt. Watson, were shown a color photographic lineup (State's 15-16) by Detective Nazurchuk and, with varying degrees of certainty, each selected Vining's picture (#2) as depicting George Williams, the person last seen with Caruso; at trial, over objection, Zaffis, Ward and Donner unequivocally identified Vining as George Williams. (R1039-46;1066-71;1086-90;1100-02-1156-57)

Records of United Telephone Company for November and December of 1987 reflect two telephone numbers, 305-862-7674 and 305-774-6159, listed for 249 Crown Oaks Way, Longwood, the address listed on Vining's drivers license. (R1293-94; State's 22-23) A personal notebook belonging to Caruso lists 774-6158 as George Williams' phone number. (R1036-38-1062-65, state's 14) Joe Taylor, a self-employed diamond dealer, also advertised in the Orlando Sentinal on November 14 a diamond ring for sale. His ad, appearing two spaces above the add placed by Caruso, was as

follows:

> DIAMOND RING - Must sell 3.00 caret [sic] round diamond & 4.36 caret [sic] round diamond Call 756-6020.

(State's 34) Phone records indicate that, on November 14, 1987, a two-minute call was placed to 305-756-6020 from one of the phones at Vining's residence, and that on November 16, 1987, two calls were made to 904-756-6020 from Vining's residence. (R1352-63; state's 23, ref. numbers 75, 79 & 80)

Taylor stated that he was first[5] contacted about the above ad on November 16, 1987, by a person who identified himself as "Billy Byrd." (R1172-73) Byrd stated that he wished to buy his wife a diamond for their upcoming 17th wedding anniversary. (R1174) Byrd would not give Taylor a phone number whereby he could be reached, and Byrd's insistence that they meet and ride together to have Taylor's gems appraised, initially at an address on Park Avenue and later in Apopka, made Taylor extremely suspicious, as did Byrd's excuse that he could not give Taylor the phone number that he was then calling from because he was at his girlfriend's house. (R1175-79) Byrd described himself to Taylor as being 5'8" tall, grayish hair, 56 or 57 years old, with glasses. (R1178)

Taylor became even more suspicious when, on Tuesday,

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[5] The state theorized in closing argument that Vining attempted to call Taylor on November 14, 1987, in response to Taylor's advertisement, but reached a Miami number rather than Taylor's because Taylor's ad neglected to set forth the 904 area code for Daytona Beach. (R1564-65)

November 17, 1987, Byrd called and requested that Taylor meet him and bring all the jewelry he had to sell because Byrd wanted to buy it all. (R1179) Byrd further said that he had viewed two diamonds on Monday which were unsatisfactory and that he wanted Taylor to ride with him to his bank near Park Avenue to receive cash for the jewelry. Taylor agreed to meet Byrd at 3:00 on Wednesday, November 18, 1987, at a friend's jewelry store, but did not go to the meeting because he believed he was being set up. (R1180-82) Taylor testified that at first the only way Byrd wanted to meet was at his (Byrd's) jeweler's or the bank, but by their last conversation Byrd was willing to meet anywhere so long as Taylor would ride to the bank with Byrd. (R1182)

Vining uses an inhaler/aspirator. (R1334;1200) In November of 1987, Vining used his mother's black 1978 Cadillac which had tinted windows. (State's 24,30; R1334) The discovery of Caruso's body was reported by the media on December 12, 1987. (R1365) Around 5:45 P.M. on December 13, 1987, firemen received a call concerning a 1978 black Cadillac Fleetwood burning in a rock pit in Marion County, Florida. (R1344; 1350) When they arrived at the scene around 6:30 P.M. the Cadillac was still smoldering. (R1350) The Cadillac appeared to intentionally have been set on fire around 5:00 P.M. (R1349-51) Two years later, Detective Nazurchuk went to the rock pit in Marion County and, using a vehicle identification number on the Cadillac's frame[6],

[6] The other VIN plates were missing. (R1353-54)

determined that the Cadillac belonged to Vining's mother. (R1353-60) Paint analysis corroborated that conclusion. (R1331-33;1338-40;1368-70) Detective Nazurchuk also located, 18 to 20 miles away from the rock pit, a telephone booth, telephone number 748-9849. (R1361,1365) United Telephone Company records indicate that, on December 13, 1987, the day the Cadillac was reported burning at 5:45 P.M., a one-minute call was made at 4:16 P.M. from that pay phone to Vining's residence. (R1365; State's 23, ref. #51)

On November 19, 1987, the day after Caruso disappeared, Vining sold to Daniel's Jewelers a 1.13 carat round diamond for $630. (R1222-27, State's 20) After the diamond was recut to 1.06 carats to correct a flaw (R1229;1240;1248), it was mounted in a ring setting and sold to Michael Merola. (R1230) The diamond was recovered from Mrs. Merola by Detective Nazurchuk. (R1266; State's 18) The diamond was shown separately to John and Elizabeth Slade, the brother and sister owners of Columbia Jewelers, and they identified it as the diamond they had entrusted to Mark Ryan on November 17, 1987, for consignment sale. (R1193;1196-99,1212-15) The Slades could identify the re-cut diamond as theirs because it was a rare, green diamond with an identifying feature inside the top of the stone. (R1193-95; 1204-05;1208-15) Ryan testified that he obtained a 1.13 carat diamond from the Slades and gave it to Caruso on November 17, 1987, for her to sell on consignment. (R1218-19)

THE PENALTY PHASE:

A special verdict form reflects that the four statutory aggravating factors found by a majority of the jury were also found by the judge. (R2416; Appendix C):

Murder Committed While Under Sentence of Imprisonment:

The State introduced a certified judgment to show that on March 31, 1983, Vining pled guilty in the United States District Court of the Northern District of Georgia to violating Title 18, U.S.C. Section 1343 (communications fraud) and that Vining received a sentence of five years imprisonment. (State's 3) Vining also pled guilty on February 26, 1985, in South Carolina to six counts of forgery: he received concurrent seven year terms of imprisonment to be served concurrently with the federal sentence. (State's 1) Vining was placed on parole on the federal conviction on January 28, 1987, with the parole to expire March 28, 1995. (R1954-55) Vining was placed on parole on the South Carolina convictions on April 9, 1987, to expire October 4, 1990. (State's 1; R1948-49) Both of Vining's parole officers testified that Vining was on parole when Caruso was killed. (R1949;1955)

Murder Committed During Commission of a Robbery:

By separate verdict, the jury found Vining guilty of the armed robbery of Caruso. (R2503) The jury also found Vining guilty of both the felony murder and premeditated murder of Caruso. (R2502;2504)

Prior Conviction of Felony Involving the Use or Threat of Violence:

On May 24, 1989, following a jury trial in Georgia, Vining was convicted of the kidnapping and aggravated assault of Gail Flemming, and Vining received fifteen year sentences on each conviction, to be served consecutively. (State's 4) The police officer who arrested Vining on those charges and the victim testified at Vining's penalty phase.

Gail Flemming owned a used car lot in Savannah, Georgia. (R1963;1993) Vining went to the car lot, ostensibly in an effort to sell his van. (R1997-98) A few weeks later, in August of 1988, Vining returned to the car lot and again talked to Flemming about selling his van. (R1993,1998) As Flemming looked in the NADA bluebok to determine the value of the van, Vining placed a gun to her head and a rope around her neck. (R1998) She grabbed for the rope and was handcuffed by Vining and another man, Larry Stewart. (R1995,1998) Flemming was placed in a cage in the back of the van; Vining drove and Stewart rode in the back with Flemming. (R1969;1999; State's 5) When transferred to a black car, Vining followed the black car and brandished a gun "with a long thing on the end of it." (R2000)

Vining threatened Flemming, stating that if they were stopped and she screamed she would be killed and then he would kill the policeman. (R2000) Vining said that he and Stewart were CIA agents gone bad; that she better cooperate and tell them

where her ex-husband had buried three and a half million dollars. (R2001) Both vehicles stopped and, after Vining and Stewart consulted, they went to an apartment complex where shovels and axes were obtained. (R2001)

They left the apartments, Stewart driving the van and Vining riding in the back with Flemming. Vining threatened Flemming with death if she refused to tell him where the money was buried. (R2002) Vining obtained from Stewart a "stun gun" and shocked Flemming in the face with it, but she still disclaimed knowing where any money was buried. (R2003) Ultimately, they stopped in a wooded area and unloaded the shovels and ax. Stewart went into the woods as Vining again drove Fleming around in the van and questioned her about the location of the buried money. (R2004) Vining picked Stewart up from the side of the road and they drove to the wooded area again. (R2005) Flemming was walked into the woods to a "straight up and down hole" dug in the ground. (R2005)

Flemming's legs were duct-taped together and Vining left after duct tape was placed over Felmming's mouth. (R2005) Stewart again asked Flemming about the money, and took her jewelry and cut her pockets out to remove the contents. (R2005) Stewart placed tape over her nose and mouth and shaped it together until Flemming passed out. (R2006)

Cold Calculated and Premeditated Murder, With No Pretense of Moral or Legal Justification:

The sentencing order reflects that the trial court

relied on the following to apply this statutory aggravating circumstance:

> Not all premeditated murders are committed in a cold, calculated and premeditated manner. And, if a claim of moral or legal justification existed that was more than a pretense, it would probably not be a capital felony. The evidence in this case justified the jury finding in its advisory sentence this factor was proven beyond a reasonable doubt. There is no moral value or legal principle that would would (sic) justify this murder.
>
> The jury found this aggravating factor proven beyond a reasonable doubt, and I concur.

(R2636; Appendix C).

In mitigation, the court found only that Vining served honorably in military service, and rejected other factors such as Vining's age (57), the fact that Vining saved his wife's life, Vining's accomplishments as a child, and that Vining was a responsible parent. (R2632-33)

The Gardner v. Florida Violation:

The sentencing order filed in open court on April 9, 1990, states the following:

> As the presiding judge at the guilt phase and the advisory sentence phase of the jury trial, I was present for all of the testimony and evidence introduced during both phases of the trial. **Also, I have read all of the depositions transcribed and filed with the clerk of the court, I have read a copy of the medical examiner's report and discussed it with him. I obtained copies of the Seminole County estate file on Georgia Dianne Caruso, deceased, and checked the claims filed in the estate which described jewelry consigned to the**

> **deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance**.

(R2630) (Appendix C).

The initial record on appeal contained neither depositions, medical examiner's reports nor probate records, so Vining moved to supplement the record with said items. The State objected and, in pertinent part, stated:

> It is clear from the record in this case that the trial judge did not consider such matters ex parte in violation of the dictates of Gardner v. Florida, 430 U.S. 349 (1977). In a letter to the State and defense counsel dated March 1, 1990, Judge Baker indicated that he had discussed with both parties his decision to speak with the medical examiner to determine that the autopsy report was the only written report on the deceased. (R2575) In a letter dated March 14, 1990, he indicated that he attempted to obtain depositions not in evidence and probate records of the deceased victim Georgia Caruso. (R2622) No objection to the viewing of such materials was ever raised below by defense counsel at the penalty phase, sentencing, or at any time prior thereto. This was not assigned as error on appeal in the statement of judicial acts to be reviewed. The Appellate Assistant Public Defender has obviously not conferred with trial counsel in his efforts to raise a Gardner issue on appeal. The record reflects, and the Assistant State Attorney Ken Hebert recalls, that both parties consented to the undertaking of the trial judge and were certainly aware of it. The State would question the ethics of now raising such issue.

RESPONSE TO MOTION TO SUPPLEMENT THE RECORD, para. 2. On October

12, 1990, this Court permitted the record on appeal to be supplemented only with copies of the depositions which were part of the record in the trial court. Over 1000 pages of depositions were taken. Several people were deposed concerning the abduction of Gail Flemming in Georgia. Specifically, Detective Ferguson, a policeman who participated in the arrest of Vining, was deposed. (R3052-3161) Ferguson at one point stated that Vining was possibly connected to four murders in Florida. (R3142-44) Larry Stewart, Vining's co-defendant, was also deposed. (R3297-3380) Stewart discussed not only the abduction of Flemming, but his confinement in prison with Vining prior to that. Stewart also discussed his ultimate escape and Vining's participation in that escape, which included harboring Stewart. (R3313-3319) Of note is Stewart's testimony that Vining never planned to murder Gail Flemming. (R3332) The deposition of Kevin Donner revealed that appraisal of a 1.13 carat diamond was performed at the same time the other appraisals were performed. (R2897) When deposed, Ward stated that Caruso took more jewelry with her than she was supposed to sell when she went to see Williams. (R2096)

Depositions were also taken from Vining's relatives concerning potential mitigation. These depositions reveal that Vining gave members of his family large sums of money as gifts. (R3294,3213) Vining's ex-wife established that Vining had a severe drinking problem, and that he treated the children "great." (R3243-44) She divorced Vining while he was in prison. (R3250) Her opinion is that Vining does not like women. (R3257)

She also explained that Vining's son, Crawford, is angry and cannot talk about the incident without getting mad. (R3271) When deposed, Crawford stated that he did not like to talk or think about his father's crimes. (R3165-66;3187) He did not want to testify, but said he would if it was necessary. (R3174) Martha Vining, Vining's daughter, was also deposed. (R3194-3236) She revealed that she and her father fought due to a "personality conflict," and claimed that Vining did not want her around. (R3197) Martha, too, felt that Vining just did not like women. (R3198) Martha feels her father should be convicted based on what she has heard. (R3199)

Martha further revealed that her older brother, Travis, was not on good terms with Vining and that he had not attended scheduled depositions. (R3203-04) Vining gave Martha $9,000 cash to fulfill a promise to her that he would get her a car. (R3213)

SUMMARY OF ARGUMENT

POINT I: This issue is dispositive of the appeal because, under State and Federal law, charges against a defendant who has requested disposition of a detainer placed against him must be dismissed if he is not tried within specific time periods set forth in the Interstate Agreement on Detainers ("IAD"). While imprisoned in Georgia, Vining requested to dispose of a Florida detainer based on the Interstate Agreement on Detainers. The Clerk of Orange County filed Vining's request in the court file and forwarded copies to the prosecutor and the assigned judge. The State also accepted temporary custody of Vining under the terms of the IAD. Vining was not thereafter timely tried within 120 days from the date he arrived in Florida and/or within 180 days from the date Florida received his IAD request for disposition of detainers. As a matter of federal and state law Vining is entitled to have the convictions reversed because they have not been timely prosecuted by the state.

POINT II: The trial court improperly considered and referred to matters not presented in open court when sentencing Vining to the death penalty. This denied Vining's state and federal constitutional rights to due process, confrontation of witnesses and effective representation of counsel. The death penalty must be vacated and the matter remanded for resentencing.

POINT III: Knowing full-well that hypnosis affects the admissibility of evidence, the police conducted unrecorded hypnosis sessions with four witnesses and thereafter had those

witnesses participate in a photographic line-up where Vining's picture was selected. Prior to trial, Vining sought to suppress the post-hypnotic identification testimony on the authority of Stokes v. State, 548 So.2d 188 (Fla.1989), which expressly holds that a hypnosis session acts as a "time barrier, after which no identifications . . . may be admitted." Stokes, 548 So.2d at 196. Because the trial court erroneously denied Vining's motion to suppress the identifications and because the State cannot show beyond a reasonable doubt that the proof did not affect the verdict, the convictions must be reversed and the matter remanded for retrial.

POINT IV: The trial court sustained State objections made during defense questioning of the jury venire, thereby unfairly restricting Vining's ability to explore areas of bias and partiality. This interference in voir dire denied Vining the ability to intelligently exercise his limited number of peremptory challenges and further precluded him from establishing that challenges for cause of particular jurors were warranted. The court also erred by denying challenges for cause concerning jurors who required that evidence be presented to overcome bias in favor of imposition of the death penalty. Due to these violations of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to Due Process, an impartial jury, effective assistance of counsel and a reliable jury recommendation and the state constitutional counterparts, the convictions and/or death sentence must be reversed and the matter remanded for retrial.

POINT V: Over objection, the trial judge instructed the jury on the statutory aggravating factor of a cold, calculated and premeditated murder, without pretense of moral or legal justification. The evidence is insufficient to support that factor beyond a reasonable doubt. Vining was prejudiced because both the jury and the trial court found that factor to exist, which in turn erroneously required Vining to overcome the additional weight of this impropeor aggravating factor in order to achieve a life imprisonment recommendation and sentence. Because the improper instruction over timely objection denied due process and rendered the death recommendation and sentence unreliable under the Fifth, Eighth, and Fourteenth Amendments, the death sentence must be reversed and the matter remanded for a new penalty phase.

POINT VI: Fundamental fairness requires that a defendant be given notice as to which statutory aggravating factors the State intends to rely on in seeking the death penalty prior to trial because the evidence presented during the guilt phase of trial is subsequently used by the jury and the judge to recommend and/or impose the death penalty. The complete lack of notice as to which statutory aggravating factors applied in this case denied Vining due process of law under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution. Accordingly, the death penalty must be reversed.

POINT VII: The trial court's sentencing order establishes that valid statutory and non-statutory mitigating factors were erroneously rejected by the trial judge. The court's rejection of valid mitigation which is, in other cases, afforded weight against imposition of the death penalty, is arbitrary and capricious, thereby rendering the death penalty unreliable and unconstitutional under Article I, Sections 9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

POINT VIII: The death recommendation is unreliable under the Eighth and Fourteenth Amendments because, over timely and specific objection, the State importuned the jury to recommend death because Vining was an affluent white person who came from a good family; a victim from a different crime allegedly committed by Vining had not yet gotten over it; and, Vining's crime concerning a victim he did not know, one that was chosen at random. These non-statutory considerations cannot be used to impose a death penalty without denying due process and equal protection guaranteed by the State and federal constitutions. Because the death penalty recommendation is unreliable and was unfairly attained by the state, the death penalty must be reversed and a new penalty phase conducted.

POINT IX: The death penalty is unconstitutional on its face and as applied because this Court, rather than the legislature, has provided the substance of the terms set forth in Section 921.141, thereby violating the separation of powers doctrine. Further,

the statutory aggravating factors are themselves too broad to sufficiently narrow the discretion of the jury/sentencer in recommending/imposing the death penalty, in that non-statutory aggravating factors are considered under the broad umbrella of a statutory aggravating factor. Finally, the death penalty legislation in Florida is unconstitutional because it places the burden on the defendant to prove that the mitigation outweighs the aggravation and, even when the burden shifting problem is corrected, the "outweigh" standard impermissibly dilutes the State's constitutional burden to prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted in a particular case. For those reasons, the death penalty in Florida is unconstitutional and the instant death penalty must be reversed.

POINT I

THE TRIAL COURT ERRED IN DENYING VINING'S MOTION TO DISMISS DUE TO THE STATE'S VIOLATION OF THE INTERSTATE AGREEMENT ON DETAINERS.

Section 941.45, Florida Statutes (1987), involves the the Interstate Agreement on Detainers ("IAD"). It requires that a defendant be brought to trial within 180 days from the date his IAD Request for Disposition of Detainers is received by Florida officials and/or within 120 days from the date the defendant arrives in Florida following the state's acceptance of temporary custody under the IAD. Both time limits were violated here. The pertinent dates are not in dispute:

May 5, 1989: Detainer placed by Orange County Sheriff's Office against Vining. (R2336)(Appendix B)

June 5, 1989: Indictment returned for armed robbery and first degree murder. (R2196-97)

July 5, 1989: Vining's Request for Disposition of Detainer, filed and distributed by clerk. (R1689,2200-04)

July 25, 1989: State accepts temporary custody of Vining under IAD. (R2338)(Appendix B).

August 31, 1989: Vining arrived in Florida. (R2205)

December 30, 1989: 120 days from date Vining arrived in Florida.

January 1, 1990: 180 days from the date Florida received Vining's Request for Disposition of Indictment.

January 10, 1990: Vining seeks discharge based on IAD violation. (R2328-30)

January 12, 1990: State moves to extend time for speedy trial. (R2333-34,2341-42)

January 17, 1990: Motion to Discharge denied. (R2343-46)

January 24, 1990: State's motion to extend speedy trial time granted. (R2417)

The State did not dispute the events and the foregoing dates but instead argued that, by filing pretrial motions, Vining tolled the IAD speedy trial time:

> COURT: What requirements are you saying the defendant has not met?
>
> STATE: Not been available. He has not been available, Your Honor.
>
> COURT: Why? What did he do? What are you saying that he did that made him unavailable?
>
> STATE: Your Honor, he arrived here on approximately August 30. A time period kicked in and he had to be at trial, depending on which of the speedy trial rules apply. There is [sic] two of them that are applicable here. One has to do with this, which is the document in front of you. In that case, we have to try him within one hundred eighty days. If we can continue on with our paperwork at the State attorney's office, which we did. That is the Simone Rosenberg name that you find there. Then we have one hundred twenty days from when he arrives here to try it. Obviously, they don't always coincide. And the speedy trial rule in this case under the IAD would have run because here under oath, on one of two days, either December 29, or January 8, is the State's contention on how you would set it.
>
> **NOW, WHAT HAPPENED IN THIS CASE IS WHEN HE WAS ARRAIGNED, IT WAS SET INADVERTENTLY AT A TIME PAST THAT**. What I say to your Honor is, and the defendant can take advantage of the fact he does not have to tell us -- I've always thought it was funny, but he can sit there and wait and watch to see what happens. And there is case law that

> says that. But what he cannot do, Your Honor, what he cannot do is raise issues before you, which make him what they call unavailable for trial. Unavailable for trial has been defined, and when we look for the definition, the cases are clear we have to look to federal cases for it. Because it has to be a federal interpretation. Not what Florida says is available, but what the federal cases say is available, because it is an act between separate states. And therefore, federal law controls. Those cases in front of you say that when the question is asked what does the defendant have to do in order to toll that running or to be unavailable for trial, they will list several things. One of them that they will list, Your Honor, is that he places before you motions which require hearings.

(R1674-77)(emphasis added) The court rejected the State's claim because the cases relied on by the State hold that the IAD trial time had been tolled because the defendant moved for a continuance in conjunction with filing pretrial motions. However, the trial court denied the motion to discharge due to a "jurisdictional" defect, that being the failure of Georgia to mail Vining's request for discharge in strict compliance with the technical procedure set forth in Section 941.43(3)(b), Fla. Stat. (1987). (R2343-44, Appendix A).

The trial court's reasoning is at odds with the facts of this case and existing precedent. Substantial compliance with the service requirements of the statute by a prisoner is the controlling standard, in that a custodial State could otherwise circumvent the statute and the prisoner's good faith attempts to invoke the protection the statute provides. See State v.

Roberts, 427 So.2d 787 (Fla. 2d DCA 1983)("As both the prosecutor and the appropriate court had actual notice of the necessary information, they should have been aware that the 180-day period had started running.") Significantly, this is not a situation where neither the State nor the court had notice. See Welch v. State, 528 So.2d 1236 (Fla. 1st DCA 1988) (Inaction not attributable to Florida where proper officials had no notice.) Here, notice to the State and court may be legally presumed because Vining's IAD request was duly filed in the court file and was thus a public record of Orange County. See First Federal Savings & Loan Ass'n of Miami v. Fisher, 60 So.2d 496 (Fla. 1952); Belcher v. Ferrara, 511 So.2d 1089 (Fla. 3d DCA 1987); Symons v. State v. Dept. of Banking Finance, 490 So.2d 1322 (Fla. 1st DCA 1986).

Even if such notice is not presumed as a matter of law, the record does NOT support the court's conclusion that service was not perfected in substantial compliance with the statute. A copy of Vining's Request for Disposition of Indictment was filed in the court file by the clerk on July 6, 1988. (R2200) A copy was also contained in the case file of the State attorney, logged in at a date consistent with the testimony of the clerk that she provided a copy to the prosecutor via interoffice mail in compliance with the standard procedure employed by the clerk's office at that time. Her notations on the paper work show that the routine procedure was followed in Vining's case. Further, Forms 7 and 6 of the Agreement on Detainers initiated by

Assistant State Attorney Rosenberg and certified by Circuit Judge Jeffords Miller as being "duly recorded and transmitted for action in accordance with the terms and provisions of the Agreement on Detainers" (R2338-39, Appendix B) conclusively demonstrate that the prosecutor and court had actual notice that the 120 day time provision of the Agreement on Detainers was operative. A defendant should not be penalized because the trial judge and State attorney neglect to refer to their files when setting a trial date. See United States v. Drummond, 511 F.2d 1049, 1053 (2d cir.) cert. denied, 423 U.S. 844 (1975) (It is the responsibility of the trial judge to assure defendants their right to a speedy trial); State v. Edwards, 509 So.2d 1161, 1163 (Fla. 5th DCA 1987) ("Ultimately it is the state's responsibility [to timely try a defendant] once the IAD speedy trial mechanisms are triggered.") These responsibilities are not met when court files are not opened until after a motion for discharge has been filed.

Even assuming that Vining's initial request was faulty due to lack of service, the State's action of obtaining temporary custody under the IAD constitutes a separate basis for dismissal of the charges. The State attorney's office through Assistant State Attorney Simone Rosenberg (R1721) obtained custody of Vining under the IAD, an act which triggered the 120 day time provision irrespective of Vining's request:

> DEFENSE COUNSEL: If I could approach, Judge, I can show you what I have. I have an agreement on detainers form seven, prosecutor acceptance of

temporary custody offered in connection with an inmate's request for disposition of the detainer. I am showing that to the State attorney at this point. I also have agreement on detainers form six, evidence of agency's authority to act for receiving state. This is also signed by assistant State attorney Simone Rosenberg. It refers to the letter of June 28, 1989, offering temporary custody of John Bruce Vining. I have a letter from the Florida Department of Corrections to Mr. Eagan's office, attention Linda Baldry with regard to the detainer agreement form and information about . . .

COURT: Which forms are they talking about?

DEFENSE COUNSEL: These are forms that are not in the court file, but are forms filed by the State attorney's office to bring Mr. Vining down here.

COURT: Which ones referred to this notice of placing prisoner requested --

DEFENSE COUNSEL: All of them do that Simone has signed on.

PROSECUTOR: Well, I'm not so sure. One of those proceedings has to do with the defense notifying us, Your Honor. The other has to do with us attempting to obtain him on our own.

DEFENSE COUNSEL: One is the hundred twenty days. one is one hundred eighty days. Both are applicable in this case. Ms. Rosenberg last summer was trying to get Mr. Vining, and therefore the hundred twenty days started running in August. These documents are from June and July of 1989 with the State attorney's office with regard to the detainer of Mr. Vining.

(R1697-98) (See Appendix B) (emphasis added).

The trial judge denied Vining'S IAD Discharge motion

based on the express finding that neither he (the trial judge) nor the state attorney had notice of Vining's IAD request because, when Vining was arraigned, the speedy trial time was computed using Florida's speedy trial rule rather than the time provisions of the IAD. (R2344-45) Remarkably, the judge at the same time noted that he had NOT previously opened Vining's court file. (R2344, para.12) (Appendix A). Later the State admitted receiving a copy of Vining's request "at or near" the time that it should have been provided by the clerk according to the deputy clerk's testimony, admitting that the request had been ignored because "the defendant had not complied with the statute or perfected service . . . as required by F.S. 941.45." (R2357;1825)

A defendant is entitled to dismissal where the government fails to try a prisoner within the IAD speedy trial limits. United States v. Mauro, 436 U.S. 340 (1978); Brown v. Wolff, 706 F.2d 902, 906 (1983).

> Article III of the Agreement provides the prisoner-initiated procedure. It requires the warden to notify the prisoner of all outstanding detainers and then to inform him of his right to request final disposition of the criminal charges underlying those detainers. If the prisoner initiates the transfer by demanding disposition (which under the Agreement automatically extends to all pending charges in the receiving state), the authorities in the receiving State must bring him to trial within 180 days or the charges will be dismissed with prejudice, absent good cause shown.
>
> Article IV of the Agreement provides the procedure by which the prosecutor in the receiving State may initiate the transfer. First, the

> prosecutor must file with the authorities in the sending State written notice of the custody request, approved by a court having jurisdiction to hear the underlying charges. For the next 30 days, the prisoner and prosecutor must wait while the Governor of the sending State, on his own motion or that of the prisoner, decides whether to disapprove the request. If the Governor does not disapprove, the prisoner is transferred to the temporary custody of the receiving State where he must be brought to trial on the charges underlying the detainer within 120 days of his arrival. Again, if the prisoner is not brought to trial within the time period, the charges will be dismissed with prejudice, absent good cause shown.

Cuyler v. Adams, 449 U.S. 433, 444, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981).

"The prisoner has the initial burden of making a written request for final disposition, and upon doing so the State has the burden to bring him to trial within 180 days. Failure to try a defendant within the time period results in a dismissal." State v. Edwards, 509 So.2d 1161, 1162 (Fla. 5th DCA 1987). The time provisions set forth in Section 941.45, Florida Statutes (1987) take precedence over those set forth in Fla.R.Crim.P. 3.191. Shewan v. State, 396 So.2d 1133 (Fla. 5th DCA 1981).

Good Cause Not Shown for Extension:

The belated finding that "good cause" was shown for the State not to comply with the time requirements of the IAD is clearly erroneous. The case was "inadvertently" set for trial

beyond the IAD requirments because neither the State nor trial judge bothered to check the court files. On January 12, 1990, AFTER the time within which to try Vining expired, the State moved to extend the trial time period, allegedly because it had not yet received hair analysis and handwriting comparison reports from its experts. (R2333-34) Vining had provided hair, blood and saliva samples on September 19, 1989. (R2216-18) Over two months later, without any mention of speedy trial considerations, the State on December 7, 1989 moved to obtain handwriting examples from Vining. (R2278) On December 15, 1989, the Court ordered Vining to submit handwriting samples within ten days. (R2301) The State's Amended Order for Extension/continuance of Speedy Trial Time states that the handwriting samples were taken from Vining and submitted to the Florida Department of Law enforcement ("FDLE") on December 28, 1989. (R2341)

The trial court heard the State's untimely motion to extend the speedy trial period on January 22, 1990, nearly two months after the IAD trial time had expired. The State presented the testimony of just one witness, Detective Nazurchuk, who testified that he had twice checked with FDLE experts since the hair samples had been submitted in September and was told that "They were still working on them." (R10) Nazurchuk also stated that he obtained the handwriting samples from Vining on December 28, 1989, sent them to the FDLE lab that same day, and that the analysis had been completed but the documentation had not been received. (R11-12) The foregoing in no way supports a finding

that the State exercised due diligence or had good cause to extend the IAD trial time assuming, arguendo, that the time period could be extended after it expired.

It is expressly submitted that the failure of the State to move to extend the IAD time limits before the time provisions were violated rendered the State's attempt to extend the time untimely and fatally defective. It is further submitted that the State in any event failed to produce sufficient competent evidence to establish good cause for violating the IAD time requirements. Nazurchuk's testimony showed that the handwriting expert had immediately performed the comparison and was therefore able to testify anytime. The fact that "documentation" had not yet been received is irrelevant because the analyst must testify at trial in person; "documentation" is not admissible.

The fact that the hair comparison was evidently not yet completed cannot be "good cause" to extend the IAD trial time because the State did not establish why that analysis was not timely performed after the experts had possession of the samples for three months! **INDEED, THE COMPARISON WAS PERFORMED IN TIME FOR THE TRIAL AS SCHEDULED. . . THE STATE HAS NOT SHOWN THAT HAD THE TRIAL BEEN PROPERLY SET WITHIN THE IAD TIME REQUIREMENT THE COMPARISON COULD NOT HAVE BEEN TIMELY PERFORMED**.

Before "good cause" can be shown for extension of the IAD trial time requirements, there must first be a good-faith attempt to comply with the time provisons. See Brown v. Wolff, 706 F.2d 902, 906 (9th Cir. 1983)("[W]here the trial judge has

not attempted to transfer the case to another judge or to adjust or increase the criminal calendar, the weight of authority supports the view that the court is not sufficiently congested to constitute good cause for extension.") (footnote omitted); United States v. Ford, 550 F.2d 732, 743 (2d Cir. 1977) (congestion held not good cause for extension where no attempt was made to transfer case to another judge), aff'd sub nom. United States v. Mauro, 436 U.S. 340 (1978).

There simply was no attempt in this case to meet the IAD trial time requirement. The State had no difficulty amassing its evidence in time for the trial date as initially and erroneously set. The State has not shown that there was good cause to extend the IAD time provisions, and the trial court's finding to that effect was untimely, unsupported by competent evidence, and patently erroneous and an abuse of discretion as a matter of law.

The presence of Vining's IAD request in the files of the State attorney and the court gave ample notice to the proper Florida officials whereby the protections of the IAD were fully applicable. Because Vining was not brought to trial within 180 days from the date Florida received his request for Disposition of Detainers under the Interstate Agreement on Detainers and/or because Florida failed to bring Vining to trial within 120 days from the date he arrived in Florida pursuant to his request for disposition of detainers under the Interstate Agreement on Detainers, his timely motion for discharge should have been

granted. This issue is dispositive of the remainder of the appeal. The fault of having charges dismissed lies squarely at the feet of the state attorney's office, an office that was quick to exercise the power of an interstate agreement, but an office that thereafter totally neglected to monitor the time provisions that were set in motion. The concluding admonition to the jury contained in the Standard Jury Instructions sums it all up:

> For two centuries we have agreed to a constitution and to live by the law. No one of us has the right to violate rules we all share.

Florida Standard Jury Instructions in Criminal Cases, 2d ed. p.29. Accordingly, the conviction must be reversed.

POINT II

THE TRIAL COURT VIOLATED THE DICTATES OF GARDNER V. FLORIDA AND DENIED DUE PROCESS OF LAW, THE RIGHT TO CONFRONT WITNESSES, AND EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, BY SENTENCING THE DEFENDANT TO DEATH BASED ON INFORMATION NOT PRESENTED IN OPEN COURT.

In pertinent part, the sentencing order provides:

> As the judge presiding at the guilt phase and the advisory sentence phase of the jury trial I was present for all of the testimony and evidence introduced during both phases of trial. Also, I have read all of the depositions transcribed and filed with the clerk of the court. I read a copy of the medical examiner's report and discussed it with him. I obtained copies of the Seminole County estate file on Georgia Dianne Caruso, deceased, and checked the claims filed in the estate which described jewelry consigned to the deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance.

(R26300)(Appendix C)(emphasis added).

The trial court's ex parte consideration of material outside of the evidence presented at trial and the penalty phase hearing violates the holding of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (Fla. 1977). The ex parte investigation by the trial judge denied due process, the right to confront adverse evidence, and the right to effective representation of counsel guaranteed by Article I, Sections 9 and

16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The holding in Gardner is very clear:

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

Gardner, 430 U.S. at 362.

The information considered by the trial judge in Gardner was a pre-sentence investigation report. Here, the trial judge read all of the depositions in the court file, read the medical examiner's report and discussed it with the medical examiner, and obtained and reviewed copies of the victim's estate file in a different [Seminole] county and compared the claims filed therein to the testimony at trial. (R2630) This ex parte investigation by the trial judge, however well intended, constitutes reversible error. See Funchess v. State, 367 So.2d 1007 (Fla. 1979) (counsel for State and defendant must be provided "an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information[.]").

> In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the United States Supreme Court reminded us that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. Gardner held that using portions of a presentence investigation report without notice to the defendant and without an accompanying opportunity afforded to the defendant to rebut or challenge the report denied due process.

> That ruling should extend to a deposition or any other information considered by the court in the sentencing process which is not presented in open court. Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.

Porter v. State, 400 So.2d 5, 7 (Fla. 1987)(emphasis added). See also Harvard v. State, 375 So.2d 833, 835 (Fla. 1978).

It is evident from reading the sentencing order that the trial judge was influenced greatly by the Gail Fleming incident in Georgia. (R2634) Much of the information used by the judge was not presented in open court. For instance, the sentencing order states, "she was taken to a wooded area where she was rescued as she lay [sic] helpless, with a gun pointed at her head, beside a verticle grave that had been dug for her in her presence." (R2634)(emphasis added). There is no mention of Flemming's rescue in the penalty phase testimony. That information is contained in detail in the depositions of the co-defendant and various law enforcement officers. The trial court's consideration of Caruso's probate estate file and comparison of the claims there made was absolutely irrelevant, and certainly greatly prejudicial. Booth v. Maryland, 482 U.S. 496 (1987). The depositions of Vining's children and ex-wife likely influenced the court to reject non-statutory mitigating factors which were otherwise uncontrodicted at the penalty phase hearing.

This Court can review the depositions which, through supplementation, are now a part of the record, but the inability of this Court to review what information/material the trial judge considered from the probate record and the judge's ex parte discussions with the medical examiner and/or his independent investigation(s) at the scene of the alleged abduction effectively precludes truly meaningful application of a harmless error analysis. Appellant cannot demonstrate prejudice when he is denied the basic information with which to do so, and this Court cannot perform an informed analysis without reviewing the material that was actually considered. Due process under the Fifth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution requires that, before a harmless error analysis can be meaningfully performed, a defendant must be afforded the necessary information to demonstrate actual prejudice. Those rights to due process were violated when Vining was not permitted to supplement the record with the material considered by Judge Baker in sentencing him to death.

It is further submitted that a harmless error analysis is improper here due to the deprivation of constitutional rights essential to the fundamental fairness of the penalty phase. Specifically, before a defendant can be denied the fundamental constitutional rights to be present when evidence is presented/considered, to confront adverse evidence, to present evidence/argument in his own behalf, and to effective representation of counsel, a knowing, voluntary and intentional

waiver by the defendant personally must exist on the record. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970).

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights (citations omitted), and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." (citation omitted).

Bookhart v. Janis, 384 U.S. 1, 4 (1966). See Harris v. State, 438 So.2d 787, 797 (Fla. 1983)(waiver of necessarily lesser included offenses in capital case must be knowing waiver by defendant personally). No such personal waiver occurred here.

Two letter from the trial judge to counsel for the parties appear in the record. (R2575,2622). In the first letter dated March 1, 1990, Judge Baker indicated that, "I confirmed that the written autopsy report, a copy of which was given to me by Mr. Hebert, is the only written report on the deceased, Georgia D. Caruso." (R2575) This letter in no way reveals an in-depth discussion had been undertaken between the judge and the medical examiner.

The second letter dated March 14, 1990, states as follows:

> During the trial and since the trial of this case **I have read** all of the

> depositions and have **attempted** to obtain documents referred to in the trial and the depositions that were not in evidence, such as Dr. Hegert's report and the probate records of the estate of the deceased, Georgia Caruso. Since I live in downtown Winter Park, I am familiar with that area where important events occurred in this case. Before sentencing, I expect to drive out to the Jamestown Shopping Center.
> It has always been my preference, as a lawyer and as a judge, to go to the places that I hear talked about or testified about. Usually, this is not possible in handling the volume of cases that I have, but in a case where there is a death or life imprisonment decision to make, I do not want to overlook anything that might make the case more clear and my decision more appropriate.

(R2622). The letter reveals that Judge Baker had already read the depositions and indicates only that the judge "attempted to obtain the documents." It further reveals that Judge Baker lives in the area where Caruso was supposedly abducted . . . not that the judge would be conducting his own investigation. It cannot reasonably be claimed that Vining personally agreed to have the judge conduct an ex parte investigation to develop information to be used in imposing sentence.

Neither can it be said beyond a reasonable doubt that these independent investigations undertaken by the trial court did not adversely affect the weighing process the trial judge performed in imposing the death sentence. See Harvard v Florida, 459 U.S. 1128 (1983)(Marshall, dissenting). Accordingly, the death sentence must be reversed and the matter remanded for resentencing.

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT HYPNOTICALLY-TAINTED TESTIMONY.

In Bundy v. State, 471 So.2d 9 (Fla. 1985), the Florida Supreme Court dealt with the admissibility of hypnotically-refreshed testimony and established a bright line rule that hypnotically-refreshed testimony is per se inadmissible in criminal trials; a witness who has been hypnotized is still competent to testify concerning those facts recalled before hypnosis. Bundy, 471 So.2d at 18. Recently, this Court again addressed the reliability and practical application of post-hypnotic testimony and established the working definition of hypnosis in Florida:

> While there is no consistently agreed upon definition of hypnosis, **for our purposes we define hypnosis as "an altered State of awareness or perception."** (citations omitted). During hypnosis, the subject is placed in an artificially induced State of sleep or trance through a series of relaxation and concentration techniques employed by the hypnotist. Hypnosis has a wide variety of forensic applications and benefits and, under clinical circumstances, can be very worthwhile. Here, we are concerned only with the use of hypnosis to refresh the recollection of a witness to an event or a crime for the purpose of testifying to his or her recollection in court.

Stokes v. State, 548 So.2d 188 (Fla. 1989)(emphasis added). In Stokes, this Court held, "the testimony of a witness who has undergone hypnosis for the purpose of refreshing his or her

memory of the events at issue is inadmissible as to all additional facts relating to those events from the time of the hypnotic session forward. A witness who has been hypnotized may testify to statements made before the hypnotic session, if they are properly recorded. Any hypnosis session shall act as a time barrier, after which no identifications or statements may be admitted." Stokes, 548 So.2d at 196 (emphasis added).

In the instant case, Vining moved prior to trial to exclude the hypnotically-refreshed testimony of several witnesses. The State countered by arguing that the witnesses had not been "hypnotized", that they had instead merely been "relaxed." (R2279,1724). A hearing was had on Vining's motion. It was established that Lieutenant Jimmy Watson, a police watch commander involved in Vining's case who had practiced hypnosis for twenty-five years and had hypnotized "thousands" of people, conducted the hypnosis sessions[7]. Lieutenant Watson was acutely aware of the legal consequences of hypnotizing a witness. He informed the detectives to obtain as much information as they

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[7] In State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), the New Jersey Supreme Court adopted strict procedural safeguards and mandated compliance with those safeguards prior to hypnosis testimony being admissible. Three of four safeguards were violated in this case. "First, an independent psychologist or psychiatrist, **not regularly employed by the prosecution or defense, should conduct the interview**. Second, any information transmitted to the hypnotist concerning the case **must be recorded** in some manner. Third, the hypnotist should derive as detailed a statement as possible from the witness prior to induction. Fourth, **all meetings between the hypnotist and subject must be recorded**. Finally, **only the hypnotist and the subject should be present during the hypnotic encounter**." Hurd, 432 A.2d at 95-96 (emphasis added).

could from the witnesses prior to the hypnosis session. "I always tell them that prior to me getting involved, due to the potential difficulties in court testimony, that they must get every bit of information they possibly can prior to me getting involved." (R1738) The procedural safeguards adopted in State v. Hurd, 432 A.2d 86 (1981) to minimize the inherent risks of hypnotically-refreshed testimony were totally absent here:

> Q: (By defense counsel): You indicated that you had no knowledge of the case prior to talking to these witnesses, is that right?
>
> A: (Lieutenant Watson): Essentially true. I had been briefed to the extent there had been an incident, and there were several witnesses that need to be interviewed. And that was about the extent of my knowledge of the case.
>
> Q: And the individual who briefed you would have been Detective Nazarchuk?
>
> A: That's correct.
>
> Q: When you were speaking with Detective Nazarchuk, was there a discussion about recording the sessions or taking notes on them?
>
> A: Right. My protocol in these cases would be I would tell the detectives it is their responsibility to record, and to note, especially since we were doing strictly investigative leads, examinations.
>
> Q: Did you give the detectives any other instructions?
>
> A: **That the detectives would have to be present during the sessions**.
>
> Q: Did you discuss what information the detectives had gotten from the witnesses prior to these sessions?

A: No, I never want to know that.

Q: Well, did you talk to the detectives at all on the subject of what they should have gotten from the witnesses prior to your speaking to them?

A: Yes, ma'am.

(R1737-38)

One of the problems with hypnosis is the heightened suggestibility that the witness experiences which may lead him to confabulate, to provide answers to questions based on perceived attitudes of his hypnotist or others present during the hypnosis session:

> This heightened suggestibility leads to other problems which tend to render hypnotically refreshed testimony less reliable than testimony of a witness whose memory has not been refreshed through use of hypnosis. For example, many researchers have concluded that a hypnotist, no matter how skilled, cannot avoid implanting intentional or inadvertent suggestions in the mind of the hypnotized subject. This occurs as much through non-verbal body language as through verbal cues. (citations omitted). **Furthermore, a hypnotic subject cannot, upon awakening, distinguish between his own thoughts and feelings and those which were implanted during the hypnosis sessions**.

Stokes, 548 So.2d at 190-91 (emphasis added); See also, Bundy v. State, 471 So.2d at 14 ("these authorities reveal that hypnosis subjects are often so susceptible to suggestion and receptive to the hypnotist's verbal and nonverbal communications that they may respond in accordance with what he or she perceives the desired

response to be in order to please the hypnotist.") Significantly, Lieutenant Watson's definition of "hypnosis" versus relaxation is unworkable, in that the only distinguishing feature is his intent in placing the person in the State of hypnosis as opposed to merely "relaxing" the witness. (R1734)

> Q: (By defense counsel) I believe you indicated you used relax and recall with these witnesses, correct?
>
> A: (Lieutenant Watson) That's correct.
>
> Q: And relax and recall is a phase of hypnosis?
>
> A: It can be, yes.
>
> Q: And you reviewed for us what the protocol was that you used with these people did you not?
>
> A: Yes, ma'am.
>
> Q: And the protocol was a compromise between full blown hypnosis and relax and recall, is that correct?
>
> A: Yes, ma'am.
>
> Q: And it is your belief that one is just another level of the other. That these are not two distinct methods?
>
> A: That's certainly correct.
>
> Q: You are not able to define hypnosis for us, are you?
>
> A: The only definition that I have ever been taught or ever read that I have ever felt was the one that I go with normally, it is an increased State of suggestibility. The term would be a hypered State of suggestibility. And usually it goes on to say that in which a person will accept suggestions which are acceptable to the person or the persons.

Q: You talked to Ms. Young about intent. And I believe you indicated your intent was relaxation. Is that true?

A: That's correct.

Q: **But whether they are within a level of hypnosis, you cannot tell for a fact, can you**?

A: **No**.

Q: **It is possible that while a witness is undergoing this relax and recall, that they go into hypnosis, is that true**?

A: **That's right**.

Q: **And you were unable to determine whether these witnesses that you spoke to were under hypnosis**?

A: **I didn't observe evidence of hypnosis**.

Q: **Do you know whether they were under hypnosis or not**?

A: **No**.

(R1735-37)(emphasis added). Lieutenant Watson testified that by using a chain and ball as a means of focusing their attention and establishig a personal rapport, he becomes a potentially powerful person; he could not say for a fact that the witnesses were not under hypnosis. (R1740-41)

Joann Ward, who was employed by Caruso as a nail technician at the "Nail Expressions" nail salon, provided a tape recorded statement to the police prior to her session with Lieutenant Watson. (R1745) After the hypnosis session with

Watson, Ward met with a police artist and prepared a sketch of the person she saw with Georgia Caruso (R1753-54), and thereafter Detective Nazarchuk brought some pictures to the shop where she worked and she selected Vining's photograph as depicting the man she saw with Caruso the day Caruso disappeared. (R1039-44,1754-55) On cross-examination, Ward stated that she did not really know whether she had been hypnotized or not. (R1749-50,1756-57) Ward previously stated in depositions and in statements that she had been to a hypnosis session. (R1752-53)

Ellen Zaffis owns the Winter Park Gemlab. Caruso brought a man there to have some jewelry appraised on the day she disappeared. Zaffis gave the police a written statement. (R1763) She met with an artist and made a composite drawing of the suspect, then approximately a month later she made another statement to Orange County detectives. (R1764) In that statement, she gave the detectives information concerning the time of the appraisal, the date of the appraisal, and the description of the person accompanying Caruso. (R1765) Thereafter, she underwent a hypnosis session with Lieutenant Watson. (R1765) Zaffis disclaimed being hypnotized. To her, hypnosis means being placed in "a State of unconsciousness, provoked into doing things that she is not aware of doing or saying." (R1768) Zaffis also met with an artist and prepared a sketch after her session with Lieutenant Watson. (R1769) Detective Nazarchuk presented Zaffis with a photographic lineup and she selected Vining's picture as depicting the person

accompanying Caruso at the time the appraisal was done. (R1083-90,1770-72)

Kevin Donner performed the appraisal of Caruso's gems at the Winter Park Gemlab and also observed the person accompanying Caruso. Donner, too, disclaimed being hypnotized, but defined hypnosis as "a deep, trance-like state." (R1119) Donner does not feel that relaxation techniques qualify as a level of hypnosis. (R1120) Donner had previously believed that he had been hypnotized. (R1121) Interestingly, Detective Watson prior to the session with Donner stated, "I want to stress to you that this is not hypnotism. (R1122) In a deposition, Donner admitted that the session affected his recall:

> Q: (by defense counsel) And then do you recall you answer being, "It was basically relaxation. It kind of clears out all the junk, shall we say out of your mind, allows you to concentrate on a single subject. That's how I relate to it anyway. **It did help me to recall, and I remember thinking that I had seen the man before on Park Avenue at another jewelry store weeks or months earlier**."
>
> A: (Donner) Mm-hmm.

(R1123)[8] Donner, also, did not select any photographs until after being hypnotized. (R1127-28)

At trial when defense counsel renewed the motion to suppress, Judge Baker revealed that he was working on an article concerning psychiatry, and that a good portion of that article

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[8] The confabulation problem was noted by this Court in Bundy and in Stokes. Bundy, 471 So.2d at 14-15, Stokes, 548 So.2d at 191.

concerned hypnosis. (R1135-41) The judge in part explained as follows:

> JUDGE BAKER: Now I've -- I'm not a good candidate for hypnosis, as I understand it; but I am told I don't -- I can't get many profound benefits from it. Some people say there are profound benefits, and I don't get them at all. But when I read this case, I think I can understand that there may be some sleep-like state, trance-like state, which we know from sideshows at carnivals and old Mr. Mesmer years ago who popularized it in kind of a vaudeville act that he took around the country. And it came to be known as Mesmerizing.
>
> But I want you to -- I want the record -- I think it's only fair that the record reflect, as I listen to these people, what they are talking about is a State of concentration which I can appreciate as one that I have, just out of curiosity, tried myself as a harmless enterprise and didn't do anything accept help somewhat in relaxation. That's the reason that's suggested; and I don't believe any of these people were in -- from what they say, I can identify them as having an experience with concentration that is not mind altering, that is not -- does not make you susceptible to suggestion in the way it's described in that Stokes case.
>
> Now, there can be such a state, but these people aren't describing being in such a state. I've never been in such a state that anybody could suggest anything to me that -- the only thing it did, and I found it, oh, just kind of interesting experience. It would be like -- I don't know. I can't compare it to anything accept something very insignificant. And so I do bring that experience to this and that understanding. Oh, I forgot to mention that I've also -- I guess it was Steve Jordan who is the psychologist who has done a lot of work with this, with hypnosis for use for, oh, relaxation and various things like that for children. So I

> don't believe that these people were in any kind of state that would -- that's described by Judge Kogan in his majority opinion in that case.
>
> The testimony is such that it does not -- whatever this hypnosis is that he was talking about, it isn't anything that I've ever experienced; and from what I listened to with these people, I don't think it's anything that these people have experienced.
>
> And that's why I am ruling as I am, and I just want the record to reflect that. I don't consider myself an expert in hypnosis at all. I am not an expert in it. I don't -- I'm not interested in hypnosis enough to be -- to take -- to do any study of it or do any -- or become an expert on it; what I probably am expert on law and psychiatry and this is a subclass of mental procedure that does fall under psychiatry and psychology. Both of those occupations or professions, whatever they are, use hypnosis, and I am familiar with it.
>
> And I still don't believe that these people are -- ought to have their testimony excluded under the rationale of the Stokes case for the reasons I have said and, I might add, for the reasons stated by the person, whatever his name was, that did this whole thing with them. I don't remember. Watson?

(R1139-41)

It is respectfully submitted that, pursuant to this Court's holding in Bundy and Stokes, the trial court erred in relying on his own experimentations with hypnosis and in allowing the State to present the testimony of witnesses concerning their identification of Vining's picture after having undergone a hypnosis session by Lieutenant Watson. Lieutenant Watson's definition of hypnosis hinges solely on his intent to place the person in a hypnotic state. A more elusive criteria cannot be

imagined by the undersigned. Lieutenant Watson and the police were extremely cognizant of the legal ramifications such a session would cause, but made no efforts to comply with any of the safeguards set forth in Hurd, supra. These hypnosis sessions were not recorded whereby it could be determined precisely what was said and what suggestions may have been transmitted, either intentionally or unintentionally, to the witnesses. At least one trained police officer with vast knowledge of this particular case was present during the hypnosis session, which also violated the recommended procedure. The mere fact that Lieutenant Watson stressed prior to the hypnosis session that the witnesses were not being hypnotized may, indeed, have affected their perception of what was being done to them at the time of the hypnosis. Unfortunately, the trial judge used his own experiences with hypnosis rather than the definition provided by this Court in Stokes. Even under Watson's description of what was done, it is certain that the witnesses were all placed in "an altered State of awareness or perception." Stokes, 548 So.2d at 190. The identification testimony should have been excluded upon timely motion because the photo line-ups occurred after the hypnosis session. Because it cannot reasonably be said that the improper testimony did not affect the determination by the jury in this case, the convictions must be reversed and the matter remanded for retrial.

POINT IV

THE TRIAL COURT IMPROPERLY RESTRICTED VOIR DIRE OF PROSPECTIVE JURORS AND OTHERWISE VIOLATED VINING'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY BY IMPROPERLY DENYING VALID CHALLENGES FOR CAUSE.

RESTRICTION OF VOIR DIRE

Fla.R.Crim.P. 3.300 provides, "Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire." The object of voir dire is to ascertain the qualifications and impartiality of persons drawn as jurors, that is, to elicit information as to the existence of partiality, bias, or other legal grounds for a challenge for cause. Cross v. State, 89 Fla. 212, 103 So. 636, 637 (1925); See Morford v. United States, 339 U.S. 258, 70 S.Ct. 586, 94 L.Ed. 815 (1950).

> . . . Actual bias can come to light during voir dire in two ways: by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed. (citations omitted).
>
> By definition, presumed bias depends heavily on the surrounding circumstances. Therefore, when a defendant is trying to prove presumed bias, the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of "actual" bias. (citation omitted). This duty cannot be discharged solely by broad, vague questions once some potential area of actual prejudice has emerged. (citations omitted).

United States v. Nell, 526 F.2d 1223, 1229-30 (5th Cir. 1976). In that regard, Florida has long recognized a party's right to

fully examine a prospective juror as to the strength and character of a previously formed or expressed opinion in order to develop information relevant to the meaningful exercise of peremptory challenges and challenges for cause. See Blackwell v. State, 101 Fla. 997, 132 So. 468, 470 (1931)("The fixedness or strength of the existing opinion is the essential test of a juror's competency[.]".

The meaningful opportunity to discover and, surely once discovered, to explore actual bias through voir dire is an essential component of the right to an impartial jury, and restriction of questioning which tends to disclose or explore a juror's actual bias denies State and federal constitutional rights to trial by an impartial jury and to meaningful, effective assistance of counsel. Further, the failure to allow a defendant to fully and fairly explore a prospective juror's personal beliefs about the death penalty renders imposition of the death penalty following a jury recommendation for the death penalty unreliable under the Eighth Amendment.

The Florida Supreme Court has expressly agreed that it is "extremely important to an accused to know whether a juror would dogmatically refuse to consider the possibility of mercy." Poole v. State, 194 So.2d 903, 904 (Fla. 1967). A juror's broad statement that he or she would automatically vote to impose death if a defendant is convicted of first-degree murder is a statement from which bias must be presumed, in that it is a statement which reveals a personal bias affecting the juror's impartiality. Even

a statement that a juror would not automatically so vote cannot be deemed conclusive as to preclude further examination on the subject.

It is here evident that the trial court's restriction of voir dire concerning several jurors' personal beliefs pertaining to their perception of mitigation and/or mercy was fundamentally unfair and violative of the rights to due process, effective representation of counsel and an impartial jury guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution. Specifically, the jurors filled out questionnaires prior to voir dire to assist the parties in focusing the voir dire questioning. (R2375-2404;2418-2444) Question 9 of the interrogatory asked, "Do you think the death penalty should always be imposed if a defendant is convicted of First Degree Murder? Please Explain." Of the 56 questionnaires, 10 prospective jurors answered with an unequivocal "yes":

> Juror 26 (Wishauer) Yes. If proper trial has been conducted, I don't think the tax payers should be constantly burdened with the expenses involved." (R2385)
>
> Juror 63 (Conway): Yes, 1st degree murder is first degree murder (R2393)
>
> Juror 56 (Coppock): Yes. (R2399)
>
> Juror 46 (Derrico): Yes, I believe if you take a life you should have yours taken. (R2403)
>
> Juror 615 (Money): If found guilty,

yes. (R2422)

Juror 613 (Crow): Yes. Taking another life against law. (R2424)

Juror 439 (Piper): Yes. (R2431)

Juror 435 (Martin): Yes. (R2433)

Juror 425 (Parsons): Yes, for consistent sentencing. (R2437)

Juror 438 (Curran) Yes. A life was taken and theirs should be also. (R2440).

Of these, defense counsel exercised peremptories to excuse Conway (R881) and Martin (R885-88); Piper and Money ultimately became jurors/alternates after defense counsel exhausted the peremptory challenges and a request for more was denied. (R885-87; 1656)

During voir dire questioning, defense counsel sought to explore these prospective jurors' positions on the concept of mercy and mitigation in light of their prior unequivocal statements that death should be automatically imposed following a murder conviction. The prosecutor objected several times to questions which asked why that particular juror would not automatically vote to impose death after having answered on the interrogatory that he/she would:

Q. (defense counsel): Does the fact that you found me guilty of first degree murder in the first part of the case mean you're going to vote for death in the second part?

A. (Ms. Money): Not necessarily.

Q: Tell me why not.

A. Well - -

PROSECUTOR: Your Honor, I have to object. Her personal reasons don't matter.

COURT: I agree. I don't think that's a proper question.

(R725) Ms. Money had previously answered, "If found guilty, yes" when that question was posed on the questionnaire. (R2422). Ms. Money served as an alternate on the jury. (R892)

The trial court would not allow defense counsel to ask jurors their personal feelings about mitigation and the death penalty. This was made clear early on in the voir dire:

MS. STARLING: In a murder case, my mind is inclined to a death penalty unless something changes it.

DEFENSE COUNSEL: Okay. Do you think that would then impair you in considering a life sentence? Is that impairment to considering a life sentence?

MS. STARLING: Well, if he -- if its proven that there are, like I say, mitigating circumstances -- I don't have any idea what they would be in a murder case that would make murder less of a murder or less worth of the death sentence; but, I mean, if --

DEFENSE COUNSEL: Go ahead. I'm sorry.

MS. STARLING: Because he brought it up, there obviously are circumstances that are present in a felony murder that are not present in another murder, a premeditated murder that's --

DEFENSE COUNSEL: What would be a circumstance that would make you vote life?

MS. STARLING: I can't --

PROSECUTOR: Your Honor, I'm going to

have to object for the same reason we had before, in that this is covered as a matter of law, and personal opinions don't apply.

DEFENSE COUNSEL: And --

THE COURT: Go ahead.

DEFENSE COUNSEL: Oh, Judge, I'm just doing the same thing the State did. They were asking her what her personal opinion was as to felony murder, and I'm just asking her personal opinion as to what a mitigating circumstance is. I -- as we all know, you will instruct her as to what the proper mitigators are, I just do want her personal feelings.

THE COURT: I don't think you're entitled to the juror's personal feelings. I think that -- the question was asked to -- about her understanding of this theory or that theory; and I think it's fair enough, since the instruction tells her that, to say there are two phases in the first phase, evidence presented on the guilt or innocence of the defendant. In the event the defendant is found guilty of first-degree murder, the second phase would take place. At that phase, jury will be presented with the evidence and instructed on the law to return a verdict as to sentence. You are asking her about that, if it comes to that second stage and there will be evidence, whatever it is, and there will be argument regarding aggravating and mitigating factors -- those are the legal terms called aggravating factors, aggravating factors and mitigating factors. From there, you want to ask her any --

PROSECUTOR: My objection was, Your Honor, she is asking the witness at this time without having heard the instruction as to what are those factors to commit to what she would require to vote for another sentence.

THE COURT: I agree with you and I have sustained your objection to that questions. **I don't think you are entitled to ask her what factors she would take into account or not**. But you can ask her -- from that context, you can ask her other questions, if you'd like.

(R258-60) The following colloquy occurred with juror Hamm:

DEFENSE COUNSEL: Okay. Do you think you would have a difficult time voting to have someone executed?

MR. HAMM: No.

DEFENSE COUNSEL: No reservations at all?

MR. HAMM: It would be, you know, a very thoughtful process.

DEFENSE COUNSEL: Mm-hmm. Would you require me to give you a reason to vote for life?

PROSECUTOR: Your Honor, I am going to have to object at this time. It's asking a potential juror to make a commitment as to --

THE COURT: Yes. I think I'll sustain that.

(R502-03) The ruling was error for, as noted by this Court in Hill v. State, 477 So.2d 553, 556 (Fla. 1985), "a jury is not impartial when one side must overcome a preconceived opinion in order to prevail." A similar restriction concerning prospective juror Clay occurred:

DEFENSE COUNSEL: If you should find Mr. Vining guilty of first-degree murder and you got to the penalty phase and you had to decide on the sentence for him, do you think after convicting him of first-degree murder you would go into that second phase leaning one way or the

other as to sentence?

PROSECUTOR: Your Honor, I am going to object. I think that's the same question that we talked about earlier and you ruled on.

THE COURT: Oh, yes. Alright. I think that can certainly be construed that way. I'll sustain that objection.

(R350) The inability of defense counsel to explore the preconceived personal opinions of the jurors restricted his ability to demonstrate that challenges for cause should be granted and impaired his ability to intelligently exercise peremptory challenge

The trial court's mandate impermissibly interfered with defense counsel's ability to ascertain whether a particular juror could accept as valid mitigation areas which have been expressly accepted as valid. See Campbell v. State, 15 FLW 342, 346 (Fla. June 14, 1990)("Valid nonstatutory mitigating circumstances include but are not limited to . . . abused or deprived childhood; contribution to the community or society as evidenced by an exemplary work, military, family or other record; remorse and potential for rehabilitation; good prison record; disparate treatment of equally culpable co-defendant; charitable or humanitarian deeds."). A defense counsel must be allowed to specifically ask about a juror's ability to consider and accept as mitigation these non-statutory factors, and open-ended questions are necessary to avoid giving the impression that the absence of a particular non-statutory factor from the defendant's

case is an aggravating factor. See Maggard v. State, 399 S.2d 973, 978 (Fla. 1981) (defendant must be permitted to waive statutory mitigating factor of "no significant history of prior criminal activity" lest it be converted into a non-statutory aggravating factor). The categorical prohibition from asking a juror's personal beliefs as to mitigation denied Vining meaningful voir dire of the prospective venire, thereby violating his right to an impartial trial, due process and effective assistance of counsel guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, and 22 of the Florida Constitution. Due to the interference with these rights, the conviction must be reversed and the matter remanded for retrial.

IMPROPER DENIAL OF CHALLENGES FOR CAUSE

A defendant charged with a capital offense is constitutionally ensured the right to a fair trial by impartial jurors. The constitutional standard of fairness requires that a defendant have "a panel of impartial 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). In Singer v. State, 109 So.2d 7 (Fla. 1959), the Supreme Court of Florida set forth the following rule:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that State of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

Singer, 109 So.2d at 2324. The foregoing rule has been consistently adhered to by this Court. See Hamilton v. State, 547 So.2d 630 (Fla. 1989)(denial of challenge for cause of juror who had preconceived opinion which would require evidence to displace was reversible error despite juror's assurance that she could hear case with open mind); Moore v. State, 525 So.2d 870 (Fla. 1988)(refusal of trial court to grant challenge for cause to juror who gave equivocal answers concerning his ability to accept insanity as defense was reversible error); Hill v. State, 477 So.2d 553 (Fla. 1985)("a jury is not impartial when one side must overcome a preconceived opinion in order to prevail."); See also Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986)(jurors ability to be fair and impartial must be unequivocally asserted in the record).

Here, after exhausting all peremptory challenges, Vining requested additional challenges whereby he could remove two jurors (Tatro and Martin) who had previously been unsuccessfully challenged for cause by the defense. (R884-85) The judge in effect granted one additional peremptory challenge by belatedly excusing for cause a different juror (Jackson) who had previously been peremptorily struck by the defense. (R886-87) Vining used that extra challenge to excuse juror Martin, and asked for an additional challenge to excuse Tatro; the request was denied. (R887) Thus, Vining has complied with the requirements needed to preserve for appellate review the denial of a challenge of a juror for cause. See Moore v. State, 525

So.2d 870, 873 (Fla. 1988)("the record reflects that the appellant exhausted all his challenges and a request for additional challenges was denied. We have no choice but to reverse and grant the Appellant a new trial.") Although several of the jurors challenged for cause stated that they could set aside their preconceived ideas and be fair and impartial, their inconsistent responses and equivocal assertions establish a reasonable doubt that they could be fair and impartial. Accordingly, the denial of the challenge(s) for cause constituted error, and the limitation of the voir dire of certain jurors compounded the error.

For instance, prospective juror News, a retired Philadelphia police officer with 38 years experience in law enforcement (R225), was certain that he could impose the death penalty, but was very equivocal about whether he could ever recommend a life sentence:

> DEFENSE COUNSEL: You could impose the death penalty?
>
> MR. NEWS: Yes sir.
>
> Q: Because you're in favor of the death penalty?
>
> A: Yes, I am.
>
> Q: If somebody was guilty of first-degree murder and then you had to try to decide whether or not to give this guy life imprisonment, as opposed to death, is it fair to say that would be a more difficult decision for you to make?
>
> A: Again, with the facts.
>
> Q: Yes, sir. And understand we don't

really know what the facts are and couldn't get into them now.

A: I know, and that's why I can't give you a positive yes I would. It would be so much easier if I had to say, "Yes."

Q: Yes, sir. If it -- the facts seem to say there's more mitigation here than aggravation -- the judge says you have aggravators and you have some mitigation and the State provides aggravation, and then the defense has to come through and show some mitigation or you're going to vote for death; and if the mitigation seems to outweigh, will you be able to vote a life sentence or is it going to be something --

A: That's what you're asking me? That's the question? I don't know until I know the full circumstances of it.

Q: Well, it's just puzzling to me because you know you can impose death --

A: Yes, sir.

Q: But you don't know that you could impose life?

A: If the case says that and the facts read that, then you vote that; if not, then you don't vote it.

Q: And if the facts read life, you're telling me you could unequivocally say, well, then life?

A: If the facts were there, yes, sir.

Q: Can you envision a scenario where that would happen?

A: No, sir.

(R227-28). A defense challenge for cause was denied. (R237-41)

Prejudicial error occurred in the voir dire of Ms. Martin:

DEFENSE COUNSEL: Ma'am, you answered on the questionnaire that if you've

convicted someone of first-degree murder, you couldn't consider a sentence of less than death right?

MS. MARTIN: Yes, mm-hmm.

Q: Okay. You believe that?

A: If it's first-degree murder, yes.

Q: Okay. You have pretty strong feelings about the death penalty?

A: Overall.

Q: Okay. You also put down that you think the death penalty should always be imposed if someone is convicted of first degree murder. Do you believe that pretty strongly?

A: Within my definition of first-degree murder, yes.

Q: Okay. And do you think if you convicted someone of first-degree murder, you'd vote death then?

PROSECUTOR: Your honor, I object.

THE COURT: I didn't hear the very end of your question. Can you just repeat the question for me?

DEFENSE COUNSEL: I asked her if she convicted someone of first-degree murder, would she probably vote for a death sentence, if she was a juror.

PROSECUTOR: My objection is it's irrelevant because she hasn't been instructed on what she has to do.

THE COURT: Well, she's been instructed -- do you understand the instruction that I read before about how, if you get to that second phase, there will be a proceeding in which you will -- remember the part where --

MS. MARTIN: That you have to look at the circumstances, the mitigating and

the --

DEFENSE COUNSEL: Mm-hmm.

MS. MARTIN: I would go by whatever the law said was supposed to be done, and I would look at the facts impartially.

DEFENSE COUNSEL: Okay. What changed your mind from when you filled out the questionnaire to now?

A. Maybe because of what I've heard, as far as, you know, what you are supposed to do according to the law.

Q: Okay.

A: Because from what I understand, one circumstance requires the death penalty. One circumstance requires a life penalty under the heading of first-degree, and that's something that a layman possibly doesn't know about right up front. I don't think most people understand the differentiation there.

Q: What do you understand the difference to be at this point?

A: Circumstances, things leading up to whatever happened. You know, I am interpreting because I don't really know.

Q: Okay. Is there any particular circumstance that would make you vote death automatically?

PROSECUTOR: Your Honor, again I object, she does not have the criteria. She said she'll follow --

THE COURT: I didn't hear the very last two words that you said. Would you just --

DEFENSE COUNSEL: Death automatically.

THE COURT: Oh, death automatically. I'll overrule that objection.

DEFENSE COUNSEL: Thank you, sir.

MS. MARTIN: I think particularly heinous crimes, possibly where there wasn't -- particularly violent crimes.

Q: Okay. Is there --

A: Where there wasn't -- I don't even know how to --

Q: Take your time. It's okay.

A: If it was a proven situation that somebody had killed someone --

(R621-23) Ms. Martin's responses are all the more equivocal because of successful State objections which left unanswered defense counsel's question of Ms. Martin as to whether a possibility existed that she would not be fair and impartial. (R626) The defense challenge for cause was denied. (R628-29)

Yet another juror who was unsuccessfully challenged for cause and who was equivocal about his ability to vote for life but was certain that he could vote for death was prospective juror Holland:

DEFENSE COUNSEL: Do you think you would vote death if it was a premeditated or felony murder?

MR. HOLLAND: If that's the judgment that we, in the first phase we came down with then --

Q: Then you'd vote death?

A: Then I would death, yes.

Q: You couldn't vote life if you came back guilty of premeditated murder?

A: I don't think so. It would -- you know, I'd have to -- I mean, it'd be a lot --

(R666) Defense counsel challenged Mr. Holland for cause due to his vacillation, and the challenge was denied. (R672-73)

The record fails to show that these jurors were impartial. Instead, the record establishes that Vining was required to present proof to overcome the jurors' personal bias in favor of the death penalty following a conviction of first-degree murder. Further, the restriction of meaningful voir dire unreasonably impaired Vining's ability to intelligently exercise the limited peremptory challenges to pear away biased and partial jurors. Because of the deprivation of state and federal constitutional rights to have a fair trial by an impartial jury and to have a reliable sentencing recommendation, the conviction and/or death sentence must be reversed and the matter remanded for retrial/resentencing.

POINT V

THE TRIAL COURT ERRED IN FINDING AND IN INSTRUCTING THE JURY ON THE STATUTORY AGGRAVATING CIRCUMSTANCE OF A MURDER COMMITTED IN A COLD, CALCULATED AND PREMEDITATED, WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION, BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THAT STATUTORY AGGRAVATING FACTOR.

To avoid arbitrary and capricious imposition of the death penalty, a statutory aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983)(footnote omitted).

> Since premeditation already is an element of capital murder in Florida, Section 921.141(5)(i) must have a different meaning; otherwise it would apply to every premeditated murder. Therefore, **Section 921.141(5)(i) must apply to murders more cold blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder**.

Porter v. State, 15 FLW S353, 354 (Fla. June 14, 1990)(footnotes omitted)(emphasis added).

This Court has recently clarified the application of the cold, calculated and premeditated murder aggravating factor:

> Thompson challenges the court's finding that the aggravating circumstances of a cold, calculating, and premeditated murder, is supported by the facts in this case. We agree with Thompson. Many times this Court has said that Section 921.141(5)(i) of the Florida Statutes (1987), requires proof

> beyond a reasonable doubt of "heightened premeditation." We adopted the phrase to distinguish this aggravating circumstance from the premeditation element of first-degree murder. See e.g., Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). Heightened premeditation can be demonstrated by the manner of he killing, **but the evidence must prove beyond a reasonable doubt that the defendant planned or prearranged to commit murder before the crime began**. Hamblen, 527 So.2d at 805; Rogers, 511 So.2d at 533. See e.g., Koon v. State, 513 So.2d 1253 (Fla. 1987), cert. denied, 485 U.S. 943 (1988).

Thompson, 15 FLW 347, 349-50 (Fla. June 14, 1990)(emphasis added).

The evidence here is woefully inadequate to establish that Vining planned to murder Caruso before the crime began. The trial court's order wholly fails to articulate any credible evidentiary support for that conclusory finding:

> I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> Not all murders are committed in a cold, calculated manner. And, if a claim of moral or legal justification existed that was more[9] then a pretense, it would

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9. The trial court is here using an incorrect standard to determine that the factor exists. The state must prove beyond a reasonable doubt that not even a pretense of moral or legal justification existed. Banda v. State, 536 So.2d 221, 224-25 (Fla. 1988). The use of an incorrect standard is itself reversible error under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

> probably not be a capital felony. The evidence in this case justified the jury finding in its advisory sentence this factor was proven beyond a reasonable doubt. The only explanation of this murder is as a cold calculated act, far beyond mere premeditation. There is no moral value or legal principle that would justify this murder. The jury found this aggravating factor proven beyond a reasonable doubt, and I concur.

(R2635-36)(Appendix C).

The bare statement that "the evidence in this case justified the jury finding" is conclusory and insufficient to provide meaningful appellate review. See Campbell v. State, 15 FLW 342, 344 (Fla. June 14, 1990)(court must "evaluate" each mitigating factor advanced by defendant to enable meaningful appellate review). Assuming that Vining planned to rob Caruso of jewelry, it is well established that a plan to rob cannot satisfy the CCP requirement that the murder be planned in advance. See Thompson v. State, 456 So.2d 444, 446 (Fla.1984) ("No evidence was produced to set the murder apart from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim either before or during an attempt to make good his escape."); Gorham v. State, 454 So.2d 556, 559 (Fla. 1984)("The record bears evidence that the robbery was premeditated in a cold and calculated manner, but that premeditation cannot automatically be transferred to the murder itself."); Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983)("Here the evidence showed that Appellant killed Donald Klein

intentionally and deliberately but there was no showing of any additional factor to establish that the murder was committed in a 'cold, calculated, and premeditated manner without any pretense of moral or legal justification.'").

> We cannot agree that the facts support a finding that this murder was cold, calculated and premeditated. This aggravating factor requires a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder. Smith v. State, 424 So.2d 726 (Fla. 1982). cert. denied, __U.S.__, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). The only evidence presented or argued as to this factor was that Hardwick intended to rob the victim and that once he began to choke or smother her, it would have taken more than a minute for her to die. The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of this aggravating factor. What is required is that the murderer fully contemplate effecting the victim's death. The fact that a robbery may have been planned is irrelevant to this issue. Gorham v. State, 427 So.2d 723 (Fla. 1983)(fact that victim was shot five times does not support finding that murder exhibited heightened premeditation). On the facts presented here, we cannot say this factor was proved beyond a reasonable doubt.

Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984)(emphasis added).

The evidence here suggests that only an armed robbery was intended by Vining. For aught that appears in the record, Caruso struggled with Vining or tried to escape when confronted with a gun and was shot at the time of the robbery. The

circumstantial evidence is simply too tenuous to support the finding of this factor beyond a reasonable doubt. Because mitigation was found to exist by the trial court and because the invalidation of this factor reasonably affected the weighing analysis performed by the trial judge and jury in deciding whether the death penalty was appropriate, the death sentence must be reversed and the matter remanded for a new penalty phase before a new jury.

POINT VI

THE FAILURE OF THE STATE TO PROVIDE NOTICE PRIOR TO TRIAL AND THE PENALTY PHASE AS TO WHICH STATUTORY AGGRAVATING FACTORS WERE BEING RELIED ON TO SEEK AND/OR IMPOSE THE DEATH PENALTY DENIES DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

It is respectfully submitted that Vining has been denied due process of law guaranteed under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by the failure of the State to provide notice prior to the trial and penalty phase as to which statutory aggravating factors would be relied upon in seeking/imposing the death penalty.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (citations omitted). It is equally fundamental that the right to notice and an opportunity to be heard "Must be granted at a meaningful time and in a meaningful manner." (citation omitted).

Fuentes v. Shevin, 407 U.S. 67, 80 (1972). This is not a new principle of constitutional law. Indeed, this Court has held it to be a denial of due process for a court to impose costs against an indigent defendant without prior notice that such costs would be imposed, the rationale being that the failure to provide notice prior to the hearing denies the defendant a meaningful

opportunity to be heard. See Mays v. State, 519 So.2d 618, 619 (Fla. 1988) ("We agree that due process requires notice and an opportunity to be heard prior to an assessment of costs under Section 27.3455."); See also, Jenkins v. State, 444 So.2d 947 (Fla. 1984). As the United States Supreme Court noted in Fuentes, "It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights. And [n]o better instrument has been devised for arriving at truth than to give a person in jeopardy OF a serious loss notice of the case against him and the opportunity to meet it.' (citation omitted)." Fuentes, 407 U.S. at 81.

Procedural due process is not a static concept. The minimum procedural requirements necessary to satisfy due process requirements depend on circumstances and interests of the parties involved. See Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

The sentencing considerations set forth in Section 921.141(5) are both substantive and procedural statutory factors which, when proveN by evidence, authorize imposition of the death penalty. See Banda v. State, 536 So.2d 221 (Fla. 1988) (imposition of the death penalty not authorized where no statutory aggravating factors exist.) The sentencer may rely on

the proof presented at both the trial and the penalty phase to find the existence of the statutory aggravating factors. Unless the defendant is provided notice prior to the evidentiary phase of trial as to which statutory aggravating factors the State intends to prove and/or rely on to seek the death penalty, a defendant is denied the ability to meaningfully confront the state's witnesses and to rebut the evidence presented in connection with those statutory aggravating factors. With the current procedure, by the time a defendant learns at the end of the penalty phase that a particular aggravating factor was being fleshed out by a particular State witness during trial, it is simply too late. He has lost the right to meaningfully confront the witness and to present evidence in his own behalf to rebut the statutory aggravating factor in a truly meaningful fashion. Belated notice that the State is seeking a particular statutory aggravating factor works a denial of due process under the Fifth, Sixth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution.

Prior to trial, Vining moved to have the trial court declare that the death penalty would not be a possible sanction because the, "failure to provide notice of such essential allegations deprived the defendant of an opportunity to adequately prepare the defense and, . . . renders the entire sentencing phase unreliable and in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." (R2257-58) Vining also moved for a statement of

the aggravating circumstances that would be relied upon by the State in seeking the death penalty. Vining's motion for the statement of aggravating circumstances was denied by Judge Baker on January 19, 1989. (R2367) The motion to have death not be a possible penalty was also denied by Judge Baker on January 19, 1989. (R2369)

The Sixth Amendment right "to be informed of the nature and cause of the accusation" is applicable to the state's through the due process clause of the Fourteenth Amendment. In re: Oliver, 333 U.S. 257, 273-74 (1948). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused." Cole v. Arkansas, 333 U.S. 196, 201 (1948) (emphasis added). In Cole, Petitioners were convicted at trial of one offense but the convictions and sentences were affirmed on appeal based on evidence on the record indicating that a different, uncharged offense had been committed. A unanimous United States Supreme Court reversed, finding a denial of procedural due process:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, Petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court.

Cole v. Arkansas, 333 U.S. at 201-2 (emphasis added). The same reasoning applies here, where issues concerning imposition of the death penalty were litigated without notice and/or a meaningful opportunity to be heard at the time. See Presnell v. Georgia, 439 U.S. 14, 16 (1978) (footnote 3) ("in the present case, when the Supreme Court of Georgia ruled on Petitioner's motion for rehearing it recognized that, prior to its opinion in the case, Petitioner had no notice, either in the indictment, in the instructions to the jury or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnapping.").

Relying on Spinkellink v. Wainwright, 578 F.2d 582, 609-10 (5th Cir. 1978), this Court has previously rejected a Sixth Amendment "lack of notice" challenge. See Preston v. State, 444 So.2d 939, 945 (Fla. 1984); Sireci v. State, 399 So.2d 964, 970 (Fla. 1981); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) (footnote 21). However, careful analysis shows that the Fifth Circuit in Spinkellink decided the lack of notice issue on lack of preservation grounds. "A review of the record indicates that neither Spenkellink (sic) nor his attorney objected at trial to the indictment, which Fla.R.Crim.P. 3.190(c) requires in order for the alleged defect to be preserved for appellate review. Accordingly, the defect, if any, was waived." Spinkellink, 578 F.2d at 609-10 (emphasis added). Any further analysis by the Fifth Circuit was purely gratuitous dicta. Further, the instant challenge is not only being brought under

the Sixth Amendment, but also as part of procedural due process required under the Fifth Amendment, and Article I, Sections 9 and 16 of the Florida Constitution. It cannot reasonably be claimed that the interests of fairness do not require a defendant to know when evidence is being presented what statutory aggravating circumstances the State is attempting to prove. To say that the aggravating factors are limited to those specified in statutes does not satisfy the notice requirement. All crimes are contained in statutes. It is incumbent on the state, as the prosecuting party, to notify the defendant which statutes apply. It is incumbent on the court, as the neutral enforcer of Constitutional rights, to require proper notice. The denial of Vining's motions seeking notice of which factors would be utilized by the State constituted a denial of due process. Accordingly, the death penalty must be reversed.

POINT VII

THE TRIAL COURT ERRED IN REJECTING AS NON-STATUTORY MITIGATION VINING'S AGE (57 YEARS OLD) HIS PAST ACCOMPLISHMENTS, AND OTHER NON-STATUTORY MITIGATING FACTORS.

Noting that "every living person is of some age" (R2631), the trial court concluded that Vining's age (57) is not a mitigating factor in this case The court further rejected as a non-statutory mitigating factor the fact that Vining's mother was an alcoholic; the fact that Vining was a good student, athlete, and member of Methodist Youth Fellowship; the fact that Vining was an alcoholic; the fact that Vining was a good family person and father; and, the fact that Vining had previously saved his wife's life. (R2632-33) Most of these factors were rejected because they were "too remote." (R2632-33) The factors found to exist by the court, Vining's stuttering as a child and his honorable service in the United States Air Force, were attributed little weight because Vining's military service "ended over 30 years ago, involved no sacrifice, and the evidence suggests his military service was a government job, providing training and experience, regular employment, and the defendant received a pension from it as well as other benefits of being retired from the military." (R2632-33)

A trial court's findings concerning imposition of the death penalty should be of unmistakable clarity to afford meaningful appellate review. Mann v. State, 420 So.2d 578, 581

(Fla. 1982). This Court has rejected the contention that old age (43 years old) may be considered a mitigating circumstance based on the premise that, when the twenty-five year mandatory minimum sentence is served, the 68 year-old defendant, if released, becomes harmless to society. Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984). Still, the fact that Vining would be at least 85 years old before even becoming eligible for parole is a factor that properly enters into the decision of whether the death penalty is warranted. But see Agan v. State, 445 So.2d 326, 328 (Fla. 1983) (54 years of age rejected as mitigating factor); Echols v. State, 484 So.2d 568 (Fla. 1985) (failure to consider age of 58 years old as mitigation not error). Here, ample evidence existed of the deterioration of Vining's ability to control himself, probably occasioned by uncontroverted evidence of alcoholism, such that the failure to find old age as a mitigating factor constituted an abuse of discretion.

In Campbell v. State, 15 FLW S342, 344 (Fla. June 14, 1990), this Court noted that a defendant's abused or deprived childhood, his charitable or humanitarian deeds, and/or his contribution to the community or society as evidenced by an exemplary work, military, family, or other record are valid considerations that must be considered by a trial court in the decision of whether to impose the death penalty. These factors have been proved here by uncontroverted testimony. The failure of the trial court to find and afford weight to those factors due to their "remoteness" essentially eviscerates this Court's

holding in Campbell and renders imposition of the death penalty arbitrary and capricious under the Eighth and Fourteenth Amendments.

Specifically, the older a person becomes before committing a crime, the more "remote" his previous accomplishments will become. The fact that good deeds were performed early in one's life is as significant as good deeds occurring later on. Some judges and juries afford significant weight to prior accomplishments, whereas this judge did not even qualify Vining's prior accomplishments as non-statutory mitigating factors. The inconsistency is arbitrary and violative of the dictates of Furman v. Georgia, 408 U.S. 238 (1972).

POINT VIII

VINING WAS DENIED A FAIR JURY RECOMMENDATION DUE TO THE PROSECUTOR'S IMPROPER ARGUMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

It is respectfully submitted that the improper prosecutorial argument that occurred over timely objection during the penalty phase rendered the jury death recommendation unreliable under the Eighth and Fourteenth Amendments and Article I, Sections 9, 17 and 22 of the Florida Constitution.

It is well-established that the State is limited to statutory aggravating factors in seeking the death penalty. Here, however, the prosecutor was able to expand on the finite list of statutory aggravating factors by contending that certain statutory aggravating factors deserved more weight because of non-statutory considerations. For instance, the prosecutor argued that the statutory aggravating factor of a "capital felony committed while the defendant was engaged in the commission, attempt or flight from committing a robbery" should weigh heavily because this murder was committed upon a victim unknown to the defendant:

> (Prosecutor): In fact, your own verdict, which is here admitted into evidence so you can see it again, you found that this defendant was by unanimous vote guilty of felony murder. Is that a weighty circumstance? Yes, yes, it is a weighty circumstance. Why I would argue to you it is? Because in those kinds of cases felony murder is present just as the robbery in this case. **They stand out different from other kinds of murders**.

> **Many murders you have victims who knew defendants, they knew each other. And while there is no justification for that killing because they had known each other something had happened between the two; some bad blood, some bad experience. But people who commit felony murder often times pick people who they don't know, who have never done anything to them.**
>
> (Defense Counsel): Objection. May we approach?

(R2131) The objection was overruled. (R2131-32) Next, when arguing the facts surrounding Vining's prior conviction of a violent felony (the abduction of Gail Flemming), the prosecutor emphasized the effect that the incident had on Ms. Flemming, that her suffering should be weighed when that aggravating factor was applied:

> (Prosecutor): You saw and heard Gail Flemming. You saw her composure or lack of it on the stand for an act that was committed on her a year and a half ago and you can only --
>
> (Defense counsel): Objection, Your Honor.
>
> The Court: I'll overrule the objection.

(R2138) Defense counsel renewed the objection at the bench, specifically arguing that the argument addressed non-statutory aggravating factors and that the argument asked for imposition of the death penalty based on emotion. (R2138-39) The objection was denied and defense counsel was cautioned that her continuous objections were beginning to have an adverse effect on the jury and that further objections would be considered to have been

adequately presented simply by a statement of the grounds without argument. (R2140-41)

The prosecutor then addressed Vining's financial situation as being a basis for imposition of the death penalty:

> (Prosecutor): You must compare the aggravating circumstances against the mitigating and determine what weight each carries. Now, there is one bit of Edward Vining's testimony that I do want to mention to you. **Sometimes people say the prosecutor's ask for the death penalty only on defendants who are poor**.
>
> (Defense counsel): Objection, Your Honor, improper argument.
>
> THE COURT: I tell you, I'm not sure what you're going to say Mr. Hebert. I recognize this is argument and as I would say to the jurors in making my rulings for and against, they must realize, as I said before, this is argument. But what prosecutor's do generally, or what this prosecutor does in other cases really is not in issue here. It's just this case.
>
> DEFENSE COUNSEL: Thank you Your Honor.
>
> PROSECUTOR: **I have not brought you a case against a poor --**
>
> DEFENSE COUNSEL: Objection. Same objection.
>
> THE COURT: Well, I'll overrule the objection to that. This is argument and I'll overrule the objection.
>
> PROSECUTOR: **A poor, underprivileged, uneducated or racial or sexual minority defendant. What you have in evidence from the testimony of Edward Vining is that this defendant was raised in a family of some wealth. Lived in a nice neighborhood in Miami; went to good schools, all white schools; who is educated with a college degree; who has**

> **some -- achieved some notoriety not being underprivileged. And said he has a plaque he presented to you as being a person who was elected to a water district board or something like that. This is not a poor black man, not a woman. He came to his crimes from every advantage. He has three brothers. One's a doctor, one a lawyer, one a captain with Pan Am, all who succeeded in life from that background.**
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: I don't want to comment. Let me comment at side-bar on that for a moment.

(R2152-53) The trial court again overruled defense counsel's objection. (R2153-54) It is expressly submitted that the outrageous line of argument that seeks imposition of the death penalty based on race and economic status is a clear violation of the Eighth and Fourteenth Amendments and Article I, Sections 9 and 17 of the Florida Constitution.

In addition to impermissibly arguing non-statutory aggravating factors, the prosecutor commented on Mr. Vining's failure to present certain witnesses, thereby shifting the burden of proof to the defense:

> PROSECUTOR: Now, against this backdrop of what the State has presented in the way of aggravating circumstances, what has the defendant -- what great things in his life has he done? What shining example has he been or conversely what terrible plight has his life dealt him? What sickness or mental deficiency or what does he offer to mitigate what would otherwise be called for as a death sentence? **Two of his four children testified. Essence of what I heard is that they liked him as children and he was a good provider. They're his oldest**

> **children. We didn't hear from the youngest, but the oldest.**
>
> DEFENSE COUNSEL: Objection. Can we approach?

(R2147) Defense counsel objected and moved for a mistrial. The trial court withheld ruling on the objection and motion for mistrial based on the prosecutor's assurance that he was not going to comment on Mr. Vining's failure to call the other children. (R2148) Immediately thereafter, the following occurred:

> PROSECUTOR: The two that were his oldest children. And the reason I mention that is from their testimony it was how this defendant treated them as children. Considering their age, in talking to you about a man, or the quality of a man some twenty or more years ago.
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: I'll overrule the objection.
>
> PROSECUTOR: **What we have in evidence before you is not only what he was twenty years ago but what he has been since that time. They did not present to you testimony of what he was like as a father during the last --**
>
> DEFENSE COUNSEL: Objection, Your Honor.
>
> THE COURT: Same ruling. I'm overruling the objection.
>
> PROSECUTOR: Ten years. **That testimony comes to you from the evidence in the state's case**.

(R2148-49)

Finally, the prosecutor was able to denigrate the role

of the jury by arguing, over timely Caldwell[10] objection, that the reason statutory aggravating factors exist is to take from the jurors the individual responsibility of deciding which factors warrant imposition of the death penalty. (R2123-26) That thought was hammered home over objection as follows:

> Now, I ask you to do one thing for me, please. Use a legal, logical standard, not one of emotional or rhetoric to base your decision on. Look at the aggravating circumstances, see if you found we've proved them beyond every reasonable doubt. **Because if we have then the law requires certain things of you. Look at the mitigating and see whether they're there and what weight you want to give them and whether they outweigh the aggravation. If they do, vote life. But if they don't then you have to decide according to law and not personal feelings. If you return a verdict recommending a sentence of death it's not because - it should not be because you want to, it's because you have to. Because the law requires it.**

(R2154-55)

The foregoing arguments of the prosecutor, all over timely objection, denied Vining a fair recommendation by a jury. The jury was thus permitted to consider non-statutory aggravating circumstances under the guise of weighing statutory aggravating factors. See Point IV, infra. The use of non-statutory aggravating considerations to impose the death penalty is arbitrary and capricious in violation of the dictates of Furman v. Georgia, 408 U.S. 238 (1972). The prosecutor's argument that

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[10] Caldwell v. Mississippi, 472 U.S. 320 (1985)

the jury must consider Vining's status as a white wealthy person is a non-statutory aggravating factor which clearly denies due process and equal protection of the law under the Fourteenth Amendment. A defendant's financial status is absolutely irrelevant to a just determination of what sentence is appropriate. Consideration of the suffering of Gail Flemming in reference to imposition of a sentence for the murder of Georgia Caruso is similarly a denial of due process and a violation of the Eighth Amendment. See Booth v. Maryland, 482 U.S. 496 (1987).

Because the improper prosecutorial argument cannot be said beyond a reasonable doubt not to have affected the jury's recommendation in this cause, the death penalty must be reversed and the matter remanded for a new penalty proceeding.

POINT IX

SECTION 921.141, FLORIDA STATUTES (1987) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by providing the definition to the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court has placed itself in the position of promulgating substantive law in violation of the separation of powers doctrine of the United States Constitution and Article II, Section 3 of the Florida Constitution. Specifically, the Florida Legislature is charged with the responsibility of passing substantive laws. Article III, Florida Constitution (1976). Simply said, legislative power, the authority to make laws, is expressly vested in the Florida Legislature. In an exercise of that power, the Florida Legislature passed Section 921.141, which purportedly establishes the substantive criteria required for authorization of imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Maynard v. Cartwright, 486 U.S. 356 (1988). In actuality, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla. 1973) where this Court established the working definitions of the statutory aggravating factors ostensibly promulgated by the Florida Legislature.

Recently, in rejecting a claim that Florida's

especially heinous, atrocious and cruel statutory aggravating factor was unconstitutionally vague based on Maynard, supra, this Court in dicta stated:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evidence from Maynard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright. 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d 720, 722 (Fla. 1989). Other instances where the definitions of statutory aggravating factors are determined by this Court demonstrate that the violation of the separation of powers doctrine is unacceptably pervasive. See Peek v. State, 395 So.2d 492, 499 (Fla. 1980)(parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla. 1981) (more than three people required to constitute a great risk of death or injury to many persons)[11]; Banda v. State 536 So.2d

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[11] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360 (Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the

221, 225 (Fla. 1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."). The passage of such broad legislation for it to be refined, defined and given substance by the Supreme Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of the respective State and federal constitutions.

FAILURE OF AGGRAVATING FACTORS TO ADEQUATELY CHANNEL THE SENTENCER'S DISCRETION TO IMPOSE THE DEATH PENALTY.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Supposedly, the things that may be considered as "aggravation" by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section 921.141(5), Florida Statutes (1989). See Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1976); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977). It is respectfully submitted, however, that these "factors" are but

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proper case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

open windows through which virtually unlimited facts may be put before the sentencer to achieve a death sentence, thereby providing unfettered discretion to recommend/impose a death penalty in violation of the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding of Furman v. Georgia, 408 U.S. 238 (1972).

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in order to allow the juror sentencer an informed basis whereby "weight" can be meaningfully attributed to the Section 921.141(5)(b) factor. See Francois v. State, 407 So.2d 885 (Fla. 1981); Elledge v. State, 346 So.2d 998 (Fla. 1977). However, this Court has at the same time recognized that such testimony is presumptively prejudicial. See Castro v. State, 547 So.2d 111, 115 (Fla. 1989)(improper admission of irrelevant collateral crimes evidence is presumptively harmful). Allowing such prejudicial testimony to come before the jury/ sentencer under the general heading of a statutory aggravating factor, permits consideration of non-statutory aggravating factors to impose the death penalty. Though the non-statutory reasons offered under this category may be constitutional in the broad sense of the word, others (such as sympathy for other unrelated crimes, as was argued here) are unconstitutional.

The same rationale applies to other statutory aggravating factors, which are in essence but categories through which unfairly prejudicial evidence is put before the

jury/sentencer. Because the statutory aggravating factors fail to adequately channel the sentencer's discretion in imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF.

Due process under the Fourteenth Amendment must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479 (1984). In order to recommend/impose the death penalty in Florida, the statute requires that the aggravating factors "outweigh" the mitigation. See Section 921.141(2) and (3), Florida Statutes (1989). In fact, the statute places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1989). This Court has recognized that the burden must be on the State to prove that the aggravating factors outweigh the mitigating factors. See Arrango v. State, 411 So.2d 172, 174 (Fla. 1982); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) ("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.") As written, the statute places the burden of proof on the defendant in violation of the Fifth and Fourteenth Amendments, Article I, Section 9 of the Florida Constitution and the holding of Mullaney v. Wilbur, 421 U.S. 684 (1975).

Even when the statute is changed by judicial fiat to place the burden on the State to show that the statutory aggravating factors "outweigh" the mitigation, a violation of due process under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution occurs because the bare "outweigh" standard fails to adequately apprise the jury/sentencer of what must objectively be present to determine whether imposition of the death penalty is warranted. As worded, the standard instructions dilute the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. The standard instruction requires only that the State show that the death penalty is warranted by a mere preponderance of the evidence, thereby resulting in a violation of due process. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). A State has no power to impose the death penalty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. In re: Winship, 397 U.S. 358 (1970). By showing that the aggravation "outweighs" the mitigation, the State achieves death penalty recommendations and/or sentences by a mere preponderance standard in violation of the aforesaid cases and the constitutional requirements to due process.

For the aforesaid reasons, the death penalty in Florida is unconstitutional both on its face and as applied. It must accordingly be declared unconstitutional and the death penalty must be reversed.

CONCLUSION

Based on the argument and authority previously set forth, this Court is respectfully asked for the following relief:

POINT I: To reverse the conviction and order the dismissal of charges due to the violation of the IAD.

POINTS II AND VII: To reverse the death sentence and remand for resentencing due to the Gardner violation and the failure to properly consider valid non-statutory mitigation.

POINT III: To reverse the conviction and remand for retrial due to the violation of Stokes v. State.

POINT IV: To reverse the conviction and remand for retrial due to the unconstitutional jury selection procedure.

POINTS V AND VIII: To vacate the death penalty and remand for a new penalty phase because of improper aggravation and argument which makes the death recommendation unreliable.

POINTS VI AND IX: To reverse the death penalty and declare Section 921.141, Florida Statutes unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 353973
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Edward Bruce Vining, #929133, P.O. Box 747, Starke, Fla. 32091 on this 29th day of November, 1990.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JOHN BRUCE VINING,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 75,915

A P P E N D I X

Appendix "A" - Order denying Vining's motion for discharge under the Interstate Agreement on Detainers. (R2343-46)

Appendix "B" - Pleadings from State invoking custody of Vining under Interstate Agreement on Detainers. (R2335-39;2357-58)

Appendix "C" - Sentencing order. (R2637)

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER
112-A Orange Avenue
Daytona Beach, Fl. 32114
(904)252-3367

ATTORNEY FOR APPELLANT

IN THE CIRCUIT COURT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CR 89-2395

DIVISION 17

STATE OF FLORIDA,

Plaintiff,

vs.

JOHN BRUCE VINING, SR.,

Defendant.
_____/

FILED IN OPEN COURT
THIS 17 DAY OF JAN., 1990
Fran Carlton, Clerk
BY _____ D.C.

ORDER DENYING
MOTION FOR DISCHARGE
UNDER F.S. 941.45

This is the sequence of events and the circumstances with respect to defendant's motion for discharge.

1. March 13, 1989, the Orange County Sheriff placed a hold on defendant, who was in custody in Chatham County, Georgia.

2. Defendant was convicted and sentenced by May 30, 1989, in Georgia on his charges there.

3. Sometime in late June, defendant filled out paperwork requesting disposition of his charges in Florida.

4. By Fla. Stat. 941.45(3)(b) this request must be sent "to the appropriate prosecuting official and the court by registered or certified mail, return receipt requested."

5. After carefully studying the statute and the legal decisions interpreting it, I conclude that this mailing is critical to the process because it is the means of obtaining service on the state for enforcing the demands of a defendant and giving notice to the court. It is thus jurisdictional.

6. The Georgia prison officials mailed the request by ~~regular~~ certified (return receipt requested) * mail to the Orange County Sheriff, where it was received on July 5, 1989. J/9

7. The Orange County Sheriff mailed the request to the clerk of the court, where it was stamped in on July 6, 1989.

8. A deputy clerk (who had been in the office about a

* these changes made in open court with counsel and D present, and recorded by court reporter J/19

month) wrote on the request (as best as I can read it): "refer/Judge Baker, SA Intake, SA Div. 17, Extradition."

9. The deputy clerk testified she had no recollection of what she did, but she thinks it was the procedure to send the court file to the judge. (That is not now the clerk's procedure.) She does not know what was sent, but she thinks she sent the court file to the judge because of the practice. She does not know what, if any, message was sent to the judge with the file, if that was sent.

10. The deputy clerk did not know what, if anything, was sent to the state attorney's office.

11. The assistant state attorney assigned to this case said he has no record in his file of receipt of the defendant's request from the clerk's office. However, a copy of the request was in the state attorney's office file, but it is not reflected where it came from and when received, which may have come from the clerk's

12. I must observe that I had never opened the court file on defendant, and I don't recall ever even seeing the file, nor had I seen the defendant's request for disposition until the hearing on January 16, 1990. 01/19*

13. An assistant state attorney named Simone Rosenberg, who is not connected with this division, prepared some documents seeking to have defendant transported from his Georgia prison to Florida. These documents were prepared in late July 1989, and bear the certificate of Judge Jeff Miller on July 21, 1989. One of the documents refers to a "letter of June 28, 1989, and offer of temporary custody." Defense counsel plausibly argued that this refers to the request from defendant which bears that date. However, we do not know what Simone Rosenberg had as the basis for preparing the documents she prepared, or at whose behest she did so.

14. On August 31, 1989, defendant arrived at the Orange County jail, where he was formally arrested. The court, and apparently the state attorney's office, Division 17, calculated this arrest as the beginning of the running of the speedy trial using Fla. R. Crim. P. 3.191. Obviously, neither the undersigned, nor the assistant state attorneys assigned to the same criminal division with me had any actual

* This correction was made in open court in the presence of counsel and the A, and transcribed by the court reporter.

2344 01/19

notice of the request from the defendant, and as will be seen from what follows, neither the undersigned nor the assistant state attorneys assigned to this case had any occasion to look at the court file where the request was filed until January 16, 1990.

15. Since he was in jail, Defendant was taken to "in jail" arraignments, which are done on television, and that means the court files are not available at the arraignments. On September 7, 1989, defendant was arraigned and given a trial date of January 22, 1990.

16. The public defender's office was appointed on September 7, 1989, at the arraignment, to represent the defendant.

17. As defendant's attorneys, the assistant public defenders filed over 20 motions but chose to set no hearings before the court until the week before the scheduled trial date. There was hearing time available throughout the period the case was awaiting trial.

18. On January 10, 1990, the public defender's office filed a motion for discharge under Fla. Sta. 941.45 claiming the 180-day time period had run on January 2, 1990.

19. It is an unavoidable part of administrative management of voluminous criminal cases that routines are established around various rules and statutes. When there is a substantial variation from the statutory process, the routine of paper work and paper flow is interrupted. A deputy clerk "referring" (whatever that means) something (we don't know what) to designated persons (if anything was done) would almost certainly evoke a different administrative response than receipt of a formal request for disposition of charges by registered or certified mail which must be signed for in the courts and prosecuting attorneys' offices.

20. The state has other arguments why the time periods in 941.45 have not expired, but it is not necessary to consider them.

Based on these events and circumstances, these

conclusions must be reached:

A. The request for disposition was not served on the court nor on the appropriate prosecuting official in the manner required in Fla. Stat. 941.45.

B. There was no actual notice to the court, to the court's judicial assistant, nor to the appropriate prosecuting official.

THEREFORE, the defendant's Motion to Discharge based on Fla. Stat. 941.45 is DENIED.

DATED: January 17, 1990

JOSEPH P. BAKER, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing order were distributed in open court this 17th day of January, 1990, to: Patricia Cashman, Assistant Public Defender, and to; Kenneth Hebert and Terese Young, Assistant State Attorneys.

~~DEPUTY CLERK~~ Judge

Inmate file

6-14

Agreement on Detainers: Form 7

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH AN INMATE'S REQUEST FOR DISPOSITION OF A DETAINER

TO: Walter D. Zant, Superintendent (Warden, Superintendent, Director) Georgia Diagnostic and Classification Center (Institution)

P.O. Box 3877, Jackson, Georgia 30233 (Address)

In response to your letter of June 28, 1989 and offer of temporary custody regarding JOHN BRUCE VINING, Inmate #EF-240545 (Inmate's Name) who is presently under indictment, information, or complaint in the Ninth Judicial Circuit, Orange County, Florida (Jurisdiction and Address)

of which I am Assistant State Attorney (Title of Prosecuting Officer), I am advising you

I accept temporary custody and propose to bring this person to trial on the indictment, information, or complaint named in the offer withi the time specified in Article III(a)(Section 941.45(3), Florida Statutes), of the Agreement on Detainers.

Comments: If your jurisdiction is the only one named in the offer of temporary custody, use the space below to indicate when you would lik to send your agents to conduct the prisoner to your institution. If the offer of temporary custody has been sent to other jurisdictions in your state, use the space below to make inquire as to the order ir which you will receive custody, or to indicate any arrangements you have already made with other jurisdictions in your state in this regard.

Signed Simone I. Rosenberg

Simone I. Rosenberg
Assistant State Attorney
P.O. Box 1673
Orlando, FL 32802

I HEREBY CERTIFY the person whose signature appears above is a appropriate officer within the meaning of Article IV(a)(Section 941.45(4), Florida Statutes), and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: 7/24/89 Signed: (Judge)

Ninth Jud. Cir., Orlando, Fl (Circuit and City)

CR 89-2395
JOHN VINING

FILED IN OPEN COURT
THIS 16 DAY OF JAN. 1990
Fern Carlton, Clerk
BY D.C.

RECEIVED
JUL 25 1989
GA DIAG. & CLAS. CENTER
JACKSON, GA

8338

Agreement on Detainers: Form 6

EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR RECEIVING STATE

TO: Robert M. Porter, Administrator, Interstate Compact.

JOHN BRUCE VINING, Inmate #EF-240545 is confined in Georgia Diagnostic and Classification Center, P.O. Box 3877, Jackson, GA 30233 and will be returned to this jurisdiction on a date to be determined or _____. In accordance with Article V(b), (Section 941.45(5), Florida Statutes), I have designated the following agent(s) whose signature(s) appear below to return the prisoner.

Simone D. Rosenberg

Simone I. Rosenberg
Assistant State Attorney
250 N. Orange Avenue
Orlando, FL 32801
(407) 836-2430

Agent(s) Typed Name(s) and Signature(s):

_____ and/or

_____ and/or

Please see attached and/or

_____ and/or

To: Warden, Superintendent or Director

In accordance with the above representation and the provisions of the Agreement on Detainers, the above listed agent(s) are hereby designated to return the above inmate to this jurisdiction for trial.

Robert M. Porter
Administrator

By: _____
(Assistant Administrator)

CR89-2395
JOHN VINING

FILED IN OPEN COURT
THIS 16 DAY OF JAN. 1990
Evan Carlton, Clerk
BY _____ D.C.

DETAINER

GEORGIA DEPT. OF CORRECTIONS
JUN 5 2 26 PM '89

ORANGE COUNTY SHERIFF'S OFFICE

WALTER J. GALLAGHER
SHERIFF

ONE NORTH COURT AVENUE
Orlando, Florida 32801

May 5, 1989

FILED IN OPEN COURT
THIS 16 DAY OF JUN, 19 89
From Carlton, Clerk
BY _____ D.C.

Georgia Department of Corrections
2 Martin Luther King Jr. Drive S.E.
Floyd Bldg., Twin Towers East, 7th Floor
Atlanta, GA 30334

ATTN: Inmate Records

RE: VINING, John Bruce, Sr. W/M 3-13-31

240545 CR89-2395
JOHN VIIVING

Dear Sir:

Please accept the enclosed copy of our warrant/capias as a detainer on the above subject who is presently in your custody.

When subject is to be released from your custody, please contact Cpl. Heidi Lee or Det. Luisa Hyder at (407) 648-3722 so that we may assume custody. If subject is transferred from your custody to another facility, please forward our detainer to that facility and advise this office.

PLEASE ACKNOWLEDGE RECEIPT OF THIS DETAINER ON COPY ATTACHED AND RETURN, USING THE ENCLOSED, SELF-ADDRESSED ENVELOPE.

Your assistance in this matter is appreciated, and you can be assured of our cooperation in all matters of mutual concern.

Sincerely yours,

Walter J. Gallagher
Sheriff of Orange County

Luisa Hyder, Det.
Extradiitons

DETAINER RECEIVED:

Date 6/07/89

Signature

Title

GEORGIA DEPARTMENT OF CORRECTIONS
Floyd Veterans Memorial Building
Room 756 - East Tower
Atlanta, Georgia 30334

David C. Evans
Commissioner

CR 89-2395
JOHN VINING

TO: Sheriff
One North Court Avenue
Orlando, Florida 32801

DATE: June 22, 1989

FILED IN OPEN COURT
THIS 16 DAY OF JULY, 1990
Fran Carlton, Clerk
BY _____ D.C.

RE: John Bruce Vining (Inmate) FE240545 (State Serial Number)

GDCC (Institution) (Location)

SUBJECT: REQUEST FOR DETAINER CHARGES: Murder/Armed Robbery

Your detainer is acknowledged and has been filed against the above-named inmate. By copy of this notification, the Warden/Superintendent, having physical custody of the inmate, will be instructed to inform the inmate of the source and content of your detainer.

Our files have been marked to show that you are to be advised approximately thirty (30) days in advance of this inmate's release date so that you may arrange to take custody of him.

In the event the charges pending against this inmate are withdrawn prior to the expiration of his penitentiary sentence, it is requested that you advise us.

SINCERELY,

DAVID C. EVANS, COMMISSIONER
DEPARTMENT OF CORRECTIONS

BY: E. Boyd/JICB
Supervisor
Reception, Release and Compacts

DCE:scw

cc: Warden/Inmate
State Board of Pardons and Paroles
Central Office File

FLORIDA
DEPARTMENT of
CORRECTIONS

6/14 Diffb Skeroff

Detainer Wozniak 7/31/84

Governor
BOB MARTINEZ
Secretary
RICHARD L. DUGGER

1311 Winewood Boulevard, Tallahassee, Florida 32399-2500 • 904/488-5021

Inmate File

CR 89-2395.
JOHN VINING

FILED IN OPEN COURT
THIS 16 DAY OF JAN. 1990
Fran Carlton, Clerk
BY [signature] D.C.

July 25, 1989

The Honorable Robert Eagan
State Attorney
Ninth Judicial Circuit
250 N. Orange Avenue, Suite 615
Orlando, Florida 32801

Attn: Linda Baldree

RE: John Bruce Vining
Inmate No. EF-240545

DDCC Hospital

Dear Mr. Eagan:

Attached are signed copies of the Detainer Agreement Form VI concerning the above individual now confined in the Georgia Diagnostic and Classification Center.

By copy of this letter I am advising the Warden you will contact him about the date your agent will take custody of Vining.

Sincerely,

RICHARD L. DUGGER, SECRETARY

[signature]
Joye C. Bruce
Assistant Administrator
Interstate Compact

JCB/sm
Attachment

cc: Georgia Diagnostic and Classification Center
Post Office Box 3877
Jackson, Georgia 30233

2335

IN THE CIRCUIT COURT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CR89-2395

DIVISION 17

STATE OF FLORIDA

Plaintiff,

VS.

JOHN BRUCE VINING, SR.
also known as JOHN B.
VINING also known as
BRUCE VINING

Defendant

_____/.

FILED IN OPEN COURT
THIS 19 DAY OF JAN, 1990
Fran Carlton, Clerk
BY _____ D.C.

MOTION TO AMEND
ORDER DENYING MOTION
FOR DISCHARGE UNDER
F.S. 941.45

COMES NOW the State of Florida by and through the undersigned Assistant State Attorney and moves this Honorable Court to amend its order Denying Motion for Discharge Under F.S. 941.45, by amending paragraph 11 of the Order and as grounds therefore states the following:

1. Paragraph 11 of this Court's order states: "the assistant state attorney assigned to this case said he has no record in his file of receipt of the Defendant's request from the clerk's office."

2. The undersigned does not believe that such representation was made to the Court, however if such was made it was not intended.

3. The State intended to make clear that it was aware that the Defendant had made a request for final disposition, however that the Defendant had not complied with the statute or perfected service in sending a Certified return receipt requested copy to the prosecuting authorities and the Court as required by F.S. 941.45, in addition to its other arguments as to why the time limits had been tolled by the filing of numerous defense motions.

4. The amending of paragraph 11 does not vitiate the validity of this Court's order, because the other findings of this Court are sufficient to justify the denial of Defendant's Motion to Discharge Under F.S. 941.45.

WHEREFORE the State respectfully requests this Honorable Court to amend paragraph 11 of its Order Denying Motion for Discharge.

KENNETH C. HEBERT
Assistant State Attorney
250 North Orange Avenue
Orlando, FL 32802
(407) 836-2430
FL. Bar # 108734

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were hand delivered this 19 day of January, 1990, to: Patricia Cashman, Assistant Public Defender.

KENNETH C. HEBERT 108734
Assistant State Attorney

IN THE CIRCUIT COURT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CR 89-2395

DIVISION 17

STATE OF FLORIDA,

Plaintiff,

vs.

JOHN BRUCE VINING, SR.,

Defendant.
_____/

FILED IN OPEN COURT
THIS 9 DAY OF April, 1990
Fran Carlton, Clerk
BY _____ D.C.

SENTENCE ON COUNT I

On February 1, 1990, the jury returned a verdict of guilty of murder in the first degree on count I and armed robbery with a firearm on count II, and the defendant was adjudicated guilty on both counts. March 8, the jury returned an advisory sentence recommending the death penalty by a vote of eleven to one.

As the judge presiding at the guilt phase and the advisory sentence phase of the jury trial, I was present for all of the testimony and evidence introduced during both phases of the trial. Also, I have read all of the depositions transcribed and filed with the clerk of the court. I read a copy of the medical examiner's report and discussed it with him. I obtained copies of the Seminole County estate file on Georgia Dianne Caruso, deceased, and checked the claims filed in the estate which described jewelry consigned to the deceased at the time of her death, as corresponding to some of the jewelry appraised for her shortly before her disappearance.

Section 921.145(5) and (6), Florida Statutes, requires the jury, first, then the judge to find from among a list of aggravating factors those that have been proven beyond a reasonable doubt, and to "weigh" these against listed mitigating factors as well as any nonstatutory mitigating factors that may have been proven by a preponderance of the evidence. That section is intended as a taxonomic method for

identifying cases that deserve the death penalty and distinguishing them from those that do not.

MITIGATING FACTORS

A. WHETHER THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

The Defendant freely, voluntarily and with the advice of counsel waived this mitigating factor.

B. WHETHER THE MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTION DISTURBANCE.

There was no evidence on this factor.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

The deceased victim was negotiating a sale of jewelry with the defendant, but that does not prove this mitigating factor.

D. WHETHER THE DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.

There was a suggestion from defense counsel that more than one person committed this crime, but there was no evidence of an accomplice being involved.

E. WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

There was no evidence of this mitigating factor.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

There was no evidence of this mitigating factor.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

At the time of the murder, defendant John Bruce Vining was 57 years old. The defendant's memorandum argues this should "weigh heavily" because of defendant's blindness in one eye and other medical problems. Every living person is of some age. When age has been considered as a mitigating factor it has usually been the youth of the defendant, for children have a special status in our society. Perhaps old age would be a mitigating factor. Perhaps comparison of ages would sometimes be a factor. In this case, the victim was 39

when she was killed.

Defendant's age is not a mitigating factor in this case.

H. ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD, IN ANY OTHER CIRCUMSTANCE OF THE OFFENSE.

The defendant's memorandum has proposed nonstatutory factors and each has been considered.

1. Number 1 in the memorandum was age, considered as G, above.

2. Defendant stuttered as a child.

Any affliction should be considered, but this was not proven to have been a substantial impediment and is not a mitigating factor.

3. Defendant's mother was an alcoholic.

It is obvious from defense counsel's evidence at the advisory sentence in this case as well as the reported opinions of other cases and from several of the statutory criteria that "genealogical" principles, in the very broad sense of generative, hereditary, congenital conditions, as well as exogenous conditions, such as family problems, may be considered.

There is ample precedent for considering childhood deprivation or sufferings as mitigating. The evidence did not show any substantial childhood difficulties from John Bruce Vining's mother, father, brothers, or others. This was not considered as a mitigating factor.

4. Defendant was a good student, an athlete and a member of Methodist Youth Fellowship.

These were argued to be inferences from school records from over 35 years ago and were not considered to be mitigating factors.

5. Defendant had a good military history.

Our country respects those who have served in our military, and defendant's record shows he served honorably until retired due to his loss of vision in one eye. The loss of eyesight was due to a nerve infection unrelated to

military activity. Military service should not be disregarded as a factor in mitigation. Little weight was given to this part of defendant's history because it appears his military service ended over 30 years ago, involved no sacrifice, and the evidence suggests his military service was a government job, providing training and experience, regular employment, and defendant received a pension from it as well as other benefits of being retired from the military.

6. Defendant was an alcoholic.

A preponderance of the evidence indicates John Bruce Vining was a frequent drinker, that he sometimes drank to excess, and it interfered with his family life. Some would say this showed defendant to be an alcoholic. There is no evidence that alcohol had anything to do with the crimes in this case. There is no evidence the defendant was under the influence of alcohol when he committed these crimes. It was not considered to be a mitigating factor.

7. Defendant was a good family person.

One of John Bruce Vining's brothers testified the defendant showed him great kindness and was a positive influence on at least this one brother. There is no reason to disregard this testimony, but in considering the traits of the defendant, the evidence does not show him to be a "family person." This was not considered to be a mitigating factor.

8. Defendant was a good father.

There is conflicting evidence on how good a father John Bruce Vining was. That two of his children testified to his parental responsibility to them should be considered, but it is not a reasonable conclusion from the evidence that defendant was a "good father."

9. Defendant saved his wife's life.

Roxanne Vining, daughter of defendant, testified to her recollection from her childhood of her father running into a lake to rescue his wife. Roxanne believes her mother was trying to drown herself at that moment. This was not considered as a mitigating factor because it was too remote,

and the circumstances were too problemmatical.

AGGRAVATING FACTORS

A. THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

This aggravating element was proven beyond a reasonable doubt, as defendant was on parole from two jurisdictions at the time of these crimes. The jury found this factor sufficiently proven as do I. It must be noted that from the nature of the crimes for which the defendant was convicted, one of these previous convictions and almost certainly both involved a deliberate scheme to obtain money from others by fraud and deceit.

B. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

This was proven as an aggravating factor beyond a reasonable doubt as found by the jury, from the testimony of Detective O.W. Ferguson and of Gail Fleming about a kidnapping and aggravated assault. In that incident which began in Savannah, Georgia, Gail Fleming was abducted with a noose around her neck and manacled, after which she was threatened and tortured, then bound more securely with duct tape over her eyes and mouth that almost suffocated her; she was taken to a wooded area where she was rescued as she lay helpless, with a gun pointed at her head, beside a vertical grave that had been dug for her in her presence. The defendant and an accomplice were caught and arrested on the scene. The defendant's conviction for these offenses by a jury in Georgia on May 24, 1989, is confirmation of this factor beyond a reasonable doubt. This criminal episode in Georgia occurred after the murder and robbery of Georgia Caruso for which defendant stands convicted in this case, but it bears some similarity to this murder and robbery in that it was a carefully planned, deliberate crime, developed over period of time before the final criminal acts were committed. Gail Fleming was the closest thing I have ever heard to a voice from the grave.

C. THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

The evidence does not prove this aggravating factor beyond a reasonable doubt.

D. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING, OR DISTRIBUTING OF A DESTRUCTIVE DEVICE OR BOMB.

This was proven beyond a reasonable doubt as found by the jury, and I concur. The jury also found defendant guilty of an armed robbery with a firearm in this trial.

E. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

This factor was not submitted to the jury and was not proven beyond a reasonable doubt.

F. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

This factor was not submitted to the jury because it was an element of the state's case of robbery and would duplicate aggravating factor D, above. It was not considered as an aggravating factor.

G. THE CAPITAL FELONY WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS.

This factor was not proven.

H. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The court ruled that this factor could not be found proven in this case for legal and factual reasons. It was not submitted to the jury, and it was not considered as an aggravating factor.

I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDIDATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Not all premeditated murders are committed in a cold, calculated manner. And, if a claim of moral or legal justification existed that was more than a pretense, it would

probably not be a capital felony. The evidence in this case justified the jury finding in its advisory sentence this factor was proven beyond a reasonable doubt. The only explanation of this murder is as a cold and calculated act, far beyond mere premeditation. There is no moral value or legal principle that would would justify this murder.

The jury found this aggravating factor proven beyond a reasonable doubt, and I concur.

CONCLUSIONS AND SENTENCE

In all capital cases, the responsibility for sentencing lies with the trial judge. The judge should be guided by the verdict and advisory sentence of the jury because the tradition of jury trials that we have adopted is oral, and a jury trial consists of sworn witnesses speaking to the jury what they know, in the presence of the accused and thus confronting him with their words, whether he chooses to respond or not. The jury renders its decision in a "verdict," which means (in Latin, from which it came) that the jury "speaks the truth." The jury speaks for the community, and for the conscience of their community. The judge's judgment is by statute and tradition in writing, giving his reasons and some of the basis in the evidence for his conclusions. My words and my reasons and my conclusions should not have importance greater than the jury simply because my judgment and sentence is written, while the jurors deliberated, reasoned together, discussed and decided this case in the privileged confidentiality of a jury room.

I recognize that for both the judge and the jury, when they are instructed to "weigh" the evidence, and to "weigh" the aggravating and mitigating factors, "weigh" is used metaphorically. "Weighing" as we use it in legal proceedings is not an arithmetical process of adding up the witnesses or the factors and seeing which sum is greater. Neither is it a mechanical process, for there is no balance scales on which to "weigh" the factors. The jury and I have found the existence of four aggravating circumstances proven beyond a

reasonable doubt. I have found that there are some mitigating factors, and perhaps the jury did too, but I am persuaded beyond a reasonable doubt, as were eleven of the jurors, that the aggravating circumstances far out-"weigh" the mitigating circumstances in this case. In this case, the verdict and advisory sentence spoken by the jury spoke the truth, beyond a reasonable doubt.

THEREFORE, it is the judgment of this Court and the sentence of law that you, John Bruce Vining, for the crime of murder in the first degree of Georgia Caruso for which you now stand convicted by a jury, shall be delivered by the Sheriff of Orange County, Florida, to the proper officer of the State of Florida, and to be safely kept in custody in an appropriate place until such day and time as the Governor, by his warrant may appoint, and within the time by the Governor's warrant directed, and within the walls of the permanent death chambers provided by law, you, John Bruce Vining, shall be electrocuted until you are dead.

DONE AND ORDERED in open court at Orlando, Orange County, Florida, this 9th day of April, 1990.

JOSEPH P. BAKER, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing judgment has been delivered in open court this 9th day of April, 1990, to: Patricia Cashman, Assistant Public Defender, and Kenneth Hebert, Assistant State Attorney.

JOSEPH P. BAKER, CIRCUIT JUDGE