IN THE SUPREME COURT OF FLORIDA

RODERRICK FERRELL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER 93,127
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

RODERRICK FERRELL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 93,127
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

PRELIMINARY STATEMENT

The record on appeal consists of 31 volumes. The first twelve volumes contain 2302 pages numbered consecutively. The remaining 19 volumes contain the trial transcript with the pages numbered consecutively from 1 to 3648. This portion of the record will be referred to using a roman numeral to designate the volume and the appropriate pages therein. The record also includes a supplemental record with consecutively numbered volumes from one to seven and numbered from page 1 through page 575. Counsel will refer to the supplemental record the same way, but with the volume number preceded by "SR" to distinguish these cites from the original record on appeal.

STATEMENT OF THE CASE

On December 17, 1996, a Lake County grand jury indicted Roderick Justin Farrell, the Appellant, and Howard Scott Anderson, charging each with one count of armed burglary and one count of armed robbery. Additionally, the indictment charged the Appellant alone with two counts of murder in the first degree. The indictment charged Charity Lynn Keesee and Dana Lynn Hooper with one count each of principal to armed burglary and principal to armed robbery. The indictment charged Keesee, Hooper, and Anderson with two counts of principal to murder in the first degree. (I 20-23)

Roderrick Ferrell, the appellant, was the first of the group to go on trial. After selecting a jury to hear the case, appellant had a change of heart and pleaded guilty to all four counts as charged. (XXI 1701-20) The jury convened at a subsequent date for a penalty phase after hearing the evidence, the jury returned with a unanimous recommendation that Ferrell should die in Florida's electric chair as to each of the two murders. (XXX 3467) Following a Spencer[1] hearing (XXX-XXXI 3475-3618) the trial court sentenced Ferrell to die for each of the murder convictions. (XI 2057-74) On May 22, 1998, appellant filed a notice of appeal. (XII 2180-81) This brief follows.

---

[1]Spencer v. State, 615 So.2d 688 (Fla. 1993).

STATEMENT OF THE FACTS

Facts of the Crimes

On the night of Friday, November 22, 1996, the appellant, Roderrick Ferrell, along with his three co-defendants, Scott Anderson, Dana Cooper, and Charity Keesee, left Murray, Kentucky for Eustis, Florida. Ferrell had lived in Eustis where he attended the ninth grade before moving back to Murray, Kentucky. (XXII 1953-56) After moving back to Kentucky, Ferrell had kept in touch with several of his Florida friends. Heather Wendorf, the daughter of the murder victims, was one of those continuing relationships. After Ferrell had moved from Florida to Kentucky, Heather Wendorf repeatedly wrote and called him. Heather told Ferrell that her parents were abusing her. She expressed a desire to run away from home and/or wished her parents dead. (XXVII 2957-59, XXVIII 3040-41, 3108-10, 3114)

After arriving in Eustis, Ferrell and his Kentucky clan visited the home of Shannon Yohee on Sunday afternoon. There, he spoke to Jeanine LeClaire and Heather Wendorf. He knew all three girls from his days of living in Eustis. Ferrell then visited the home of Audrey Presson, another friend. (XXV 2548-53, XXII 1953-58) Ferrell asked Presson if she wanted to leave Eustis with him. He explained that he was in town on some unfinished business. However, no one in the group said anything about killing anyone. (XXII 1959-61, 1968-69)

The next day, Monday, November 25, 1996, Ferrell and his companions had a flat tire while driving in the Eustis area in Scott Anderson's mother's car. (XXVI 2729) They decided that they needed to leave Eustis that evening. The group returned to Shannon Yohee's house and called Jeanine LeClair and Heather Wendorf to inform them of the imminent departure. During the group's visit, Yohee heard Ferrell make a statement that he was going to kill Heather's parents so that they could steal their car and leave town. (XXV 2556-58) Ferrell spoke to Heather Wendorf by telephone, drew a map to her house from her directions and then left the Yohee residence. (XXV 2553-56, 2561-62)

The group drove to Heather Wendorf's neighborhood and met her down the road from her home. The three girls, Heather Wendorf, Dana Cooper, and Charity Keesee, went to visit Heather's boyfriend and to pick up Jeanine LeClair. Ferrell and Scott Anderson were to meet the girls at Jeanine's house after stealing the Wendorfs' money and vehicle. They armed themselves with a stick that Ferrell referred to as a "quarter staff" in case they needed it to defend themselves during the burglary. Ferrell and Anderson reached the Wendorf home a few minutes later. They entered through an unlocked garage where they searched to find a better weapon. Their plan was to "hog tie" Heather's parents and rob them. They may have discussed the possibility of "taking out" the victims if they fought back during the burglary. (XXVI 2765) They

did not know Mr. Wendorf's size. As a precaution, Ferrell armed himself with a crowbar from the garage. (XXVI 2758-71)

When the pair entered the home, Richard Wendorf was lying on the couch in front of a blaring television. Naoma Queen was taking a shower in another part of the house. Scott Anderson disconnected the telephone from the wall. Ferrell approached Richard Wendorf (who may have been asleep) and raised the crowbar over his head. Ferrell proceeded to strike Wendorf's head repeatedly with the crowbar. (XXVI 2771-73) Richard Wendorf died as a result of blunt impact to the head with skull fractures and brain lacerations. Richard Wendorf suffered no defensive wounds. The position of his body was consistent with the fact that he was completely unaware of the attack. (XXII 1989-99, XXIII 2000-23, 2049-56)

Anderson and Ferrell then began to search the house for money and the keys to the Wendorf's Explorer. Ferrell explained that they were trying to find the keys and get out of the house before Naoma Queen got out of the shower. (XXVI 2774) Unfortunately, appellant's plan failed. Naoma Queen encountered the intruders when she walked into the kitchen. Queen reacted by throwing a cup of scalding hot coffee onto Ferrell. She also scratched and clawed his face and fought him. Ferrell responded by beating her into submission and ultimately to death. (XXVI 2732, 2774-78) Naoma Queen died as a result of chop wounds of blunt impact to her head

which resulted in skull fractures and brain laceration. Queen's brain stem was severed which resulted in almost instantaneous death. Queen did suffer wounds on her hands and arms which were consistent with defensive wounds. (XXIII 2048-52)

After the murders, Ferrell and Anderson searched the house for valuables, money, and keys. They took a credit card from the body of Richard Wendorf. Ferrell and Anderson then left the house in the Wendorfs' Explorer. (XXVI 2780-82) They met Cooper, Keesee, and Heather Wendorf as the girls were returning to the Wendorfs' neighborhood. The entire group then left Eustis in both vehicles and traveled to Sanford, Florida, where they abandoned the Buick. They switched the license plates so that the Explorer bore the Kentucky plate of the Buick and vice-versa. (XXVI 2788) All five then drove the Explorer west to New Orleans, Louisiana. Along the way they used Richard Wendorf's Discover credit card to buy gasoline and a knife from a Walmart in Crestview, Florida. (XXV 2595-98)

When they reached Baton Rouge, Louisiana, Charity Keesee phoned a relative. Keesee's relative tipped off the authorities and the group was arrested without incident. (XXVI 2789-93) The appellant agreed to cooperate with the police if they allowed him to visit with Charity Keesee, his girlfriend. In statements to Louisiana authorities and to Florida detectives, Ferrell took most of the blame for the crimes. (XXVI 2720-2823) Ferrell subsequently pled guilty as charged and the case

proceeded to a penalty phase. (XXI 1701-1726)

The State's Case for Aggravation

Based on the circumstances of the murders, the state argued, and the trial court agreed, that the murders were committed in the commission of an enumerated felony; that the murders were committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification; and that the murders were committed for pecuniary gain. (XI 1952-53) The trial court subsequently found that the "pecuniary gain" factor merged with the factor dealing with "during the course an enumerated felony." (XI 2059-60)

The state also convinced the trial court that the circumstances of Naoma Queen's murder were especially heinous, atrocious, or cruel (HAC). The state did not argue nor did the trial court find that the murder of Richard Wendorf was HAC. (XI 1952-53, 2060) Finally, based on the simultaneous convictions for the murders of two separate victims, the trial court found that Rod Ferrell was "previously" convicted of another capital felony or of a felony involving the use or threat of violence. (XI 2059)

Facts in Mitigation[2]

Rod Ferrell, a boy of only 16, on November 25, 1996 when Richard Wendorf

[2] The facts in this section are taken **verbatim** from the sentencing judge's findings of fact in support of the imposition of the death penalty. Any errors are in the original.

and Naoma Queen were killed, was born in the small college town of Murray, Kentucky on March 28, 1980. His mother is Sondra Gibson, who was only 17 when Rod was born, and his father is Rick Ferrell who also was only a teenager. Rod's father and mother did not marry until Rod was 9 days old. Within a few weeks they broke up and Rod remained with his mother. His father entered the military and filed for a divorce through a local attorney in Murray. His father spent little time with Rod as he was growing up. The last time he saw "the child" as he referred to him during his entire testimony, was when Rod was about eight years old. His paternal grandmother, Betty Jean Ferrell testified that she had gone back to court when he was a small child to obtain court order visitation with "Roddy" as she fondly referred to him. She described him as a "sweet boy" whom she loved dearly, and but for the interference of his mother, she believes she could have made a difference in his life. She had not seen Rod since he was about eight either. Sondra Gibson, Rod's mother, was described by these two witnesses as manipulating and prone to making up stories, fits of temper which made it nearly impossible to have a relationship with the young boy. His father stated that he finally just gave up trying to have a relationship with his son. Rod's father since joining the armed forces had completed a bachelor and masters degree in aviation technology and was employed in the airline insurance business.

After Rod was born, his mother lived with her parents, Rosetta and Harrell Gibson. Mr. Gibson's employment moved the family from Murray, Kentucky to central Florida and back several times while Rod was growing up. The first move brought the Gibsons to the Winter Garden area. It was at this time that Rod allegedly fell ill with what was diagnosed as encephalitis, although no medical records could be located regarding that illness. The mother testified that Rod had suddenly become ill and the child was taken to a nearby hospital. According to the mother the doctors told the mother that he might not survive the night. This information was provided by the family to Dr. Meyer for his evaluation. He determined that it would not be likely that a medical professional would tell a family that their child might not survive unless it was really a severe illness. Dr. Meyer also concluded that this illness could be related to the onset of some of the symptoms of bizarre behavior that Rod had manifested over the months prior to November 25, 1996.

The next move was back to Murray, Kentucky. It was during this period that Rod spent time with his paternal grandmother two times per week in the after noon. He was also exposed to his paternal grandfather, who it was documented suffered from the debilitating mental illness of schizophrenia. It should be noted that the evidence revealed that Rod was not related by blood to his paternal grandparents because his father had been adopted. Although Dr. Meyer did suggest that the environmental

exposure of Rod to his paternal grandfather may have had an effect on him. Further, it was during this time that Rod has stated on numerous occasions he was raped while on a fishing trip with his grandfather, although the grandfather he has continuously referred to with regard to the sexual abuse allegation is his maternal grandfather. This evidence is supported by Rod's Aunt who as a young teenager was sexually fondled by her father. Rod has been consistent about his innocence being taken away at age 5. He also relates being exposed to the occult at this age, having witnessed human sacrifices during this time period, and being introduced to the Dungeons and Dragons improvisational games. Both his mother and father have admitted that they freely permitted this young child to play these fantasy games.

It was also during this time frame that Rod began a long time friendship with Matt Goodman. He had also known Scott Anderson since second grade, but it was not until this time period that he and Matt and Scott developed their fantasy games which later became an enormous part of their everyday life. The fantasy games were based initially on the Dungeons and Dragons games.

All through Rod's young life he was described as a sweet boy, obedient, loving, caring, and considerate. His mother would leave Rod on a regular basis with her parents. However, they were not permitted to discipline Rod. She reserved that authority for herself. She was often dancing in nightclubs, running the streets with

men, prostituting herself, and using drugs and alcohol. During the late 80's Rod lived alone with his mother at the Southside Manor Apartments in Murray, Kentucky. These are fully subsidized apartments and Sondra Gibson was living there rent free. Rod was permitted to play his fantasy games all the time with his friends, using the woods near their homes to engage in their battles and violent fantasy games.

Around the age of 10, Rod and his mother moved back to Florida and again began living with her father and mother, on Lemon Avenue, in Eustis, Florida. Rod attended Eustis Middle School and had begun Eustis High School when in December, 1995 the family again moved to Murray, Kentucky. When Rod lived in Eustis he was described by his friends as a laid back kind of guy, nice and quiet. Audrey Presson recalled Rod's strawberry red hair that he wore in a pony tail. He dated Shannon Yohee during this time period. Shannon identified pictures of her with Rod at Sondra Gibson's wedding to Darren Vraven in Daytona Beach in mid 1995. It was during this time period that Rod began hanging around Heather Wendorf and Jeanine LeClair. In December, 1995, Sondra Gibson walked into Rod's room in their home and found Jeanine LeClair, Rod and another young boy with the lights off and blood all over the place. The kids had sliced their arms with a razor blade and were engaging in a blood letting and crossing over ritual, commonly engaged in by members of vampire cults. It was shortly after this incident that Rod was removed from school in Eustis and moved

again to Murray, Kentucky. When the family first arrived in Murray, Sondra, her new husband, Rod lived once again with Darrell and Rosetta Gibson. Rod was enrolled in Calloway County High School as a transfer into the 10th grade. It was also at this time that Sondra and her new husband moved to Michigan. Rod was told by his new stepfather that, "his mother was never coming back, so he might as well get used to it." Sondra Gibson cried during her testimony when she recalled learning of what her son had been told. It upset her so much that she returned immediately to Murray, Kentucky to be with her son and filed for a divorce from Darren Vraven. Sondra Gibson admitted that Mr. Vraven was supplying her son with drugs and that she did nothing to stop it. Ferrell also told law enforcement officials in Baton Rouge, Louisiana that Vraven was a drug dealer. Rod's mother also spoke of physical and mental abuse by Vraven. In addition, there was testimony that Vraven was involved in satanic worship and such rituals.

When Rod's mother returned, she and Rod moved once again into the Southside Manor Apartments on Broad Street in Murray, Kentucky. It was during this time period that Rod's behavior, in school and at home, and his outward appearance began to transform from the normal teenager to a demonic, dark painted, creature that walked the cemeteries at night, cutting himself so other could drink his blood, and telling people he was a 500 year old vampire named Vesago. His school work became

non-existent. He violated school policy by failing to attend class, smoking cigarettes on campus, and being openly defiant to his teachers and other school officials. Stephen Murphy aka "Jaden" is also someone that Rod began to hang around with. It was Stephen who crossed Rod over in to Vampirism, gave him the name Vesago, and became his sire. Stephen Murphy was known in Murray as the "Prince of the City". April Doeden, a former girlfriend of Rod's testified that on the night Murphy crossed Rod over he couldn't get to sleep, he cried and shivered all night long like a scared little boy. April described how Rod's mother would yell at him and blame him for ruining her life saying that he was responsible for killing all of his unborn brothers and sisters (children Sondra had lost through miscarriages), and that she wished he were dead.

The school assistant principal tried to help Rod by getting him into counseling at Calloway County High School with Marianne O'Rourke. Rod attended six sessions with Ms. O'Rourke before he was expelled in April, 1996. Rod's mother was permitting him to stay out all night long with Murphy, use drugs, and not go to school. She knew he was mutilating himself and yet through all of these distinct and obvious signs, and against the advice of Ms. O'Rourke she did not seek to hospitalize this young boy. Also at this time, Rod was having telephone conversations long distance with Heather Wendorf and Jeanine LeClair. The first time someone overheard

Heather tell Rod she wanted him to get rid of her parents was in late spring of 1996. April Doeden overheard Heather tell Rod that her parents were hurting her and that she wanted him to come get her, but he would have to kill them, because they would never let her go. Along with his relationship with April, Rod developed a relationship with a young girl by the name of Charity Keesee who attended his high school. It was an incident involving his comforting Ms. Keesee and a teacher named Stonecipher approached and directed him to go to class that led to his expulsion from school. He responded that her command was shitty.

In May, 1996, Sondra took her son to an evaluation with the Kentucky Mental Health and Retardation Board in Murray. The social worker, Debra Mooney spent at most 45 minutes with Rod and then 15 minutes with his mother, although she is not sure if she only spent 30 minutes with Rod and 30 minutes with his mother. She described Rod as all dressed in black with black nail polish, black hair, and makeup. That he was engaging in self-mutilation and he felt persecuted by society. She noted that she felt the mother and son were minimizing the need for psychological help. There was no testing or releases obtained to complete the evaluation on that date. Tod's next appointment was canceled by his mother, and he failed to show up to the next two sessions. The next time Debra Mooney saw Rod was in early October, 1996. She only saw him for 15 minutes because, as she stated, she didn't think Rod was

going to show up, so she filled in his appointment slot with a patient who was suicidal.

During the Summer of 1996 Rod's mother engaged the assistance of the Division of Child Services and had Rod declared an uncontrollable minor. However, once again, Sondra Gibson minimized and lied for her son so that he could avoid getting a job, going to counseling, and his overall participation in the real world. He was continuing to use drugs regularly during this time.

In addition, Sondra Gibson had been writing love letters to the 14 year old brother of Stephen Murphy, trying to solicit him to cross her over and have her as his vampire bride. She reported the Vampire cult information to the Department of Children's Services but they did not take any aggressive action. They appeared to be acting upon the mother's requests for assistance, and when the mother was lying for Rod and assisting him in avoiding the requirements the Department had scheduled for him, his illness seemed to become further exacerbated. In the summer of 1996, Rod was sparing with Matt Goodman to prepare for a fantasy game they were going to play later that evening and Rod kicked Matt in the teeth. Matt believed that this was intentional. Since that time Rod's relationship with Matt deteriorated. In September, 1996 Rod was attacked by Stephen Murphy. Rod was taken to Murray Calloway County Hospital but refused treatment. His mother states that he was knocked unconscious when Murphy threw him up against the wall. Stephen was charged and

sentenced for this offense. It was shortly after this incident that Sondra Gibson was charged with soliciting a minor for the letters she had written to Murphy's little brother.

The Trial Court's Conclusions Regarding Mitigation Circumstances

Based on the testimony and evidence at appellant's penalty phase, the trial court concluded that the defense proved three statutory mitigating circumstances. Specifically, the trial court concluded that Ferrell committed the murders while he was under the influence of extreme mental or emotional disturbance. Dr. Wade Meyer, a psychiatrist specializing in the study of homicidal children and children involved in the occult, concluded that Ferrell fit this particular circumstance. Dr. Harry Krop and Dr. Elizabeth McMahon, two clinical psychologists, also reached the same conclusion. (XI 2066-67) All three doctors concurred that, although Ferrell could appreciate the criminality of his conduct at the time of the crimes, his ability to conform that conduct to the requirements of the law was substantially impaired. This shortcoming was the result of Ferrell's significant childhood abuse, his schizotypal personality disorder, his bizarre thought processes, and his excessive use of drugs and hallucinogens on the night of the murders. (XI 2067) The third statutory mitigating factor found by the trial court was Ferrell's age of sixteen at the time of the crimes. Additionally, the trial court accepted the fact that Ferrell had the emotional age of a three-year-old. (XI

2067)

The trial court found the following nonstatutory mitigating factors:

> (1) Appellant suffers from schizotypal personality disorder which has overlapping traits with schizophrenia.
>
> (2) Rod Ferrell was abandoned and isolated from his real father.
>
> (3) Ferrell was raised in a single parent home by a mother who failed to discipline him properly or to provide him appropriate role models essential to his psychological development.
>
> (4) Ferrell's only parent failed to provide him appropriate role modeling essential for his psychological development.
>
> (5) Rod was allowed to play violent, destructive fantasy games which further impaired his ability to deal with reality in an appropriate and adaptive manner.
>
> (6) Rod Ferrell grew up in a dysfunctional family in which the father was generally absent and the mother suffered from an emotional disturbance.
>
> (7) Ferrell lacked the attention, discipline, and role modeling of a father figure.
>
> (8) Ferrell felt persecuted by society.
>
> (9) Ferrell suffers from the influences of vampirism and practices of the occult.
>
> (10) Ferrell has a history of multiple drug use and was under the influence of drugs at the time of the crime.
>
> (11) Ferrell suffered from encephalitis as a child.

(12) Ferrell's sense of self was significantly distorted which distorted his interaction and his interpretation of his social environment.

(13) Rod's parents' perceived attitudes toward him became part of his consciousness, which was then his standard of normalcy. As he grew his notion of the acceptability of certain behavior was largely influenced by his family conduct.

(14) As a result of child abuse, Ferrell suffered a low sense of self, an inability to experience self love, sense of safety, and the ability to trust. This made Rod prone to attention-seeking behavior and manipulation by others. He also may have been manipulated by Heather Wendorf in her plot to kill her parents and run away.

(15) Ferrell was forced to witness the physical abuse of others which impaired his functional development.

(16) Ferrell took responsibility for the crimes by confessing immediately after his apprehension and pleading guilty as charged.

(17) Rod Ferrell was sexually abused as a young child.

(18) Ferrell has adapted to a structured environment while in custody and is capable of functioning in an open prison environment.

(19) Ferrell will be removed from society for the rest of his life with four consecutive life sentences.

(XI 2068-73)

SUMMARY OF THE ARGUMENT

Ferrell initially contends that the trial court abused its discretion in allowing a mere forty-five minutes for each side to summarize the evidence and advocate their positions in closing argument. The jury heard a full six days of testimony consisting of forty-three witnesses, with several of them testifying more than once. 137 exhibits were introduced into evidence. Convincing a jury that a double homicide committed by a mentally ill sixteen-year-old boy is not the most aggravated and least mitigated first-degree murder is an extremely difficult task. It takes time to explain the concept of mitigation to a jury much less the twenty-two mitigating factors actually found by the trial court in this case. The trial court abused its discretion by arbitrarily and unreasonably allowing only forty-five minutes for final summation.

Additionally, appellant's trial judge departed from his position of cold neutrality and exhibited at least the appearance of bias. In addition to arbitrarily and unfairly restricting the time allowed for final summation, the court also restricted appellant's voir dire. Most egregious, the trial court provided race neutral reasons to support the prosecutors' peremptory challenge of one of the few African American jurors on the panel.

The trial court unfairly limited the scope of voir dire by refusing to allow defense counsel to explode a misconception held by many jurors, i.e. that life

imprisonment is more expensive than executing a citizen. The court also restricted voir dire into pertinent areas of examination including jurors' attitudes about smoking, their ability to treat some first-degree murderers differently than others, and jurors' attitudes about the death penalty.

Ferrell challenges the admissibility of his confession based upon the totality of the circumstances and police misconduct. He was a sixteen-year-old boy without significant experience in dealing with the criminal justice system. Police officers used improper inducement in extracting Ferrell's confession by agreeing to allow him to see his girlfriend. Under the totality of the circumstances, Ferrell's plea was not voluntary. Additionally, Florida law enforcement was directly involved in extracting Ferrell's confession in violation of Louisiana law, the situs of the confession. This type of police conduct is the reason the exclusionary rule was created.

Over objection, the trial judge allowed a witness to testify how she interpreted a critical statement by Ferrell the day before the murders. Ferrell stated that he was in town on "unfinished business." The witness should not have been allowed to testify what this meant to her. The jury was just as capable of interpreting Ferrell's statement.

Appellant also argues that the trial court should have granted his request for a change of venue where the publicity was so pervasive and salacious that prejudice

could be presumed. Additionally, examination of the jury panel revealed actual prejudice.

The trial court also allowed over objection evidence that Ferrell talked of a plan to escape when he was in the juvenile facility awaiting trial. This was evidence of collateral crimes which was not relevant and highly prejudicial. Additionally, Ferrell challenges the applicability of the "heightened premeditation" aggravating factor as to both murders and the heinous, atrocious, and cruel aggravating factor relating to Queen's murder. Finally, appellant points out that the crimes he committed are not the most aggravated, least mitigated first-degree murders when compared to other first-degree murders. This is especially true because Rod Ferrell was a mentally ill, sixteen-year-old boy. His execution should be precluded as a matter of law.

ARGUMENTS

Rod Ferrell discusses below the reasons which, he respectfully submits, compel the reversal of his death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY LIMITING FINAL SUMMATION TO A MERE FORTY-FIVE MINUTES RESULTING IN A DEPRAVATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND TO EFFECTIVE ASSISTANCE OF COUNSEL.

The trial court limited defense counsel's closing argument to a mere forty-five minutes. With six full days of testimony, extensive physical evidence and a myriad of issues to discuss, a mere forty-five minutes was woefully insufficient. Appellant had offered evidence of three statutory mitigating factors as well as a plethora of nonstatutory mitigating circumstances. The trial court's ruling denied appellant his opportunity to fully explain the concept of mitigation, much less the voluminous evidence that established significant mitigating factors recognized by law and society. Additionally, appellant had legitimate arguments against the aggravating circumstances that the state sought to prove. Furthermore, defense counsel had legitimate arguments

regarding the doubling of two of the aggravators and the proper weight that the jury should assign to certain aggravating factors. Finally, the severe time limitation hindered appellant in his argument that a proper weighing of the valid aggravating circumstances against the substantial mitigation should result in a sentence with life imprisonment without possibility of parole rather than death by electrocution. The trial court's ruling denied appellant his constitutional right to effective assistance of counsel, his right to a fair trial, his protection from cruel and unusual punishment and his right to due process of law. These rights are guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17 of the Florida Constitution.

The trial court clearly limited each side to forty-five minutes for closing argument. The trial court stated on the record, "I intend to give both of you, **over noted objection**, forty-five minutes each for closing, State first, Defense last. (XXVII 2915) The trial court reiterated the forty-five time limit near the end of trial. On Friday, February 20, 1998, the trial court excused the jury for the weekend. He told the jury that they would begin Monday morning with closing arguments by the lawyers. "This will take an hour and one half total. There are some things I can time in this world, and those (sic) are times." (XXIX 3328-29) Just before the start of closing arguments, the trial court emphasized, "So we are clear, State is first, Defense

last, forty-five minutes a side." (XXIX 3337) The record on appeal clearly reflects that the sum total of both closing arguments was almost exactly ninety minutes. The jury returned to the courtroom at 9:21 a.m. After preliminary instruction by the trial court, the state presented closing argument which consumes twenty-seven pages of transcript. (XXIX 3337-65) Defense counsel then presented closing argument consisting of twenty-five pages of transcript. The court recessed at 10:55 a.m. (XXIX 3366-91)

Because there was clearly an objection to the time limitation, but none appeared on the face of the record on appeal, this Court relinquished jurisdiction to reconstruct the record in that regard. The trial court conducted two hearings. The trial court stated that there was little doubt that defense counsel objected to the limitation where the judge stated on the record, "over noted objection." (SR VI 541-42, 552) It is clear from both hearings that lead defense counsel, Candance Hawthorne, and Rod Ferrell, the appellant, were the only trial participants who remembered any specifics about appellant's objection to the time limitation. Ferrell remembered a discussion between defense counsel, the prosecutor, and the trial judge on the issue. (XXVII 2900) Ferrell remembered Ms. Hawthorne objecting to the forty-five minute time limit as an insufficient time to explain the numerous nonstatutory mitigating circumstances to the jury. Ferrell recalled Ms. Hawthorne requesting between ninety

minutes and two hours. The trial court responded that many of the nonstatutory mitigating factors were "overlapping." (SR VII 564-71)

Ms. Hawthorne did not specifically remember verbalizing an objection but did remember concluding that forty-five minutes was woefully insufficient and that a time limit of two hours was more realistic. She mentioned the large number of aggravating circumstances that the state sought to prove and the "two dozen mitigators" that the defense proved. (SR VI 545-46) She also mentioned the "truck load" of evidence that had been admitted. (SR VI 546) Defense counsel testified that if she had more time, she would have read several documents to the jury during closing arguments instead of simply reminding them to look at these documents during deliberations. (SR VI 546-47) Both lawyers for appellant remembered concluding that forty-five minutes would not be enough time to sufficiently discuss the large number of statutory mitigating circumstances. Appellant had argued, without success, that the trial court should specifically instruct the jury regarding the nonstatutory mitigating factors that were proved by the defense. When the trial court exercised its discretion and chose not to specially instruct the jury, the defense lawyers knew that the allotted time would be inadequate. (SR VI 547-48, 551-52) The trial judge controls the courtroom. The trial court can set an appropriate limit on the time allowed for closing arguments. However, a trial court can abuse its discretion in setting an unreasonable

time limit.

> But the limitation of the time for argument must of necessity within reasonable bounds, rest in the discretion of the trial court. This is the general rule. The right may be waived, but, when requested, reasonable time must be allowed. The question to be determined is what is reasonable time, and this depends upon the facts and circumstances of each case. No hard and fast rule can be prescribed. But, if it appears that the time for argument is unreasonably limited, such action will be held an abuse of discretion, requiring a reversal of the judgement for new trial.

May v. State, 89 Fla. 78, 103 So. 115, 116 (1925). In May, this Court held that a twenty minute limitation of closing argument deprived the defendant of a fair trial where he faced a possible twenty years in prison upon conviction. This Court also pointed out that, although the facts at trial were not complicated, there were sharp conflicts in the evidence on material issues. Both the state and the defendant called several witnesses and the testimony at trial consumed "several hours". Id.

Rod Ferrell's trial consumed six full days of testimony and evidence. More importantly, the issue at Ferrell's trial was not a simple one. The jury did not need to decide Ferrell's guilt. Rather, they faced the much more difficult task of deciding whether Ferrell should spend the rest of his life in prison or be executed in Florida's electric chair. Unlike lay jurors, this Court is familiar with the subtle complexities of Florida's capital sentencing scheme. Before being called for jury duty in this case,

Ferrell's jury undoubtedly had never even heard the terms "aggravating and mitigating circumstances." Defense counsel had the unenviable task of attempting to educate this jury about the process of differentiating the most aggravated, least mitigated first-degree murders from the general class of first-degree murders. This is a fine distinction indeed which is very difficult to convey especially in forty-five minutes.

Closing argument at a penalty phase is easy for a prosecutor. Jurors want to punish murderers. The state usually has most of the evidence as well as much of the law on its side. All first-degree murders are tragic. In reality, defense counsel must convince the jury that the defendant deserves mercy. This is usually an extremely difficult task in a first-degree murder trial, especially one involving a double homicide, as this one does.

Undersigned counsel was unable to find any Florida case discussing the limitation of time for closing argument at the penalty phase. Appellant submits that the lack of case law in this particular situation is further support for his contention that trial courts should be **extremely** accommodating where human life hangs in the balance. There is no bright shining rule that dictates the exact amount of time a criminal defendant is given for closing argument even at the guilt phase. Adams v. State, 585 So.2d 1092 (Fla. 3rd DCA 1991) The cases consistently hold that limiting closing to less than thirty minutes is generally suspect. Foster v. State, 464 So.2d

1214 (Fla. 3rd DCA 1985)

In Stockton v. State, 544 So.2d 1006 (Fla. 1989), this Court disagreed with the First District Court of Appeal and held that a thirty-minute time limit constituted an abuse of discretion in a second-degree murder trial. This Court pointed out that Stockton was convicted of a life felony, the trial lasted two full days, fifteen witnesses testified, and the evidence was extremely conflicted.

Other cases are helpful as well. Munez v. State, 643 So.2d 82 (Fla. 3rd DCA 1994) [twenty minute limit was unreasonable in two-day aggravated battery trial with five witnesses]; Adams v. State, 585 So.2d 1092 (Fla. 3rd DCA 1991)[fifteen minute limit held unreasonable in trial of sale of cocaine near school property where mistaken identity at issue]; Bell v. Harland Rayvals Transport, Ltd., 501 So. 2d 1321 (Fla. 4th DCA 1986) [thirty minute limitation unreasonable in negligence trial which lasted a week and involved complex issues of liability and damages]; Hickey v. State, 484 So.2d 1271 (Fla. 5th DCA 1986)[thirty minute limit unreasonable in four day second-degree murder trial even though State's case was strong and trial court believed the defense had very little about which to argue]; Kane v. State, 481 So.2d 546 (Fla. 5th DCA 1986)[fifteen minute limitation results in reversal in a trial for delivery of a controlled substance]; Rodriguez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985)[fifteen minute limit warrants new trial in view of "serious nature of crime"

(burglary of a dwelling) and conflicting evidence on critical element of intent]; Pittman v. State, 440 So.2d 657 (Fla. 1st DCA 1983)[thirty minute limit unreasonable in trial of various minor offenses arising from a fracas which broke out when police attempted to disburse a noisy party—thirty-three witnesses called and seven different defendants, all charged with third-degree felonies]; Neal v. State, 451 So.2d 1058 (Fla. 5th DCA 1984)[twenty-five minute limit mandates new trial where defendant faced minimum twenty-five-year prison term and was ultimately convicted of second-degree murder; trial took one full day of jury selection and two full days of testimony; and although the facts of the crime were fairly simple, there was sharp disagreement concerning question of premeditation and the case raised novel and complex spouse abuse defense].

In Ferrell's six day trial **for his life**, the jury heard from forty-three witnesses, including two who testified more than once. The parties commenced closing argument first thing Monday morning following a weekend recess. The lawyers had used their allotted time for summation before 11:00 a.m. (XXVII 3391) The jury was instructed and retired to deliberated at 11:45 a.m. (XXX 3433) Shortly before 2:00 p.m., the jury asked to hear Ferrell's videotaped confession. (XXX 3434) After listening to the tape, the jury again retired to deliberate at 2:33 p.m. They returned at 4:28 p.m. with their recommendation of death. (XXX 3467-69) In light of the fact

that the trial court had arranged a full day for closing arguments, jury instructions, and deliberations, it would not have been unreasonable under the circumstances to allow ninety rather than forty-five minutes for each side to close. Assuming all other things remained equal, an additional forty-five minutes per side would have brought the jury back with their verdict at approximately 6:00 p.m. instead of 4:30 p.m.

A penalty phase trial is the most serious court proceeding in this state. The issues involving aggravating circumstances and mitigating circumstances are subtle and complex. Three mental health professionals testified at great length concerning their diagnosis of Rod's mental illness. All three experts concurred that Ferrell met both statutory mitigating factors. Their diagnoses were varied, but all agreed that Rod suffered from a schizotypal personality disorder. Counsel submits that such a diagnosis is unusual and needs explanation and amplification, especially **why** this evidence **mitigates** the crimes. The prosecutor countered with argument that the experts' conclusions were not worthy of belief, contending that their opinions were based on faulty data i.e., garbage in, garbage out. (XXIX 3343-48)

Appellant invites this Court to read defense counsel's closing argument. In the forty-five minutes allotted by the trial court, she was simply unable to adequately sum up the evidence. The argument appears rushed and disorganized. She spends only two paragraphs explaining the "doubling" instruction. (XXIX 3376-77) Only three

sentences are spent arguing that the crime was not committed to avoid arrest which, incidently, the trial court concluded did not apply. (XXIX 3377) Defense counsel uses a mere three sentences to argue against the "heightened premeditation" aggravator. (XXIX 3378) Because of the time constraint, defense counsel simply glosses over the numerous mitigating factors that apply to the case and that the trial court found. Many of them she simply reads without explanation. Because of the arbitrary time limitation set by the trial court, defense counsel was forced to use 24 pages to cover 1500 pages of testimony. All tolled, there were 137 exhibits introduced into evidence at Ferrell's six day trial. Forty-three witnesses testified. The issues were complex. Human life was at stake. Forty-five minutes was simply not enough.

POINT II

APPELLANT'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM AS WAS HIS PENALTY PROCEEDING WHERE THE TRIAL COURT CROSSED THE LINE OF NEUTRALITY AND IMPARTIALITY THUS DENYING FERRELL ESSENTIAL DUE PROCESS BY DEPRIVING HIM OF THE APPEARANCE OF AN UNBIASED MAGISTRATE AND AN IMPARTIAL TRIER OF FACT.

The requirement of judicial impartiality is at the core of our system of criminal justice. As this Court said:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of courts to scrupulously guard this right and refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that is typifies, purity and justice. The guaranty of a fair

> and impartial trial can mean nothing less than this.

State ex rel. Davis v. Parks, 141 Fla. 516, 519-520, 194 So.613, 615 (1939). More recently, in a similar vein, this Court elaborated:

> We canonize the courthouse as the temple of justice. There is no more appropriate justification for this than the fact that it is the only place we know where the rich and poor, the good and the vicious, the rake and the rascal–in fact every category of social rectitude and social delinquent–may enter its portal with the assurance that they may controvert their differences in calm and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner. Such a pattern for administering justice inspires confidence. The legend on the seal of this court–"sat cito si recte" (soon enough if right or just)–embossed on the floor in the rotunda of this building, encourages devotion to such a pattern. Litigation guided by it makes the courthouse the temple of justice. When judges permit their emotions or the misapplication of legal principles to shunt them away from it, they must be reversed. The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or break under stress. He may ask questions to clarify the issues but he should not lean to the prosecution or defense lest it appear that his neutrality is departing from center. The judge's neutrality should be such that even the defendant will feel that his trial was fair.

Williams v. State, 143 So.2d 484, 488 (Fla. 1962); See also, Crosby v. State, 97 So.2d 181 (Fla. 1957).

The trial court in appellant's case first appeared less then neutral during jury

selection. Prospective juror Jefferson, one of the few African Americans on the panel, was a few minutes late after a luncheon recess. The panel was told to report back to the courtroom at 1:30 p.m. At 1:40 p.m. the trial court announced that everyone had assembled except for prospective juror Jefferson. (XX 1595) The prosecutor suggested that the court had the discretion to proceed with jury selection without Mr. Jefferson, "We could strike him from the pool and go on." (XX 1595) Defense counsel pointed out that Mr. Jefferson might have a legitimate reason for being late and the trial court agreed to allow an additional ten minutes before taking up the matter once again. (XX 1595-96) At the very beginning of the ten minute wait, the trial court requested a bench conference where the judge stated:

> THE COURT: Frankly, this is a little premature, but here is my concern with Mr. Jefferson to begin with. I don't think this is a secret to anyone up here.
>
> Number one, he is a Black male, the record would reflect that.
>
> Two, if he is challenged and if someone calls someone's hand on the challenge then someone has to state a race neutral reason why he would be excluded.
>
> Candidly, I will hear you argue, **I have written down three race neutral for Mr. Jefferson.**
>
> MR. KING (prosecutor): Yes sir.
>
> THE COURT: **He had a horrible experience with law enforcement where they pulled guns on him and he is extremely affected by that. He is a full time student in school–**
>
> THE BAILIFF: He is here, sir.

> THE COURT: Wonderful. (WHEREUPON THE JUROR ENTERED THE COURTROOM.)
> THE COURT: He is a full time student in school and having to do his work at night and turn in his papers during the day time and he actually said that he had religious scruples against rendering judgments on his fellow man.
> MR. KING: And he also indicated he was opposed to the death penalty although he'd follow the Judge's instructions, which is a legitimate reason for a peremptory challenge. But it is not a cause challenge, obviously.
> THE COURT: Well, Mr. Jefferson is here and we will deal accordingly, but those are some feelings I felt for Mr. Jefferson.
>
> I was really anticipating he wasn't going to show up and I was wondering if we could do something about it now. But he is here, we don't have to worry about him, we will press on.

(XX 1595-98) Jury selection proceeded without incident until the state exercised a peremptory challenge of Mr. Jefferson. Appellant objected and requested race neutral reasons. The prosecutor replied that Mr. Jefferson was a full time student with homework, that he did not like the death penalty in general but he could apply the law as instructed, and that he was once the victim of mistaken identity and accosted at gunpoint by police officers which was a very distasteful experience. The trial court responded:

> Candidly, along with those, I believe at one point Mr. Jefferson said that he had a religious scruple against judging other persons, which jumped right out at me.

> I'm going to state that the State has stated at least three race neutral reasons and I think I have a right to consider another and I have, and Mr. Jefferson is a strike for the State.

(XXI 1646-48) Defense counsel did not object to the race neutral reasons given by the trial court and the prosecution team. However, defense counsel did question at least the appearance of bias by the trial court. Appellant claimed in his motion for new trial that the court inappropriately demeaned perspective juror Jefferson after he was a few minutes late from the lunch break. The trial court responded by reading his remarks to the venire on the record. (XXXI 3636-37) The trial court added:

> ...And I am advised in the motion that I effectively provided the State with reasons to strike him because I was irritated at him because he came back late.
>
> That is insanity. There is no such thing in the record. It is not true. It is absolutely a misstatement of what happened. I'm not even sure I made that connection between that person and the juror that came back late.
>
> So, in any event, with that said, that motion is denied.

(XXXI 3637-38) It does not really matter whether the trial court's motive was connected to the prospective juror's tardiness. The fact of the matter is that the trial court **did** provide race neutral reasons which the state subsequently used to justify their peremptory challenge of Mr. Jefferson, the slightly tardy African American juror.

The trial court engaged in similar conduct to that condemned in Foster v. State,

24 Fla.L Weekly D1039 (4th DCA April 28,1999). In McFadden v. State, 24 Fla.L Weekly D1040 (4th DCA April 28, 1999). The trial court impermissibly departed from his role of impartiality by helping an unprepared prosecutor make his case for the defendant's violation of probation. In spite of the overwhelming evidence and the fact that it was a VOP hearing, the appellate court could not escape the "settled feeling that the trial judge went too far in assisting" the prosecutor. A judge may not, in fact, also act as a prosecutor. Merchn v. State, 495 So.2d 855 (Fla. 4th DCA 1986) While a judge may ask questions deemed necessary to clear up uncertainties, the trial court departs from a position of neutrality when its *sua sponte* orders the production of evidence that the state itself never sought to offer into evidence. J.F. v. State, 718 So.2d 251, 252 (Fla. 4th DCA 1998)

Unfortunately, the trial court departed from his role of neutral arbiter in appellant's case. In addition to supplying the race neutral reasons to excuse juror Jefferson, the trial court also unfairly limited voir dire (see Point III), and also arbitrarily and unfairly limiting appellant's time for final summation. See, Point I. Because of the trial court's appearance of partiality, this Court must order a new penalty phase.

POINT III

THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION DURING JURY SELECTION, RESULTING IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL RENDERING FERRELL'S DEATH SENTENCE CONSTITUTIONALLY INFIRM.

Voir dire examination of prospective jurors by counsel is assured by Florida Rule of Criminal Procedure 3.300(b). Jones v. State, 378 so.2d 797 (Fla. 1st DCA 1980). The purpose of voir dire, "Is to obtain a fair and impartial jury to try the issues in the cause." Keene v. State, 390 so.2d 315,319 (Fla. 1980). "Subject to the trial court's control of unreasonable repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed pre-judgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence." Jones, 378 So.2 at 798.

Wide latitude should be allowed during the examination of jurors during voir dire. Cross v. State, 103 So.2d 636, 89 Fla. 212 (1925). Voir dire examination should be as varied and elaborate as is necessary to obtain fair and impartial jurors whose minds are free of all interests, bias or prejudice. Gibbs v. State, 193 So.2d 460 (Fla. 2d DCA 1967).

On numerous occasions, the trial court restricted appellant's attempts to throughly and completely question the prospective jurors. Many of the jurors

unequivocally favored the death penalty over a sentence of life imprisonment without possibility of parole because of their misconception that the death penalty saved taxpayer dollars. See, e.g., (SR II 210, 222, 276; XVII 929-32) [to point out just a few of the many examples of this type of juror]. When appellant attempted to delve into this biased misconception during voir dire, the trial court sustained the state's objection and precluded that line of inquiry. (XVII 920-21)

Another group of jurors favored the death penalty for all first-degree murders. See, e.g., (SR II 216, 228, 234, 240, 276) [again just to point out a few of many]. A couple of prospective jurors thought the death penalty might be inappropriate in certain murder cases, **if the defendant acted in self defense** for example. See, e.g., (SR II, 210, 282) When defense counsel attempted to ferret out these jurors, many of whom had been rehabilitated by the state, the trial court again put a stop to appellant's efforts. Appellant asked prospective juror Stevens about his feeling that **all** first-degree murderers should be sentenced to death.

> ...[B]asically you're saying regardless of what the instructions are, if you come back guilty of first-degree murder you're going to give him death, is that correct?
> PROSPECTIVE JUROR: Yes sir. If the evidence points to it, why should we put him in prison for life and feed him the rest of his life...he's basically got it better in there than he does in the real world. ... I mean, he took a life and so, you know, why let him enjoy that?

(XVIII 1030) When defense counsel attempted to ask another prospective juror the same question, the state objected claiming the question called for the juror to commit to a position "when they don't know any facts and haven't been given the law." (XVIII 1031) The trial court sustained the objection and precluded that line of inquiry as well.

The trial court eventually decided that defense counsel had asked "enough" questions regarding the prospective jurors' feelings about the death penalty. The trial court precluded any further inquiry into this issue.

> THE COURT: We have voir dired this jury on the death penalty extensively. I have denied your Motion to Re-Voir Dire on the Death Penalty. I'm going to strike that question to be addressed to any other member of the jury.

(XX 1576) Defense counsel complied with the court's unequivocal order. The trial court subsequently restricted appellant's questioning of the venire regarding their feelings about children and smoking (XXI 1633-35); as well as the jurors' experience with school detention. (XXI 1635-36)

The trial court's severe restrictions of appellant's voir dire resulted in a denial of appellant's constitutional rights to a fair trial and to due process of law. The questions were relevant and necessary. Especially relevant and critical was the ability of appellant to fully address prospective jurors' feelings about the appropriateness of

the death penalty for **all** first-degree murders. Similarly, an extremely damaging but pervasive misconception among the general populous is the belief that life imprisonment without possibility of parole is much more expensive than executing an individual. This Court knows that such is not the case. Counsel should have been allowed to completely explore these misconceptions with venire. The jurors' attitudes regarding smoking were important in the case for two reasons. The evidence showed that Ferrell's mother allowed him to smoke cigarettes at home with her approval. Additionally, Louisiana police willingly gave cigarettes to Ferrell when they successfully extracted his confession. The record does not reveal where defense counsel is going regarding school detention because the trial court cut her off in such a perfunctory manner.

Appellant submits that **any** limitation on questioning prospective jurors about their attitudes regarding the death penalty is a dangerous situation in a capital case. The trial court's erroneousness rulings during voir dire were exacerbated by the trial court's refusal to comply with Florida Criminal Rule of Procedure 3.281 which provides:

> Upon request, any party shall be furnished by the clerk of the court with a list containing names and addresses of prospective jurors summoned to try the case together with copies of all jury questionnaires returned by the prospective jurors.

Appellant is entitled to a new penalty phase. Amends. V, VI, VIII, and XIV, U.S. Const.; Art. I §§ 9,16, 17, and 22, Fla. Const.

POINT IV

THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS TO TESTIFY TO HER OPINION AS TO WHAT DEFENDANT MEANT BY HIS WORDS, IMPROPERLY INVADING THE PROVINCE OF THE JURY AND RESULTING IN A DENIAL OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY JURY AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, AND 22, OF THE FLORIDA CONSTITUTION.

During a trial, counsel introduces evidence of relevant facts by offering testimony from witnesses as to facts about which they have personal knowledge. As recognized in Section 90.604, Florida Statutes, if a witness does not have personal knowledge of a fact, he or she may not testify to the fact. It is the province of the jury to decide between conflicting facts, to draw inferences from the facts, and to reach the factual conclusions in the trial. Generally, witnesses may not testify in terms of opinion or inferences. It is the function of the jury to draw those inferences or opinions. Ehrhardt, Florida Evidence, §701.1 (1998 Edition).

At Ferrell's penalty phase, the trial court allowed a witness to testify, over defense counsel's timely and specific objection, as to matters that invaded the province of the jury, and matters that were pure speculation on the part of the witness. Audrey Presson, a former classmate of Ferrell's in Eustis testified that Ferrell and the

rest of the crew came to her home on the night before the murder. They asked Presson if she wanted to leave Eustis with them. She declined. (XXII 1953-58) Ferrell explained to Presson that he had returned to Eustis "on unfinished business." (XXII 1960) When the prosecutor asked Presson what the statement meant to her, defense counsel objected, pointing out that her answer would be speculative. Presson could not know what was going on in Ferrell's mind. The trial court overruled the objection, relying on the fact that the question asked what Ferrell's statement "meant to her[Presson]." (XXII 1960-61) Presson responded:

> My understanding that it's–unfinished business means that somebody has done somebody else wrong and they will pay for it, that's unfinished business.

(XXII 1961)

A witness' testimony of what he saw or observed is relevant; but "when it leaves this field and enters into that of opinion or supposition, it invades the province of the jury." Scott v. Barfield, 202 So.2d 591, 594 (Fla. 4th DCA 1967). Thus, the trial court must not allow such improper speculation, since one witness' guesses or assumptions about facts cannot constitute relevant evidence that would reasonably support the factual conclusion. Holden v. Holden, 667 So.2d 867 (Fla. 1st DCA 1996); Dept. of Labor & Employment, Div. of Workers' Compensation v. Bradley, 636 So.2d 802, 809 (Fla. 1st DCA 1994) (assumptions of witnesses do not constitute

reliable evidence); Drackett Products Co. v. Blue, 152 So.2d 463, 465 (Fla. 1963) (testimony consisting of guesses, conjecture or speculation are clearly inadmissible).

Under Section 90.701, Florida Statutes, before a lay witness may testify in the form of inference and opinion, the party offering the testimony must establish that "the witness cannot [otherwise] readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact" and that the witness' "use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party." Kight v. State, 512 So.2d 922, 929 (Fla. 1987). Here, although it may have been Presson's subjective view that Ferrell meant to exact some type of revenge, rather than the equally plausible inference that Ferrell had some unfinished personal matters to attend to, "this is not the type of lay opinion testimony which is admissible under section 90.701." Kight v. State, supra at 929. The state here, as in Kight, failed to establish that the witness could not have otherwise communicated her perceptions – what she heard the defendant actually say – to the jury without the improper interpretive slant given by the witness to the words. This witness was wrongly asked her conclusions or understandings of the intention or meaning of the accused, instead of being questioned simply as to the defendant's acts and words, and leaving the jury to draw therefrom their conclusions as to his meaning. Hodge v. State, 26 Fla. 11, 7 So. 593, 595 (1890). The witness must be confined in his testimony to a

statement of facts, leaving it to the jury to draw the proper inferences as to what was the party's meaning. Branch v. State, 96 Fla. 307, 118 So. 13, 15 (1928).

In Dixon v. State, 13 Fla. 636 (1869), the Florida Supreme Court ruled that a witness would not be allowed to give his understanding of the meaning of words used in declarations of the accused. This holding is precisely on point for the instant case. Similarly, in Lee v. State, 24 Fla.L.Weekly D736-738 (1st DCA March 19, 1999) a police officer should not have been allowed to testify that the defendant "appeared to have something on his mind that he appeared to want to talk to somebody about" before he gave a taped statement.

Likewise, it was not for Presson to decide what Ferrell meant by the term "unfinished business." Rather, that was a job for the jury to decide on their own, without Presson's personal, speculative commentary of the words' meaning. The jury already had all of the facts from the witness, they did not require, and should not have suffered, the irrelevant theories of the witness. The objectionable, speculative, irrelevant, and inflammatory interpretation by Presson supported the state's theory regarding the "heightened premeditation" aggravating factor. With such inappropriate conjecture before the jury, the appellant did not receive a fair trial. Reversal for a new penalty phase is required.

POINT V

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO AUTHORITIES IN LOUISIANA FOLLOWING HIS ARREST, WHERE THE STATEMENTS WERE OBTAINED IN VIOLATION OF FERRELL'S CONSTITUTIONAL RIGHTS.

Pertinent Facts

Rod Ferrell, Heather Wendorf, Scott Anderson, Charity Keesee, and Dana Cooper were all arrested in Baton Rouge, Louisiana within a few days of the murders. Baton Rouge police were contacted by Florida authorities after Charity Keesee called a relative in South Dakota who, in turn, notified Florida authorities. Louisiana authorities spotted the Wendorfs' Explorer in a motel parking lot. All five teenagers were arrested without incident and transported to police headquarters in Baton Rouge. (XXIV 339-44,376-91)

Shortly after 9:00 p.m., Louisiana detectives placed Rod Ferrell, a sixteen-year-old boy, in handcuffs, in a small interview room. (XXIV 344-47) Due to the shortage of space in the juvenile facility, along with the fact that Dana Cooper was technically not quite a juvenile anymore, police kept the group at the police station over the course of the next twenty three hours until approximately 8:00 the next evening. (XXIV 347) The group's gastronomical needs were met. They were allowed to use the bathroom, but there was no place for them to sleep other than chairs and the floor.

(XXIV 348-49) Police kept the children separated, because they did not want them communicating with one another. (XXIV 356-57) The interview room where Ferrell remained was completely enclosed, without windows but with a mirror that allowed police to observe undetected. (XXIV 358-59) Police provided Ferrell with cigarettes, despite the fact that this was a violation of Louisiana law. (XXIV 366-67)

From all indications, Rod Ferrell seemed to be very much in love with Charity Keesee, whom he called Shea. At the time of his arrest, Ferrell believed that Keesee was pregnant with his child. Shea was practically the only thing that mattered to Rod Ferrell. As he was being transported to the Baton Rouge police department following his arrest, Ferrell began talking to Officer Dewey. Dewey warned Ferrell not to make any statements. Ferrell advised Officer Dewey that "all he wanted to do was speak with his girlfriend, Shea. That he would tell me anything that I wanted to hear...". (XXIV 392-96) Dewey again warned Ferrell not to make any statements and reminded him of his rights under Miranda. Dewey told Ferrell that Sgt. Odom would be the one who decided if he could visit his girlfriend. (XXIV 396-97)

At the police station Officer Dewey informed Sgt. Odom that Ferrell was willing to give a statement. All Ferrell requested was a visit with his girlfriend, Shea. Odom was cognizant of Louisiana law, so he called a local juvenile prosecutor for advice. Odom then called Bill Gross, a Lake County, Florida prosecutor and advised

him of the situation. Odom explained to Gross that, under Louisiana law, he could not take Ferrell's statement without the presence of his parent, lawyer, or guardian. Odom and Gross had two or three telephone conversations about the issue that evening. Eventually, Gross called from Florida and told Odom to ignore Louisiana law, since the prosecution would occur in Florida. (XXV 418-27)

At approximately midnight, Dewey advised Ferrell of his rights pursuant to Miranda. Dewey ascertained that Ferrell had completed the tenth grade and had been seeing a psychiatrist. (XXVI 2720-24; State's exhibit #77) After these preliminaries, Odom began:

> Sgt. Odom: Okay, Rod. I understand that you talked to Detective Dewey and that you have agreed to give a statement about what you know about this problem that arose in Lake County.
> Ferrell: **As long as I get to see Shea.**
> Sgt. Odom: **Okay. Not a problem.** Go ahead and start, I guess from when you were up there in Kentucky.

(XXVI 2724; State's exhibit #77) Ferrell then gave a complete confession which was secretly videotaped. (XV 454-55) After giving the statement to Louisiana authorities shortly after midnight, Ferrell gave a second statement to Florida authorities later that day also at the Baton Rouge police station. The trial court denied appellant's motion to suppress the statements and allowed them into evidence over objection. (VI 1048-77; XXVI 2676;XVI 669-70)

The Totality of the Circumstances Render Ferrell's Confession Involuntary

"[B]ecause of the tremendous weight accorded confessions by our courts and the significant potential for compulsion–both psychological and physical–in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing–coercion." Traylor v. State, 596 So.2d 957, 964 (Fla. 1992). In Traylor, this Court reiterated the following standard for determining the admissibility of a confession, first set out nearly a century and a half ago:

> To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, uninfluenced by fear or hope. To exclude it as testimony, it is not necessary that any direct promises or threats be made to the accused. It is sufficient, if the attending circumstances or declarations of those present, be calculated to delude the prisoner as to his true position, and exert an improper and undue influence over his mind.

Simon v. State, 5 Fla. 285, 296 (1853). Accordingly, the test for the admission of a confession is voluntariness. In assessing voluntariness, this Court must consider the totality of the circumstances to determine whether coercive police activity produced the confession. The determination must be made by the judge–not the jury. Traylor at 964. The State has the burden to prove by a preponderance of the evidence that the confession was freely and voluntarily given. Thompson v. State, 548 So.2d 198, 204 (Fla. 1989) and DeConingh v. State, 433 So.2d 501, 503 (Fla. 1983).

Under the totality of the circumstances, Ferrell's inculpatory statements to law enforcement were involuntary, and were admitted in violation of the Fifth Amendment protection against self-incrimination and the self-incrimination clause in Article I, Section 9 of the Florida Constitution. Specifically, the detectives preyed upon an inexperienced boy of sixteen with an emotional age of three who had little if any sleep in the seven days since he committed the two murders that shattered his already dysfunctional life. Almost immediately after his arrest, Ferrell expressed relief that he had finally been caught; that he had been on the run for seven days. (XIV 395) Almost immediately thereafter, Ferrell expressed a willingness to "tell [the detective] anything that [he] wanted to hear...that all he wanted to do was speak with his girlfriend, Shea." (XIV 396)

The record on appeal belies the authorities' testimony that they made no promises to Ferrell concerning a visit with his girlfriend contingent upon giving a statement. When Sgt. Odom begins taking Ferrell's confession (which he secretly videotaped), he began with a explanation of his constitutional rights. After some preliminary questioning, Ferrell signed a waiver of rights form. Sgt. Odom then stated his understanding that Ferrell wanted to make a statement about his involvement. Ferrell's response, "As long as I get to Shea" reveals all. In response to Ferrell's request, Odom does not tell Rod that he cannot promise anything. Rather, Odom tells

Ferrell, "Okay, not a problem." (XXVI 2724)

In Frazier v. State, 107 So.2d 16, 21 (Fla. 1958), this Court stated:

> A confession should be excluded if the attending circumstances, or the declaration of those present at the making of the confession, are calculated to delude the prisoner as to his true position, **or to exert improper and undue influence over his mind**.

(Emphasis added). A confession is inadmissible if it is "obtained by any direct or implied promise, however slight." Fillinger v. State, 349 So.2d 714, 715 (Fla. 1979). Promises or inducements are objectionable if they establish an express *quid pro quo* bargain for a confession. Id. Appellant contends that the record clearly reflects such a deal in this case. He gave the statements on the condition that he be allowed to see his girlfriend. (XVI 615-20) All Rod Ferrell cared about was spending some time with his girlfriend. See, e.g. (XV 476, 536-37) For that, he would tell the police "anything." That he did.

While the above cited "bargain" is the most objectionable and coercive aspect of Ferrell's statement to authorities, other objectionable aspects exist as well. Ferrell did not approach the police. He was arrested and was not free to leave. He admitted that he had been without sleep most of the past seven days. He was a lad of only sixteen without much exposure to police tactics, especially when it came to extracting a confession. He had never been arrested. He was seeing a psychiatrist. He had

drunk a bottle of wine on an empty stomach which made him disoriented. He felt intimidated and did not "completely" understand his rights. (XVI 615-20) He had an emotional age of only three. He was isolated from his friends, his parents, and his lawyer. See, e.g., Snipes v. State, 651 So.2d 108 (Fla. 1995); Drake v. State, 441 So.2d 1079 (Fla. 1983); and Doerr V. State, 383 So.2d 905 (Fla. 1980).

Appellant's Statement Should be Excluded Where a Florida Prosecutor Told Louisiana Police to Violate Louisiana Law and Illegally Extract the Confession, Since Florida Law Would Apply to the Confession's Admissibility.

All parties below agreed that, under Louisiana law, Ferrell's subsequent confession would be inadmissible in court. Louisiana law requires that a juvenile's parent or lawyer to be present before the child can be questioned. (XXIV 319-25; XXV 418-27) The record is clear. Louisiana police arrested Rod Ferrell based on a Florida warrant. Ferrell seemed willing to confess, but Louisiana police knew that, under Louisiana law, they were powerless to take his statement without the presence of his parent, guardian, or lawyer. Louisiana recognizes the inherent coerciveness in a juvenile's custodial encounter with police. State In the Interest of Dino, 359 So.2d 586 (La.1978) Florida does not recognize such a per se rule of inadmissibility. When Louisiana police realized their predicament, they consulted with the head of their local juvenile prosecution division who confirmed their belief that they could not take Ferrell's confession. This led them to contact a Lake County, Florida prosecutor who

ultimately told them to ignore their local law. The statement would be admissible in a Florida court under Florida law. The trial court's ruling admitting Ferrell's statements into evidence at his penalty phase vindicated the Florida prosecutor's legal advice.

Appellant takes issue with the trial court's ruling where the state acted in bad faith. The Florida prosecutor told Louisiana police to violate their oath to uphold Louisiana law, engage in police misconduct, and illegally take the juvenile's confession. The rationale for the exclusionary rule is to deter police misconduct. Mapp v. Ohio, 367 U.S. 643 (1961). Appellant contends that the Florida prosecutor's advice to Louisiana police is outrageous conduct which should not be rewarded. Indeed, the behavior should be punished by exclusion of Ferrell's statements.

The fact pattern in this case is analogous to the old cases involving the "silver platter doctrine." In some situations, the doctrine allowed evidence illegally obtained by state police to be used by federal authorities to obtain a conviction in federal court. The evidence must be presented to federal officials on a "silver platter" by state authorities i.e., without any federal participation in the underlying illegal search or seizure, in order for the evidence to be admissible in federal prosecutions. Lustig v. United States, 338 U.S. 74, 79 (1949) The doctrine was condemned in Elkins v. United States, 364 U.S. 206 (1960) which held that evidence obtained by state officers in violation of the Fourth Amendment, as made applicable to the states by the

Fourteenth Amendment, was inadmissible in a federal prosecution **not withstanding that federal officers had no involvement in the search and merely received the evidence on a "silver platter."** The silver platter doctrine was alive and well in the days when the Fourth Amendment applied to federal, but not state officials. United States v. Comstock, 805 Fed. 2d 1194 (C.A. 5 Tex. 1986).

It is important to note that Florida law enforcement was directly responsible for the extraction of Ferrell's confession in violation of the law in Louisiana, the situs of the statement. Even under the silver platter doctrine, Florida authorities could not use the tainted confession where they were direct participates in the illegal interrogation. It is as if Lake County, Florida assistant state attorney Bill Gross reached out to Louisiana, orchestrated the illegal interrogation, and then used the tainted confession to successfully obtain a death sentence for Rod Ferrell.

As a matter of law, moreover, even a good faith decision to continue a constitutionally tainted prosecution does not erase the taint when, as alleged here, the prosecution continues to utilize the fruits of the tainted behavior. United States v. P.H.E., Inc., 965 Fed.2d 848, 859 (C.A. 10 Utah 1992). The exclusionary rule is not a personal constitutional right but is a judicially created remedy designed to safeguard those rights generally through its deterrent effort. United States v. Eastland, 989 Fed 2d. 760 (C.A. 5 Tex.1993). Where there is some strong social policy, courts may

extend the exclusionary rules of evidence beyond constitutional and statutory requirements. Id. Appellant specifically raised this issue at trial. (XVI 649; XIV 331-33)

At the Florida prosecutor's insistence, Louisiana police ignored their oath and violated local law to obtain Ferrell's confession. Under the circumstances, appellant submits that the Louisiana authorities were not acting in their capacity as Louisiana law enforcement. Instead, they were acting as the instrument of Florida authorities. Because of their lawless behavior, this Court could consider the Louisiana detectives as no more then private individuals acting at the behest of Florida police. Although the exclusionary rule does not apply to evidence obtained by private citizens, the evidence would be excluded where the private citizen acts in collusion with law enforcement officials in order to circumvent requirements of the law. United States v. Clutter, 914 Fed 2d 775 (C.A. 6 Ky. 1990). Analogously a federal court may exercise its supervisory powers by excluding state officials' ill-gotten evidence in a federal prosecution where federal officials seek to capitalize on the state officials' flagrant abuse of the law. United States v. Sutherland, 929 Fed 2d 765 (C.A. 1 Mass. 1991). Florida authorities should not be allowed to capitalize on the tainted confession.

POINT VI

THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE, DUE TO THE PERVASIVE AND PREJUDICIAL PUBLICITY WHICH SURROUNDED THIS CASE AND INFECTED THE COMMUNITY FROM WHICH APPELLANT'S JURY WAS SELECTED.

The Sixth Amendment to the Constitution of the United States guarantees to every person charged with a crime a fair trial, free of prejudice. Murphy v. Florida, 421 U.S. 794 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

In ruling on a motion for change of venue, a trial court should determine

> whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977); Pietri v. State, 644 So. 2d 1347, 1352 (Fla. 1994).

To establish presumed prejudice, the defendant must present "evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from

the community." Mayola v. Alabama, 623 F. 2d 992, 997 (5th Cir. 1980).

Within two months of Rod Ferrell's indictment, defense counsel filed a motion for change of venue. (I 149-55) Lake County is a rural community with a population of less than 200,000 people. (XIV 295-96) The local and national press were eager to cover this case. Because of all of the defendants' youth, much of the information about the case was initially withheld from the public and the press. The local press took legal action to gain access. As a result, ancillary proceedings from Sentinel Communications Co. v. Brad King, State Attorney, are a part of this record on appeal. See, e.g., (SR IV 452-529; XIII 5-12) Appellant was concerned enough about the pervasive and inflammatory pretrial publicity to request that certain proceedings be closed and that the venire be sequestered. (XIV 225-26, 281-85) The case received national coverage. (XV 114)

Appellant introduced numerous newspaper articles to document the pervasive publicity and rural Lake County. The coverage focused on the sensational aspects of the crimes with headlines such as "VAMPIRE CULTIST"; "IN THE SHADOWS OF VAMPIRISM"; VAMPIRE TALES TAKE SHAPE"; "VAMPIRE FANTASIES"; "VAMPIRE TEEMS"; "INTERVIEW WITH A VAMPIRE"; "INTERNATIONAL ATTENTION"; and "HUMAN BLOOD DRINKING RITUALS". (SR IV 486) It is difficult to imagine much more inflammatory rhetoric than what was widely

disseminated in this case. After hearing the results of a survey conducted by the defense, the trial court reserved ruling on the motion for change of venue until jury selection. (XIV 295-98) Subsequently, the trial court denied the motion which appellant renewed right before the jury was sworn. (XXI 1694-96)

A convicted defendant may also show actual prejudice in order to justify a reversal of the trial court. Actual prejudice means any actual, expressed opinion indicating the jurors' prejudice or inability to be impartial and indifferent as the Sixth Amendment requires. Irvin v. Dowd, 366 U.S. 717 (1961) When this Court reviews a trial court's ruling denying a motion for change of venue, it must reverse if the lower court manifestly or palpably abused its discretion. Gaskin v. State, 591 So.2d 917 (Fla. 1991). Meeting that standard should not be so difficult because this Court has also said:

> We take care to make clear, however, that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubts to the ability of the state to furnish a defendant a trial by fair and impartial jury. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is a reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage. On the other hand, granting a change of venue in a questionable

> case is certain to eliminate a possible error and eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant a change of venue.

Singer v. State, 109 So.2d 7, 14 (Fla. 1959). In short, "Where the evidence presented reflects prejudice, bias, and preconceived opinions, the trial court is bound to grant the motion" to change venue. Manning v. State, 378 So.2d 274, 276 (Fla. 1979)

In addition to the presumed prejudice from the pervasive publicity in this rural community, the record also demonstrates actual prejudice. Almost every single potential juror had read about the case and had formed opinions. Examination of the juror questionnaires reveal extensive knowledge of the case gleaned from the media. Many had formed fixed opinions about appellant's case. The problem was exacerbated by the trial court's erroneous pretrial ruling denying appellant's request for a list of names of the prospective jurors who would be called. (XIV 232-36) Defense counsel cited this problem immediately prior to the swearing of the jury. (XXI 1694-96) Florida Rule of Criminal Procedure 3.281 provides:

> Upon request, any party shall be furnished by the clerk of the court with a list containing names and addresses of prospective jurors summoned to try the case together with copies of all jury questionnaires returned by the prospective jurors.

Appellant never received this pertinent and helpful information until the morning of

jury selection. Under questioning by the trial judge and the prosecutor, many claimed that they could "put aside" any extrajudicial knowledge and previously formed opinions, such that they could render a fair and impartial verdict. Appellant seriously doubts that this is possible in a case as salacious as this one.

In light of the extent and nature of the publicity in this case, to which most of the prospective jurors had been exposed, this Court must find that Appellant was deprived of his right to a fair trial by the refusal of the lower court to grant him a change of venue. Amends. VI, VIII, and XIV, U. S. Const.; Art. I, § 9 and 16, Fla. Const. His remedy is a new trial.

POINT VII

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE MATTERS THAT HAD NO RELEVANCE BUT WERE EXTREMELY INFLAMMATORY AND PREJUDICIAL.

Over a timely and specific objection by defense counsel, Desiree Nutt, a former correctional officer in the Lake County Jail when Ferrell was awaiting trial, testified that Ferrell told her about his "escape plan." She testified in great detail that Ferrell explained how he would escape and how he would "take out" the "dumb deputies." He was an amateur assassin and he would take hostages. (XXVI 2524-34) The evidence of these "collateral crimes" was not relevant to any issue before the penalty phase jury. The state initially promised that they would not introduce the evidence but mysteriously elicited the testimony from the witness. The trial court even more mysteriously overruled appellant's objection and allowed the testimony.

> MR. LACKEY (defense counsel): Your Honor, could I object one time, Judge? I think the evidence is going to be a collateral crime and shouldn't –
>
> THE COURT: I disagree at this point with regard that issue and overrule.

(XXV 2533)

The erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v.

State, 397 So.2d 903, 908 (Fla. 1981) This exact type of evidence resulted in a reversal in St. Louis v. State, 584 So.2d 180 (Fla. 4th DCA 1991)[testimony by juvenile detention center employee that defendant had verbally threatened employee and his family by stating that he could kill them just as easily as he killed someone else was not admissible as admission to charged crimes, but rather was inadmissible collateral crimes evidence.] Collateral crimes evidence may also result in a reversal at a penalty phase where "substantially different issues arise... that require analysis qualitatively different than that applicable to the guilt phase." Castro v. State, 547 So.2d 111, 115 (1989)[Error to admit witness' testimony that Castro had tied him up and threatened to stab him several days prior to killing the victim.] Ferrell's death penalty was based, in part, on this irrelevant and prejudicial evidence. A new penalty phase is required.

POINT VIII

THE TRIAL COURT ERRED IN FINDING THAT THE MURDERS WERE COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In finding this particular aggravating factor, the trial court wrote:

> ...This circumstance is proven beyond a reasonable doubt by Ferrell's statements on the afternoon of the murders that he was going to kill the victims, his careful surveillance of the home before entry, the procurement of a deadly weapon in advance of his entry into the home, the lack of resistence of Richard Wendorf and the number, location and severity of the wounds inflicted on both of the victims....

(XI 2061)

Appellant objected to an instruction as to this factor. (XXVII 2893) To support a finding of the CCP aggravator, the evidence must establish beyond a reasonable doubt that: (1) the murder was the product of cool and calm reflection; (2) there was a careful plan or prearranged design to commit murder before the fatal incident; (3) there was heightened premeditation; (4) there was no pretense of moral or legal justification for the murder. Walls v. State, 641 So.2d 381 (Fla. 1994).

The evidence produced by the state simply does not support the finding of CCP. The evidence certainly proves that the appellant and Scott Anderson fully intended to burglarize the Wendorf home and to steal the keys to their vehicle so that

they could drive the Wendorfs' Ford Explorer on their trip out of state. However, the evidence does not conclusively show that the boys intended to kill the victims prior to their entry into the home. In fact, the evidence indicates otherwise.

Appellant and Anderson selected weapons in the Wendorfs' garage immediately prior to the burglary. There was evidence that the boys grabbed the weapons at the last minute as much for "protection" in case the burglary did not go according to plan. (XXVI 2764-68) Ferrell explained to the police, "we never thought about it until ten minutes before we did it." (XXVI 2738) Ferrell explained that it was spontaneous because "if you premeditate something it's easily planned out and easily known" (XXVI 2739); "because we weren't suppose to exactly do what we did." (XXVI 2758) The original plan was to simply pick up Heather who wanted to run away from home. "We didn't think anything about her parents at that time. We didn't think about the parent thing until ten minutes before we did it so that was kinda spontaneous, it was premeditated." (XXVI 2761-62) Even the discussion about "taking someone out" before they entered the home seemed to focus on **incapacitating** the victims rather than killing them. Ferrell told police that they "decided that we would go into the house, and at least hog-tie or something her parents...Didn't exactly plan on beating them to death." (XXVI 2764-65) When asked why the pair armed themselves before entering the house, Ferrell explained that

he was taking precautions, "Just in case they attacked me." (XXVI 2767-68) They saw machetes, chainsaws, and axes in the garage, but did not grab them "...because I didn't plan on killing anyone...". (XXVI 2770-71)

Once the pair entered the house, Ferrell, weapon in hand, stood over Richard Wendorf, who was unaware of the intruders. Ferrell perceived that Mr. Wendorf turned "around and starting to get back up...". (XXVI 2772) At that point Ferrell launched a frenzied attack consisting of numerous blows to Wendorf's body. This type of frenzied attack after the victim "makes a move" is the antithesis of a cold, calculated, premeditated plan to kill.

The trial court relies heavily on Ferrell's statement at Shannon Yohe's house on the day before the murder. This was the **only** evidence at all of premeditation. The bulk of the substantial, competent evidence indicates otherwise. Dr. Krop explained that Ferrell's statement the day before the murders could have been a "fantasy." (XXV 2453-54) Dr. McMahon testified that he might have made the statement without meaning it. (XXIX 3227-28)

The CCP factor is even less applicable to the homicide of Richard Wendorf's wife, Naoma Queen. After killing Mr. Wendorf, appellant encountered Queen in the kitchen as she came from a recent shower. The victims did not know their assailants, so there was no motive relating to witness elimination based on any recognition of the

boys. Understandably upset at the discovery of an intruder in her home, Queen used her cup of hot coffee as a weapon, throwing it at Ferrell. In the ensuing act of sudden combat, Ferrell beat Queen to death. The entire encounter lasted a few minutes at most before Queen was rendered unconscious and dead.

This Court has previously disapproved the CCP factor where the victim overtly confronted and physically threatened the defendant at the time of the homicide. Blanco v. State, 452 So.2d 520 (Fla. 1984) [victim confronted and struggled with the defendant during a burglary]; Cannady v. State, 427 So.2d 723 (Fla. 1983) [CCP improperly found where the robbery victim jumped at the defendant before the fatal shot.] Ferrell's confession to authorities following his arrest reveals the lack of "heightened premeditation." "I was actually going to let her live, but after she lunged at me, ... because that pissed me off.... She clawed me, spilled fucking scalding hot coffee on me, pissed me off...so I made sure she was dead." (XXVI 2732-33) Ferrell's sudden and violent encounter with Queen is diametrically opposed to the requisite calm, cool reflection; careful plan; heightened premeditation; and absence of justification, all of which are necessary for a finding of CCP.

Additionally, although this Court has shown great reluctance to apply the fourth prong of CCP (without a pretense of moral or legal justification), such a pretense does exist in this case. There was substantial evidence that the victims' daughter, Heather

Wendorf, convinced Rod Ferrell (true or not) that she was being continuously mistreated by her parents, the victims in this case. (XXVIII 3040-41; XXX 3583-84)Heather convinced appellant that her parents must be killed in order for her to "escape" from her harsh environment . If Heather's allegations were true, they were clearly not a justification for murder. A call to the appropriate authorities would have been more appropriate. However, this aggravating factor talks of a **pretense** moral or legal justification. Dr. McMahon described Ferrell as an assassin who was out to right a wrong. (XXIX 3238-39) In the mind of a sixteen-year-old boy with a schizotypal personality, the killings may have seemed justified at the time. This is especially true when one considers the abusive childhood endured by Roderrick Ferrell. In Ferrell's mind, Wendorf and Queen had to die to stop their abuse of Heather so that she could escape to a better life.

POINT IX

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF NAOMA QUEEN WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The trial court found that the murder (only as to one of the victims, Naoma Queen) was especially heinous, atrocious, or cruel. The trial court wrote:

> ...This circumstance is clearly proved by the facts recited above beyond a reasonable doubt. When Ferrell confronted Naoma Queen his clothes were blood stained from her husband's beating and Ferrell had the crow bar in his hands. Ms. Queen spilled hot coffee on him, scratched his face and fought him until she was beaten to the floor and was then beaten in the head multiple times. It is clear from the defensive wounds on her hands and arms as well as Ferrell's own description of the event that Ms. Queen was faced with unspeakable fear and terror as she faced and fought her murderer. These facts support a finding of heinous, atrocious and cruel. [Citations omitted.] This circumstance is given great weight by the Court as it shows Ferrell's complete indifference to, and enjoyment of, the suffering of Ms. Queen.

(XI 2060)

The constitutional validity of this aggravating factor depends on judicially imposed limitations and applications. Espinosa v. Florida, 505 U.S. 1079 (1992); Sochor v. Florida, 504 U.S. 527 (1992). In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), this Court defined those crimes which are heinous, atrocious, or cruel:

> It is our interpretation that heinous means extremely

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

The United States Supreme Court relied on Dixon's limitation of the heinousness factor to a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim," to approve the facial validity of the statute. Proffitt v. Florida, 428 U.S. 242 (1976). See also, Espinosa; Sochor.

This Court has further refined the definition of the HAC factor. In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), this Court wrote:

> The factor of heinous, atrocious or cruel is proper only in torturous murders-those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

In Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992), this Court, citing Sochor reaffirmed that to qualify for HAC "the crime must be **both** conscienceless or pitiless

and unnecessarily torturous to the victim." Appellant objected to the applicability of this instruction at trial. (XXVII 2892)

Initially, appellant addresses the second prong of HAC, i.e., "unnecessarily torturous to the victim." One important aspect of this second prong is the time length of the criminal episode. Ferrell's confrontation with Queen was sudden and was over in a matter of minutes. Indeed, Queen could have been unconscious in a matter of seconds, certainly less than one minute. Contrary to the trial court's finding, Queen did not recoil in abject terror. Rather, she struck out against the intruder, taking the offensive with a preemptive strike of scalding hot coffee. Although she eventually lost the battle, it was not due to a fearful retreat from the fray. The murder of Naoma Queen was many things, but it was not heinous, atrocious, or cruel.

The mere fact that Queen was beaten to death does not necessarily call for the finding of this particular aggravating factor. This Court rejected the HAC factor in Elam v. State, 636 So.2d 1312 (Fla. 1994), where the victim was repeatedly bashed in the head with a brick. Like Queen, Elam's victim was rendered unconscious in a very short period of time. In Scott v. State, 494 So.2d 1134 (Fla. 1986), this Court found an insufficient basis for HAC even though the victim was pinned under a car and suffocated. There was no evidence that the victim was conscious during his ordeal. Similarly, the medical examiner could not tell the order of the blows. (XXIII 2039)

Additionally, the medical examiner conceded that Queen could have been "cold-cocked", i.e. knocked unconscious on their feet, and still stumble a few steps before falling. Once knocked unconscious, they would not feel any pain. (XXIII 2058-59) The beating that Queen endured was tragic, but it was not the type of prolonged suffering required under HAC.

Finally, it should be noted that Rod Ferrell's mental state is a factor in the consideration of whether or not he **intended** the crime to be conscienceless or pitiless. If a murderer has no conscience he is incapable of feeling pity for his victim. The mental health experts all agreed that Rod Ferrell suffered from a schizotypal personality disorder. All agreed and the trial court found that Ferrell was under the influence of extreme mental or emotional disturbance at the time of the murder. They also concurred that, although Ferrell could appreciate the criminality of his conduct, his ability to conform his conduct to the requirements of the law was **substantially impaired**. This conclusion was based on Ferrell's abusive childhood, his schizotypal personality disorder, his bizarre thought processes, his excessive drug use, and his use of hallucinogens on the night of the murders. (XI 2066-67)

This Court has recognized the interplay between a defendant's mental state and the application and/or wait that should be given to this aggravating factor. In Orme v. State, 677 So.2d 258 (Fla. 1996), this Court held that a defendant's mental or

emotional defects do not affect the application of HAC. Orme did recognize that the mental condition of the defendant is used to weigh against the total case in aggravation. However, other decisions by this Court seem to indicate that a defendant's mental defects can form a basic mental incapacity to intend the suffering of the victim. These cases focus on the torturous intent required for this factor. See, e.g., Hamilton v. State, 678 So.2d 1228 (Fla. 1996); Santos v. State, 591 So.2d 160 (Fla. 1991); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Porter v. State, 564 So.2d 1060 (Fla. 1990); Huckaby v. State, 343 So.2d 29 (Fla. 1979) [heinousness was the direct consequence of defendant's mental illness]; Jones v. State, 332 So.2d 615 (Fla. 1976) [stabbing victim 38 times in a frenzied attack was result of long-term paranoid psychosis]. In Buford v. State, 403 So.2d 943 (Fla. 1981), this Court held that killings committed in an "emotional rage" were not heinous, atrocious, or cruel. See also, Halliwell v. State, 323 So.2d 557 (Fla. 1975) Similarly, this Court has reversed death sentences where the heinousness of the murder resulted from the defendant's drug or alcohol intoxication. Holsworth v. State, 522 So.2d 348 (Fla. 1988); Ross v. State, 474 So.2d 1170 (Fla. 1985) Under any theory, the HAC factor is not supported by substantial, competent evidence.

POINT X

APPELLANT'S CRIMES ARE NOT THE MOST AGGRAVATED, LEAST MITIGATED FIRST-DEGREE MURDERS IN THIS STATE. A PROPER WEIGHING OF THE VALID AGGRAVATING FACTORS AGAINST THE SUBSTANTIAL MITIGATION SHOULD RESULT IN A SENTENCE OF LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE.

As to the murders of Naoma Queen and Richard Wendorf, the trial court found four aggravating factors but considered only three since the "pecuniary gain" factor merged with the fact that the murders occurred during the commission of a burglary or robbery. The trial court additionally found that Queen's murder was especially heinous, atrocious or cruel. However, there is not sufficient competent evidence in the record to support this finding. See Point VIII. Additionally, there is not sufficient competent evidence to support the trial court's finding that either murder was committed with the requisite "heightened premeditation." See Point VII Appellant cannot argue with the remaining three aggravating factors, which the trial court correctly weighed as only two aggravating factors. However, the factor relating to Appellant's "prior" capital felony conviction should be given significantly less weight in light of the fact that Ferrell's "prior" convictions were contemporaneous, i.e., all of them arose from this single incident. The other two aggravating factors that merged

into one, pecuniary gain and during the commission of a felony, are "garden variety" aggravators that are found in the vast majority of felony murders. Mysteriously, the trial court gave both of these circumstances "great weight." (XI 2059-16) Appellant recognizes the trial court's discretion in this regard, but fails to see why these two factors were so heavily weighed, especially the felony murder factor.

Weighed against the valid but insubstantial aggravation, is the abundance of mitigation that the trial court recognized and accepted in its entirety. The trial court found both mental mitigating factors (under the influence of extreme mental or emotional disturbance as well as the fact that his capacity to conform his conduct to the requirements of the law was substantially impaired). However, the trial court again mysteriously gave one of these factors "some weight" and the other "considerable weight." (XI 2066-67) The trial court also found Rod Ferrell's chronological age of sixteen and emotional age of three as mitigation but only gave it "significant weight" rather than great weight. (XI 2067) As addressed elsewhere in this brief, Ferrell's tender age should carry the day in this case resulting in a sentence of life imprisonment without any possibility of parole rather than death in Florida's electric chair. Again recognizing the trial court's discretion in this regard, this mitigating factor should have been given **great weight**. A proper weighing reveals life imprisonment to be the appropriate sentence in this case.

The trial court agreed that the evidence established **nineteen nonstatutory mitigating factors**. (XI 2068-73) Many of these factors relate to Rod's abusive childhood and dysfunctional family. [3] Indeed, the trial court called Ferrell's environment "one of the most dysfunctional family environments anyone could ever be cursed to be raised in...". (XXXI 3623) The trial judge also conceded that Ferrell's family failed him and that society failed him. (XXXI 3624-25)

Aside from Ferrell's dysfunctional family, the trial court recognized that Ferrell suffers from schizotypal personality disorder. (XI 2068) The trial court also recognized Ferrell's history of multiple drug use and the fact that he was under the influence of drugs at the time of the murders. (XI 2071; XXIV 2381-82) There was evidence that Ferrell took approximately eight "hits" of LSD on the day of the murders. (XXIX 3228-30) One doctor diagnosed him as suffering from polysubstance abuse. (XXIII 2161, 2179) The court also accepted the fact that Ferrell has adapted to a structured environment and is capable of functioning in prison. (XI2073) Additionally, Ferrell took responsibility for the crimes, pleading guilty as

---

[3] Although Ferrell just recently turned nineteen on Florida's death row, his situation calls to mind Merle Haggard's song, "I turned twenty-one in prison doing life without parole . . .. Mama tried, Mama tried." In contrast, Rod Ferrell's "mama" clearly did not try to raise him right, even engaging in Satanic ritual and cult activity herself. The trial judge announced at sentencing that Ferrell's mother should be on trial, that she thwarted every attempt to get psychological help for Rod. (XXXI 3623)

charged. (XI 2072) The trial court pointed out that Ferrell will be removed from society for the rest of his life with the two life sentences on the noncapital offenses as well as the sentences for the murders. (XI 2073)

Finally, although not in his findings of fact, the trial court seemed extremely bothered by the unequal treatment of Ferrell compared to Heather Wendorf, the victims' daughter. At the sentencing, the trial court stated on the record:

> It is the opinion of this Court after having heard the testimony of numerous witnesses throughout the course of this trial that significant questions remain regarding the involvement of Heather Wendorf in the murder of her parents...[We] have heard testimony from numerous witnesses and seen exhibits and evidence in this trial, witnesses who have told us they have never testified before the grand jury in Lake County regarding this matter. It is the strong suggestion of this Court to Mr. King, our elected State Attorney , that the grand jury be reconvened, these witnesses be presented to the grand jury in efforts that Lake Countians can understand once and for all whether or not Heather Wendorf is, in fact involved in these brutal killings.

(XXXI 3621-22) The State Attorney did in fact reconvene the grand jury which after two separate sessions, found no probable cause to believe that Heather Wendorf was a knowing participate in the murders. (XXX 3599); See attached appendix. Both grand jurys found that, although Heather clearly acted inappropriately the week of the murders and chose her associates and activities unwisely, there was insufficient

evidence to charge her with any crime.

Much of the evidence at trial points to Heather Wendorf as the catalyst for this entire, tragic chain of events. The fact that Rod Ferrell will be executed for these crimes while Heather Wendorf remains scot-free, smacks of unfairness.

POINT XI[4]

CAPITAL PUNISHMENT OF A 16-YEAR-OLD CHILD OFFENDER VIOLATES INTERNATIONAL LAW AND THE CONSTITUTION OF FLORIDA AND THE UNITED STATES.

"The international human rights movement is premised on the belief that international law sets a minimum standard . . . for the treatment of human beings generally." DeSanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985). An international standard expressly condemns state execution of child offenders.[5] This was noted by the Organization of American States in Resolution 3/87, Case 9647, where the Inter-American Commission on Human Rights found that the United States violated Articles I and II of the American Declaration of the Rights and Duties of Man when Texas executed two 17-year-old offenders:

> The Commission finds that this case arises, not because of doubt concerning the existence of an international norm as to

---

[4] This argument is currently before this Court in Jeffrey Farina v. State, case no. 93,907, whose initial brief was served the day before Appellant's brief.

[5] Convention on the Rights of the Child, Article 37(a); International Covenant on Civil and Political Rights, Article 6(5); American Convention on Human Rights, Article 4(5); Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Safeguard 6; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), Rule 17.2; Fourth Geneva Convention of 12 August 1949 Relative to the Protection of Civilian Persons in Time of War, Article 68.

> the prohibition of the execution of children but because the United States disputes the allegation that there exists consensus as regards the age of majority.

Resolution 3/87, Case 9647, paragraph 56. (VI,778-79) The United States, alone, is the only civilized nation that executes children.

> The death penalty for juvenile offenders is an almost uniquely American pastime. This practice appears to have been abandoned everywhere in large part due to the express provisions of the United Nations Convention on the Rights of the Child and of several other international treaties and agreements. For example, the U.N. Convention (Article 37(a)) provides that "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." ***The United States is literally the only country in the world that has not yet ratified this international agreement***, in large part because of the American desire to remain free to retain the death penalty for juvenile offenders.

V. Streib, "The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1973-October, 1998," page 7 (emphasis added).

The United States has signed and ratified the International Covenant on Civil and Political Rights ("ICCPR"). Article 6 (5) states, "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." When the ICCPR was ratified the United States tried to reserve a "right, subject to Constitutional restraints, to impose capital

punishment on . . . persons below eighteen years of age." 138 Congressional Record, §4781-01, §783-84 (daily edition, April 2, 1992). This attempted reservation of a right to execute child offenders has been found to be invalid because it is at odds with the object and purpose of the ICCPR:

> The Special Rapporteur shares the views of the Human Rights Committee and considers that the extent of the reservations, declarations and understandings entered by the United States at the time of ratification of the ICCPR are intended to ensure that the United States has only accepted what is already the law of the United States. He is of the opinion that the reservation entered by the United States on the death penalty provision is incompatible with the object and purpose of the treaty and should therefore be considered void.

Paragraph 140, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61. See William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?," 21 Brook.J.Int'l.L. 277, 318-19 (1995); Ved P. Nanda, "The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights," 42 DePaul L.Rev. 1311, 1331-32 (1993). Historically, the reservation of a right to disregard an integral part of a treaty is invalid. See Restatement (Third) of the Foreign Relations Law of the United States § 313 (1987). Execution of child offenders is also proscribed by these

agreements as cruel and unusual punishment.

Our independent states are necessarily precluded from violating the terms of valid international agreements. Article VI, Section 2 (The Supremacy Clause) of the United States Constitution makes "as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States." Baldwin v. Franks, 120 U.S. 678, 683 (1887). In that regard, "[t]he word 'treaty' has more than one meaning. Under international law, the word ordinarily refers to an international agreement between sovereigns, regardless of the manner in which the agreement is brought into force." Weinberger v. Rossi, 456 U.S. 25, 29 (1982). The ICCPR is at the very least a compact between the United States and other governments not to execute child offenders. As such it supercedes conflicting state statutes irrespective of the Supremacy Clause. United States v. Belmont, 301 U.S. 324 (1937). If the United States can enter into international treaties that prevent states from killing birds within their boundaries, and it has, Missouri v. Holland, 252 U.S. 416 (1920), it surely can enter into international treaties that prevent states from killing children within its boundaries.

There can be no doubt that Roderick Ferrell was a "child" when he committed this offense. A 16-year-old is a child under internationally accepted definition. See, e.g., The Convention on the Rights of the Child; "Report of the Third Committee on

Agenda Item 108, U.N. GAOR, 44th Session, Annex, Agenda item 108, at 15, U.N. Doc. A/44/736 (1989). A 16-year-old is a child under Florida law. § 39.01(10), Fla. Stat. (1997). A 16-year-old is a child under federal law. 18 U.S.C. § 5031.

Capital punishment of a 16-year-old child offender violates current minimum international standards of human rights and customary international law. The United States has recognized that customary international law sets a minimum standard of conduct to be followed and applied by the courts of civilized nations when properly raised and timely presented:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their deter-mination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900). A review of Paquete is instructive. The United States seized two privately owned fishing vessels, "The Paquete Habana" and "The Lola," as prizes during the Spanish-American War. The seizure of fishing

vessels as prizes of war was not covered by either statute or treaty between the United States and Spain, though treaties existed between other countries. The Court reviewed the historic treatment of fishing boats during times of war and, noting the practice of "civilized" nations, held that by general consent of civilized nations of the world it is established international law that coast fishing vessels, with their implements and supplies, cargoes and crews, are exempt from capture as prize of war. Paquete, 175 U.S. at 708. Likewise, state execution of 16-year-old children is repugnant to civilized nations by a clear international consensus.

The United States government solely has the power to enter into agreements with other nations and its actions must necessarily transcend the ability of a state to violate international agreements. A state has the power to punish criminal conduct, protect society and protect the interests of its citizens within the bounds of express agreements made by the United States and the international standards of human rights recognized by civilized nations. An international treaty that excepts from its control the customary practices of its independent states would eviscerate all agreements made by any country that has local governments. An international treaty setting forth a minimum standard of human rights is an evolving standard of decency that must be recognized by the courts.

Rather than execute the children within its boundaries, every state is

historically compelled to protect them under the doctrine of parens patriae:

> The concept of parens patriae is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and powers, which were referred to as the 'royal prerogative.' (Citations omitted). These powers and duties were said to be exercised by the King in his capacity as 'father of the country.' Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics,' and as the superintendent of 'all charitable uses in the kingdom.' In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States.

Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 257 (1972) (footnotes omitted). Thus, historically and for sound moral reason, children of civilized nations are protected by the state governments. As guardians of fundamental rights of its people, the courts of civilized states must recognize the international illegality of state execution of infant offenders:

> [P]reference for legislative treatment cannot shackle the courts when legally protected interests are at stake. As people seek to vindicate their constitutional rights, the courts have no alternative but to respond. Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.

Satz v. Perlmutter, 379 So.2d 359, 360 (Fla.1980). Perlmutter is apt here because it

involves legislative inaction. A claim exists that the ICCPR is not enforceable because it is not "self executing." See Igartua De La Rosa v. U.S., 32 F.3d 8, 11 fn.1 (1st Cir. 1994). Assuming but not conceding[6] that some provisions of the ICCPR may not be self-executing, the "not self-executing" argument cannot forestall recognition of fundamental rights protecting human life:

> We think it appropriate to observe here that one of the exceptions to the separation of powers doctrine is in the area of constitutionally guaranteed or protected rights. The judiciary is in a lofty sense the guardian of law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it. . . . When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.

Perlmutter, 379 So.2d at 360-361, quoting Dade County Classroom Teachers Ass'n v. Legislature, 269 So.2d 684, 686 (Fla.1972).

Capital punishment for this child offender is otherwise barred by art. I, §§ 2, 9, 16 & 17, Fla. Const. and the Eighth and Fourteenth Amendments. It is cruel and unusual punishment under international law and thus disproportionate under Florida

---

[6] Using a similar separation of powers analysis, the Constitutional power of the President to recognize basic human rights on behalf of the United States in his dealings in foreign policy cannot be thwarted by partisan inaction by the Legislative branch in failing to pass "enabling" legislation.

law. Tillman v. State, 591 So.2d 167, 169 (Fla.1991). Florida has determined that, consistent with Thompson v. Oklahoma, 487 U.S. 815 (1988), fifteen-year-old offenders are ineligible for the death penalty. Allen v. State, 636 So.2d 494 (Fla.1994). The holding in Allen was based primarily on Florida law. This Court has not yet decided this question for sixteen-year-old offenders under Florida law. But see Stanford v. Kentucky, 492 U.S. 361 (1989).

The death penalty for this 16-year-old offender is disproportionate under the facts established below. In that regard, except for the jury recommendation, the facts in Hegwood v. State, 575 So.2d 170 (Fla.1991) are far more egregious than here because three people died there. In Hegwood, a 17-year-old youth killed three Wendy's employees during an armed robbery in Ft. Lauderdale. The same statutory aggravating factors that exist here were also found there. Hegwood, 575 So.2d at 173, fn.8. Essentially the same mitigation supported a life sentence.

Appellant raised the issue of his youth at the trial level. (XI 1965-68) Since Furman v. Georgia, this Court has never approved imposition of the death penalty for a 16-year-old offender. It should not do so here. The mental health experts pointed out that Ferrell's emotional age was much younger than his chronological age. (XXV 2456-57) Dr. McMahon testified that Rod's emotional age was equal to that of a three-year-old. (XXIX 3267-68) In addition to Ferrell's chronological and emotional

age, the plethora of mitigation in this particular case cries out for mercy. Rod Ferrell has adapted to a structured environment and should spend his life in prison. We should not execute him.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate the death sentences and remand for the imposition of sentences of life imprisonment without possibility of parole. Alternatively, this Court should remand for a new penalty phase.

Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, FL 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, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Roderrick Ferrell, #124473, Florida State Prison, P.O. Box 181, Starke, FL 32091-0181, this 26th day of May, 1999.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced CG Times, 14 pt.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

RODERRICK FERRELL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER 93,127
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPENDIX

Presentment of the Grand Jury