

**SENTENCING STATEMENT OF
HON. FRANCIS J. DARIGAN, JR.
SEPTEMBER 29, 2006**

There has been much controversy and public finger-pointing about who said or did what in the plea negotiation sessions which resulted in the Court's decision to accept the pleas of the Defendants here today.

This Court accepts full and total responsibility for the acceptance of these pleas and for the sentences which will be imposed upon the Defendants in these cases.

It is not a question of what the parties did or did not agree to or in fact who did or did not recommend or suggest the sentences which the Court has indicated it will impose.

What is important and critical to the process is that this Court is the sentencing authority in all criminal cases and has the right and the final responsibility to impose sentences in these cases.

To be sure, that responsibility is often exercised after a trial upon a finding of guilt by a jury.

It is far more usual and customary, however, for the Court to sentence a Defendant during the pre-trial and plea negotiation phases of a case and without a trial ever taking place.

Most often in criminal cases, the prosecutors will make a recommendation regarding a sentence to defense counsel.

That recommendation is then conveyed by the defense counsel to the defendant for the defendant's acceptance or rejection. Oftentimes a counter-offer may be made or suggested to the State by the defense counsel which may or may not be acceptable to the

State. This process may go back and forth several times between the prosecution and the defense before an agreement on sentencing is reached.

This plea negotiation process considers the nature of the crime, the profile of the defendant, the outcome of the crime and its impact on the victims of the crime.

In a majority of cases an agreement can be reached between the State and the defendant regarding the sentence.

The proposed sentencing agreement is then put before the Court for its approval. The Court reviews the case in the same manner as did the prosecution and defense, and then either approves the sentence or disapproves it.

In some cases the Court may offer suggestions to both parties which may either increase or decrease the proposed sentence based on the Court's perspective on the matter.

If the Court approves of the recommendation, a change of plea is made by the defendant and the Court imposes the agreed-upon sentence.

Only the Court may accept a change of plea in a criminal case.

In *these* cases, while that process was engaged in over a long period of time with a strong desire by the Attorney General and the Defense Counsel to reach an agreement on sentencing and to conclude these cases without trial no agreement was ultimately achieved.

Throughout this process, the Court was aware of these discussions and often participated in them as various factors regarding the cases for each Defendant were debated and weighed by the State and Defense Counsel.

This Court was well aware that all parties desired to conclude these cases without a trial. As the structure of these cases and the issues for the trial became clearer and more crystallized, the Court began to share this opinion.

As the date for the trial approached, the Defendants clearly indicated to the Court and the Attorney General's Office that they wished to change their pleas.

It was at this time that the parties asked the Court if it would accept a change in the pleas and impose sentences to which the State, if it wished, could object.

The Court's decision to accept a plea took many variables into consideration. Many of the factors considered by the Court went beyond the final question of what an appropriate sentence would be for each Defendant.

The Court had to consider the length of each trial – estimated by the parties to take at least three to four months – as well as the number of witnesses to be called from throughout the country by the Prosecution and Defense, estimated to be over 300 persons.

The Court also considered the fact that many of the fire survivor witnesses were unwilling or unable to appear to testify – either because of the trauma of reliving these events or because the state of their mental or physical health prevented or greatly hindered their appearance.

Some witnesses, the Court has been informed, had to seek medical attention when subpoenas were served upon them compelling them to appear at trial.

The Court also had to take into consideration how a jury of 16 men and women could be seated for this trial as open-minded, objective jurors who could afford – financially and otherwise – to devote three to four months of their lives sitting on this difficult case.

Initially, 800 potential jurors were summoned to serve in the first trial. This number was reduced to a preliminary juror pool of 421 prospective jurors, who filled out the questionnaires provided by the Court on September 5th and 6th. This number was then divided into two groups of approximately 210 jurors each.

The combined challenges-for-cause for jurors to be excused from service on this case issued by both the State and the Defense came to 140 jurors from the 218 jurors who had been placed in group one. In addition, several more jurors had been excused by the Jury Commissioner during this period.

All of this occurred prior to any in-court questioning of a single juror.

This analysis, and the Court's review of the potential juror's answers to the questionnaires in this case, clearly indicated that while seating an unbiased jury in this case could be achieved, it would only be done with considerable difficulty.

The Court also had to take into consideration that the outcome of a trial is uncertain. A trial could result in acquittal of charges, or in a guilty finding, or – perhaps most unsatisfactorily to all involved – a jury might not be able to achieve a unanimous verdict and the case may have to be retried. In addition, if a jury returned a verdict of guilty there was the prospect of an appeal of the verdict which would be a lengthy process as well.

These considerations, while not bearing on the substantive merits of a case, still had to be weighed and considered by this Court when considering a decision to accept the Defendant's change in pleas.

The Court has earlier spoken of the traumatizing effect that the evidence in these cases could have on the victims' families, fire survivors, jurors and the general public.

The Court understands that it is not its function to be the arbiter of what is “good for” or what may be “acceptable” to peoples’ sensibilities or what might be in their best interests.

However, this Court has seen an extremely disturbing, 20-minute video tape of events leading up to as well as before and during the fire, while only a fraction of this video tape has been seen by the public. The Court has likewise reviewed evidence provided by the Medical Examiner which would have related the cause and manner of death of all 100 fire victims. Also, the Court has seen photographs of fire victims which this Court found to be horrifying and gruesome in their graphic detail.

These are examples of the type of evidence that was excepted to be reviewed by the jury and the public if these cases had gone to trial. This consideration is another factor that has been evaluated by the Court.

The Court had to weigh and consider all these factors in the light of two Defendants who were both willing to plead and requesting this Court to accept their change of pleas to 100 counts of misdemeanor manslaughter.

While it was clear that the prosecution and the defense believed that a disposition of these cases by pleas was in the best interests of all it was also evident that the only missing equation was a mutual agreement as to what the terms of the sentences would be, despite weeks of determined effort to attain agreement.

It was at this point that this Court made the decision to accept the Defendant’s pleas and to impose sentences that this Court believes to be appropriate to the crimes charged and according to law.

The Court's decision in this regard is a legitimate function for this Court to undertake, and is within the inherent authority and responsibility of the Superior Court.

When weighing the factors that have been enumerated, the Court had to make a judgment as to what benefit would be achieved from pursuing trials as opposed to accepting pleas by both Defendants to the charges and having sentences imposed that would be certain, definite, and a final outcome for these cases.

In the face of the uncertainty of outcome of two trials – what greater effect or satisfaction would be achieved if a guilty verdict was obtained? What enhancement of sentence, if any, would be accomplished? What effect would an acquittal have on the grieving families if that were the jury verdict, and what consternation would result if the jury failed to reach a verdict at all and the case had to be retried?

What effect would a second trial for Jeffrey Derderian have had on the witnesses, jury, survivors and families – a trial similar to the first, with similar characteristics of duration and uncertainty of outcome.

While none of these many factors which have been discussed were individually controlling on this Court's decision to accept the Defendants' pleas in these cases, each deserved important consideration which this Court analyzed and measured in reaching its decision to accept the Defendants' pleas.

Before imposing a sentence on the Defendants, Michael and Jeffrey Derderian, the Court would like to speak about the purposes of imposing criminal sentences, the nature of the crime the Defendants have pled to, and the process the Court has used to fashion what it believes to be an appropriate sentence in these cases.

Every criminal sentence is designed to address one or more of the four theories of criminal punishment: retribution, deterrence, incapacitation, and rehabilitation. Retribution responds to society's need to maintain respect for the law, punishing defendants retroactively for engaging in unlawful conduct, and likewise suppressing acts of private vengeance. Deterrence, on the other hand, encourages lawful conduct prospectively, by impressing on defendants and others the serious consequences of violating the law. While incapacitation prevents dangerous defendants from committing additional unlawful acts while confined, rehabilitation is instead focused on the prospect of returning defendants to society as law-abiding citizens.

Despite their inherent conflicts, these four goals represent the legitimate and well-recognized objectives of the criminal justice system.

Based on the four justifications for criminal punishment, the Rhode Island Supreme Court has identified five factors that fall within the scope of constitutionally permissible sentencing considerations. These include: the defendant's background, the defendant's potential for rehabilitation, the deterrence effect the sentence will have on society, the severity of the crime charged, and the appropriateness of the punishment in relation to that crime. In addition to these five factors, a trial justice may also take into consideration factors which could justify a mitigation of a sentence – that is, whether a defendant exhibited contrition and consideration for the victims of his criminal activity and pled guilty to the crime charged. The Court has carefully considered the information that it has received as it relates to all of these factors, for both of these Defendants.

The Court acknowledges that both Michael and Jeffrey Derderian are first time offenders. The Court believes both Defendants have good employment and educational

backgrounds, and each has been a productive member of society. They appear to have had a good upbringing and maintain healthy relationships with their families and peers in the community. There is nothing in either Defendant's background to suggest any previous criminal conviction or tendency. There is nothing in their records or personal backgrounds to indicate that they may be repeat offenders.

Moreover, the Defendants also appear to have a high potential for rehabilitation. Based on the Court's observations of the Defendants in these cases, their willingness to accept responsibility for their actions, and their allocution here today, the Court finds the Defendants to be credible and believes that they have the attitude and remorse consistent with rehabilitation.

The Court has also considered social deterrence when fashioning the Defendants' sentences, as it is imperative that others avoid similar violations of the Rhode Island Fire Code in the future. The Court hopes and expects that the horrific consequences of the Defendants' actions, and their subsequent prosecution and pleas to these charges, will alert other business owners within this state of the essential need to make safety the utmost priority when operating *any* place of assembly.

The severity of the crime charged and admitted to by the defendants is also an important factor the Court considered in determining what constitutes appropriate criminal sentences in these cases. The Court believes this factor deserves an explanation under the circumstances, and hopes that this clarification will serve to alleviate some of the doubt and frustration expressed by many in the community regarding the Court's decision today.

In Rhode Island, when a person causes the death of another, that act is classified as one of several different criminal offenses; these offenses are generally called “homicides.”

Each type of homicide involves a different level of “culpability,” that is responsibility or fault.

The most culpable form of homicide is murder in the first degree, which requires a specific intent to kill with malice aforethought. Slightly less culpable than first degree murder is murder in the second degree, which requires malice but not the specific intent to kill – in other words, second degree murder involves actions that were intended to cause death without premeditation.

Manslaughter is a broad term for homicides that lack the element of malice aforethought. Due to this lesser standard of culpability, manslaughter is considered a lesser offense than murder.

There are two forms of manslaughter under Rhode Island law. The first type, voluntary manslaughter, occurs when an intentional death results from a voluntary act made in the heat of a passion brought on by an adequate legal provocation.

Involuntary manslaughter, in comparison, is an unintentional homicide, without malice aforethought, committed either in the performance of a lawful act with criminal negligence, or in the commission of an unlawful act not amounting to a felony.

This definition of involuntary manslaughter clearly creates two distinct theories of the crime: one based on a criminal negligence theory and one based on an unlawful act theory. The State charged the Defendants with 100 counts of involuntary manslaughter under *both* of these theories, but it is the second form of involuntary manslaughter, based

on the unlawful act theory – in Rhode Island called “misdemeanor manslaughter” – to which the Defendants have pled here today.

There are no sentencing guidelines or benchmarks for misdemeanor manslaughter in Rhode Island. The Rhode Island statute for involuntary manslaughter convictions allows the Judge broad discretion when determining an appropriate jail term, anywhere from zero to 30 years.

A thorough examination of other involuntary manslaughter sentences handed down in Rhode Island and throughout the nation reveals a norm, but does not mandate what standard the Court should use in fashioning an appropriate criminal sentence.

The foundation of the charge of misdemeanor manslaughter is that a defendant committed a misdemeanor, and that this misdemeanor proximately caused unlawful death. In order to be a proximate cause, the death must have been a natural and foreseeable result of the misdemeanor in question.

Misdemeanor manslaughter is the least culpable form of homicide. Indeed, many states do not even define misdemeanor manslaughter as a felony, and thus punish defendants under this theory of manslaughter with considerably lower prison sentences, or, in fact, with no prison sentences at all. Even in states which consider this crime a felony, sentences are imposed mindful of the lesser degree of culpability involved. Nevertheless, misdemeanor manslaughter is a felony in Rhode Island, and a felony punishment for this crime is appropriate.

The misdemeanor to which each Defendant will plead today is that the Defendants purchased and installed polyurethane foam in The Station nightclub that was not flame or fire resistant as required by the State Fire Code. The Defendants will further

plead that the commission of this misdemeanor and the subsequent igniting of the foam was a proximate cause of 100 deaths.

This combination of events resulted in the crime of involuntary manslaughter, a felony offense called misdemeanor manslaughter.

The Defendants, having pled *nolo contendere* to a felony, are not free of criminal culpability. However, the Court is also cognizant of the fact that there is nothing in the record of these cases that indicates the Defendants ever intended to harm anyone through the purchase and installation of the foam used in The Station nightclub. In other words, the deaths in this tragic case were not the result of malice or criminal negligence.

The Court must take this lesser level of culpability of the crime pled into account when determining an appropriate sentence for these Defendants.

A criminal sentence based on misdemeanor manslaughter can not be predicated on the end result, or the punishment would not be in keeping with the law and with the lower culpability requirements for the crime admitted. Any attempt by the Court or by others to correlate *any* sentence imposed today with the value of the lives lost, or to use any other yardstick that may be applied, would be a disservice to the memory of the victims of this terrible tragedy.

The Court must sentence the Defendants for the crimes to which they have pled – not on the basis of the terrible outcome.

In making the determination of “appropriateness,” the Court considers a myriad of factors. While the outcome of 100 deaths is indeed one of the factors in this equation, it can not be the determinate one.

If this were so, a sentence of life imprisonment or the death penalty, if available, would not be sufficient to respond to 100 deaths. This Court is most acutely aware that there is no sentence sustainable by law which could ever be imposed that could possibly reflect the value of the lives lost or in anyway bring back the victims to those that loved them, or to extinguish the pain that is experienced on a daily basis.

The system of justice which we employ in these United States is the most objective, and fair of any system in existence today. Yet, at its best, this system is not perfect and is sometimes inadequate to meet the ends of justice in every situation, in every case, and to every person's satisfaction.

The criminal justice system in these United States and here in Rhode Island has been continuously developing since the 1600's and it is a continuation and expansion of the common law of England.

The law in the 21st century is a continuing, living body of rules enacted by Congress and the State legislative bodies to meet the ever-changing needs of a fast-paced, growing and complex society.

At its best, it provides an orderly framework of rules to guide us as a people, and to give us societal norms to govern our behavior which are then enforced upon all by the government for the common good. Transgressions of these rules results in action by the government which could result in a criminal charge and possible punishment.

However, the common law, statutes and case law upon which our criminal justice system is built and upon which society depends can not and does not meet every possible contingency, nor is it able to regulate and punish every possible wrong.

Indeed, there was no criminal statute in place in Rhode Island upon which the survivors of The Station fire could be considered victims of a crime – there is now, as a result of a statute enacted in response to that void in the criminal law.

Additionally, the Court notes that the Rhode Island legislature has extensively revised the Fire Code in response to the results of The Station fire in the hope of preventing further tragedies in the future.

The rule of law, which the Court must diligently apply to criminal cases, does not always result in a sentence approved of by all members of society. This is particularly true in high profile, highly controversial cases, where there oftentimes exists a division of opinion in the general public as to how the case should be decided, or regarding the terms of the sentence determined. After presiding over the Station fire cases for two-and-a-half years, as I have said before, I know these cases fall within that category.

What truly makes these cases so serious and devastating to the families of the victims and to the Rhode Island community as a whole is the sheer, almost incomprehensible amount of life lost as a result of the Defendants' crime and the profound and everlasting effect it has and will always have on the loved ones of the deceased.

This Court has always acutely been aware that no resolution of these cases, whether by trial or by plea, would ever satisfy everyone in this community, but is the Court's sincere hope that this Court's decision today will help to bring some measure of relief to this heartbreaking chapter in our shared history, and allow the victims and our entire community to begin to somehow move beyond this dreadful tragedy.

The Court has had the opportunity to view all of the evidence available in these matters, and has read the victim impact statements submitted by the victims' family members and has heard the compelling testimony of family members here today and at earlier court sessions.

The Court recognizes that the Defendants have changed their pleas of "not guilty" to pleas of "*nolo contendere*" to help, as they have stated, to "alleviate the victims' families and broader community from being subjected to an emotional reliving of the tragedy at trial."

The plea of *nolo contendere* in Rhode Island is equivalent to a plea of guilty. Thus, in fashioning these sentences the Court finds that the Defendants, to an extent, have exhibited repentance and remorse towards the victims of their criminal activity and will be convicted felons for the rest of their lives.

It is not unusual that co-defendants in a criminal case are apportioned different sentences. This distinction is based on their degree of involvement in the crime and according to the level of culpability engaged in between Defendants.

In these cases, there is a different level of culpability between the actions of the two Defendants which forms the basis for the difference in the sentences imposed here today. That difference concerns the extent of each Defendant's actions relative to the purchase and installation of the foam placed on the walls of the nightclub by the Defendants.

It is this Court's determination that, based on a review of the evidence in these cases and applying to each Defendant the principles which this Court must consider in assessing every defendant – a process which I have discussed earlier in these remarks – that the sentences which this Court is about to impose are appropriate to each Defendant in these cases based on the law and the evidence and in view of the totality of the circumstances understood by this Court.

The justice system in the United States is based completely on an adversary system of trial advocacy. That is to say, it is the responsibility of the Attorney General of this State to prosecute defendants to the full extent of the law, both at trial and at the time of the imposition of a defendant's sentence.

The Attorney General's objection voiced in these cases is a legitimate exercise of the responsibility and prerogatives of that office. This Court understands and respects that right as an integral part of this process.

It is also the Defendant's right to be represented by counsel in these cases and for those counsel to advocate vigorously on behalf of each Defendant at all stages of this process.

This Court, in accepting the responsibility cast upon it by law and in the exercise of the court's authority and discretion in the sentencing of the Defendants, will now impose sentences which this Court believes conform to the rule of law which binds this Court and which this Court feels are appropriate in this matter.

The Court sentences Defendant Michael Derderian to fifteen (15) years at the Adult Correctional Institute, four (4) years to be served by him in a minimum security prison with the remaining eleven (11) years to be suspended. In addition, he will be

ordered into a work release program acceptable to the Department of Corrections, and he will be placed on probation for three (3) years following his release.

The Court sentences Defendant Jeffrey Derderian to ten (10) years at the Adult Correctional Institute, the term of which will be suspended. He will be ordered to perform 500 hours of appropriate community service, and he will be subject to a three (3) year period of probation.