IN THE SUPREME COURT OF FLORIDA

JEFFREY ALLEN FARINA,

Appellant,

v. CASE NO. 80,985

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES

CASES: PAGE:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

The state accepts appellant's statement of the case and facts subject to the inclusions and corrections. The state objects to appellant's recitations of facts as slanted and because it fails to set forth the facts determined below in a light most favorable to the state, the prevailing party. Sections of appellant's statement are set forth in a manner suitable only to the argument section of a brief. Appellee would ask that such statement be stricken.

Appellants Anthony and Jeffrey Farina stipulated as to cause of death and the ownership of Taco Bell (T 48-49). The state stipulated as to the authenticity of a conviction against Jim Brant, Anthony Farina's ex-stepfather, for child abuse against Anthony Farina to be admitted in mitigation during the penalty phase (T 49).

A new objection was raised to the admission of the tapes of the conversation reflecting the statement "We should have cut their fucking throats" of the Farina brothers in the patrol car on the grounds of relevance and undue prejudice and also reflecting lack of remorse (T 265-266). The objection was overruled (T 267). An objection was re-raised on the same grounds before the tapes were admitted (T 295).

A conference regarding guilt phase jury instructions was had (T 467-490). The defendants were present (T 467). Both defendants indicated they were satisfied with the services of their attorneys (T 490). The court denied motions for directed judgment (T 490).

The jury was given final instructions before deliberations (T 530-559). No objections other than those made at the charge conference were interposed (T 560).

Judge Blount varied from his usual procedure and allowed the instructions and indictment to go into the jury room. Counsel for Jeffrey Farina requested the indictment go in. Counsel for Anthony Farina objected (T 561-62).

The first alternate was substituted for Juror Rogoish who the defense contended had nodded off during jury instructions (T 562-565).

The jury selected a foreman (T 565). It retired to deliberate. It later asked for a dictionary and copy of closing arguments. The requests were denied. The defense renewed their requests for a prior special jury instruction. It was denied (T 575).

The court reconvened on November 19, 1992, for the penalty phase (T 583).

The state called the surviving victims for the purpose of re-enacting the crime but was prevented from doing so pursuant to defense objection (T 605-613). The state then called Mr. Van Ness but such victim impact evidence was ruled inadmissible as far as the jury was concerned pursuant to prior rulings (T 614-20). The state did not present any initial evidence (T 621).

Judge Orfinger originally ruled that the confessions of each of the co-defendants could not be utilized at a joint trial (T 565). The state proffered the testimony of Detective Allison Sylvester during the penalty phase concerning what each

individual co-defendant had said about himself. Jeffrey Farina had said that the killing was to eliminate potential witnesses. Anthony Farina said the purpose of the attempted murder and the actual murder was to avoid getting caught. Judge Blount ratified Judge Orfinger's prior ruling, applying it to the penalty phase, as well (T 965-973).

The state indicated that it would like Mr. Van Ness and Miss Van Ness, Kimberly Gordon and her parents, and Derek and his parents to testify about victim impact. The court disallowed such testimony (T 974).

Anthony and Jeffrey Farina indicated they were satisfied with the services of their attorneys (T 1000).

After hearing closing arguments of counsel and retiring to deliberate the jury returned a 7-5 death recommendation for Anthony Farina and a 9-3 death recommendation for Jeffrey Farina (T 1038).

The 911 caller at 2:18 a.m. on May 9, 1992, was Gary Robinson (T 15). He described an individual with a tattoo (T 21). Anthony Farina had a tattoo matching the description (T 21; 29).

Kim Gordon had an injury to the back of her head as well as the upper part of her back (T 33).

When the police responded to Taco Bell they found the doors on the west of the building unlocked. The lights were on inside (T 57). The parking lot lights and sign were off (T 58). Kim Gordon was found just inside the freezer, lying face down, with her hands tied behind her back (T 60). She was unconscious (T

62). There was a large amount of blood and matter under her face. Her pulse was rapid and breathing shallow and she was making a gurgling noise (T 61). Michelle Van Ness was also found in the freezer with her hands bound behind her back with a white rope (T 61). She was also unconscious (T 62). Her breathing was very rapid and shallow and her eyes were open and fixed (T 61-62). Her body was heaving (T 62). She had a head wound. There was a large amount of blood on her head and on the floor (T 62). Officer Wiles untied her hands to save time for the paramedics (T 63). He then lifted her head off the floor so she could breathe (T 64). The freezer was small and very cold inside (T 95). When the police found Derek Mason he was bleeding from the mouth and carrying a cup around ti spit in. He was in a lot of pain and had a hard time talking (T 68). Derek had observed an older model dark colored station wagon before the robbery (T 70). A BOLO was put out on Anthony Farina including a description of the tattoo (T 71). Nineteen-year-old Gary Robinson was found in the back storage room, kneeling down, with his shirt off, where he remained after calling 911. He had a bullet hole in the left side of his chest (T 72-73; 328). Derek and Gary had untied their own hands (T 83). The police found the money clips upon the cash drawers in the manager's office (T 81). There was no paper currency in the cash drawers (T 82). A cylinder pin to a revolver was found on the right hand side of the cooler (T 85).

At the time of the robbery, Derek was sixteen-years-old and in eleventh grade at Mainland High School. He worked as a cashier to make some extra spending money (T 99-100). Nineteen-

year-old Gary had only been working at the store three days (T 101). Gary, Kim, Michelle, and Derek stayed to close up the store after twelve o'clock (T 102). Patty went home ten to fifteen minutes after the store closed (T 103). Michelle was not even supposed to be closing the store that night. She stayed out of friendship for Derek (T 104).

They were all ordered to the back of the store by Anthony Farina (T 107). Jeffrey Farina had the gun. Anthony Farina had a bag of rope and a knife (T 109). Both the Farinas were wearing rubber gloves (T 110). Anthony told Kim to go up front and get the money. Anthony did the talking (T 111). Michelle cried and held onto Derek's arm (T 112). She was scared and shaking (T 113). Derek and Gary told her everything would be all right (T 114). One of the Farinas walked back and returned with a large plastic Taco Bell bag and put cash into it (T 114). Kim asked everybody if they wanted a cigarette. Michelle and Kim smoked (T 115). Jeffrey Farina, who had a knife in his hand, took Derek to the manager's office and tied him up (T 115). Anthony had handed Jeffrey the bag of rope (T 116). Jeffrey cut some of the rope and tied Derek's hands behind his back (T 116-117). Anthony Farina held the gun on the others (T 117). Derek received permission from Anthony to sit down in the storage area (T 117). Derek recognized Anthony from working with him at another Taco Bell (T 107). He said "Tony, come here for a minute." He then asked if he was going to hurt anyone. Anthony Farina responded "No, just cooperate and everything's going to be all right." (T 118). After Gary was tied up Anthony and Jeffrey Farina switched

weapons. Kim and Michelle were tied with their hands behind their backs by Anthony Farina (T 120). Gary was shot first in the chest by Jeffrey Farina (T 123). Anthony Farina was grinning (T 124). Jeffrey tried to bang the knife into the back of Kim's head with his hands. Derek was not sure but he thought Anthony Farina was holding Kim's head down (T 128). Blood poured all over the floor (T 128). The knife was then shoved into her back (T 129).

Derek played dead until the Farinas left (T 129). Gary went to the manager's office to phone for help. When Derek walked in Gary thought it was the Farinas and hung up the phone. Derek locked the door and propped a chair against it. Gary called 911 (T 131). "Tony" or Anthony Farina had been in the store earlier that evening (T 135). Derek was surprised to see Tony again at the time of the robbery. Tony's nickname was "Crazy" (T 135).

Derek made an in-court identification of Anthony Farina (T 137). Anthony's hair is black (T 136). On May 9, 1992, he looked different. His hair was not cut (T 137). Derek also identified Jeffrey Farina as the man with the gun who had plunged the knife into Kim's back (T 138). At the time of the robbery Jeffrey had his hair in a pony tail (T 139).

The bullet which was lodged between the muscle and the jaw bone was removed from Derek's jaw. He was in the hospital for three days. His jaw was wired shut for six and a half weeks (T 140). He will be scarred for the rest of his life unless he has plastic surgery (T 141).

Derek further testified that while in Taco Bell the Farinas were very calm and knew exactly what to do. Anthony Farina seemed to be in control (T 141). The Farinas did not appear intoxicated or on drugs (T 142).

Patty Gately worked at Taco Bell the evening of the robbery. She testified that at approximately twenty minutes before twelve Anthony Farina came into the store and spoke with Michelle (T 159). He asked if Doug Shockley, the assistant manager was there. Michelle responded "no." He then asked who was there (T 160). Michelle told him herself, Kim, Derek and Gary. Farina left. Patty made an in-court identification of Anthony Farina (T 161). She left Taco Bell at 1:20 a.m. that morning and did not help close up (T 164).

Carmine Wolstenholme worked at Taco Bell stores. She knew Anthony Farina (T 167). Anthony did not like Derek and was always mean to him (T 168). Derek complained. He was afraid of Farina (T 168). Carmine learned of the robbery (T 169). She began to track down Anthony Farina. Her sister's boyfriend was the Holly Hill Taco Bell manager. He indicated he knew where Farina might be. Carmine called 911, then drove down to a hotel to get a license number from Farina's car. It was not there. She stopped at a Shell station to call the manager back (T 171). Her sister then saw Anthony Farina pumping gas. She called 911 and the police came (T 1720.

A cylinder pin was found laying partially in a large pool of blood on the threshold of the freezer doorway (T 183). Without the cylinder pin the firing pin would not hit a bullet.

The cylinder in a revolver would be misaligned (T 185). A rubber glove was found inside the cooler door (T 184). The cash drawers had originally been in the safe but were placed on the counter in the manager's office during the robbery (T 187).

Two spent casings and six live rounds were found in a trash container behind Rollie's Court Motel in Holly Hill (T 188-89). The casings and unspent bullets were .32 caliber (T 191). The bullets had not been fired but there were little markings on the back where the firing pin would hit (T 192). Consent to search the apartment the Farinas shared with their mother at the motel was given by Jeffrey Farina (T 220). Jeffrey Farina was registered as "Buddy Chapman," his mother as "Susan Brant." (T 195; 199). A blue and white Walgreen's bag containing $782.00 was found under the center cushion of the couch in the living room (T 194; 208). A bag with the Taco Bell logo was found on the shelf in the bedroom and contained $83.00 in rolled coins (T 195).

Inside the Farinas' car police found a purse containing $200.00 with ID in the name of Tammy Renwick; a purse containing $220.00 with ID in the name of Susan Brant and a checkbook containing $400.00 in the name of Buddy Chapman (T 198). A K-Mart receipt was in the checkbook dated May 8, 1992, reflecting that "Buddy Chapman" had purchased clothesline and vinyl gloves at 12:41 p.m. that day (T 201). .32 caliber bullets had also been purchased (T 212-214). The total from Tammy Renwick's purse, Susan Brant's purse, the money seized at the motel and the money in the checkbook totalled $1,875.00 (T 202-203).

A pink shirt torn across the back, two pairs of shorts and a black bike week hat were also recovered at the motel and matched the victims' descriptions of clothing worn by the assailants (T 205).

Anthony Farina's fingerprints were found on the Taco Bell bag (T 243). Anthony had told Crime Analyst Kelly May that he had worn two pairs of rubber gloves and had taken them off, without thinking, prior to leaving and had touched the door lock on the exit door (T 241). Both Farina brothers' fingerprints were found on the K-Mart receipt (T 244-45).

A forensic pathologist who had performed an autopsy on Michelle Van Ness testified that she died May 10, 1992, at 2:48 p.m. from a gunshot wound to the head (T 271). The bullet was recovered (T 290). There were bruises on both of her wrists consistent with her having the rope or binding (T 276).

$174.00 was removed from Anthony Farina's wallet (T 280). Jeffrey Farina had his photo on a Florida identification card with the name "Chapman" (T 281-82). A box of .32 caliber cartridges were obtained from Tammy Renwick, who was Anthony Farina's girlfriend. She lived in the apartment with the Farinas (T 283-84). They had been purchased at the Volusia Avenue K-Mart with a $15.87 check signed by Buddy Chapman (T 286-87).

The murder weapon was traced from a pick up at Park's Seafood to the dump. The dump was searched but the gun was never found (T 304). Jeffrey Farina had told authorities they may find the gun at a dumpster outside of Park's (T 311). The Farinas were employed at Park's (T 312).

Bullets recovered from Derek and Michelle were determined to have been .32 auto caliber (T 316). The bullets could have been fired from a group of inexpensive revolvers known as "Saturday night specials" (T 317). Both bullets were fired from the same gun (T 318). The two cartridges and six live rounds recovered from the trash could have come from the box of Winchester .32 auto shells (T 319-320).

When Michelle died the charges against the Farinas were amended. On May 11, 1992, they were brought back to Daytona Beach for booking and processing. Detective Sylvester overheard conversations between the Farinas, in the company of John Henderson, in the back of the police car (T 291). The conversations were taped (T 292). At a time when the Farinas were in the car by themselves Detective Sylvester overheard Jeffrey Farina state he had previously spoken to another individual about why he shot the victims and had told the person "I had a boring day." Anthony Farina told him "just don't talk about your case too much with too many people." (T 297). Jeffrey told Anthony he had told the psychiatrist the truth, "I felt nothing." (T 297). Jeffrey indicated that he thought Kim rather than Michelle would die. Anthony responded that he wasn't too sure because the knife didn't go in Kim that far (T 297). The tape was played for the jury (T 303). Anthony remarked that the kid who had been shot in the face had been released. Jeffrey tried to recall who he had shot in the face. He stated "I remember shooting the one guy in the chest and the guy and Michelle in the head and I don't remember how many times I shot

the other guy." Anthony remarked that two guys untied themselves. He was going to cut the phone line but didn't. Jeffrey stated he wasn't sure how to tie them up. He didn't want to tie them too tightly. He lamented that they should have put stockings or something on but there was nothing they could do about it now. Anthony stated "should have made a little more fucking ... so no one got away. Instead of stabbing them in the back should have sliced their fucking throats and then put something in front of the freezer door so they couldn't open them... cut the phone lines..." Jeffrey replied that they were in a hurry to get out of there (T 301-303 S. Ex 58). Jeffrey referred to Sylvester as the bitch with the gun in the holding cell (T 303). Anthony Farina stated he put bullets in a trash canister and they were retrieved (T 305-306). Both Farinas discussed telling Kelly May they were wearing gloves during the robbery (T 307).

Gary was working as a graphic artist at two print shops and took a third job at Taco Bell to get through school at D.B.C.C. (T 328-29). He had only been there for three days when the incident happened (T 329). He arrived at Taco Bell around 8:30 (T 330). He was doing the dishes at closing time (T 331). Gary testified that the weapons were being displayed in a threatening manner. Jeffrey Farina had the gun pointed at Derek's back. Anthony Farina had the knife in his hand (T 333). They were ordered to the back of the store. They sat in front of the cooler. Anthony asked Kim to open the safe. Jeffrey held the gun on them. Anthony and Kim returned. Anthony took money out

of bags (T 334). He offered everyone a cigarette. He then asked someone who was not smoking to come with him. Derek went. Then Gary went. His hands were tied behind his back by Jeffrey, who then had the knife. Anthony Farina had the gun and was watching the others on the floor (T 336). Anthony asked Gary how long he had been there. Gary responded "three days." Anthony said "Well, yeah, I haven't seen you here before." (T 335-36). Michelle was tied up next, then Kim. Gary thought Anthony tied them and Jeffrey had the gun (T 336). Michelle cried. She thought they were going to kill them (T 337). Derek said Anthony told him no one would be hurt as long as they did what they said. Anthony ordered them into the cooler. Kim asked Anthony to shut the cooling off. He walked outside the cooler with Jeffrey. He said he could not turn off the cooling unit. He was afraid it would sound an alarm. Anthony asked them to step back into the freezer (T 338). The freezer had a heavy, insulated door that would conceal the sounds of screams and gunshots (T 345). It also could not be seen through the windows (T 346). As Gary was sitting on the floor, he looked up and saw Jeffrey Farina holding a gun on him. Jeffrey shot him in the chest (T 338). When the shot went off Jeffrey had a grimace, or look of disgust on his face. Anthony stood behind him. Gary felt something but did not see a bullet hole. He thought they might be firing blanks to scare them. When Jeffrey shot Derek in the face Gary saw blood and knew that he, himself, had actually been shot. He also saw a hole in his shirt (T 339). Jeffrey pointed the gun in Michelle's direction. Gary saw her drop (T 339). Anthony Farina stood

behind Jeffrey, armed with the knife. Jeffrey then pointed the gun at Kim's head. He tried to fire it twice but it didn't go off (T 340). Kim said "no, please don't kill me" when he pointed the gun at her head (T 341). Jeffrey turned to Anthony. Anthony handed him the knife. Jeffrey Farina put the knife in her back and pounded the top with his hand (T 340). Kim convulsed and spat up blood (T 341). There was a lot of yelling and crying (T 341). Jeffrey pulled the knife out and left. Gary untied himself and called 911 (T 342). He was in intensive care for seven days (T 343). He recuperated for ten weeks (T 344). The bullet is still in his left lung. He has diminished capacity in that lung (T 344). When Anthony ordered them into the cooler it wasn't as if he was trying to be nice about it (T 347). Gary thought the incident took a half hour to forty-five minutes (T 348). They were in the cooler two to three minutes before they were asked to step into the freezer. They were in the freezer five to ten minutes before the Farinas left. When Kim was standing in front of the fire door Jeffrey told her to get away from it (T 349). Anthony Farina had a burning heart tattoo on his right shoulder. When Anthony told them to get in the cooler Gary felt like he had no choice. Gary calmed down when Derek told him Anthony had said no one would be hurt if they cooperated (T 350). When Anthony first indicated he would turn the cooler down Gary felt that everything would be okay. It was Anthony Farina who ordered them into the freezer (T 351). Anthony did not shoot or stab anyone or say "shoot them." Anthony did hand Jeffrey the knife before the stabbing. Gary did not see Anthony

assist Jeffrey in the actual stabbing of Kim Gordon (T 353). Anthony didn't do anything, however, to stop his brother from killing. He just stood there (T 355). Gary was scared. He didn't try to resist or get up and run while the killing was going on because Anthony Farina was standing there with the knife (T 3550. Gary had seen Jeffrey Farina in the restaurant earlier that night (T 355).

Kimberly Gordon was eighteen years old on May 8, 1992 (T 359). She was the shift manager. She had a cold that day and would rather have stayed home (T 360). She saw Anthony Farina earlier in the evening when the business was still open (T 362). It closed at one that morning, May 9th (T 363). Including the money in the safe, cash drawers, and additional cash on hand, there was $2,158.00 at Taco Bell that night (T 365). The doors were locked. Gary was doing dishes. Derek and Michelle were cleaning the stoves and sweeping the floor. She was doing paperwork (T 366). Michelle and Patty had switched. Patty was supposed to be working late. Michelle wanted Saturday off (T 367). Kim walked to the front. She heard her name. She saw the Farinas with Michelle and Derek. She knew Anthony Farina from the Holly Hill store (T 368). Anthony had the knife. Jeffrey had the gun (T 369). Anthony told them to go to the back. Anthony said "Kim, I know you have the keys." They walked up front. The beeper in the safe was going off. Anthony asked if there was money in there. She told him "no." He ordered her to show him. There was no money in the vault. She took one drawer and he took the rest of them back (T 370). Anthony had the

knife. They went in the office. He told her to put all the money in a plastic bag, then he helped do it. She asked if she could have a cigarette. He told her to ask the others if they wanted one too. She and Michelle were smoked cigarettes (T 371). Anthony told someone without a cigarette to come with him. Anthony Farina appeared to be the leader or in charge. Jeffrey stood by the back door, holding the gun on everyone (T 372). She didn't try to escape because she didn't want to get hurt. They tied each of them up, one by one (T 372). Jeffrey tied Derek, then Michelle, Kim with their hands behind their backs (T 373). Anthony asked her if she wanted a second cigarette. He took it out of her pocket and tried to light it with matches but it wouldn't light. Jeffrey Farina handed him a lighter then he lit it (T 374). They both had plastic gloves on their hands. Neither one of them had a mask or disguise (T 375). Anthony Farina told everyone to get in the cooler. He asked her how to turn it off. She told him the only way she knew of was the emergency button. Anthony indicated he did not want to hit that because an alarm might go off (T 376-77). The alarm would not have gone off if the thermostat was shut off. The alarm system was on the back door (T 389). Derek asked if they were going to hurt them. Anthony kept saying "not as long as you cooperate." Michelle was crying as she walked in the door (T 376-77). The Farinas could have taken the money in the front and left (T 379). After they were in the cooler Anthony walked out. He returned then said "We have one more precaution, everybody in the freezer." They went into the freezer, turned around, and the

shooting began. The shooting was done by Jeffrey Farina. Gary was shot first in the chest, then Derek, then Michelle. She turned around and shielded herself because she knew she was next (T 380). She felt her head being forced down. She felt something at her head like a knife. She heard grinding noises. Then she felt the knife driving into her back. Blood came out of her mouth. She thought she was going to die. Her legs shook but she couldn't feel them (T 381). Blood kept coming out. She passed out. Her next conscious memory was four days later. She woke up in the intensive care unit. She was in the hospital for nine days (T 382). She recuperated at home three or four months. She is not working now. She is attending DBCC (T 383). She still suffers pain in the scar in her back where they went inside (T 383-384). While they were in the cooler everybody said that they didn't want to die: "Please don't murder us, Please don't kill us." (T 384). She didn't hear Anthony say anything to encourage Jeffrey to shoot them (T 386). The fact that Anthony said he would turn the cooler off didn't indicate to her that he was concerned with their well-being. They again asked him later to turn it off. She didn't notice if Anthony was holding the knife on anyone or sticking the gun on anyone because she was worried about everyone and wasn't paying attention (T 387). She never heard Jeffrey Farina say anything (T 389). At one point she was near the back door and Anthony told her to get away from the alarm (T 389). The Farinas could have shot and stabbed them anywhere in the store. You can't hear anything behind the cooler door and it would hide gunshots or screams (T 390).

John Henderson was also indicted for first degree murder, three counts of attempted first degree murder, armed robbery with a deadly weapon, burglary of an occupied structure, battery, four counts of kidnapping and conspiracy to commit robbery and/or armed robbery. He took the stand on behalf of the defense (T 405-06). He lived at Rollie's with the Farinas (T 404). Prior to going to Taco Bell on May 9, 1992, he smoked crack cocaine at work, after he got home, and on the way to Taco Bell with Anthony Farina (T 407-09). At the time the Farinas went in he was still high from it (T 409). Anthony drove the car from Rollie's (T 410). He had to make turns to get there (T 411). They parked in front of Taco Bell and Anthony went in and acted as though he was going to buy tacos and use the bathroom, then walked out. He knew the Farina brothers were going to rob the place (T 412). Anthony asked him if he wanted to come along (T 413). Anthony told him when the lights went out outside to start the car. He started it (T 414). Henderson had been at his place of work with Anthony and Jeffrey Farina. He overheard a conversation between them that they were going to rob Taco Bell (T 415). They stopped talking. He shared a small amount of crack with Anthony at work (T 416). If you smoke a small amount the high will last from fifteen minutes to a half hour. Henderson only had $40.00 to $60.00 worth of crack (T 419). After Henderson left work at 11:30 p.m. he rode his bike to Rollie's Motel (T 419). He and Anthony smoked crack there. Anthony asked him if he wanted to go for a ride. When he said no, Anthony told him he was going to rob Taco Bell (T 420). When Anthony came back out of Taco Bell

he drove to Walgreens (T 423-24). It was about one o'clock (T 424). The clerk cashed a personal check for Jeffrey. Anthony was aware enough to buy a Mother's Day card for his mother for the next day May 10th (T 423). Anthony turned the car around, parked it by Taco Bell and sat there (T 427). Someone came out. Anthony drove up the road and came back. He turned his lights off and cruised up behind Taco Bell (T 428). Henderson thought the gun was in the bag Jeffrey loaded in the car (T 429). He saw Jeffrey with the gun but he didn't see Anthony with the knife (T 430). The Farinas discussed how they would get someone to let them in. Jeffrey told Anthony he could ask to use the bathroom. Jeffrey said he could cut himself above the eye and act like there was an accident. Anthony didn't think it would work (T 431). They all ducked down in the seats. Two victims walked out to take the trash out (T 432). Anthony asked if he wanted to do it now and Jeffrey was out the door (T 433). Henderson remained ducked down in the seat and did not see them go up to the two victims or enter the store (T 434). He stayed in the car ten to fifteen minutes (T 435). He heard a shot and a scream inside Taco Bell (T 436). It was loud and sounded like a young girl's scream (T 437). Henderson never tried to talk the Farinas out of the robbery (T 438). The Farinas came out and jumped in the car. Henderson asked Jeffrey what happened. Jeffrey said "shut the fuck up." Anthony drove. Jeffrey indicated he had lost the pin to his gun but Anthony was not going to go back and get it (T 439). They put gloves on before they went into Taco Bell (T 441). They got rid of the gun, gloves and rope at Park's Seafood

Restaurant (T 442). Jeffrey threw them in the dumpster (T 443). The Farinas took the money in the bedroom and counted it out. Anthony told his mother they were at a party, a fight started, someone pulled a gun, they grabbed the money and took off (T 442). Jeffrey did not smoke cocaine with them (T 447).

Carmine Wolstenholme testified she had seen Anthony Farina under the influence of narcotics two or three times (T 454). The narcotic was only marijuana, not crack. Farina worked regularly (T 455). He was capable of earning an honest living (T 456).

Vicky Pena went to Taco Bell around 11:30 p.m. on May 8, 1992 (T 457). She saw Jeffrey Farina come into Taco Bell (T 463-64).

Penalty Phase

Dr. Sun Park examined Jeffrey Farina at age eleven. His mother claimed he had seizure problems after a car accident (T 703). In the daytime he would be unresponsive and his head would jerk to the side. At night he had chronic seizures where his upper and lower extremities jerked. He was put on phenobarbital. It controlled the daytime seizures but not the nightly seizures (T 705). He was referred to a neurologist, Dr. James Bale (T 706). Jeffrey's mother was concerned enough to bring Jeffrey in for treatment (T 708). There was no evidence of physical abuse during the exam (T 714). Jeffrey was acceptably dressed. He was quiet and receptive to being examined. There is no correlation from a medical standpoint between epilepsy and robbing and intentionally murdering someone (T 710). Even a person with low self-esteem does not necessarily rob and murder other people (T 710).

Anthony Farina, Sr., never abused Anthony's mother when the child was in the same room (T 717). Susan Brant, Jeffrey's mother, further testified that she did not abuse her sons. She tried to do what she could within her limited means to take care of them (T 734). When Anthony's father hit him with a crutch she ended the relationship (T 735). She was not an alcoholic. She did not consider herself a neglectful mother (T 736). She did the best she could for them. Times weren't always easy. When the robbery occurred she had money from a social security check. Anthony and Jeffrey didn't have to rob anyone (T 737-38). There was food, a roof over their heads, and they had jobs (T 738). Anthony was not a crack addict that she knew of. He went to work and came home most of the time (T 738). She denied ever sexually abusing Anthony and said he had admitted he had lied. Anthony was not sexually abused in her household (T 739). Jim Brant has not been near Anthony for five years. He left when Anthony was thirteen. Anthony acted like an adult, got a job, and fathered two children. Anthony admitted to her that he had gone there to rob Taco Bell (T 740). Jeffrey admitted there were to be no witnesses when he shot and killed Michelle Van Ness. She fell at his feet in the freezer (T 741). Jeffrey's last seizure was six years ago when he was ten years old. Dr. Park took him off medication (T 742). Jeffrey was such a good student they talked about advancing him two grades. He got bored with school and was suspended. He was mature for his age (T 743). He didn't exhibit a chronic drinking problem (T 743). He was generally sober and hard working. He learned how to control his temper. He was not explosive or violent (T 744).

Anthony was removed from the Brant household as a result of physical abuse in a June 23, 1987, incident (T 781). There was no indication Jeffrey was being beaten. There was another incident on July 15, 1987. There was another report of abuse. Then the parents alleged sexual improprieties on the part of Anthony. Jeffrey Farina said that he was not being beaten with a belt, although Anthony and the little sister said that he was (T 782). Jeffrey said he wasn't being beaten by Mr. Brant (T 783).

Dr. Harry Krop, a clinical psychologist testified that Jeffrey Farina is an intelligent individual, possibly in the above average range of intellectual ability (T 856). He has no major thought disorder, mental illness or psychiatric disturbance (T 857). When he was five years old he was hit by a car and suffered a brain injury (T 857). He started exhibiting seizures but they were controlled with medication until he was eleven or twelve years old, then he started showing signs of seizures again for a three month period. He was taken to the doctor (T 858). He has not exhibited any more seizures. His mother reported that after the brain injury he started having temper outbursts but not all the time. He was generally mild mannered and sensitive (T 859). Through therapy he learned to deal with and control those urges (T 860). Jeffrey drank when he was going to school and left school prematurely. There is no indication he was drinking the night of the offense (T 866). Dr. Krop diagnosed Jeffrey as having an intermittent explosive disorder (T 869). He received his GED while in jail (T 873). On the night of the tragedy he panicked (T 874). Dr. Krop admitted on cross-examination that he

testifies a lot more for the defense than the state (T 876). The murder was premeditated (T 878). The robbery had been talked about and planned for a couple of weeks. The Farinas discussed it extensively the day of the robbery/murder (T 879). They discussed what would happen if someone tried to come at them or attack them. Dr. Krop reviewed the tapes of the conversation between Jeffrey and Anthony in the back seat of the police car (T 880). Jeffrey referenced his earlier statement to the police and indicated he told her exactly what had happened inside -- they got the cash, Anthony called him into the office as the victims were in the cooler and said "what do you want to do? It's your call from here. It's your show." Jeffrey thought for a moment, then said "I'm going to shoot them." Anthony asked "When?" Jeffrey replied "You tell them to get in the freezer." Anthony told them to get in the freezer and Jeffrey shot them. Dr. Krop admitted that did not sound like a panic situation (T 881). The robbery was economically driven. There is nothing to indicate the victim provoked Jeffrey's anger or the killing. They had discussed cutting the phone lines but they were mainly concerned about getting caught (T 882). The killing was not the result of any kind of organic brain disorder (T 883). He wasn't suffering any kind of seizure, drinking, or taking drugs at the time (T 884). Jeffrey had no diagnosable personality disorder, was sane and competent, knew right from wrong and understood the consequences of his actions (T 864). He also stated in the car that he would probably do the same thing over again (T 885). The decision to rob Taco Bell could have been made because Anthony

used to work there, knew the set up, the people, and how to get into the safe. They cased the joint and found out only the young women and two younger boys would be there that night. It looked like easy pickings. There was no attempt to conceal Anthony's identify even though there was a possibility some of the workers would likely identify him (T 890).

While Jeffrey worked at Park's Seafood Restaurant he never displayed a drinking or drug problem, was easy going and never had any explosive episodes where he was out of control (T 911). Jeffrey had a fake ID card under the name "Buddy Chapman" and the people at Park's knew him as "Buddy" (T 906). He got along with his co-workers (T 914). Stephanie Carter indicated Jeffrey had expressed remorse for the offenses (T 916). He freely admitted the robbery/murder (T 923). Jeffrey worked a full week and was able to make a living (T 917).

Dr. Umesh Mhatre determined that Jeffrey Farina was sane, knew right from wrong at the time of the offenses and was competent to stand trial (T 946). There was no correlation between the abuse of Jeffrey as a child and the robbery/murder. Jeffrey was not acting under any emotional disturbance or under extreme duress. He knew the difference between right and wrong. There was no history of a substantial head injury resulting in unconsciousness. His head injury would have nothing to do with his acts at the time of the offenses. Nothing impaired his ability to act rationally (T 949). He was hoping to receive a benefit from his action (T 950). He was not acting out of panic (T 949).

SUMMARY OF ARGUMENT

I. There is neither a historical nor a modern societal consensus forbidding the imposition of the death penalty on minors older than fifteen who commit murder and the imposition of the death penalty on a person who was sixteen years old at the time of the murder was upheld in *Stanford v. Kentucky,* 492 U.S. 361 (1989). The Florida Legislature has specifically mandated that when an indictment is returned against a child for a violation punishable by death or life imprisonment the child shall be tried as an adult. The audience for arguments on the wisdom or morality of such is not this court but the citizenry whose lives are increasingly endangered by the proliferation of serious and just as deadly juvenile crime.

II. The HAC aggravating factor was proven beyond a reasonable doubt. The victim suffered mental anguish not only contemplating her own possible fate but then witnessing the botched executions of her co-workers before the gun was turned on her. The CCP aggravator was properly applied. The Farinas planned a robbery, which plan included a plan to murder the victims. The motive for the killing was witness elimination. The contemporaneous conviction of a violent felony properly qualifies as an aggravating circumstance.

III. The weight of the statutory mitigating factor of age was properly diminished by evidence of maturity. Jeffrey Farina functioned in all respects as an adult. He could have obtained money by continued employment. The trial court expressly found the mitigating factor of no significant history of prior criminal

activity. Little weight was properly assigned to the history of abuse as a child where the defendant's actions in committing the murder were not significantly influenced by his childhood. The potential for rehabilitation was properly assigned little weight when Farina had the same opportunities in the past but did not avail himself of them. Evidence of remorse was contradicted by appellant's statement he would probably do the same thing again and his discussion with his brother in which they cavalierly discussed the victims. The death penalty was proportionate.

IV. The jurors in this case could lay aside impressions gained from publicity and render a verdict based on the evidence. Appellant has failed to make a sufficient showing that the jurors who tried the case were actually biased or prejudiced against the defendant. The veniremen asserted their ability to be impartial despite having been exposed to pretrial publicity. Jurors were properly stricken whose views on the death penalty would prevent or impair the performance of their duties as jurors.

V. Appellant has not shown prejudice of a constitutional magnitude by the placement of a camera five or six feet from the jury which was separated from the victims' families.

VI. The state attorney did not hand-pick the judge who ultimately presided over the case. Appellant received a fair trial.

VII. Appellant has waived the right to complain of prosecutorial misconduct. The conduct of the prosecutor would not have led the jury to base its verdict on considerations beyond the evidence or caused the jury to render a more severe sentencing recommendation.

VIII. The jury was properly instructed in the penalty phase based on standard jury instructions. The standard instructions concerning the role of the jury are constitutional. The HAC instruction contained language approved in *Proffitt v. Florida,* 428 US. 242 (1976). The CCP instruction is not unconstitutionally vague.

IX. Florida's death penalty statutes are constitutional on their face and as applied. There is no burden shifted to the defendant. Notice of aggravating factors is not required.

X. The state should have been allowed to present victim impact evidence pursuant to *Hodges v. State,* 595 So. 2d 929 (Fla. 1992), and *Payne v. Tennessee,* 111 S.Ct. 2597 (1991) and section 921.141(7), Florida Statutes.

XI. The lower court erred in precluding the state from conducting a single trial of appellant and his codefendants where their statements were consistent and interlocking and references to each other could have been redacted.

XII. The trial court erred in granting a judgment of acquittal as to the kidnapping offenses where the victims were moved to a location where it was easier to control and kill them and where detection was less likely.

I THE UNITED STATES AND THE FLORIDA CONSTITUTIONS ARE NOT VIOLATED BY EXECUTION OF A SIXTEEN-YEAR-OLD MURDERER.

Although the Eighth Amendment's ban on cruel and unusual punishment does not prohibit capital punishment, it does prohibit death sentences that are disproportionate for certain crimes or individuals. *Gregg v. Georgia,* 428 U.S. 153, 187 (1976) (plurality opinion); *Thompson v. Oklahoma,* 487 U.S. 815, 834 (1988) (plurality opinion). To determine whether a particular sentence is excessive, traditionally the United States Supreme Court examines society's views of the challenged punishment as expressed by objective evidence of community values, including legislative judgments, sentences imposed by juries, public opinion, and international practices. *See, Stanford v. Kentucky,* 492 U.S. 361, 370-373 (1989); *Gregg v. Georgia,* 428 U.S. 153, 181 (1976) (plurality opinion); *Thompson v. Oklahoma,* 487 U.S. 815, 830-831 nn.31-34 (1988). By linking interpretation of the Eighth Amendment to this evidence, the Court seeks to give effect to "the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia,* 428 U.S. at 173 (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)). The Court has stressed that legislative judgments are "the clearest and most reliable objective evidence" of community values. *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989). Four justices have discounted the value of any indicia of community values other than legislative judgments and jury sentencing. *See, Stanford,* 492 U.S. at 377 (plurality opinion) ("A revised national consensus so

broad, so clear and so enduring as to justify a permanent prohibition on all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.") The baseline for discussion of "evolving standards of decency" has often been common-law views of the challenged punishment. *See, Stanford v. Kentucky,* 492 U.S. 361, 368 (1989).

The death penalty may be disproportionate when applied to certain classes of individuals, regardless of the nature of their crimes. In *Thompson v. Oklahoma,* 487 U.S. 815 (1988), the Supreme Court held that the imposition of the death penalty on a defendant who was fifteen years old at the time he committed the murder violated the Eighth Amendment. *Id.* at 838. In *Thompson,* a plurality of four justices would have invalidated the death penalty for crimes committed by offenders under age sixteen by finding such punishment offensive to civilized standards of decency. *Id.* at 821-23. The plurality rejected the view that death penalty statutes that include no minimum age for execution imply that "current standards of decency would still tolerate the execution of ten-year-old children." *Id.* at 826-29. In support of its finding of a national consensus against such executions, the plurality noted the extreme infrequency with which death sentences are actually imposed on those under sixteen and the even rarer frequency with which execution actually occurs. *Id.* at 832-33. The Court ultimately concluded that the penological goals of retribution and deterrence were not advanced by such a penalty. *Id.* at 836-38. Justice O'Connor, who concurred in the

judgment, concluded that because Thompson's death sentence may have resulted from the inadvertent interaction of two Oklahoma statutes, one authorizing capital punishment without setting any minimum age for death-eligibility and the other providing that in some cases a fifteen-year old may be tried as an adult, the death sentence lacked the "careful consideration that we have required for other kinds of decisions leading to the death penalty. *Id.* at 857. (O'Connor, J., concurring in judgment). Justice O'Connor did not agree with the plurality that a national consensus against such executions had been proved by the facts of the case. *Id.* In the present case, the death penalty is not sought to be imposed upon a defendant who was fifteen years old at the time he committed the murder.

In *Stanford v. Kentucky,* 492 U.S. 361 (1989), the Court upheld the imposition of the death penalty on a person who was sixteen years old at the time of the murder. *Id.* at 380 (plurality opinion); *id.* at 381 (O'Connor, J., concurring in part and concurring in judgment). Finding "neither a historical nor a modern societal consensus forbidding the imposition" of the death penalty on minors older than fifteen who commit the murder, the Court held that the punishment did not violate the Eighth Amendment. *Id.* at 380 (plurality opinion); *id.* at 381 (O'Connor, J., concurring in part and concurring in judgment). A plurality of four Justices, joined by Justice O'Connor, aggregated the nineteen states that set no minimum age in their death penalty statutes with the three states that expressly permitted the execution of sixteen year olds and the one state that implicitly

allowed the practice to find that a majority of states that permitted capital punishment authorized the execution of sixteen year olds. *Id.* at 370 (majority opinion); *id.* at 381-82 (O'Connor, J.). These five Justices also found that the infrequency with which the death penalty was sought for and imposed on minors could be explained by the small number of capital crimes committed by minors, as well as jury consideration of age as a mitigating factor. *Id.* at 373-74 (majority opinion); *id.* at 381-82 (O'Connor, J. concurring). The fact that the majority of states permitted capital punishment for sixteen year olds was sufficient to show the absence of a national consensus against the practice. 492 U.S. at 370-73. In *Stanford,* the Court also reviewed the common-law treatment of juvenile offenders to find the execution of sixteen and seventeen year old offenders constitutional. 492 U.S. at 368. In a departure from settled Eighth Amendment jurisprudence, a plurality of four Justices in *Stanford,* expressed a willingness to limit the proportionality inquiry to the question of how society views the challenged punishment. 492 U.S. at 377-80. The plurality rejected the contention that "socioscientific" evidence proffered by *amici* on the psychological and emotional development of sixteen and seventeen year olds was relevant to the Court's consideration of the death penalty as applied to juveniles: "The audience for these arguments... is not this Court but the citizenry of the United States." *Id.* at 378. The plurality also refused to consider age-based statutory classifications in other areas of the law as relevant to the appropriateness of imposing the death penalty. *Id.* at 376-77.

The four dissenters, together with Justice O'Connor, rejected this analysis. *See, Id.* at 382 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 392-93) (Brennan, J., with Marshall, Blackmum and Stevens, J.J., dissenting). It is clear that there is no Eighth Amendment proscription against executing sixteen year old adults.

Virtually the same reasoning would apply in rejecting the notion that the execution of a sixteen year old offends Article I, Section 17 of the Florida Constitution. The Florida Legislature has not simply provided that juveniles can be processed through the adult system and treated as adults in some circumstances. It has specifically mandated that when an indictment is returned against a child of any age for violation of Florida law punishable by death or life imprisonment, the child shall be tried and handled in every respect as if he were an adult on the offense punishable by death or by life imprisonment. §39.022(5)(c), Fla. Stat. (1991). The Florida Legislature has further mandated that "if the child is found to have committed the offense punishable by death or life imprisonment, the child shall be sentenced as an adult." §39.022(5)(c)(3). Legislative action through approximately the last forty years has consistently evolved toward treating juveniles charged with serious offenses as if they were adult criminal defendants. *See, LeCroy v. State*, 533 So. 2d 750, 757 (Fla. 1988). For purposes of §39.022(5)(c)(1), a "child" means any unmarried person under the age of eighteen alleged to be dependant, in need of services, or from a family in need of

services, or any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of eighteen years. §39.01(7)(a), Fla. Stat. (1991). It is clear that the Legislature did not intend to draw an arbitrary bright line between those who are eighteen years of age and those, such as here, who are sixteen years of age. *See, LeCroy, supra,* 533 So. 2d at 758. Instead, the Florida Legislature, in its wisdom, decided that age should be a statutory mitigating factor. §921.141(6)(g), Fla. Stat. (1993). Thus, the Legislature intended that youth in its potential characteristics be considered as a factor by the jury and the sentencing judge in determining whether a youthful defendant should be subject to the death penalty. *LeCroy, supra,* 533 So. 2d at 758. It should be remembered that legislative judgments are the clearest and most reliable objective evidence of community values. There is no common-law proscription against executing juvenile offenders sixteen years of age. *Stanford, supra,* 492 U.S. at 368. A bright line in favor of execution has been drawn by the *Stanford* court at the age of sixteen. It must be assumed that the *Stanford* decision embodies "the earmarks of careful consideration that have been required for other kinds of decisions leading to the death penalty." *Thompson, supra,* 108 S.Ct. at 2711. This court has ensured evenhanded application of §921.141(6)(g), Fla. Stat. (1991), by mandating that whenever a murder is committed by one who at the time was a minor the mitigating factor of age must be found and weighed, although the weight can be diminished by other evidence showing unusual

maturity, and the assignment of such weight falls within the trial court's discretion. *Ellis v. State,* 622 So. 2d 991 (Fla. 1993). The cases cited by appellant for the proposition that Florida seldom imposes or upholds the death penalty on minors indicate only that minors convicted of first-degree murder tend to exhibit immaturity or mitigating characteristics which persuade juries, sentencing judges, and ultimately this court, that the death penalty is inappropriate in their specific cases. *See, Echols v. State,* 484 So. 2d 568, 575 (Fla. 1985); *LeCroy v. State,* 533 So. 2d 750, 757 (Fla. 1988). The cases also involve procedural error. *Hegwood v. State,* 575 So. 2d 170 (Fla. 1990), involved a jury override when there was a basis for the jury to believe Hegwood was mentally or emotionally deficient. Farina, on the other hand, had been a good student and was not so emotionally deficient that he could not hold a job. The cases also cited by appellant lack the aggravation and cold, deliberateness of the present murder, which can hardly be excused on account of age. As Justice Scalia noted in his dissent in *Thompson*:

> It is surely constitutional for a state to believe that the degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater than the degree necessary to fully appreciate the pros and cons of brutally killing a human being.

487 U.S. at 871 n.5. Appellant's cases also reflect that juries have not been reluctant to impose the death penalty upon juveniles. *See, Simpson v. State,* 418 So. 2d 984 (Fla. 1982); *Livingston v. State,* 565 So. 2d 1288, 1292 (Fla. 1990); *LeCroy v. State,*

533 So. 2d 750 (Fla. 1988); *Ellis v. State,* 622 So. 2d 991 (Fla. 1993); *Bonifay v. State,* 18 Fla. L. Weekly 464 (Fla. Sept. 2, 1993). Contrary to appellant's assertion sentences imposed by juries have been considered a significant and reliable objective index of contemporary values. *Gregg v. Georgia,* 428 U.S. 153, 181 (1976) (plurality opinion). In the context of sixteen year old killers, James Morgan has been sentenced to death three times for his crime. *Morgan v. State,* 392 So. 2d 1315 (Fla. 1981); *Morgan v. State,* 453 So. 2d 394 (Fla. 1981); *Morgan v. State,* 537 So. 2d 973 (Fla. 1981). In neither the case of James Morgan nor Henry Brown, did this court indicate that a death sentence for a sixteen year old would be improper. *See also, Brown v. State,* 367 So. 2d 618 (Fla. 1979). Simply because a sixteen year old has not recently been executed in the State of Florida does not mean as appellant seems to suggest that such execution would be "unusual." The common-law treatment of juvenile offenders favors execution of sixteen year olds. *Stanford,* 492 U.S. at 368. A majority of states authorize the execution of sixteen year olds. *Id.* at 370 (majority opinion). That executions have been delayed due to intractable and interminable litigation hardly indicates that such punishment is unusual. As far as the unusual nature of such punishment is concerned, five justices found that the infrequency with which the death penalty was sought for and imposed on minors could be explained by the small number of capital crimes committed by minors, as well as jury consideration of age as a mitigating factor. *Stanford, supra,* at 373-74. Appellant's argument as to the lack of justification offered for capital punishment of

juveniles was considered in the context of fifteen year olds in *Thompson v. Oklahoma,* 487 U.S. 815 (1988). Appellant's argument is the type of speculative, "socioscientific" argument that was rejected as relevant to the Court's consideration of the death penalty as applied to juveniles in *Stanford*. 492 U.S. at 377-80.

Appellee also herein adopts the arguments made by the state, where not inconsistent with the arguments contained herein, in *Allen v. State,* No. 79,003 and *Morgan v. State,* No. 75,676.

The trial court properly found that the murder of Michelle Van Ness was heinous, atrocious and cruel. The record supports the fact that these victims were herded into the freezer at Taco Bell (T 338). All of the employees were not shot immediately upon entering the freezer. They were shot *one by one*. Gary was shot first in the chest, then Derek, then Michelle (T 380). Thus, Michelle had the privilege of watching two victims being gunned down before the weapon was turned on her. At that point any repeated assurances that the victims would not be harmed were surely meaningless. It is irrelevant that Derek and Gary may have believed blanks were being fired. The record reflects that it was only Gary who thought they may be firing blanks simply because of the fact that although he felt something hit him, he could not see a bullet hole. When he saw Jeffrey shoot Derek in the face he then knew that he, himself, had actually been shot (T 339). Gary and Derek's false beliefs, in any event, would have no effect upon what the actual victim, Michelle Van Ness, felt prior to her death. The trial court's reference to the victim begging for her life did not come from an improper opening

statement of the prosecutor. Kimberly Gordon testified that while the victims were in the cooler "everybody was saying that they didn't want to die; please don't murder us, please don't kill us." (T 384).

The statutory aggravating factor that the murder was heinous, atrocious and cruel was proved beyond a reasonable doubt in this case. A murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law, not heinous, atrocious, or cruel. *Amoros v. State,* 531 So. 2d 1256 (Fla. 1988). In the present case, however, there is evidence that the victim labored under the apprehension that she was to be murdered. *Cf. Robinson v. State,* 574 so. 2d 108 (Fla. 1991). It is clear that the mind set or mental anguish of the victim is an important factor. *Harvey v. State,* 529 So. 2d 1083 (Fla. 1988). Thus, the victim's knowledge of impending death may support a finding that the killing was especially heinous, atrocious, and cruel, even if the death itself was quick, which in this case, it was not. *Bruno v. State,* 574 So. 2d 76 (Fla. 1991); *Douglas v. State,* 575 So. 2d 165 (Fla. 1991). Derek Mason knew Anthony Farina from working with him at another Taco Bell (T 107). Kimberly Gordon also knew Anthony Farina from the Holly Hill store (T 368). She saw him in Taco Bell that night (T 362). He talked to Michelle Van Ness to find out who would be working there late in the evening (T 160-164). When Michelle Van Ness went with Derek Mason to empty trash what she viewed was a gun held to Derek's back by Jeffrey Farina and a knife held by someone, if not actually known by her, at least

recognizable (T 106; 109-110). It could not have escaped her attention that even though this familiarity existed, there was no attempt at disguise or concealment. The tattoo of a burning heart on Anthony's right shoulder was clearly visible (T 67-72). A black, readily identifiable, bike week hat was worn (T 205). It could not have escaped her notice that despite the fact the Farinas could be easily identified, yet wore no disguise, they did not intend to be caught, for they wore rubber gloves... (T 110). The Farina, Anthony, who herded her into the store with a knife was 6'3" tall and weighed over 200 pounds (T 842). What was in store for her was apparent from the bag of rope Anthony carried (T 109). By the time Kimberly Gordon was in route to fetch the money Michelle was *scared, shaking, crying and holding onto Derek's arm* (T 112-113). As she smoked a cigarette she could not help but notice that Derek's hands were tied behind his back. Then Gary's hands were tied. Then her own (T 336-337). Michelle *cried*. She correctly suspected the Farinas were going to attempt to kill them (T 337). It must have been apparent to all the victims that the Farinas could have taken the money in the front and simply left (T 379). The cooler was a soundproofing agent for the mayhem to follow (T 345, 390). Michelle was *crying as she walked in the door* (T 376-377). The victims in the cooler pleaded for their lives, imploring the Farina brothers not to kill them (T 384). Then came the final Farina "precaution." The victims were directed into the freezer (T 380). Michelle was then treated to the sight of the botched executions of her co-workers, one by one. Gary Robinson was shot in the chest (T 338).

Anthony Farina was *grinning* (T 124). Derek Mason was then shot in the face (T 140). Then the gun was turned on Michelle, and *execution* style, she was shot in the head (T 339). There were bruises on her wrists (T 276). One cannot imagine a more "helpless anticipation of impending death." *Cf. Clark v. State,* 443 So. 2d 973 (Fla. 1983).

In *White v. State,* 403 So. 2d 331 (Fla. 1981), a homicide committed by tying the victims up and systematically shooting them in the back of the head was found to be especially heinous, atrocious or cruel. The present case is no less repugnant to the common man's sense of dignity and embodies the worst nightmare of those who must toil for a living in retail or food establishments where they may fall prey to the opportunistic or simply someone who had a boring day. This factor was also properly found in *Cooper v. State,* 492 So. 2d 1059 (Fla. 1986), under circumstances almost parallel to the present case. In *Cooper,* the murder victims were acutely aware of their impending deaths. They were bound and rendered helpless. A gun was pointed at the head of one of the victims and misfired three times. Another victim pleaded for his life. *Cf. also, Melendez v. State,* 498 So. 2d 1258 (Fla. 1986).

The circumstances of this case, furthermore, evince an extreme and outrageous depravity exemplified by an utter indifference to or enjoyment of the suffering of another. *See, Wickham v. State,* 593 So. 2d 191 (Fla. 1991). Anthony Farina grinned as Gary Robinson was shot in the chest (T 338). The same generous soul who passed out cigarettes later indicated it would

have been better to have sliced their throats (T 301-303 S. Ex. 58). That one could envision such a fitful ending for one who labors to serve the public at little more than minimum wage is the height of depravity. This depravity is in no way lessened by the fact that the victims were allowed a last cigarette, a common practice of firing squads, or that they were led to their contemplated deaths in the freezer, where shots would not be heard, by false reassurances of their safety.

The decision in *Bonifay v. State,* 18 Fla. L. Weekly S464 (Fla. September 2, 1993), is wholly distinguishable from the present case. *Bonifay* involved a contract murder. The medical examiner testified that the two shots to the head would have resulted not only in the victim's immediate unconsciousness but with death following in minutes. That is not the case with Michelle Van Ness who lingered until the following day. In *Bonifay,* there was no collective herding of the victims into a freezer where they could suffer anguish over their fate and witness the attempted murder of each other, which in the case of Michelle Van Ness, was actually successful. The state would submit that the decision in *Bonifay*, should be receded from, in any event. The decision in *Bonifay*, is inconsistent with this court's decision in *Hitchcock v. State,* 578 So. 2d 685 (Fla. 1990), where the court indicated that the fact that the defendant might not have meant the killing to be unnecessarily torturous did not mean that it actually was not unnecessarily torturous and did not preclude finding as an aggravating factor that the killing was heinous, atrocious or cruel. The decision in *Bonifay,* also conflicts with the cases

previously cited above involving a collective herding and witnessing by the victim of the preceding deaths of others. The record before this court reflects that Michelle Van Ness was crying and literally scared to death throughout her ordeal. To her the crime was certainly heinous, atrocious and cruel. We must not allow ourselves to become immune to the pain and suffering of victims simply because new factual scenarios arise in cases that are uniquely heinous. The viewpoint of the victim must be considered. In considering the vantage point of Jeffrey Farina, it is also clear that he enjoyed the suffering.

Appellant has failed to demonstrate that the heinousness factor was based on the age of the victim. The sentencing order does not so reflect and the facts of the case as compared with other cases show that the crime is heinous in itself without considering the element of youth.

The trial court properly found that this murder was cold, calculated or premeditated, with no pretense of moral or legal justification. It is not true as appellant suggests that the admissions of the Farina brothers considered by the court came only by virtue of the questions of the prosecutor in the penalty phase. The discussions between Anthony and Jeffrey were before the court in the guilt phase. The tape was played for the jury (T 303). It revealed Jeffrey to be the shooter. The tape included Anthony's comment that they should have slit their throats (T 301-303; S. Ex. 58). Contrary to appellant's assertion the facts of the case do not show that the shootings were the result of a sudden impulse. In the present case, as

distinguished from the cases cited by appellant, the plan of the Farinas certainly included the commission of murder. Anthony knew that he would be recognized and could be later identified (T 679; 682). They brought rope to tie the victims after they had herded them into the cooler. They had no plans to leave town. They wore rubber gloves so that they could not be otherwise identified. From the circumstances of the crime alone, it is obvious that murder was contemplated. Anthony even told Detective Sylvester that the people were shot because he didn't want to get caught (T 685). The post-murder statements of the Farina brothers in the back of the patrol car also reflect that all their pre-planning did not pertain simply to the robbery. They lamented the fact that they had not devised another plan for ridding themselves of witnesses such as "slitting their throats, putting something in front of the freezer, and cutting the phone lines." (T 301-303 S.Ex. 58). Even in the event that there was no planning prior to the entry of Taco Bell, there was certainly planning midway through the commission of the robbery. There was evidence that there was a discussion between the Farina brothers as to what to do, with Anthony indicating to Jeffrey that it was his call, and Jeffrey responding that he would shoot them, Anthony did not protest such decision and then accompanied and acted in concert with Jeffrey by herding the victims into the freezer so Jeffrey could shoot them (T 881).

The sentencer properly found that the murder was committed to avoid arrest. The trial court's findings contained distinct proof as to both the avoiding arrest and the cold, calculated and

premeditated factor. *See, Hill v. State,* 422 So. 2d 816 (Fla. 1982). The trial court found that the dominant "motive" for the killing was to eliminate a potential witness (R 3094). In finding that the capital felony was committed in a cold, calculated and premeditated manner, the court considered the discussion between the brothers prior to the killing and the execution style in which they attempted the murders and accomplished the actual murder without any need to do so to accomplish the robbery (R 3095). Thus, evidence of a prearranged plan went to the aggravating factor that the murder was cold, calculated and premeditated. That the motive for the killing was witness elimination to avoid arrest is an entirely separate consideration. A witness could be spontaneously eliminated without the prior careful planning which is involved in the finding of the cold, calculated and premeditated factor. In the present case there was also a pre-existing plan to not just commit a felony but to kill the victim. Jeffrey Farina not only admitted that he had gone to Taco Bell to rob it but also that there were to be no witnesses when he shot and killed Michelle Van Ness (T 741). Anthony admitted he did not want to be caught so the people were shot (T 685). The Farinas could have taken the money in Taco Bell in the front of the establishment and simply left (T 379). Instead, they herded the victims into a freezer as "one more precaution." (T 380). As the trial court noted, "the victims were moved to a small isolated and easily controlled portion of the restaurant where they were arranged in a manner to limit the possibility of escape during the execution

process that followed." (R 3095). They later discussed the fact that their plan may have been more successful had they simply slit the throat of the victims (T 301-303; S.Ex. 58). That Jeffrey Farina may not later have been entirely candid with Dr. Krop does not mean that the instant murder was not committed in a cold, premeditated, and calculated fashion pursuant to the motive of eliminating witnesses.

In *Maharaj v. State,* 597 So. 2d 786 (Fla. 1992), both the CCP and avoiding arrest factors were found. The court found that the execution style murder of a party who had witnessed the defendant's killing of the first victim, while the party was allegedly kneeling or sitting with his face to the wall, was murder "committed in a cold, calculated and premeditated manner and committed for the purpose of avoiding or preventing lawful arrest" within the meaning of the statutory aggravating circumstances.

It is clear that a contemporaneous conviction of a violent felony may qualify as an aggravating circumstance in a capital murder prosecution. *Tafero v. State,* 561 So. 2d 557 (Fla. 1990); *Pardo v. State,* 563 So. 2d 77 (Fla. 1990). Despite Justice Kogan's concurring opinion in *Ellis v. State,* 18 Fla. L. Weekly S417, 420-421 (Fla. 1993), indicating that the plain language of Florida Statute §921.141(5)(b) provides that the defendant must have been "previously" convicted of a "prior" violent felony before that fact can be used in aggravation, the fact remains that in this case Jeffrey Farina stood at sentencing convicted of the attempted murders of the other victims and of robbery. The

violent felony was certainly a "prior" one in regard to victims Gary Robinson and Derek Mason who were shot prior to the murder of Michelle Van Ness. There is no mandate in the statutory language compelling the jury and judge to consider only violent felonies remote in time from the present murder. It is not likely that the Legislature intended such a result. A defendant with a robbery in his history would be penalized but a mass murderer would profit from the sheer number of his victims. Appellee would submit that the plain language of the statute compels consideration of contemporaneous convictions.

In the event that an aggravating factor was improperly found, such error is harmless as there is no reasonable likelihood that the trial court would have concluded that the valid aggravating circumstances were outweighed by the mitigating factors. *Capehart v. State,* 583 So. 2d 1009 (Fla. 1991).

The trial court did not err in finding that the statutory mitigating factor of age was applicable but not of great weight. In *Ellis v. State,* 622 So. 2d 991 (Fla. 1993), this court mandated that whenever a murder is committed by one who at the time was a minor the mitigating factor of age must be found and weighed. This clearly indicated, however, that the weight can be diminished by other evidence showing unusual maturity and that the assignment of such weight falls within the trial court's discretion. The fact that Jeffrey Farina may not have exhibited the immaturity that has persuaded juries and judges in other cases to find the death penalty inappropriate does not mean that the trial court in this particular case abused its discretion by

undertaking an analysis required by this court and concluding that his age did not impose upon his ability to understand the responsibilities of following the law as well as understanding the criminality of his conduct. Farina was in all respects functioning as an adult. He could have continued doing so and held his job. Greed is hardly the exclusive domain of the juvenile. Farina's own mother testified that he was mature for his age, generally sober and hard working (T 743).

The trial court did not refuse to find the mitigating factor of no significant history of prior criminal activity. The court expressly found that the evidence adduced did not demonstrate significant history comparable to the brother (R 3095). The weight given this mitigating circumstance was within the domain of the trial court. The relative weight to be given a mitigating factor is within the province of the sentencing court. *Campbell v. State,* 571 So. 2d 415 (Fla. 1990). There is nothing which precluded the trial judge from considering the enormity of the instant offense in weighing the aggravating and mitigating circumstances. Such consideration is but another way of indicating that the aggravation was overwhelming in comparison to the mitigation. Convictions for prior violent felonies would significantly outweigh a history prior to that of little significant criminal activity.

The trial court found that the defense had established nonstatutory mitigation regarding Farina's childhood as there was evidence that he had suffered some level of abuse and that the level of emotional and financial support was limited (R 3097).

The court questioned, however, the defense expert's suggestion that such childhood led Farina to rob Taco Bell. The state's mental health expert found no correlation between such abuse and the murder (R 3097; T 949). Jeffrey was simply hoping to receive a benefit from his action (T 950). Indeed, he had been able to hold a job and was planning on getting his own apartment. Jim Brant had not been near the Farina brothers for years (T 740). Jeffrey had been a good student and there had even been talk about advancing him two grades. He was mature for his age (T 743). Where a defendant's actions in committing the murder were not significantly influenced by his childhood, the history of abuse suffered by the defendant as a child and the difficulty of his childhood need not give rise to a mitigating circumstance. *Lara v. State,* 464 So. 2d 1173 (Fla. 1985). In the instant case, the trial judge did consider it as nonstatutory mitigation but simply rejected the hypothesis that such background led him inevitably to the Taco Bell murder. Little weight, therefore, was assigned to such factor (R 3097).

The sentencer did not reject the mitigating value of the nonstatutory factor of potential for rehabilitation because serious crimes had occurred. The record reflects that the court considered the fact that Farina's mental health experts suggested that he was capable of rehabilitation. Farina was diagnosed by his own expert, however, as having an intermittent explosive disorder (T 869). The instant murder and preceding crimes were certainly violent and explosive. Farina had previously been a good student in school but was suspended when he got bored (T

743). At the time of the murder he worked a full week and was able to make a living (T 917). The trial court could properly question the significance of a capacity for rehabilitation when in the past Farina had the same opportunities and had not availed himself of them but chose to rob and inevitably murder instead. There was certainly no refusal to consider a potential for rehabilitation. This factor was appropriately questioned and given little weight.

Appellant is incorrect that evidence of Jeffrey Farina's remorse was uncontradicted. This is a defendant who had not only murdered Michelle Van Ness but also pounded a knife into the skull of a second victim (T 668). He admitted that there were to be no witnesses (T 741). He stated in the car that he would probably do the same thing over again (T 885). Appellant also ignores Farina's statement that he felt nothing when it happened (S.Ex. 58). A remorseful Jeffrey also referred to Detective Sylvester as "the bitch in the holding cell with a gun." (T 303).

In light of the very strong case for aggravation, any error of the trial court in failing to find or weigh mitigating evidence is harmless. *See, Wickham v. State,* 593 So. 2d 191 (Fla. 1991).

The death penalty in the present case is not disproportionate. In *Garcia v. State,* 492 So. 2d 360 (Fla. 1986), this court indicated that the death penalty imposed for two first degree murder convictions arising out of a planned robbery which included a plan to murder witnesses was not disproportionate to the crime or to the death sentences that the court had approved

statewide. Comparison of this case to other cases involving death sentenced juveniles reflects that Jeffrey Farina did not display the immaturity present in the other cases which would cause the jury or the judge to impose a life sentence because of the weight given to the age of the defendant. As the decision in *Stanford,* reflects, it is not cruel and unusual punishment to execute sixteen year old offenders.

II NO ERRORS UNDERMINE THE CONFIDENCE IN THE FAIRNESS AND IMPARTIALITY OF THE JURY.

A trial judge is only bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias and preconceived notions would be the natural result and the defendant may not receive a fair and impartial trial. *Manning v. State,* 378 So. 2d 274 (Fla. 1979). That is not the case here. Moreover, the refusal of a motion for change of venue sought on the ground of adverse publicity or public reaction, does not constitute reversible error where there is no showing that the defendant was prejudiced to the extent that a fair trial was impossible under the circumstances. *McClendon v. State,* 196 So. 2d 905 (Fla. 1967). The mere existence of extensive pretrial publicity is not enough to raise the presumption of unfairness of a constitutional magnitude. *Hitchcock v. State,* 578 So. 2d 685 (Fla. 1990). The constitutional standard of fairness does not require a juror to be totally ignorant of the facts and issues involved, it being sufficient that the juror can lay aside impressions gained from publicity

and render a verdict based on the evidence presented in court. *Murphy v. Florida,* 421 U.S. 794 (1975). Appellant has failed to make a sufficient showing that the jurors who tried the case were actually biased or prejudiced against the defendant. *See, Buchalter v. New York,* 319 U.S. 427 (1943). The veniremen in this case asserted their ability to be impartial despite having been exposed to pretrial publicity. *See, Murphy, supra.*

The state would agree with Judge Blount that the question to the jurors regarding whether a crime had been committed was "a little bit silly" (R 2055). As the trial judge reasoned, "I think they can assume a crime was committed or they wouldn't be here. And I also told them an indictment was filed here charging a crime." (R 2055). The juror acknowledged that he would follow the judge's instruction that the defendants don't have the burden of proving anything (R 1741-42). The juror had indeed been misled by the questioning. The jury was properly instructed as to the state's burden of proof. The jury was specifically instructed that before it could find the defendants guilty of first degree premeditated murder the state must prove that Michelle Van Ness is dead (R 532, 534). They were also instructed that before the defendants could be found guilty of robbery the state must prove that they took money or property from the victims through force, violence or assault and the property was of some value (R 540). The jury was properly instructed as to the elements of all crimes charged and lesser included offenses thereof (R 530-559). It should also be noted that the jury was instructed pursuant to the Florida Standard

Jury Instructions that "the defendants have entered a plea of not guilty, which means that the jury must presume that the defendants are innocent and that such presumption stays with the defendants until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt, and that to overcome the presumption of innocence, the *state has the burden of proving that the crime with which the defendants were charged was committed*" (R 552). The state would only suppose that the purpose of these instructions is to enlighten the jury and that once given, in the absence of any contrary evidence, such juror must be assumed to have properly performed his duty.

Juror William Marriott's voir dire did not reveal significant bias, prejudice or a predisposition to vote for death upon a guilty verdict. Mr. Marriott indicated that he had not received outside information from the media or pursuant to conversations that would cause him not to be a fair juror to the state and the defendants. He could set aside information that he had been exposed to and base his verdict entirely upon what he heard in the courtroom (R 2021). He would require the state to prove everything, even if outside information indicated that a crime, in fact, may have occurred. *He would require the state to prove not only who committed the crime, but even the fact that it occurred at all, and would hold the state to such burden.* He understood that the defendants had no burden to overcome anything or to prove their innocence. Although he indicated that he could recommend a death sentence he also stated that he would consider the person's background, rough childhood, and age in the penalty phase (R

2022-2023). He would fairly consider both a life and death recommendation (R 2023). Although he had seen news stories and had read about the case in the newspaper *he did not hold even a fixed opinion that a crime had been committed* (R 2026). Upon individual voir dire Mr. Marriott indicated that he had not gleaned too much information about the case from news accounts and had not read any recent articles about the case (R 2057). The only thing he had recently learned was that there was a problem finding jurors. He indicated that he had formed no fixed opinion as to the guilt of the defendants (R 2061). He had also formed no opinion as to the appropriate sentence. He indicated that if he served as a juror he would base his verdict only on what he heard in the courtroom and not upon what he saw in the newspaper or on television. He would make the state even prove that there was a crime and would not assume that there was a crime from the newspaper. The juror even stated that "otherwise it is all hearsay." The prosecutor asked Mr. Marriott "With regard to this particular case, Mr. Marriott, have you received outside information from the media or conversations of family members of such a level you could not be a fair juror to the state and the defendants in this case?" Juror Marriott indicated "I don't think so," meaning that he had actually *not* received outside information of such a degree that he could not be fair (R 2021). Juror Marriott's answers indicated that he *would* make the state prove that a crime had been committed. This juror indicated that he would consider the defendant's age, background, and rough childhood in the penalty phase. He also indicated that he would

be able to consider a life recommendation as well as a recommendation of death even in the case of premeditated, deliberate, first degree murder (R 2023). He was only a supporter of the death penalty if it had been proven to be appropriate. He certainly did not indicate that he would automatically vote for death upon a finding of guilt. What the colloquy would indicate is that he is not a supporter of the death penalty in the absence of a finding of guilt, which is not only a logical assumption, but it is also the law. No bias has been demonstrated on the part of Juror Marriott so that a challenge for cause should have been granted.

A perusal of the extraordinarily lengthy voir dire in this case will reveal that numerous jurors indicated that the jury selection procedure had not tainted them -- a fact appellant should be citing and bringing to the attention of this court.

What media coverage the jurors gleaned was literally splashed across the pages of voir dire.

Individual voir dire was conducted. Appellant can hardly demonstrate prejudice simply because the court felt what was ultimately done may have been unnecessary.

Juror No. 43, Robert Heffelfinger was called from panel one (R 248). On questioning by the state Mr. Heffelfinger indicated that he was opposed to the death penalty. Upon being questioned as to whether his opposition was so strong that no matter what the evidence revealed he would always vote against a recommendation for death if he were sitting on a capital case he responded "probably almost always." He indicated that "there

would probably be an exception." (R 1250). He agreed with the prosecutor that the exception may be in such a case as Adolf Hitler or some notorious murderer. Mr. Heffelfinger indicated that his feelings about the death penalty were so strong that he would probably always or almost always vote against the death penalty regardless of the evidence (R 1251). Mr. Heffelfinger was asked by defense counsel for appellant if "there was a case he could imagine in premeditated first degree murder, the most heinous or terrible thing he could imagine, where he would think that the death penalty would be appropriate?" Mr. Heffelfinger responded "probably, but I don't know what it is" (R 1262). Heffelfinger indicated that he understood that the death penalty is the law of the state of Florida. He was asked whether notwithstanding his own personal views, if he would be able to follow the law as the judge would instruct him and as it applies to the death penalty. Heffelfinger responded "I believe so." He understood that lawyers, judges, police officers, and other members of the criminal justice system have their own individual opinions pro or con for the death penalty (R 1263). He understood that there are people who have professional obligations to follow the law (R 1264). He understood that they were able to do that because it's their duty. He "presumed" he would be willing to follow the law in this case (R 1264). The state challenged Mr. Heffelfinger for cause as he said that he opposed the death penalty (R 1277). The defense objected on the grounds that Heffelfinger said he would follow the law and also stated he would in some situations consider death penalty

alternatives and could arrive at a verdict. The court denied the challenge for cause. The state indicated that it would peremptorily strike him (R 1278). Counsel for appellant objected to the state's use of the peremptory on the ground that Heffelfinger indicated that he would impose the death penalty only in certain circumstances but that he could impose it. The state then withdrew the peremptory challenge (R 1280). Upon further questioning Mr. Heffelfinger indicated that he did not believe he *would ever* recommend the death penalty for a sixteen-year-old (R 1286). The prosecutor then asked Juror Heffelfinger "With regard to the issue of the death penalty, is it your position that as far as you can conceive, regardless of the evidence, you would always vote against the imposition of death?" Mr. Heffelfinger responded "*Yes*. Pretty near." Mr. Heffelfinger then stated:

> I think the death penalty is unproductive. I think it's not necessarily a dispensation of justice. I think it's vindictive and inhumane and I think there are certain incorrigible situations that nothing could be done.

The prosecutor then inquired if what he was saying was that sometimes he could vote for the death penalty. Heffelfinger responded "Probably could happen. I don't know. I am not experienced in voting for it." (R 1288). The prosecutor then asked Heffelfinger again whether he would consider imposing a death penalty where the defendant was sixteen years old. Heffelfinger again indicated "*Probably not* a sixteen year old where I feel the life is salvageable." The prosecutor asked him to clarify whether he was saying "probably not" or "would not?"

Heffelfinger responded "I would say I *would not* because I feel a sixteen year old life should be able to be salvaged." (R 1289). Although Mr. Heffelfinger indicated that he could follow the instructions of the court regarding aggravating and mitigating circumstances, when asked if he would be able to do that in spite of his personal beliefs he responded "I *think* so, yeah. It's the law. It's the law." (R 1298). The state again challenged Mr. Heffelfinger for cause on the basis that he indicated he would never vote for the death penalty for a sixteen year old because he thought he could be rehabilitated (R 1301). The court indicated that after hearing all the testimony it would grant the challenge for cause (R 1302).

The standard for determining whether a juror is qualified to sit on a capital case in which death is a possible penalty, is whether the juror's view on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Darden v. Wainwright,* 477 U.S. 165 (1986); *Wainwright v. Witt,* 469 U.S. 412 (1985); *Adams v. Texas,* 448 U.S. 38 (1980); *see also, Witherspoon v. Illinois,* 391 U.S. 510 (1968). The standard applies to jurors who show bias both for and against the death penalty. *Morgan v. Illinois,* 112 S.Ct. 2222 (1992); *Randolph v. State,* 562 So. 2d 331 (Fla. 1990).

It is clear in Mr. Heffelfinger's case that his view on the death penalty would prevent or substantially impair the performance of his duties as a juror. He is opposed to the death penalty en toto except for someone like Adolf Hitler. He would

almost always vote against it regardless of the evidence. Although Heffelfinger "presumed" he would follow the law, he then reiterated that he would "pretty near" always vote against the imposition of the death penalty, regardless of the evidence. He did not believe he would ever recommend the death penalty for a sixteen-year-old. He merely "thought" he could follow the instructions of the court regarding aggravating and mitigating circumstances. He was not specifically asked about the mitigator of age. Prospective jurors who believe the death penalty is unjust may be removed when their beliefs prevent them from applying the law. *Randolph v. State,* 562 So. 2d 331 (Fla. 1990). Such is the case here.

III APPELLANT WAS NOT DENIED A FAIR TRIAL BECAUSE OF THE PLACEMENT OF A CAMERA AND THE VICTIMS' FAMILIES IN CLOSE PROXIMITY TO PROSPECTIVE JURORS.

Neither the United States Supreme Court nor this court has found the presence of cameras in a courtroom to constitute a per se denial of due process. *Chandler v. Florida,* 449 U.S. 560 (1981); *In Re Petition of Post-Newsweek Stations, Florida, Inc.,* 370 So. 2d 764 (Fla.), *appeal dismissed,* 444 U.S. 976 (1979). In order to have cameras excluded from a courtroom during trial, a defendant must show prejudice of constitutional dimensions. *Jent v. State,* 408 So. 2d 1024, 1029 (Fla. 1982). The defendant cannot show with any specificity that the presence of the camera impaired the ability of the jurors to decide the case only on the evidence before them or that their trial was adversely affected by the impact on any of the participants of the presence of cameras and the prospect of broadcast. *Chandler, supra.*

Any possible problem with audio pick up was remedied. Judge Blount instructed defense counsel to face in a direction so that his voice would not be picked up (R 1066). A cameraman separated the victims from the jurors (R 1589). The prospective jurors were seated in the very back rows and the victims were sitting in the very front rows. There was no contact between the victims and the jurors (R 1590). Counsel's diagram was not even to scale. The court stated that the camera was five or six feet away from the jury (R 1591). Counsel has revealed nothing to this court to demonstrate that the judge's description of the many objections as "paranoid thinking" was not entirely warranted.

IV APPELLANT WAS NOT DENIED A FAIR TRIAL ON GROUNDS OF PROSECUTORIAL MISCONDUCT.

State Attorney John Tanner approached Volusia County Circuit Court Clerk Newell Thornhill before or during the time indictments were being handed down in regard to the instant case (R 796-797). Mr. Tanner indicated he was concerned that the Taco Bell case was being held in Daytona Beach and would like the case to be tried in DeLand, where they had tighter security. He expressed his bigger concern, that he didn't want students in the courtroom when the trial was going on because it was gong to be very emotional (R 798). He did not ask the clerk to transfer the case (R 799). The clerk was not aware that the case had been transferred to a judge on the east side (R 800). He was not aware that the grand jury was meeting that day (R 803). The clerk referred Mr. Tanner to Mrs. Hendricks who was in charge of

the criminal division (R 803). The case was assigned to Judge Orfinger (R 805). It ended up in DeLand (R 807). The clerk was not aware that there was an administrative order that dealt with the assignment of capital cases until a day or two later (R 816).

Chalynn Faller overheard Mr. Thornhill tell Ms. Hendricks that Mr. Tanner had asked him if he would assign the case to Judge Orfinger (R 821). Ms. Hendricks indicated it was contrary to the administrative order regarding assigning capital cases. She indicated Judge Briese would be next on the rotation (R 824). Mr. Thornhill said he did not know there was an administrative order, then left. Ms. Hendricks instructed the DeLand felony department to assign the case to Judge Orfinger (R 825). Ms. Faller testified on cross-examination that the case was never assigned to Judge Briese. The cases are not even given numbers until the indictment comes down, therefore, there was no judge assigned to it (R 825). In a case where an individual is charged with an attempted murder the judge assigned at first appearance would not necessarily hear the case where the victim dies and an indictment is forthcoming. The clerk would go to a whole new random rotation (R 827). There is no guarantee Judge Briese would have anything to do with the case once there was an indictment (R 828). Cases are routinely transferred pursuant to an agreement between circuit judges. At the time of the indictment there had already been an emotionally charged funeral for Michelle Van Ness (R 831).

Criminal Director Nancy Hendricks testified that Mr. Thornhill had asked that the Taco Bell case be assigned to the

west side of the county. Judge Orfinger was the only judge on the west side handling felony cases (R 841). Mr. Thornhill indicated Mr. Tanner had asked him to have the case assigned to the west side for security reasons, since they had better security there and they were afraid school children would be skipping school (R 842). The cases were assigned on a random rotation basis (R 842). She told Mr. Thornhill that was not normally the way to assign cases (R 843). Judge Blount could handle the case at any time as a retired judge. Any judge could be assigned to try a case in DeLand (R 846). The assignment of a capital case to a division does not assure who the judge will be. Mr. Thornhill only asked that the case be assigned to the west side. He never specifically asked for Judge Orfinger to be assigned (R 847). Mr. Thornhill would not know what judge was coming up next (R 849). All capital cases are blind filed and assigned a judge at the time a case number is generated. But pursuant to the administrative order the clerk had the responsibility to reassign upon the random rotational basis. Sometimes there would be a judge already assigned to a case then when the case is indicted upon the clerk may reassign it through the random rotational assignment. If a party wanted to change courts they would have to file a motion with the court (R 853). If they had gone exactly through normal rotation Judge Briese would have been the next judge (R 858). The clerk has the authority to bump a case to another judge who had less capital cases. There was nothing improper in the request to Mr. Thornhill, according to the administrative order (R 859). Even

if the defendants had been assigned to a different division, that did not guarantee who the circuit judge would be who tried the case. Judge Orfinger could very easily have ended up trying this case (R 860).

Judge Briese testified that he saw his name assigned to the case on CJIS pre-indictment (R 868). It was his understanding the case would be his (R 870). When he found out he no longer had the case he called the clerk's office (R 8710. Rae Nissley told him to call Mr. Thornhill (R 872). He called Mr. Thornhill but got no answer as to why the case was not assigned to his division (R 873). Judge Briese indicated it was a possibility that if an individual was initially arrested for an attempted murder charge and the victim died and an indictment was forthcoming, the judge who was initially assigned the case from a blind filing system might have the case transferred to another division. The case would be subject to change by the clerk and the nature of the charges (R 879). After Judge Briese had spoken to Mr. Thornhill he called the chief judge to advise him he felt the system was being manipulated (R 884-85). The chief judge offered to give the case back to him but Judge Briese did not ask for it back (R 886). No case is finally assigned in capital cases until the indictment (R 892).

Judge Orfinger properly refused to disqualify the state attorney's office (R 932). Appellant had no standing to have Judge Orfinger removed from the case. A litigant does not have standing to enforce internal court policy, which is a matter of judicial administration and a proper concern of judges of the

particular court and of the administrative supervision of the judicial system. *Kruckenberg v. Powell,* 422 So. 2d 994 (Fla. 5th DCA 1982). This is so because no matter how a judge is assigned to a case the simple fact remains that "in legal contemplation judges, like litigants, are all equal before the law." 422 So. 2d 996. That being the case, appellant cannot demonstrate that he was prejudiced by the prosecutor's actions nor are any due process concerns implicated. While a prosecutor can be removed from the case in conflict situations, *see, Castro v. State,* 597 So. 2d 259 (Fla. 1992), there is no authority for disqualifying the prosecutor in a situation such as this. There simply is no reason to do so. The control and conduct of the trial is within the province of the trial judge, who is presumed to not only know, but apply the law, and is quite capable of curtailing misconduct. Clearly no benefit accrued to the state by virtue of the fact that the case was assigned to Judge Orfinger who had no role in the assignment of the case. Judge Orfinger was ultimately disqualified, in any event, and the trial was conducted by Judge Blount (R 1063). Appellant has failed to show how the fairness of the trial, conducted by a different judge not contemplated any party, could have been affected by any prior machinations of the prosecutor. Appellant has failed to demonstrate how being arraigned two weeks early has worked to his detriment.

Appellant next complains of improper argument during penalty phase opening statement. Appellant is correct in that opening statement is ordinarily a preview of what will hopefully

be presented. In the context of the penalty phase, however, there is an important distinction. The state has already put on most of its evidence in the guilt phase and does not waste the time of the court by duplicitously putting on the same evidence again in the penalty phase. The state can't do a "roadmap" kind of opening statement and by necessity there may be some elements of review in the state's opening.

No contemporaneous objection was made to the prosecutor's statement that "you have come to know the terror and the horror that four young people came to on that evening" (T 585). An objection was not interposed until the prosecutor made an entirely separate statement (T 585). If error is to be based on improper argument by counsel, objection must be made at the time the argument is presented in order to preserve it for appeal. *Wasko v. State,* 505 So. 2d 1314 (Fla. 1987). The belated objection was made on grounds other than the ground now argued. From appellant's liberal use of italics it would appear he is now complaining about the prosecutor's reference to the youthful age of the victims. Nowhere was that argued below. It was quite clear from the guilt phase that all the victims were young. The flowery language of the prosecutor hardly implanted seeds of prejudice or confusion so as to lead to fundamental error. Jury arguments are not considered grounds for mistrial nor reversal unless they are highly prejudicial and inflammatory. *Pitts v. State,* 307 So. 2d 473 (Fla. 1st DCA 1975).

An objection was made to the prosecutor's statement "they attempted to murder each of those young people" on the grounds

that it was not opening statement but argument. The objection was overruled (T 588). No argument was made that such statement was intended to inflame the passions of the jury. A challenged argument of a prosecutor will be reviewed by the appellate court only when an objection to it is timely made, and the issue will be deemed waived if the defendant did not object on the specific ground that he urges on appeal. *Black v. State,* 367 So. 2d 656 (Fla. 3rd DCA 1979).

No objection at all was raised to the prosecutor's statement "They kidnapped each of these young people." (T 588). This issue is waived. *Wasko v. State,* 505 So. 2d 1314 (Fla. 1987).

An objection was made and sustained to the prosecutor's statement "They should not benefit by the fact that we only had one child dead on that cold floor" on the grounds that it was argumentative, not on the ground now raised, that it inflamed the passions of the jury. No motion for mistrial was made. This issue is waived. *Black v. State,* 367 So. 2d 656 (Fla. 3rd DCA 1979); *Holton v. State,* 573 So. 2d 284 (Fla. 1990). Even if it could be considered it is not egregious enough to warrant a new penalty phase.

The defense objected to the prosecutor's statements "Consider the circumstances of this crime. Is this an ordinary robbery where someone walks into a store? This was no ordinary robbery," only on the grounds that it was argument and the objection was sustained on that basis alone (T 589). No motion for mistrial was made. Nowhere did the defense complain that the argument inflamed the passions of the jury. This argument is

also waived. Any error was harmless. It obviously wasn't an ordinary robbery. Such fact could have been pointed out in closing argument. That it was noted instead in opening is hardly prejudicial.

No objection was made at all to the prosecutor's later references to "young" people or to the question "Why was Michelle Van Ness ruthlessly murdered." (T 591). This issue is waived. *Wasko v. State,* 505 So. 2d 1314 (Fla. 1987).

The prosecutor's question as to why the "children" were moved from the cooler to the "execution chamber" was objected to and sustained only on the ground that it was closing argument, not on the ground now raised (T 591). No timely motion for mistrial was made. This argument is also waived. *Black, Holton, supra*.

The prosecutor's statement "As Derek described to you the young girl who held onto his shoulder, held onto his arm as he tried to console her, as she contemplated her death -- " was again only objected to and sustained on the grounds that it was argumentative, not on the grounds now argued (T 592). No request for curative instructions or a motion for mistrial was made. This issue is also waived. *Black, Holton, supra*.

The statements "And was this a cold, calculated, and premeditated killing? Can there be more of an obvious execution style --," were again only objected to and sustained on the basis that it constituted argument, not on the grounds now argued (T 592). No curative instructions were requested or motion for mistrial made. This issue is waived. *Black, Holton, supra*.

No contemporaneous objection was made to the reference to "two young girls and two young boys." This issue is waived. *Wasko, supra.*

The prosecutor then stated:

> In our history there have been others that have moved people into the cold chambers, bound and tied, unsuspecting like lambs. Consider whether or not this was an execution style killing. Weigh that aggravating factor (T 592-93).

The defense made only a *general* objection to the above argument of the prosecutor, which was sustained by the trial court. In order to preserve as issue for appeal, a specific legal ground must be presented to the trial court. *Bertolotti v. State,* 565 So. 2d 1343 (Fla. 1990). The defense then made a motion for a mistrial on the grounds of extreme prosecutorial misconduct which was also denied (T 593). Even assuming the motion for mistrial saved this issue for appeal, no relief is warranted. Questionable statements that do not incite the passions and fears of the jury are not unconstitutional, and a new trial will not ordinarily be granted because of improper appeals by counsel to the sympathies of the jury unless it appears that the passions or prejudices of the jury have been aroused, or that the jury has been misled and has based its verdict on considerations beyond the evidence, or that the remarks influenced the jury to render a more severe sentencing recommendation in a capital case than it would have otherwise. *Valle v. State,* 474 So. 2d 796 (Fla. 1985). The reference to the "cold chambers" is not as flowery as it may appear at first blush, given the fact that a freezer <u>is</u> a "cold chamber" and that is exactly what the victims in this case were

herded into. That is exactly what the evidence showed. The evidence also showed that the victims were, for the most part, "unsuspecting like lambs," at least up until the point they began to plead for their lives, although Michelle Van Ness was, nevertheless terrorized. The reference to "others" that have moved people into the "cold chambers" could refer to virtually any other past criminal endeavor. Whether the murder was execution style was an appropriate jury consideration. The major impropriety with the prosecutor's statement is that it wasn't limited to a discussion of facts he intended to substantiate. *See, Spaziano v. State,* 429 So. 2d 1344 (Fla. 2d DCA 1986). This extraneous, flowery language in *opening* statement, however, was hardly of the magnitude to cause the jury to render a more severe sentencing recommendation. The facts previously and subsequently presented reflect that this was an unusual execution-style murder, which took place in a freezer and was obviously cold, calculated and premeditated.

An objection to the prosecutor's statement "And consider the actions of Jeffrey and Anthony as they acted in concert to eliminate these children as their witnesses" was made and sustained solely on the basis that the prosecutor was continuing to argue, not on the ground now raised on appeal (T 595). This issue is waived.

It is true as appellant argues "it is the duty of the trial judge to carefully control the trial and zealously protect the rights of the accused so that he shall receive a fair and impartial trial." *Kirk v. State,* 227 So. 2d 40, 42-43 (Fla. 4th DCA

1969). That this was done in this case is no more obvious than when one reflects upon the silence of defense counsel during the majority of the argument. Those objections that were raised were largely made by counsel for *Anthony* Farina (T 585; 588; 591; 592; 593). Counsel for appellant largely complained that the statements were argumentative (T 589). Counsel committed even more waiver by not requesting curative instructions. *Morris v. State,* 456 So. 2d 471 (Fla. 3rd DCA 1984). Counsel did not join in the motion for mistrial after the prosecutor's reference to the victims being "unsuspecting like lambs." (T 593). Present appellate counsel was even at the trial below. He apparently sees new error only in hindsight. It is clear that counsel below felt the main problem with the state's opening argument was only that it was closing argument, not that it improperly inflamed the jury or led it astray. Any such error is harmless considering the evidence actually available for jury consideration at the penalty phase, which was susceptible to similar comment in closing argument and which led to the proper application of aggravating and mitigating factors.

The trial judge further protected the rights of the appellant by sustaining objections to the state's proposed re-enactment and refusing to allow the victim's father, Mr. Van Ness, to testify (T 610-611; 618-619). The intent of the prosecutor is of no consequence since this evidence was not placed before the jury. The prosecutor could well ask, in any event, a predecessor judge to reconsider the ruling of the previous judge regarding victim testimony and arguably had a leg to stand on by virtue of *Payne v. Tennessee,* 111 S.Ct. 2597 (1991).

The prosecutor next stated "The mitigating factors that the defense will argue is, the age of the defendants at the time of the crime. Is that a mitigator under these circumstances?" The defense objected on the basis that "That is the law." The objection was overruled and the trial court noted that the court would instruct the jury as to the law. The prosecutor then continued:

> His Honor will instruct you that you are to weigh the evidence and accept or reject it. Is that a mitigator, the age of these young men? They're certainly old enough, mature enough, and experienced enough to know exactly what they were doing. If anything, the age is an aggravator. These aren't thirteen or fourteen -- (T 1010).

The defense objected to the prosecutor's conversion of a statutory mitigating circumstance into an aggravating circumstance. The trial judge indicated that he would instruct the jury that they were to follow the instructions to be given by the court and that he would instruct them on the law. Counsel for Anthony Farina moved for a mistrial and was joined by counsel for Jeffrey Farina on the grounds that the prosecutor had specific knowledge of what the law is and knows that the aggravators are specifically statutorily provided for and that his conduct was intentional. The prosecutor indicated that he did not want a mistrial and that his argument went to the weight of the evidence. He had previously stated that it would be argued by the defense as a mitigating circumstance. The trial court instructed the prosecutor to "stay to that." (T 1012-1013). The jury was instructed that the sentence they recommend to the court must be based upon the facts as they find them from

the evidence and the law (T 1050). The jury was properly instructed as to aggravating and mitigating circumstances (T 1046-1050). Defense counsel argued to the jury that age was a proper statutory mitigator and indicated:

> If you find that Anthony Joseph Farina is of such an age that that ought to be considered in determining what your recommendation is, then that's a valid mitigator. Anthony Joseph Farina's birthday is today. At the time this occurred he was eighteen years old. That's young. He's a young man. I think we can all agree to that. I don't believe that there's any real argument about that. (T 1032-33).

A prosecutor's improper statement about the law is not prejudicial error where the judge correctly instructs the jury on the law prior to their deliberations. *Cabrera v. State,* 490 So. 2d 200 (Fla. 3d DCA 1986).

The prosecutor's opening statement was at the most argumentative, and was perceived as such below. No re-enactment of the crimes took place. Victim impact evidence was not introduced. The case was not heard by Judge Orfinger, but by Judge Blount. At the most what the prosecution may have sought was expedition of the case. It was certainly not looking for a biased judge, and did not get one. Any prosecutorial misconduct below was not of the magnitude to warrant a new trial or resentencing. In the penalty phase of a murder trial, prosecutorial misconduct must be *egregious* to warrant vacating the sentence and remanding for a new penalty-phase trial. *Jackson v. State,* 522 So. 2d 802 (Fla. 1988).

V THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT TRIAL AND SENTENCING.

Appellant cites not authority for his novel proposition that the trial court should have instructed the jury that where a statute does not specifically define words of common usage, such words are to be construed in their plain and ordinary sense and that expressly defined statutory words must be followed according to their fixed legal meaning. Appellee would submit that the jury was properly instructed in accordance with the standard jury instructions. Many of such instructions to the jury are not even based on the statute but are based on evolving caselaw. The proffered instruction would be incorrect as a matter of law because the jury does not accept and exclusively apply the definitions of words in terms of- ----as they are defined by statutes. For instance, the heinous, atrocious and cruel jury instruction is based on language from *Proffitt v. Florida,* 428 U.S. 242 (1976). Such instruction would only have confused the jury. It is not the function of the jury to construe statutory language in the first instance. Such instruction would be superfluous, in any event, since the instructions actually given the jury were narrowing in the first instance and were designed with the purpose in mind of channeling the jury's discretion. Definitions of the heinous, atrocious and cruel and cold, calculated and premeditated aggravating factors are provided by the court to limit what the jury can consider in the first instance. There is no requirement that the jury be further instructed that it is limited to the definitions provided by the court. A juror of reasonable intelligence would not assume that definitions had been provided to him simply so he could speculate as to other meanings.

The standard preliminary instruction is not objectionable and cannot reasonably be read as limiting the things that may be presented as mitigation to "the nature of the crime and the character of the defendant." (R 3022). In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the jury, under the Texas sentencing scheme, returned a verdict in the form of responses to three "special issues" framed by the judge to determine (1) whether the defendant's conduct was deliberate, (2) whether the defendant had potential for future dangerousness, and (3) whether the defendant's conduct was unreasonable in response to any provocation by the victim. Thus, the trial court's instructions allowed the jury to give effect to mitigating circumstances only in relation to the "special issues" in the Texas capital sentencing statute. The majority of the Court reasoned that mitigating evidence of mental retardation and childhood abuse had relevance to moral culpability beyond the scope of the statute, and thus, a special jury instruction was necessary to permit the sentencer to give effect to all mitigating evidence. *Id.* at 322-26. In the present case, the jury was instructed that they could consider "any other aspects of the defendant's character or record or any other circumstance of the offense." (R 1049). This is the very sort of instruction that would have been found under *Penry* to permit the sentencer to give effect to all mitigating evidence. All of the nonstatutory mitigation and evidence offered in support thereof went to Farina's character or record or circumstances of the offense. Appellant does not suggest what further category should be added to this broad catch-all instruction.

The standard jury instructions concerning the role of the jury have been found to be constitutional. *Fotopoulos v. State,* 608 So. 2d 784 (Fla. 1992); *Grossman v. State,* 525 So. 2d 833 (Fla. 1988). When a defendant claims that improper jury instructions resulted in a *Caldwell v. Mississippi,* 472 U.S. 320 (1985), violation he "must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams,* 489 U.S. 401, 407 (1989). Under the Florida death penalty sentencing statute the role of the jury in Florida is advisory. There is no evidence in this case that the sentencing jury was misled as to its role. The importance of the jury's role was certainly highlighted by defense counsel when he stated to the jurors "Ladies and Gentlemen, I say, you are America. Each and everyone of you right now as we sit... You are the power of the people right now." (R 1044).

The heinous, atrocious, or cruel instruction given by the judge contains the requisite language approved in *Proffitt v. Florida,* 428 U.S. 242 (1976), and was found to be acceptable by this court in *Preston v. State,* 607 So. 2d 404 (Fla. 1992).

The cold, calculated and premeditated jury instruction limits the class of persons eligible for the death penalty and is acceptable pursuant to *Arave v. Creech,* 113 S.Ct. 1534 (1993).

The contention that the term "should" is equivocal in the instruction that the jury "should recommend a life sentence if the aggravating circumstances do not justify the death penalty" is without merit.

The standard jury instruction on nonstatutory mitigating circumstances was given in this case. The jury was instructed that they could consider " any other aspects of the defendant's character or record or any other circumstances of the offense." (R 1049). No special proposed instruction on "mitigation" was required. This court has previously determined that a court is not required to list the nonstatutory mitigating circumstances in its instructions to the jury. *Jackson v. State,* 530 So. 2d 269 (Fla. 1988); *Robinson v. State,* 574 So. 2d 108 (Fla. 1991). The jury was hardly precluded from considering valid mitigation.

The standard jury instruction on weighing of aggravating and mitigating factors has been sufficient by this court. *Stewart v. State,* 549 So. 2d 171 (Fla. 1989); *Arango v. State,* 411 So. 2d 172 (Fla. 1982). The jury in this case was instructed that:

> Mitigating circumstances need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it established. If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. (R 1050).

These instructions were sufficient to aid the jury in their consideration of mitigation factors. *Cage v. Louisiana,* 111 S.Ct. 328 (1990), is inapposite. The Court in *Cage,* found that a reasonable juror could have interpreted the reasonable doubt instruction in the guilt phase to allow a finding of guilt based on a degree of proof below that required by the due process clause. That is not the case here. The "grave uncertainty,"

"actual substantial doubt," and "moral certainty," offending language is not present in this case.

Any error in the court's instructions is harmless since the result of the sentencing hearing would have been the same had the jury been instructed as appellant now contends it should have been. *See, Steinhorst v. State,* 574 So. 2d 1075 (Fla. 1991).

VI FLORIDA'S DEATH PENALTY STATUTES ARE CONSTITUTIONAL ON THEIR FACE AND AS APPLIED.

In the absence of any showing by appellant where these claims were raised below and entertained and how they were disposed of, appellee herein raises the affirmative defense of waiver and procedural bar. Appellee objects to the vexatious practice of lumping claims together in a boilerplate fashion in a final point with no indication where and even if they were raised below. Appellant has a duty of candor to this court.

It is the duty of this court to define and interpret statutes. That hardly constitutes a violation of the separation of powers doctrine.

The claim that the death penalty statute and jury instructions shift the burden to the defendant to prove sufficient mitigating circumstances exist which outweigh aggravating circumstances is without merit. *Kennedy v. Dugger,* 933 F.2d 905 (11th Cir. 1991).

Notice to the defense of aggravating circumstances is not required. *Tafero v. State,* 403 So. 2d 355 (Fla. 1991); *Clark v. State,* 379 So. 2d 97 (Fla. 1979).

CROSS/APPEAL

I THE TRIAL COURT ERRED IN PROHIBITING THE STATE FROM INTRODUCING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE.

At the penalty phase the state sought to call the victims' families to the stand (T 614). In a proffer, the prosecutor indicated it was for the purpose of providing a brief background of the victim without even getting into the loss to the family (T 616). Judge Blount ratified the previous order of Judge Orfinger prohibiting consideration of victim impact evidence at the penalty phase (T 616-617). The state would submit that such ruling is in error.

In *Hodges v. State,* 595 So. 2d 929 (Fla. 1992), this court indicated that evidence regarding the impact of the victim's death on the victim's family was admissible at the penalty phase, so long as the victim's family members did not characterize or give an opinion about the crime, defendant, or appropriate sentence.

At the time of trial Section 921.141(7) authorized the introduction of and argument concerning victim impact evidence. Subsection (17) reads:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of the victim impact evidence.

This provision became effective July 1, 1992. Even prior to the enactment of this provision victims had a statutory right to appear at a sentencing hearing and make a statement. F.S. §921.143 (1988).

This court's decision in *Grossman v. State,* 525 So. 2d 833 (Fla. 1988), posed no impediment to the introduction of such evidence. The *Grossman* decision relied on *Booth v. Maryland,* 482 U.S. 496 (1987), which was overruled by *Payne v. Tennessee,* 111 S.Ct. 2597 (1991), at the time of trial.

II THE LOWER COURT ERRED IN PRECLUDING THE STATE FROM CONDUCTING A SINGLE TRIAL OF APPELLANT AND HIS TWO CODEFENDANTS UTILIZING REDACTED CONFESSIONS AND STATEMENTS.

Pursuant to the trial judge's order, in the absence of a severance the state could not introduce the statements of the Farinas to Detectives Sylvester and Flynt on May 9, 1992. The state could, however, utilize the conversations between the Farinas themselves in the police car on May 11, 1992. The state was also to redact any reference to Jeffrey Farina from Anthony Farina's statement to Kelly May on May 11, 1992.[1]

The fact that a defendant might have a better chance of acquittal or a strategic advantage if tried separately does not establish the right to severance. *Bryant v. State,* 565 So. 2d 1298 (Fla. 1990). To the extent *Bruton v. United States,* 391 U.S. 123 (1968), could be said to be implicated, it is clear there is no violation if the defendant is not directly implicated by

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[1] When Kelly May was fingerprinting Anthony Farina, Farina spontaneously told him they were wearing gloves (R 732).

codefendant's out-of-court statement. *See, Richardson v. Marsh,* 481 U.S. 200, 208-09 (1987) (no *Bruton* violation when co-defendant's confession on its face did not incriminate defendant and only does so when linked with other evidence at trial); *United States v. Donahue,* 948 F.2d 438, 443-44 (8th Cir. 1991), (no *Bruton* violation and denial of severance upheld when codefendant's potentially incriminating statement contained no explicit reference to the defendant, and did not expressly implicate the defendant). The Confrontation Clause is not violated when a co-defendant's redacted confession does not identify the defendant even though the defendant's own actions and statements may connect the defendant to the confession. *United States v. Espinoza-Seanez,* 862 F.2d 526, 534 (5th Cir. 1988). *See also, United States v. Romero,* 897 F.2d 47, 53 (2d Cir. 1990). When a codefendant's confession is purely cumulative to the defendant's own, in the context of interlocking confessions, it makes little difference that the jury has heard the codefendant's version of what happened. *Whitfield v. State,* 479 So. 2d 208 (Fla. 4th DCA 1985). Indicia of reliability exists. None of the defendants laid the blame on the other and their statements revealed a consistent factual scenario of the crimes. In *United States v. Harty,* 930 F.2d 1257, 1265 (7th Cir. 1991), inculpatory tape recordings of conversations between codefendants were not found to violate the Confrontation Clause because self-interest and the incriminating nature of the conversations provided sufficient indicia of reliability . Independent evidence of guilt is overwhelming. Three surviving victims were able to identify Anthony Farina and describe him as

the leader. The admission of testimony not subject to cross-examination may be harmless where the testimony is merely cumulative and other evidence of the defendant's guilt is overwhelming. *Harrington v. California,* 395 U.S. 250 (1969); *United States v. Ruff,* 717 F.2d 855, 858 (3rd Cir. 1983).

III THE TRIAL COURT ERRED IN GRANTING A JUDGMENT OF ACQUITTAL NON OBSTANTE VEREDICTO AS TO THE OFFENSES OF KIDNAPPING.

Kidnapping may be committed by forcibly, secretly, or by threat confining, abducting, or imprisoning another person against the victim's will and without lawful authority, with the intent to commit or facilitate the commission of any felony pursuant to the plain language of Section 787.01(1)(a)2, Florida Statutes (1992). In *Faison v. State,* 426 So. 2d 963 (Fla. 1983), this court literally rewrote the statute in adopting standards more stringent than required by the Legislature. Appellee respectfully submits that the court should recede from *Faison*.

Appellee would submit that *Faison* is not controlling as to the instant factual scenario, in any event. Convictions have been upheld in *Smith v. State,* 541 So. 2d 1275 (Fla. 1st DCA 1989), where the defendant moved the victim a short distance to a location where sexual batteries were easier to commit and where detection was less likely, and in *Carter v. State,* 468 So. 2d 37 (Fla. 1st DCA 1985), where the defendant tied up an armed robbery victim in order to make a clean getaway even knowing that the victim would be able to free herself. Clearly, the goal in this case was a clean getaway. The victims were moved into the

freezer because it was easier to control and kill the victims there and because of the heavy door and soundproofing, screams and gunshots were less likely to be detected.

CONCLUSION

Based on the foregoing arguments and authorities, appellee requests this court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by Delivery to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 20th day of December, 1993.

Margene A. Roper
Of Counsel