IN THE SUPREME COURT OF FLORIDA

ANTHONY J. FARINA,

Appellant,

v. CASE NO. 81,118

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/CROSS APPEAL

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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 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).

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).

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 to 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 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

Although Dr. Levin testified that Anthony Farina fit a dependency profile of alcohol and drug addiction, Farina, himself, minimized his usage of alcohol, marijuana and crack

cocaine (T 634). He indicated he had only experimented with crack cocaine for about six months (T 634). Dr. Levin further indicated that Anthony is not acutely mentally ill and there is no indicia of psychosis or thought disorder (T 637). Dr. Levin described Anthony as having a dependent personality disorder, antisocial personality disorder, and drug dependency disorder. He also acknowledged that there were times when Anthony would become explosive and aggressive. He can change under stress, react impulsively and lash out (T 638). In terms of rehabilitation, there were negative aspects. His disorder is a chronic personality disorder with a pattern of withdrawal, dependency, and not trusting other people. He rebelled going through the guardian program (T 640). Dr. Levin also testified that a crack cocaine high is very short-lived (T 643). Anthony was capable, on a limited basis, under stress of formulating heightened concentration and focus and taking logical steps to achieve a result. He is not someone who didn't understand what was going on (T 648). He was goal oriented and understood what he was doing as far as the robbery was concerned (T 648). Anthony knew the difference between right and wrong (T 649). He was legally sane at the time of the commission of the offenses (T 650). Anthony reported that he used crack several hours prior to the actual murder. In Dr. Levin's opinion, Anthony was not acting under the influence of crack cocaine at the time of the offense (T 650). There was no direct intoxication due to crack (T 651). Anthony was not buying large quantities of crack (T 652). He was able to maintain employment and was working at the

time of the offense (T 653). Anthony tends not to take responsibility for his actions and blames others (T 654). Part of an antisocial personality is to minimize responsibility for your own actions (T 655). Anthony Farina is rational, has no hallucinations, is capable of taking care of himself, and is driven by money (T 658). He is of average intelligence. Many of the people Dr. Levin has dealt with that have eventually ended up on death row have evidence of antisocial personality disorder (T 659). They are people capable of committing heinous crimes (T 660). Anthony engaged in various petit thefts and vandalism throughout his juvenile history (T 661-665). He stole money, ran away and vandalized a yacht (T 669). There was evidence he was a sexual abuser of his own young sister (T 662). The sister was four when he sexually abused her (T 664). There was a very complete program at Lad Lake (T 667). Anthony possessed the antisocial characteristic of not liking authority (T 669). Anthony reported that he had been sexually abused by his mother -- there were contrasting reports from Lad Lake as to whether this was a lie (T 670). Dr. Levin felt he had been sexually abused by someone but it wasn't clear who he was abused by (T 671). Anthony's history is replete with lying (T 673). According to Dr. Levin's report of January 13, 1987, Anthony was involved in arson (T 674). He exhibited each and every characteristic of an antisocial personality prior to the age of fifteen (T 675). This antisocial personality disorder doesn't prevent him from knowing the difference between right and wrong. He is impulsive, another characteristic of an antisocial

personality (T 677). Anthony entered Taco Bell with a knife with the intent to threaten people to force them to give up their money (T 678). He was able to realize that if three of the four people in Taco Bell recognized him he would not get away with robbery (T 679). He had no plans to move from the area. He didn't leave until he thought they were dead (T 680). He had spoken to Michelle Van Ness just before the robbery (T 681). He had the capacity to know he could be identified by his clearly exposed tattoo of a burning heart with a flame on top. He knew when he tied and put the victims in the freezer it was an area from which they couldn't escape (T 682). He earlier contemplated what he would get from the robbery. He obtained rubber gloves to conceal fingerprints and rope to bind his victims (T 683). He told Detective Sylvester the people were shot because he didn't want to get caught (T 685). Dr. Levin stated that Anthony knew what was going to happen to the victims ahead of time but passively went along with his brother (T 686). If he held down Kimberly Gordon's head, however, so Jeffrey could pound the knife into her skull, that was not passive (T 668). Such fact would change his opinion as to Anthony not being an active participant or not acting with premeditation to kill Kim Gordon (T 689). It's quite likely Gordon wouldn't be able to see Anthony holding her head if she turned away (T 696).

Dr. Sun Park examined Anthony Farina's sister Katrina Windesnyder in reference to the sexual incident with Anthony and a physical exam revealed no signs of physical abuse (T 702). That does not always rule out the possibility of sexual assault, however (T 712).

Anthony Farina, Sr., never abused Anthony's mother when the child was in the same room (T 717). Susan Brant, Anthony's mother, testified that Anthony had told her years later after a lot of therapy that a motel manager in Tampa, Florida had sexually abused him. Anthony then started soiling his pants on a daily basis (T 724). On cross, however, she acknowledged that the manager had merely fondled him (T 738). Anthony does not see his own son (T 728). Susan Brant 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).

Anthony Farina has become a young man, about 6'3" tall and over 200 pounds. He has two children out of wedlock (T 842).

Dr. Umesh Mhatre determined that Anthony Farina was competent, sane, and knew the difference between right and wrong at the time of the offenses (T 932). Dr. Mhatre did not view incopresis as a symptom of sexual abuse but an expression of anger toward the environment or the parents (T 935). In Dr. Mhatre's opinion, Anthony was not under the influence of crack cocaine at the time of the robbery/murder. The affects are gone within twenty to thirty minutes. Anthony had smoked $20.00 to $30.00 worth of crack an hour or more before the incident (T 936). It was Dr. Mhatre's opinion that Anthony committed the robbery for personal gain. He saw no correlation between his

abuse as a child and the robbery (T 942). He was not under any kind of duress. He had planned it for several weeks (T 943). There was no correlation between the abuse and the murder. Anthony was driven by money. There was no evidence Anthony was being led by Jeffrey Farina. Anthony was more of a dominant person in the family (T 944). Anthony knew what he was doing. In Dr. Mhatre's opinion Anthony suffers from an antisocial personality disorder (T 958).

SUMMARY OF THE ARGUMENT

I. The jurors were unbiased. They are not required to be totally ignorant of the facts and issues. They were able to lay aside impressions gleaned from publicity and render a verdict based on the evidence. Cause challenges were properly denied on jurors peremptorily stricken. Jurors were properly stricken whose views on the death penalty would prevent or impair the performance of their duties as jurors. Voir dire was not improperly restricted. The veniremen asserted their ability to be impartial despite having been exposed to pretrial publicity. Appellant has failed to make a sufficient showing that the jurors who tried the case were actually biased or prejudiced against him.

II. The taped conversations of the Farina brothers in the back of a patrol car were admissible under the hearsay exception for statements against interest. The statements of the Farinas to detectives should have been admissible in a joint trial as interlocking confessions. There were no antagonistic defenses. Any error in admission of statements in the penalty phase was harmless.

III. The jury was properly instructed in the penalty phase by virtue of 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 U.S. 242 (1976). The CCP instruction is not unconstitutionally vague.

IV. The death sentence is proportional to other cases where defendants planned a robbery which included a plan to murder witnesses and the nonstatutory mitigating circumstances were noncompelling. The aggravators were properly found. The trial court expressly evaluated proffered nonstatutory mitigation.

V. Appellant did not preserve for appeal his claim that the prosecutor's opening statement was inflammatory and prejudicial and objected on other grounds below. The prosecutor was not allowed to reenact the murder. The victim's father was not allowed to testify. The judge correctly instructed the jury on the law. Any prosecutorial misconduct would not have misled the jury to render a more severe sentencing recommendation than it would have otherwise.

VI. The state attorney did not hand-pick the judge who ultimately presided over the case and appellant received a fair trial. The state attorneys office could not be removed on mere suspicion of future misconduct.

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

VIII. 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.

ARGUMENT

I APPELLANT WAS TRIED BY UNBIASED AND IMPARTIAL JURORS IN ACCORDANCE WITH THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The question of whether a juror is biased or impartial is largely a judicial one to be determined by the trial court on all the facts and circumstances as they may appear. *Walsingham v. State,* 61 Fla. 67, 56 So. 195 (1911). If there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party or by the court on its own motion. *Singer v. State,* 109 So. 2d 7 (Fla. 1959). The test is not whether the juror will yield his bias or prejudice to the evidence, but whether he is free of such prejudice or bias, or if he is infected by bias or prejudice, whether he will, nevertheless, be able to put such completely out of his mind and base his verdict only upon evidence given at the trial. *Singer, supra; McCullers v. State,* 143 So. 2d 9090 (Fla. 1st DCA 1962). When it does not appear that the juror is biased or prejudiced, nor that the circumstances of the case are such as to evince good reason for interest or bias, the court is justified in refusing a challenge for cause. *Burns v. State,* 89 Fla. 353, 104 So. 447 (1925).

Juror Nice stated that there was no reason he could not serve as a fair and impartial juror (R 1954). The prosecutor asked him if he was "of a state of mind right now that you couldn't give these young men a fair trial?" Mr. Nice responded "If they deserve one." The prosecutor then explained that under our legal system everyone is presumed to be innocent until they are proven guilty and defendants are not tried in the newspaper, television, or by rumor but are tried only in the courtroom based upon the evidence. Mr. Nice indicated that he could follow that general principle and presumed the defendants innocent (R 1955). He would base his verdict entirely upon what he heard in the courtroom. If the evidence warranted it he would be able to recommend death. He understood that the burden was on the state to prove their case and the defendants did not have to prove they were innocent. He also indicated he would be able to recommend mercy (R 1956). He later explained to defense counsel that what he meant by the remark that he would give the defendants a fair trial "if they deserved one" was that *his decision would be based upon the evidence presented* (R 1957). He understood that the burden of proof is on the state to prove its accusations beyond and to the exclusion of a reasonable doubt (R 1959). He would apply that burden of proof throughout the case even at a penalty phase. He indicated that he had read about the case briefly in the newspapers. He could be fair and impartial. He could presume Anthony Farina innocent (R 1960). He felt that life imprisonment could be adequate punishment for someone who had deliberately killed another (R 1962). Upon individual voir dire Mr. Nice

realized that he was thinking of another incident and had actually *heard nothing* about the Taco Bell case. There was nothing that would interfere with his ability to be fair and impartial. He had not read any articles concerning the pretrial motions or hearings (R 1982). He could presume that no crime had been committed (R 1983). The trial court properly denied the challenge for cause to Mr. Nice on the ground that he was not instructed as to what his obligation was under the law and, when he was rehabilitated, he said he certainly could give the defendants a fair trial (R 1984). Juror Nice's statements indicated that he could and would return a verdict according to the evidence submitted and the law announced at the trial. He satisfactorily explained his previous statement and there was nothing in the colloquy to indicate that Juror Nice was any way biased or would not give the defendant a fair trial on the evidence presented.

Juror Peggy Marley indicated that, unlike Mr. Scott, she was *not* already biased because of exposure to outside information. She "guessed" that she presumed the defendants innocent, although she had read about the case, and "felt from that point what she felt," but she recognized that *there would be a trial* (R 1998). She indicated that if she sat as a juror she would be able to base her verdict *entirely upon the evidence* she heard in the courtroom and nothing else. She could discipline herself to set aside any outside exposure and base her verdict *entirely and exclusively* upon what she heard in the courtroom and the judge's instructions (R 1999-2000). She would fairly consider the

background of the defendants, including the fact that they had a rough or abused childhood, their ages, and other factors, and give such factors such weight, credibility or importance as she saw fit as a juror. She would not automatically vote for death upon conviction of murder by premeditation (R 2001). She would consider recommending a life sentence, as well as the death penalty, and would fairly consider both options. She agreed with the other jurors that the defendants did not have to prove their guilt or innocence. The state had to prove their guilt. *The defendants did not have to overcome anything that may have been in the paper* (R 2002). The information she had received previously *would not interfere with her decision-making process* (R 2003). Ms. Marley indicated that she felt the same as Ms. Stewart, in that she would consider herself a strong proponent of the death penalty in some cases. But she always felt that mercy had a role to play in such a case. There was room for mercy even if it was premeditated first degree murder (R 2007). Upon being asked by defense counsel how she would put the things aside that she had heard in the media, she indicated that once the case had been presented she would base her decision on that. She would listen only to the witnesses and what she had heard and would base her feelings on that alone (R 2010). She recognized that in a criminal case the state had to prove their case to the exclusion of every reasonable doubt (R 2014). Upon individual voir dire examination she indicated that she had heard about the case on the news the next morning and read about it in the newspaper. She had read articles about the case in the Daytona Beach News Journal. She indicated that based

on the news she felt that a crime had occurred (R 2042). The article she had read described how the Taco Bell was held up and that the victims were put in a locker or freezer and shots were fired and there was a stabbing. She did not know why the shooting occurred other than for a theft (R 2043). She indicated that she was not at all influenced by another juror's answer that he would not be flexible in a first degree murder case and would automatically impose the death penalty. She stated that she had her own feelings (R 2045). This juror was absolutely free of bias. Appellant states no authority for his novel proposition that Juror Marley should have been excused for cause because prior to the trial she expressed a belief that a crime had been committed. The state would agree with Judge Blount that the question to the juror 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 the defendant did not have to overcome anything in the paper. She recognized that the state had to prove their case to the exclusion of every reasonable doubt. She indicated that she would decide the case on the basis of the evidence. 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). There was no initial doubt as to this juror's sense of fairness or mental integrity that she should have been excused on challenge for cause. It should also be noted that the jury was instructed pursuant to the Florida Standard Jury Instructions, cited by appellant, 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.

Contrary to appellant's assertion, 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). Appellant fails to point out that 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." Appellant misleads the court when he states that Juror Marriott replied "I

don't think so" to the question of whether he could be fair after receiving outside information. In the first place, it was not established that he had received outside information at that point in time. What the prosecutor actually asked Mr. Marriott was "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 were not equivocal at all but clearly 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, as the appellant now suggests, 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.

Juror Stewart indicated that in *some cases* she considered herself a strong proponent of the death penalty but felt that *mercy* always has a role to play in such a case (R 2007). She felt that the death penalty could be merited in the right instance, where she was thoroughly convinced that is what was deserved (R 2008-2009). She did not view the death penalty as a real deterrent but thought that sometimes it was the only way to make a statement that what has been done was wrong (R 2209). She indicated that she only knew a crime had been committed from what she heard on the television (R 2009). She would be able to set aside any assumption based upon facts in the media *that a crime had been committed and would base her decision on the evidence.* She indicated "I'm here to listen to the facts presented, and I don't care what anybody else says." She indicated that her verdict would come from the evidence in the courtroom only (R 2054). She would not consider the penalty in the guilt or innocence phase but only when it came time to consider it, in the penalty phase (R 2000). She would fairly consider factors such as background, rough or abused childhood, and age and give such factors the weight, credibility or importance she saw fit as a juror. She would not automatically vote for death just because of a conviction of murder by premeditation (R 2001). She indicated that the information she had heard about the case would not interfere with her efforts to be fair and impartial (R 2003). Contrary to appellant's assertion, Ms. Stewart had not come to a firm, fixed assumption that a crime had been committed as a result of exposure to television coverage of the case. The colloquy does

not reflect that because of her belief in the death penalty she would automatically vote for the same. *Cf. Bryant v. State,* 601 So. 2d 529 (Fla. 1992). She clearly indicated that it was merited only in the right instance, "if she was thoroughly convinced that is what was deserved" (R 2008-2009).

Juror Sullivan indicated that she was not in possession of information that would impair her from presuming the defendant's innocence. She, along with the other jurors, indicated that if she had a previously formed opinion she would be able to set it aside and base any verdict entirely and exclusively upon the evidence she heard in the courtroom and the judge's instructions (R 1595). She presumed the defendant was innocent, recognized that he did not have to prove he was innocent, did not have to introduce any evidence at all, and that the proof must come from the state (R 1597). She would not automatically vote for death based upon a verdict of guilty in the first degree but would consider each case on its own merits as to whether or not to vote to recommend death (R 1598). She recognized that the judge would decide what evidence came in and that she would consider only the evidence he allowed in (R 1599). She indicated that the first time she had heard about the case was when someone at work approached her about it but the person did not express an opinion to her and as a result of the communication she did not form an opinion about the case (R 1602). She may have heard something on television about the case but it was very little (R 1602). She indicated that mercy was something that *should* be taken into account in a death penalty case. In her opinion, social

background and childhood abuse are things that should be considered in a death penalty case. She further indicated that nothing she had experienced in the process of jury selection would have a bearing on her ability to be fair and impartial (R 1603). On individual voir dire Ms. Sullivan indicated that the employee who asked her if she had heard about the shooting at Taco Bell did not go into any details about the case and that she had no emotional reaction to the news. She thought she heard something about the case on television but she didn't pay much attention to it. All she could remember was that someone died and there was a funeral (R 1689). After she saw the TV report she was not left with an impression about the case (R 1690). Even knowing what she did about the case she could still presume the defendant to be innocent (R 1692). Appellant, again, distorts the record when he claims that Ms. Sullivan stated that she would automatically vote for the death penalty in the case of a conviction. She merely stated that she could recommend the death penalty if the defendants were found guilty of premeditated or felony murder *if she was convinced that the death penalty was appropriate* (R 1598). She had, in fact, previously indicated that she would *not* automatically vote for death based upon a verdict of guilty in the first degree (R 1598). Appellant also does not indicate where he challenged this juror for cause or even peremptorily.

The record hardly reflects that Jurors Marley, Marriott, Stewart and Sullivan were biased or prejudiced so as to deprive appellant of a fair trial. 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 gleaned from publicity and render a verdict based on the evidence. *Murphy v. Florida,* 421 U.S. 794 (1975); *Geralds v. State,* 601 So. 2d 1157 (1992). None of the jurors indicated that they would automatically vote for the death penalty for every eligible defendant and there was no reason for them to be excluded for cause. The jurors indicated that they would consider the evidence of aggravating and mitigating circumstances and fairly consider not only the death penalty but a penalty of life as well. *Cf. Morgan v. Illinois,* 112 S.Ct. 2222 (1992).

II APPELLANT WAS NOT DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY BY VIRTUE OF USING PEREMPTORY CHALLENGES ON JURORS FOR WHOM A CAUSE CHALLENGE COULD NOT BE GRANTED.

Mr. Wagoner indicated that he would fairly consider age and background and all the circumstances of the parties in the penalty phase (R 1798). He was asked "Do you think mercy has any application in a death penalty case," to which he responded "No." (R 1807). Mr. Jeffers indicated that he was neither for nor against the death penalty (R 1905). He specifically indicated "it depends on the facts of each case whether or not he would vote for death *or for a recommendation of mercy.*" (R 1906). He would weigh the evidence and decide what value it had, recognizing that the judge would decide what evidence he was to hear (R 1906). This prospective juror was asked by the defense if he "believed that mercy has any place in a death penalty case," to which he responded, "No." He was then asked "Do you

believe that in a first degree premeditated murder case that whether or not a person has an abusive childhood background or neglected childhood, does that have anything to do, in your opinion, with whether the death penalty would be appropriate," to which the prospective juror responded "My last answer was no." (R 1909). The inartfully constructed questions of defense counsel give no reason to believe these jurors would not consider mitigating factors or would not follow the law and the instructions of the court in regard to the weighing of aggravating and mitigating circumstances which is what a proper recommendation of mercy is based on. Neither of these jurors stated that they would *not* recommend mercy if there was some basis for so doing.

Venireman Wasko never indicated that she viewed the death penalty as the only appropriate penalty in a premeditated murder case. She was asked "In what kind of cases do you think the death penalty ought to be imposed?" She responded "I really would have to think about that. In the case of deliberate, premeditated murder, I would agree a death sentence would be *appropriate*." Defense counsel tried to lead her down the primrose path of *Bryant v. State*, 601 So. 2d 529 (Fla. 1992), but was unsuccessful in so doing. Counsel asked her "So I understand and have it clear in my mind, in every case where there is a deliberate, premeditated murder, you would think the death penalty is appropriate?" The state properly objected on the basis that was not what the juror had said. Such objection was properly sustained. Counsel then asked her to explain what she

meant. She indicated that she would first like to hear all the details and could not answer with a simple yes or no. (R 1062). She was then specifically asked "Do you think in a premeditated murder situation, the death penalty just automatically somehow applies?" This juror unequivocally responded "*No.*" (R 1063) Her answers left absolutely no doubt about her ability to be a fair and impartial juror on the issue of appropriate sentence.

The prosecutor asked Venireman Domeij whether he would automatically recommend the death penalty if someone were found guilty of premeditated murder in the first degree. Mr. Domeij responded "I have very strong feelings about that." The prosecutor then asked "You strongly support it but you would not automatically vote for it, would you?" The venireman replied "It's a hard line to cross." The prosecutor then explained to the venireman that the guilt phase is separate from the penalty phase and that the jury first considers evidence only as to guilt or innocence and only if the defendant is found guilty of a capital crime does the case go to the penalty phase where the jury hears additional argument (R 1614). It was further explained to the venireman that evidence that did not come in the guilt phase may be admitted in the penalty phase and that the jury would be instructed by the judge. In effect, a second trial takes place and the jury deliberates again and decides whether or not to recommend a death sentence or life in prison with a minimum of twenty-five years without parole. Mr. Domeij was then asked "Would you be able to, if the defendant were found guilty in this case of murder in the first degree, objectively and

impartially and fairly make a decision with regard to the sentencing recommendation based only upon the evidence in this courtroom and the judge's instructions?" The venireman replied "I might have a little difficulty." Mr. Domeij subsequently indicated that in the penalty phase he would be able to consider such mitigating factors as personal or family background. He indicated that at that moment he was neutral with regard to what punishment, if any, he would recommend in the case, having heard no evidence. (R 1616). Upon questioning by counsel for Jeffrey Farina, the venireman responded, "I think so." To the question "If you found one person deliberately killed another person, would you decide death is the only appropriate penalty, given your strong views?" (R 1620). When Venireman Domeij was challenged for cause the state noted that the question as phrased did not preclude him from following the law and he was never asked the question in the context of aggravating factors. The state suggested that a cause challenge was premature. The court properly denied the challenge for cause. Rather than further questioning Venireman Domeij to establish possible grounds for a cause challenge defense counsel instead asked for additional peremptory challenges so that he could exercise one against Mr. Domeij. The court gave defense counsel six more challenges and counsel then struck Mr. Domeij peremptorily. (R 1625).

Ms. Wasko indicated that she supported the death penalty but would look at the details. She indicated that there were cases where the death penalty is warranted and cited Ted Bundy (R 1115). She was asked by counsel for appellant if she believed

that there was any case of first degree murder where the penalty should not be death and she indicated that she would have to hear the details before she could say yes or no. She indicated that she would be able to listen to all the details. She was asked if the socio background of the person on trial would have anything to do with whether she would be for or against the death penalty. She indicated "No." The court explained to her the system of a bifurcated trial with aggravating and mitigating circumstances upon which the jury would be charged and would consider in their deliberations (R 1061). She specifically indicated that in a premeditated murder situation she did not feel that the death penalty just automatically applied (R 1063). Wasko was not even challenged for cause on the grounds that she would automatically vote for the death penalty but on the ground that she would not consider family background or social issues as a mitigator, which was not at all demonstrated (R 1141).

Appellee fails to see the significance of cases cited by appellant regarding the inability to follow the court's instructions on an insanity or intoxication defense.

Appellant was not prevented from exploring the attitudes of the potential jurors pertaining to the mitigating circumstances he anticipated establishing. Appellant's questions were inartfully drafted and sought to explore the juror's feeling rather than ascertaining if they could follow the law. Appellant also sought to have the jury precommit to accepting his hypothesized nonstatutory mitigating circumstances.

The jurors did not indicate that they would not give fair consideration to such factors as age, child abuse and other non-statutory mitigators. Wasko clearly indicated that she would have to know the details before she could determine the penalty. As previously stated, she was asked about the "sociobackground of a person" and whether it would have anything to do with whether or not she would be for or against the death penalty (R 1060). Such questioning hardly indicated that the juror would not, upon proper instructions, consider nonstatutory mitigating factors. Ms. Graham specifically indicated that if a person were convicted of premeditated first degree murder there would be circumstances in her mind which would justify not imposing the death penalty. When asked what types of things would be important in making that decision she specifically stated "age." (R 1262). When asked if she supported the death penalty she indicated that it depended on the case and the situation (R 1275). Jeffers indicated that it would depend on the facts of each case whether or not he voted for death or a recommendation of mercy (R 1906). He would consider all the evidence and any evidence the court weighed and give it fair consideration in determining whether to recommend life or death (R 1905-1906). Not having been explained the role of mitigating factors in the penalty phase this juror's answer that an abused or neglected childhood would not have anything to do with whether the death penalty would be "appropriate" hardly indicates that upon proper instruction this juror would ignore nonstatutory mitigating factors in determining whether or not death would be an appropriate sentence (R 1908-1909). Jeffers

presumed that the defendants were innocent. He indicated that he thought he could put aside any exposure to the case through the media and base his verdict entirely upon what he heard in the courtroom (R 1905). All he had heard about the case in the first place was that they were having a hard time finding a jury from television reports (R 1910). The particulars he knew about the case were that someone was shot as the Taco Belle was held up at gunpoint (R 1916). Ann Johnson was nonequivocal in her answers about her ability to be fair and impartial (R 928). She indicated she could put aside any media information and base her verdict on nothing but the evidence she heard in the courtroom (R 1886). Upon questioning by defense counsel she was asked if she could be fair and impartial completely and if anything she had heard, read, seen or otherwise been exposed to would influence her in any way in deciding the issues in the case. She replied "I'm not sure." She was not questioned on this matter further by counsel for the appellant (R 1895). Upon further questioning by counsel for Jeffrey Farina she indicated that if she found someone guilty of first degree murder she would consider everything that had happened and would not automatically vote for imposition of the death penalty. She understood that she would be weighing aggravators and mitigators (R 1899). She was not immediately challenged (R 1900). Upon individual voir dire examination she indicated that she had heard about the Taco Bell case on the news. She had heard that there were teenagers on duty in the evening and that robbers came in and tied them up. She also heard heard that they wanted to eliminate witnesses (R

1925). Her coworkers had discussed the fact that they had trouble picking jurors. She indicated in those conversations that she really hoped she wouldn't be called. She was specifically asked if she thought she could be fair in this case and she said "I hope so." She then indicated that she wouldn't feel comfortable serving as a juror not because of her exposure to the media but because of her personal involvement in a case that would involve someone else's life (R 1928). She had no attitude or opinion as to the guilt or innocence of Anthony Farina (R 1929). She was not challenged peremptorily after the cause challenge was denied (R 1932). Margaret Daniel indicated that there was no reason she could not serve as a fair and impartial juror. She volunteered that she had small business dealings with Mr. Tanner's family. She was immediately challenged for cause. The prosecutor objected on the ground that his family and he deal with half the merchants in the communities and if that was grounds to excuse them then they may not get a jury. The court agreed and reserved ruling on it until further interrogation (R 1339-40). She indicated that she could set any media exposure aside and base the verdict entirely upon what she heard in the courtroom. She considered herself totally neutral between the parties with regard to guilt or innocence or punishment (R 1340). She indicated that she did not know the prosecutor at all but for the fact that her family sold the prosecutor's family a life insurance policy on one of his daughters. That was the extent of the contact and it was between Ms. Daniels' son and the prosecutor's family, not her. She had

never talked to the prosecutor. Her son talked to the prosecutor's wife (R 1341). She recognized that it was up to the state to prove their case and the defense did not have to prove anything. She agreed that not every first degree murder would necessarily call for a recommendation of the death penalty (R 1342). She, again, along with the other jurors indicated that they would consider mitigating and aggravating factors in the penalty phase. She also indicated that she could consider the factors of age and a rough background (R 1343). She indicated that despite her family's relationship with the prosecutor's family she would be comfortable sitting as a juror in the case. She did not necessarily feel that there may be some favoritism she would give to the prosecutor because of the business relationship between her son and Mr. Tanner's family. She further indicated that she had not formed any opinions about the case (R 1354). She understood that if the case got to the second phase the court would give her the law and she would have to apply that law to the evidence and the facts (R 1364). The court properly determined that there was no reason to grant a cause challenge on this juror (R 1367). Ms. Graham indicated that she had read articles concerning a Taco Bell case the day after (R 1476). She knew that more than one person had been shot and that another had been stabbed. She presumed the defendant to be innocent (R 1478). She indicated that her decision would be based entirely on the evidence she heard in the courtroom. If the state didn't prove a killing had occurred as far as she was concerned a killing didn't occur (R 1479). The same with robbery

(R 1480). This juror was thoroughly rehabilitated by the state and it is clear that she did not expect the defense to present evidence to overcome information that she had in the media.

III THE TRIAL COURT PROPERLY EXCUSED JURORS FOR CAUSE WHO COULD NOT BE FAIR AND IMPARTIAL AND APPELLANT WAS NOT DEPRIVED OF A FAIR AND IMPARTIAL JURY.

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). On questioning by counsel for appellant 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.

Prospective juror number 26, Barney Gulin was called from panel four (R 1757). Mr. Gulin indicated that he did not support

the death penalty (R 1770). When asked by counsel for appellant if there were any circumstances in which he could impose the death penalty Mr. Gulin replied "*No. Just that I'm against it, that's it.*" Defense counsel then asked "So would you be able to follow the law? Even if it's different than your own personal opinion?" Mr. Gulin responded "Well, I'll follow the law. That's what they say." (R 1770). The state challenged Mr. Gulin on the ground that he said he had opposed the death penalty and would not vote to recommend it. The defense objected to the challenge on the basis that Mr. Gulin indicated he could follow the law and put his personal opinions aside. The state responded that Mr. Gulin had not indicated he would put his personal opinions aside and noted that the question he was asked regarding whether he could follow the law was not even specific to the death penalty. Mr. Gulin was properly discharged by the court for cause (R 1774). This juror was not rehabilitated by the defense.

Prospective juror number 38, Fannie Hudson was called from panel four (R 1776). When asked whether she was opposed to the imposition of the death penalty in an appropriate case Ms. Hudson responded that she had mixed feelings. When asked if her feelings were such that she would never recommend the death penalty in a murder case she indicated that "it would depend on the circumstances." She responded affirmatively when asked whether she could fairly consider the imposition of the death penalty, depending on the evidence she heard in the courtroom. (R 1778). When advised that the state was going to seek the death penalty and upon being asked if she could give the state a

fair shake she responded that "I will try." (R 1779). When asked if she would have difficulty finding the defendants guilty of murder because of her concerns about the death penalty she responded "If I'm totally, whole heartedly convinced, then I would do what I thought was right." When asked if that would even include voting guilty of murder in the first degree she responded "If they are guilty, yes, or if the person is guilty." (R 1781). The state then indicated to the judge that it would like to examine Ms. Hudson further in individual voir dire as she appeared very reluctant to find someone guilty. (R 1792). Defense counsel for Anthony Farina challenged Mr. Nichols for cause. The court asked if it was a reverse discrimination type thing that the state couldn't do but the defense could. Mr. Powers responded that it was not. (R 1792). Mr. Powers indicated that the challenge was for cause. The state objected as the juror indicated that he would not automatically vote for the death penalty and would follow the evidence. The court responded "I think I have pretty much been granting these for the state, so I'll grant this one for the defense." The prosecutor then stated, "While we're at it then, Judge, could we for cause go ahead and challenge Mrs. Hudson for cause?". The judge responded "Let them object so it will be on the record and it will be granted. Put your objection on the record. Tell me why you object." Counsel for Jeffrey Farina objected on the grounds that he was entitled to a jury of his peers including people who are not only in favor of the death penalty but opposed to it. (R 1793). The judge then indicated "I thought it would be

interesting to see how it works both ways. So if I grant you, I'm going to grant him." The trial judge also indicated to counsel for appellant "You join in and the ruling will be the same. If I grant yours, I'll grant his." Counsel for appellant joined in, citing the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 2, 9, 16, 17 and 22. The trial judge indicated that he was trying to be fair to both sides. (R 1794).

Where prospective jurors indicate that they could not fairly consider the issue of a defendant's guilt knowing that the imposition of death was a possible penalty, and the defense does not attempt to rehabilitate them, the court does not err in granting a challenge for cause. *Johnson v. State,* 608 So. 2d 4 (Fla. 1992). Where a juror equivocates on her ability to follow the law, removing the juror for cause is not error. *Randolph v. State,* 562 So. 2d 331 (Fla. 1990). This juror evinced no real ability to follow the law, only what *she thought* was *right*, which involved only "trying" to give the state a fair shake.

IV THE TRIAL COURT DID NOT IMPROPERLY RESTRICT VOIR DIRE.

Ms. Wasko was asked in what kind of cases she thought the death penalty ought to be imposed. She responded "I really would have to think about that. In the case of deliberate, premeditated murder, I would agree a death sentence would be appropriate." Defense counsel then paraphrased what she had said: "So I understand and have it clear in my mind, in every case where there's a deliberate, premeditated murder, you would

think the death penalty is appropriate?" The state objected on the basis that that is not what the juror said. The objection was sustained (R 1062). Counsel then properly posed the question "Do you think in a premeditated murder situation, the death penalty just automatically applies?" Ms. Wasko replied "No." (R 1063). Appellant has failed to demonstrate that voir dire of this juror was curtailed at all.

Ms. Lee was posed the question, in a vacuum, if when she considered the appropriate penalty she would consider family or abusive background. The state objected to the defense having the juror negatively commit without the benefit of the law or the court's instructions. The objection was sustained (R 1081). Questioning of the juror was not curtailed and counsel could well have explained to the juror the context in which such background could have been considered.

Mr. Olson was also posed an incomplete question about the statutory mitigating factor of age: "Would you, in your consideration of whether death is an appropriate penalty, would you consider the age of the person charged or accused as being pertinent?" (R 1085). He was later properly asked whether he would consider age if he was instructed by the court that age is a factor to consider. He responded "I would have to go by what has instructed, if age is going to be a factor, you have to look at it, yes." He also said he would consider an abused childhood along with age. An objection was properly sustained as to how he "personally felt about it." The trial court properly determined that the only pertinent inquiry in this regard was whether the

juror would follow the instructions of the court and abide by the law. Voir dire was not improperly curtailed.

The trial court properly sustained an objection to the question to the entire panel about whether they would consider age in making a decision as to what penalty would be appropriate (R 1087). The trial court properly found their "attitude" was immaterial and that philosophical questions on what they thought the law was were not warranted (R 1151). Counsel fully explored all the jurors ability to follow the law regarding this mitigating circumstance.

Counsel was allowed to voir dire Mr. Miller on the issue of whether he had formed an opinion on guilt or innocence, contrary to appellant's assertion. After first posing an inartfully constructed question counsel subsequently directly asked Mr. Miller if he had formed any opinion whatsoever about the question of guilt or innocence. Mr. Miller responded "the only thing I know is what the newspaper and television would say. They have been accused of it. But, no, I haven't formed a concrete opinion." (R 1052).

Further attempts to voir dire jurors personal attitudes about mitigating factors were properly curtailed. The defense was trying to get the jurors to precommit rather than simply trying to elicit whether the jurors could follow the instructions of the law and properly consider mitigating circumstances.

The sustained objections were also largely due to inartfully drawn questions which were later properly framed.

Appellee cannot fathom how appellant can complain of curtailed voir dire of Juror Campbell by virtue of the inability to repetitively ask the same question (R 2040-41).

V THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTIONS FOR CHANGE OF VENUE.

A trial judge is 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.*

VI APPELLANT WAS NOT DENIED A FAIR TRIAL BY VIRTUE OF BEING TRIED WITH A CODEFENDANT AS THE STATEMENTS OF THE CODEFENDANT WERE RELIABLE AND ADMISSIBLE AS A HEARSAY EXCEPTION.

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] Investigator Sylvester monitored conversations between Anthony and Jeffrey Farina in the company of John Henderson in the back seat of a police car (R 291). State's exhibit Q-1 through Q-6 are original tape recordings of the conversations on May 11, 1992, while they were being processed for booking (R 292). State's NNN-1 was an edited account of the conversation between the Farinas as contained in Q-3. NNN-2 was an edited account of Q-5 of the original tape of the conversation between the Farinas and John Henderson (R 293). Counsel for Anthony Farina objected to the admissibility of Q-1 through Q-6 (R 292). The state withdrew them from consideration. Counsel then objected to the statement "should have cut their fucking throats" (R 295). The trial court

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

then ratified and confirmed the ruling of Judge Orfinger and NNN-1 and 2 were received into evidence (R 295).

Appellee would note that the statement objected to below was made by the defendant, himself, Anthony Farina. No complaint was voiced at all as to the statements of Jeffrey Farina as implicating Anthony Farina. The confrontation right can be waived when a defendant fails to make a timely objection to the admission of hearsay testimony. *United States v. McDaniel,* 773 F.2d 242, 245 (8th Cir. 1985). Appellant is entitled to no relief, in any event.

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).

Section 90.804(c), Florida Statutes (1992), as amended in 1990, c. 90-174, §4 allows statements such as the ones at issue to be admissible as a hearsay exception as a statement against interest. The 1990 amendment specifically deleted the language that "a statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception."

Bruton v. United States, 391 U.S. 123 (1968), and its progeny involved confessions. The statements in question were not *Bruton*-styled confessions but tacit admissions, admissible as substantive evidence. To the extent *Bruton* could be said to be implicated, it is clear there is no violation if the defendant is

not directly implicated by 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). Here, any reference to Anthony Farina was omitted. 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).

During redirect examination in the penalty phase of Reverend Crider, counsel for the defendant brought out the fact that Reverend Crider believed that Anthony and Jeffrey were influenced by their past, over the objection of the prosecutor that the Reverend was not qualified to give such an opinion (R 846-847). On re-cross examination the prosecutor inquired with regard to Jeffrey if when he indicated it was his call whether to shoot them or not it came from his past. Counsel for Anthony Farina objected solely on the ground that the question contained facts not in evidence. The objection was sustained (R 847). Counsel then claimed such error could not be cured by an instruction and moved for a mistrial. The motion was denied (R 848). Counsel did not object on confrontation grounds that he was unable to cross-examine Jeffrey Farina. On cross examination Dr. Krop indicated that he had reviewed the tapes of the conversation of the Farinas in the back seat of the police car (R 880). The prosecutor asked if he recalled Jeffrey's statement that he recounted to a police officer that after they got the cash Anthony called him into the office and asked him what he wanted to do, that it was his call or show and that Jeffrey

thought for a moment then stated that he was going to shoot them. Counsel for Jeffrey Farina objected solely on the grounds that the question assumed facts not in evidence and was outside the scope of direct. Counsel for Anthony Farina posed the very same objection (R 881). Again, no objection was raised on the basis of a violation of the Confrontation Clause. Appellant has waived the right to complain of a Confrontation Clause violation. *United States v. McDaniel,* 773 F.2d 242, 245 (8th Cir. 1983).

Dr. Krop had discussed with Jeffrey Farina the discussions Jeffrey had with Anthony regarding the possibility of having to shoot someone. The prosecutor inquired of Dr. Krop "Well, they did discuss killing anyone that tried to resist them, didn't they?" Counsel for Anthony Farina objected because of an inability to cross-examine and moved for a mistrial, which motion was denied (R 879). The prosecutor later inquired of Dr. Krop "And Jeffrey on several occasions said, the witnesses were killed to eliminate witnesses to prevent identification, correct?" Dr. Krop responded "That's what has been said, yes." Counsel for Anthony Farina objected and moved to strike the answer on the basis that he could not cross-examine the statements. The objection was overruled (R 882).

The same considerations attendant to an analysis regarding the guilt phase are also pertinent to the penalty phase. The conversations are statements against interest and tacit admissions. They are interlocking in nature. It makes absolutely no sense that a killer should benefit from the fact that the person he chose to make incriminating statements to is

his equally culpable co-defendant. This is especially true in the absence of antagonistic defenses and where the defendant comes before this court complaining that his confession and remorse were not properly weighed. The jury was aware from the guilt phase testimony of the surviving victims that Jeffrey was the shooter and Anthony was the leader. Anthony entered Taco Bell with a knife with the intent to threaten people to force them to give up their money (T 678). He was able to realize that if three of the four victims recognized him he would not get away with robbery (T 679). He had spoken to Michelle Van Ness just before the robbery (T 680). He had the capacity to know he could be identified by his tatoo (T 682). He wore rubber gloves to conceal fingerprints (T 683). He brought rope to bind the victims (T 683). He knew they could not escape from the freezer (T 682). He knew what was going to happen to the victims ahead of time (T 686). He didn't leave until he thought the victims were dead (T 680). There was sufficient evidence to support the aggravating factors against Anthony Farina even excluding his brother's statements. Any possible error is harmless. *See, Harrington v. California,* 395 U.S. 250 (1969); *State v. DiGuilio,* 491 So. 2d 40 (Fla. 1986).

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

The standard jury instruction on nonstatutory mitigating circumstances was given in this case. 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 instruction given hardly precluded the jury from considering mitigating circumstances.

The standard jury instruction on weighing of aggravating and mitigating factors has been deemed 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 mitigating 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.

The trial court was not obligated to instruct 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. The record reflects that

defense counsel, himself, instructed the jury as to the construction of words at some length (R 1037). Appellant does not reveal in which context error was, thereby, committed or, indeed, how he was prejudiced. Many of the instructions to the jury are not even based on the statute but are based on evolving caselaw. For instance, the heinous, atrocious and cruel jury instruction is based on language from *Proffitt v. Florida,* 428 U.S. 242 (1976). The jury instructions are designed to aid, narrow and channel the jury's discretion. 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.

Again, an instruction that the jury should only consider statutory aggravating factors as defined by the court would be superfluous. The jury was instructed that "the aggravating circumstances that you may consider are limited to any of the following that are established by the evidence," and the jury was then instructed as to applicable aggravating circumstances (R 1047-1049). There is no evidence of the jury or the judge applying a nonstatutory aggravating factor.

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 proffered 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 standard CCP instruction has been found not to be unconstitutionally vague by this court. *Brown v. State,* 565 So. 2d 304 (Fla. 1990). The statute upon which the jury instruction is based has been found not to be unconstitutionally vague. *Klokoc v. State,* 509 So. 2d 219 (Fla. 1991).

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.

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).

VIII THE TRIAL COURT PROPERLY SENTENCED APPELLANT TO DEATH; THE SENTENCE IS PROPORTIONAL; THE AGGRAVATING CIRCUMSTANCES ARE SUPPORTED BY THE EVIDENCE AND WERE PROPERLY APPLIED; THE TRIAL COURT DID NOT FAIL TO FIND MITIGATING CIRCUMSTANCES AND PROPERLY WEIGHED MITIGATORS ESTABLISHED BY THE EVIDENCE.

What is intended to be included by the aggravating circumstance that the capital felony was heinous, atrocious or cruel are those capital crimes where the actual commission of the capital felony was accompanied by additional acts that set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime that is unnecessarily torturous to the victim. *Douglas v. State,* 575 So. 2d 165 (Fla. 1991). The murder of Michelle Van Ness embodies all that is heinous, atrocious or cruel.

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). 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). Michelle must have listened and joined in, as well, as 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 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 dreadful 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), which is now the subject of a motion for rehearing, 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. This court found that *Bonifay* did not intend to cause the victim unnecessary and prolonged suffering. It is clear in the present case, however, that Anthony Farina obviously enjoyed the mental torment of his

victims as they were collectively shot one by one. 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. It should matter little that his was not the finger that pulled the trigger. *See, Copeland v. State,* 457 So. 2d 1012 (Fla. 1984), but *see also, James v. State,* 453 So. 2d 786 (Fla. 1984).

The facts of this case support the trial court's finding of the cold, calculated and premeditated aggravating factor. There was no evidence that the killing of Michelle Van Ness was an impulsive one committed during a felony. 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 preplanning 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 fucking 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 with Anthony not protesting such decision and then accompanying and acting in concert with Jeffrey by herding the victims into the freezer so Jeffrey could shoot them (T 881).

It is clear that a contemporaneous conviction of a violent felony may qualify as an aggravating circumstance in a capital murder prosecution, as long as the crimes involved *multiple victims* through separate episodes. *Pardo v. State,* 563 So. 2d 77 (Fla. 1990). *See also, Tafero v. State,* 561 So. 2d 557 (Fla. 1990). In *Correll v. State,* 523 So. 2d 562 (Fla. 1988), the aggravating factor of a conviction of another capital felony was found to have been properly applied to all four murders committed in *one* episode. 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 Anthony 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. As this court noted in *Kelley v. Dugger,* 597 So. 2d 2632 (Fla. 1992), the death penalty statute is silent as to time or place of previous convictions. In *LeCroy v. State,* 533 So. 2d 750 (Fla. 1988), this court held that the "prior" conviction could be used

in aggravation even if the crimes were prosecuted contemporaneously.

Any possible error in finding an aggravating circumstance is not such a change that its elimination could possibly compromise the weighing process of either the jury or the judge and resentencing is not required. *Hill v. State,* 515 So. 2d 176 (Fla. 1987). 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).

Anthony Farina's death sentence is not disproportionate. The facts of the case demonstrate that he was no mere accomplice to the murder but was acting in concert with his brother, Jeffrey. He smiled when Gary Robinson was shot in the chest. There is testimony that he held the head of Kim Gordon down so that his brother Jeffrey could stab her. Pursuant to §921.141(6)(d), Florida Statutes (1993), the participation of an "accomplice" must be relatively minor. There is absolutely no evidence that Anthony Farina was acting under the domination of his younger brother Jeffrey. There was testimony that Anthony seemed to be the leader. He was armed at all times with either a knife or a gun. He was certainly not entitled to the mitigating circumstance that he was a mere accomplice whose participation in the capital felony was relatively minor. While the victims did not hear Anthony actively encourage Jeffrey Farina to shoot them he did absolutely nothing to stop him, and acted in concert with him. The actual decision to rob Taco Bell was Anthony Farina's.

Anthony Farina was at least of equal culpability with his brother in the perpetration of this brutal and calculated capital felony as the trial court so properly found (R 2653).

As far as proportionality is concerned, this court found in *Garcia v. State,* 492 So. 2d 360 (Fla. 1986), that a 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 other death sentences.

In *Freeman v. State,* 563 So. 2d 73 (Fla. 1990), the imposition of the death penalty for a felony-murder conviction was found not to be disproportionate to other cases, in view of two statutory aggravating circumstances, including the defendant's conviction of a prior murder, the absence of statutory mitigating circumstances, and the noncompelling nature of nonstatutory mitigating circumstances: low intelligence, abuse by his stepfather, artistic ability, and enjoyment playing with children.

Death was found to be the appropriate sentence in *Hayes v. State,* 581 So. 2d 121 (Fla. 1991), despite evidence that the defendant was eighteen-years-old at the time of the crime, of low intelligence, developmentally learning disabled, and the product of a deprived environment.

The trial court did not fail to expressly evaluate nonstatutory mitigating circumstances. The court evaluated Anthony Farina's intelligence in the context in which it was offered -- as being average and therefore enabling Farina to benefit from vocational training (R 2654).

Farina's passive/submimssive dependent personality was considered in the context of having a "non-violent" personality that would result in his not being a discipline problem as a prisoner (R 2654).

The trial court properly considered Farina's use of illegal drugs (R 2652). The fact of his drug addiction was disputed by Farina, himself, and his mother and the testimony of mental health experts established that he was not high on crack cocaine at the time of the murder (T 650; 738; 936). The court considered the fact that the plan to rob Taco Bell was formulated sometime prior to the incident (R 2651).

The court considered Farina's prior criminal activity and noted a juvenile history and the use of illegal drugs. He had been involved in arson as well (T 674). The court concluded that even if there was no significant history of prior criminal activity it would be of little significance in view of the grievous nature of the capital felony (R 2652).

Farina's confession was subsequently suppressed. He did not take the stand to reaffirm his guilt. There was nothing to consider in this respect. The trial court thoroughly considered his remorse and found it questionable (R 2654).

Farina's condition of being employed and the fact he contributed finanacial support to his family was considered by the trial judge (R 2654). It was found to be nonstatutorily mitigating despite the fact that it would tend to show the robbery/murder was the product of greed since Farina was capable of earning an honest living.

Farina's potential for rehabilitation and status as a prisoner was thoroughly explored by the trial judge who found him to be an antisocial personality (R 2654).

The trial court properly determined that Anthony Farina was a co-equal partner with his brother in the perpetration of the capital felony and was equally culpable (R 2653). He was acknowledged by the victims as the leader (T 141).

The trial court found the circumstances of Farina's childhood to be nonstatutorily mitigating, which would encompass the cause, i.e. the alleged failure of the state social system (R 2654).

That appellant could argue as mitigation that he showed consideration for the physical and mental comfort of the victim strains credulity and was implicitly rejected by the court in its findings in aggravation.

Many of the postulated factors went to broader, recognized categories of nonstatutory mitigation such as child abuse and potential for rehabilitation. It would clearly be an undue burden to require the trial court to evaluate every historic incident or reference related to mental health experts. That is not the import of *Campbell v. State,* 571 So. 2d 415, 419 (Fla. 1990). There is no prescribed form for the order containing the findings of mitigating and aggravating circumstances where it appears that the sentence imposed was the result of reasoned judgment. *Lucas v. State,* 568 So. 2d 18 (Fla. 1990). That is certainly the case here. If there was error in failing to evaluate or find nonstatutory mitigation it is harmless in light

of the very strong case for aggravation and in view of the fact that any error could not reasonably have resulted in a lesser sentence. *Wickham v. State,* 593 So. 2d 191 (Fla. 1991); *See also, Cook v. State,* 581 So. 2d 141 (Fla. 1991) (Despite failure of the trial court's sentencing order to specifically address certain nonstatutory mitigating circumstances this court affirmed the death sentence where it was convinced that the trial court would have imposed the death sentence even if the sentencing order had contained findings that each mitigating circumstance had been proven.

IX APPELLANT WAS NOT DENIED HIS RIGHT TO A FAIR SENTENCING HEARING DUE TO PROSECUTORIAL MISCONDUCT.

At the beginning of the penalty phase the state gave an opening statement (T 586). The record reflects that the state argued:

> You should ask yourself in weighing those factors, whether these defendants should have aggravation placed upon them for the crimes they committed, or whether they should benefit by the fact that three of their four victims did not die. We submit to you, that, by the best efforts of these two men, three out of four people survived in spite of their best efforts. They should not benefit by the fact that we only had one child dead on that cold floor. (T 589).

The defense raised an objection on the ground that the statement of the prosecutor was *argumentative*. The court sustained the objection (T 589). No request for a curative instruction was made. No motion for mistrial was made. An objection to a prosecutor's comment which has been sustained must be followed by a motion for a mistrial in order to be preserved for appeal.

Holton v. State, 573 So. 2d 284 (Fla. 1990). A different ground of objection also should not be considered on appeal. *See, Hines v. State*, 425 So. 2d 589 (Fla. 3rd DCA 1982).

The prosecutor then further argued:

> And under our law you are to consider as an aggravating factor, the factor that after these crimes had occurred, and in the escape from these crimes, that conscious decision had been made, from the time that they went into that store until they put those children into that cooler, and then Anthony walked in and he told Kim, we've got one more precaution to take, get into the freezer. What was their purpose for moving them back into that execution chamber? (T 591).

The defense objected to the prosecutor's statement on the ground that it *constituted closing argument*. The court sustained the objection (T 591). Again, no motion for mistrial was made below and a totally different ground of objection or error is being raised on appeal. This issue is waived.

The prosecutor further argued:

> You should also consider the terror and the horror that has been shown to you by the evidence in this case that Michelle Van Ness went through. 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 -- (T 592).

The defense objected to this statement of the prosecutor again on the grounds that it was *argumentative*. The trial court sustained the objection (T 592). Again, no request for a curative instruction or motion for mistrial was raised below and a different claim of error is being raised on appeal. This claim is waived.

In discussing the cold, calculated and premeditated aggravating factor the prosecutor stated "Can there be more of an obvious execution-style --." The defense objected again on the basis that the statement *constituted argument* and the objection was sustained by the trial court (T 592). Again, no motion for mistrial was raised below and a different claim of error is being raised on appeal. This claim is waived.

The prosecutor then argued:

> 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 593).

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 is 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.

At the very beginning of opening statement the prosecutor stated:

> Through the testimony of the witnesses in this case, you have come to know the terror and the horror that four young people came to on that evening. You came to know the terror of Michelle Van Ness. Though she could not be with us in this courtroom today and could not be with us in this courtroom throughout these proceedings, sat here

> silently in the testimony of what occurred to her on that night -- (T 585).

Defense counsel objected that this statement was "improper." The objection was overruled by the trial court (T 585). The objection below was in the nature of a general objection. Furthermore, where a defense objection is properly overruled by the trial court, a different ground for the objection will not be considered on appeal. *Hines v. State*, 425 So. 2d 589 (Fla. 3rd DCA 1982). It was never argued below that this comment was inflammatory or prejudicial.

In considering whether there were cold, calculated and premeditated acts the prosecutor asked the jury to consider that Jeffrey Farina raised the gun and pointed it at Gary Robinson and pulled the trigger and pointed the gun at Derek Mason and pulled the trigger first and struck him in the face. The prosecutor asked the jury to consider Derek up against the back wall and to consider that second attempt to pull the trigger --. The defense objected that the statement was argument designed to inflame the passions of the jury rather than opening statement. The trial court sustained the objection (T 595). No request for a curative instruction was made. No motion for mistrial was made on the basis of this comment. This issue is waived. No relief is warranted even if this statement could be considered. That the defendant shot one victim first then upon a misfire of the gun in the attempt to kill another victim, refired, is certainly relevant as to the deliberateness preceding the execution murder of the later victim. That another victim is considered in such

scenario does not run afoul of *Payne v. Tennessee,* 111 S.Ct. 2597 (1991).

In the context of the penalty phase, it should be remembered that all the information referenced by the prosecutor was already before this jury in the guilt phase. In such a situation an opening statement in the penalty phase will have some elements of review rather than just being a roadmap for the evidence to come. The comments of the prosecutor were not so egregious as to deeply implant seeds of prejudice or confusion and there was no fundamental error requiring resentencing by this court. The jury could ultimately consider what the prosecutor asked it to and the evidence was sufficient to show that Michelle Van Ness was terrorized by the cold, calculated, premeditated act of the defendant.

On direct examination of Derek Mason the prosecutor asked him to examine three items marked for identification. Counsel for Anthony Farina objected that he had not been presented with that evidence: a .32 caliber pistol, a dagger, and a section of rope similar to the murder and assault weapons and the rope that was used to bind the victims (T 605-606). The defense complained that the probative value of such evidence had was greatly outweighed by the prejudice (T 606). The jury was removed from the courtroom (T 606). The state indicated that it was not requesting that these items be received in evidence but were to be used as props in a reenactment of the assault (T 606). The objection was sustianed (T 607). Defense counsel for Jeffrey Farina then asked for a curative instruction. The court stated

"All right. There is nothing to instruct them, except the items are not being received and marked." Defense counsel for Anthony Farina then moved for a mistrial based upon the displaying of the items before the jury. Counsel argued that a curative instruction was not appropriate or effective under the circumstances and merely called more attention to the items. Defense counsel for Jeffrey Farina indicated that he did not have such a motion. The motion for mistrial was denied (T 608).

The state called Gary Robinson and Kimberly Gordon to the front of the courtroom (T 608). The state also requested that it be allowed to call four employees of the state attorney's office to help in a reenactment. Counsel for Anthony Farina objected to the procedure as a theatrical play. The state attorney indicated that he wished to reenact the crime. The court overruled the objection (T 609). The court ultimately disallowed the enactment because of the danger of prejudice (T 612).

The state next indicated that it would call Mr. Van Ness, the father of the deceased victim. An objection was made as to improper procedure and the jury was removed to the jury room. Defense counsel for Anthony Farina indicated that there had been pretrial motions filed to exclude victim impact evidence and objected to such testimony (T 614). Defense counsel for Jeffrey Farina requested a proffer of what Mr. Van Ness would testify to. The state indicated that such testimony would come within the reasonable purview of admissible evidence and was for the purpose of giving a brief background of the victim, and her dreams or aspirations, without getting into the loss to the family. The

state further argued that at the very least, pursuant to the amendment to the statute permitting victim impact testimony, it should be allowed to establish the age of the victim and fact that she was a high school student living at home (T 616). The trial judge noted that Judge Orfinger had previously entered an order providing that victim impact evidence would not be considered by the court or the jury in the event that a capital sentencing proceeding was conducted. The order indicated that the court would, outside the presence of the jury, if requested by the state, consider victim impact evidence in determining the appropriate sentence, in the event that the defendants were convicted of one or more of the noncapital crimes which had been charged (T 617). Judge Blount indicated that he would abide by that order. He further ruled that testimony had already established the age and activities of the victim (T 617). The state also indicated that it would be offering Mr. Van Ness' testimony "in a limited fashion as to the age and background of his daughter, to establish the element of heinousness, atrociousness, and cruelty, in contemplation of death, and what Michelle Van Ness brought to that incident, as she contemplated her impending death." The trial judge indicated that was bordering on what they were not supposed to be doing, according to Judge Orfinger's order, which he had ratified. The court indicated that the Florida Supreme Court had ruled victim impact evidence harmless and that he would hear Mr. Van Ness outside the hearing of the jury. The state indicated that it would like Mr. Van Ness to be heard from before sentencing and the court

indicated it would address that problem after the jury was discharged (T 618). Counsel for Anthony Farina objected on the basis that Mr. Van Ness was called as a witness to invoke the sympathy of the jury and asked that the state be admonished from such antics in the future. The court stated "Let's don't play games, lets's get on with the case. I'm not going to admonish anybody for anything." Defense counsel for Jeffrey Farina joined in the objection and asked for a curative instruction (T 619). Judge Blount told counsel to submit an instruction and he would review it. The prosecutor indicated that nothing had been paraded before the jury. He had walked up to the bench where the clerk was and handed him the items and the jury was some twenty feet away, and the items were not held out for the jury to look at. The court indicated, nevertheless, that if the defense had something they wanted read to the jury he would review it. Counsel for Anthony Farina stated that the gun and the dagger were in clear sight of the jury. Judge Blount indicated that he did not know if they were or not. Mr. Mott also noted that the actors in the proposed reenactment were within the sight of the jury. Judge Blount responded "Certainly they were. I asked you to submit me a proposed instruction if you desire." (T 620).

The contemplated reenactment never took place. The items were not admitted into evidence. The actors never read their lines. Any possible error was cautiously avoided. That the jurors may have seen state attorney personnel present in the courtroom without more, hardly entitles Anthony Farina to a new sentencing proceeding. Mr. Van Ness was properly in the

courtroom pursuant to *Payne v. Tennessee,* 111 S.Ct. 2597 (1991), and the proffer of his testimony evoked no due process concerns. The mere sight of the victim's father, without more, is hardly sufficient to vitiate the entire penalty phase. There is no evidence the jurors saw the gun, knife and rope. Even if they did, that the victims were killed, assaulted and bound by such items was hardly news to them, having sat through the guilt phase. There were no grounds present to grant a mistrial. The defense was given the opportunity to prepare an instruction for the jury which most certainly would have been done had the jury paid any attention to the matters complained of. If there was any error it was harmless. *State v. DiGuilio,* 491 So. 2d 40 (Fla. 1986).

In closing argument the state attorney began:

> As I began, I guess, the earlier statement that I made to you was -- began with a sentence something to the effect, I'm sorry that you are here. (T 1002).

Defense counsel for Anthony Farina objected on the grounds that it was personal opinion. The objection was overruled. The prosecutor continued "I'm sorry that any of us are here. But I'm glad that we have a system that works, functions, that vigorously and stringently protects defendants' rights, and that ensures as best as possible with regard to human affairs that justice has done." (T 1003). Wide latitude is accorded a prosecutor during closing argument. *Morgan v. State,* 415 So. 2d 6 (Fla. 1982). The courts recognize the difficulty in rigidly confining argument exclusively to the evidence. *Henderson v. State,* 94 Fla. 318, 113

So. 689 (1927). When the statement is a general one and of a character not likely to cause prejudice in the eyes of honest men of fair intelligence, the failure of the trial court to check counsel should not be deemed such an abuse of discretion as to require a reversal. *Pitts v. State,* 307 So. 2d 473 (Fla. 1st DCA 1973). That is certainly the case here.

The prosecutor later stated:

> His Honor will instruct you that it's your duty to follow the law as given to you by the court in rendering an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. (T 1006).

Defense counsel for Anthony Farina objected to the "emphasis" on the word advisory as it diminished the role of the jury. The trial court properly overruled the objection (T 1106). Where a prosecutor tells the jury in closing argument that their role in sentencing the defendant is only advisory, he is properly stating the law, and is not improperly minimizing the jury's role in the sentencing procedure. *Reed v. State,* 560 So. 2d 203 (Fla. 1990); *Combs v. State,* 525 So. 2d 853 (Fla. 1988).

The prosecutor later stated:

> What was Michelle Van Ness going through for that twenty to thirty minutes, as they consciousless and pitiless -- without pity, contemplated and clearly carried out the murder? She was so frightened she trembled and cried continuously. Continuously asked for reassurance. She knew. And certainly by the time the first shot was fired into Greg, she knew. And when the next shot was fired into Derek, she knew. She knew she was going to die with her hands tied behind her back. Michelle expressed it in cries of fear and horror. Kimberly told us. I knew I was going to die. There is no way to condense that moment. There is no way for us to experience it. (T 1009).

Defense counsel for Anthony Farina objected to the prosecutor's statement as a violation of the Golden Rule. The objection was overruled by the trial court (T 1009). A "Golden Rule" argument is an appeal to the jurors to place themselves in the position of the victim of the crime. *Ballard v. State,* 436 So. 2d 962 (Fla. 3d DCA 1983). Here the prosecutor told the jury there was no way they could experience what Michelle Van Ness was going through. Even if the statement could be construed as an invitation for the jurors to try and experience her horror, any error is harmless beyond a reasonable doubt and would have had no effect upon the advisory recommendation. *State v. DiGuilio,* 491 So. 2d 40 (Fla. 1986). What Michelle went through was readily apparent to the jury from the facts of the case and the testimony and they didn't have to try and put themselves in her shoes to see how she felt. Her murder was heinous, atrocious and cruel.

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 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). 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 what are 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).

X THE STATE ATTORNEY DID NOT HAND PICK THE JUDGE WHO TRIED THE CASE AND APPELLANT RECEIVED A FAIR TRIAL.

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 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). 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 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. There is no authority for removing a party from a case because of suspicions of future 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 by any party, could have been affected by any prior machinations of the prosecutor.

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 to the stand Mr. Van Ness, the father of the deceased victim, Miss Van Ness, Kimberly Gordon and her parents and Derek Mason and his parents (T 614; 974). 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 (7) 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 TRIAL COURT ERRED IN PRECLUDING THE STATE FROM CONDUCTING A SINGLE TRIAL OF THE DEFENDANT, HIS BROTHER AND HENDERSON AND IN LIMITING TESTIMONY AS TO THE ADMISSIONS MADE BY EACH OF THE CO-DEFENDANTS BY THE POLICE OFFICER WHO HAD TAKEN THOSE STATEMENTS.

The state reiterates those arguments contained in Point VI herein. The statements were not only consistent but interlocking. Redacted statements could have been utilized. The state should have been able to utilize the statements of the Farinas to Detectives Sylvester and Flynt.

III THE TRIAL COURT ERRED IN GRANTING A JUDGMENT OF ACQUITTAL NON OBSTANTE VEREDICTO AS TO HE 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 plan 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 U.S. Mail to Thomas R. Mott, Esquire, 528 North Halifax Avenue, Post Office Box 2055, Daytona Beach, Florida 32115-2055, this 20th day of December, 1993.

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