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IN THE SUPREME COURT OF FLORIDA

ANTHONY J. FARINA,

Appellant,

v. CASE NO. 93,050

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF FONT

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STATEMENT OF THE CASE

The statement of the case set out on pages 1-4 of Farina's brief is argumentative and is denied. The State relies on the following statement of the case.

On April 18, 1996, this Court affirmed Farina's first degree murder conviction (among others), and remanded the case to the Volusia County Circuit Court for a new sentencing proceeding[1]. *Farina (Anthony) v. State*, 679 So.2d 1151, 1153 (Fla. 1996). This Court denied rehearing on September 24, 1996, and the mandate of this Court was filed in the Circuit Court on October 31, 1996. (R1). Various preliminary motions were filed, and, on April 6, 1998, jury selection began. (TR1). Trial began on April 13, 1998, and, on April 20, 1998, the jury returned its unanimous advisory verdict recommending that Anthony Farina be sentenced to death. (R336). A *Spencer* hearing was conducted on May 1, 1998, and, on May 7, 1998, the Circuit Court followed the jury's recommendation and sentenced Farina to death. (TR2433; 2629).

Farina gave notice of appeal on May 19, 1998, and, on September 29, 1998, the record as supplemented was certified as complete. Farina filed his *Initial Brief* on January 26, 1999.

STATEMENT OF THE FACTS

The Statement of the Facts contained in Farina's brief is not

[1] In this brief, reference to "Farina" is to the defendant in this case (Anthony Farina) unless otherwise specified.

only abbreviated, but also is argumentative, and, for those reasons, is not accepted by the State. Instead, the State relies on the following Statement of the Facts.

This Court summarized the facts of this crime in the following way during the original direct appeal proceedings[2]:

> [Jeffery] Farina and his brother, Anthony J. Farina, were tried together and convicted of fatally shooting seventeen-year-old Michelle Van Ness during the May 1992 robbery of a Taco Bell restaurant in Daytona Beach. *See also Anthony J. Farina v. State*, 679 So.2d 1151 (Fla. 1996). Jeffery Farina fired the shot to the head that killed Van Ness.
>
> The jury convicted Jeffery Farina of first-degree murder and recommended death by a vote of nine to three. The trial judge followed the jury's recommendation and sentenced Farina to death.
>
> . . .
>
> Van Ness and the other three victims all worked at Taco Bell. After the restaurant closed early on May 9, 1992, Jeffery and Anthony Farina confronted Van Ness and Derek Mason, 16, while the two employees were emptying trash. Jeffery was armed with a .32-caliber pistol, Anthony carried a knife and rope, and both wore gloves.
>
> The Farinas ordered Van Ness and Mason into the restaurant, where they rounded up two other employees. Jeffery held three employees at gunpoint, while Anthony forced employee Kimberly Gordon, 18, to open the safe and hand over the day's receipts. Although there were assurances that no one would be hurt, the Farinas tied the employees' hands behind their backs and Anthony forced them into a walk-in freezer.

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[2] This Court referred to the *Jeffrey Farina* case for the recitation of the facts. *Farina (Anthony) v. State, supra,* at 1153. The State has done likewise, but has omitted certain sentencing facts related specifically to Jeffrey Farina.

> Survivors testified that Van Ness was shaking and crying as she entered the freezer and she was afraid she would be hurt. Shortly after the employees were led to the freezer, Jeffery shot Mason in the mouth. He then shot employee Gary Robinson, 19, in the chest, and finally shot Van Ness in the head. Gordon was stabbed in the back.
>
> The Farinas fled the restaurant, but were arrested later that day after another Taco Bell employee saw Anthony buying gasoline at a service station and called the police. When arrested, Jeffery had a receipt from a local store indicating that he had purchased .32-caliber bullets, gloves, and clothesline on May 8. The Farinas had $1,885 of the $2,158 that was taken from Taco Bell.
>
> Van Ness died on May 10. The Farinas were charged with first-degree murder and six other offenses.

Farina (Jeffrey) v. State, 680 So.2d 392, 394-5 (Fla. 1996).

The resentencing proceeding ordered by this Court began on April 6, 1998. During that proceeding, the following evidence was presented.

On May 8, 1992, Derek Mason was a 16-year-old high school junior who worked part-time at Taco Bell. (R1260-61). He had been working at Taco Bell since January 1992. (R1261). On May 8, 1992, Derek arrived at work at about 6:00 PM at the Taco Bell located at the corner of Clyde Morris and Beville Road in Daytona Beach. (R1262-3). Kim Gordon was the manager that night, and Gary Robinson, Mike Davis, and Michelle Van Ness were the other employees. (R1263). Michelle and Derek had worked together at the Beville Road Taco Bell since it opened in late January of 1992. (R1263). Derek knew Anthony Farina because he was also an employee of Taco Bell. (R1263).

Derek did not see Anthony during the early evening hours of May 8. (R1264). The Taco Bell closed at midnight, and Derek and Michelle began taking the trash out. (R1264). After they had taken several bags out, two men got out of a car and approached them -- one person put a gun to Derek's back, and the other put a knife to Michelle. (R1265). Derek did not recognize either man at the time, but, once back inside the store, recognized Anthony and Jeff Farina. (R1265-6). Anthony ordered Derek to get the store manager (Kim), which he did. (R1266). Anthony then went with Kim to the part of the store where the safe was located. (R1266). Shortly thereafter, Anthony and Kim returned to the back of the store with a quantity of money, which was placed into a Taco Bell bag. (R1266). Anthony then offered cigarettes to the four employees, and then ordered anyone not smoking to "get up and come here". (R1267). Anthony gave some rope to Jeff, who tied Derek's hands behind his back, and then tied Gary in the same fashion. (R1267). Anthony was holding the gun while Jeff was tying Derek and Gary up. (R1269). During this process, Anthony was telling Jeff what to do. (R1268).

Derek asked Anthony if he and his brother were going to hurt anyone, and Anthony told him that if they (the Taco Bell employees) cooperated, everything would be "OK". (R1268). Michelle was crying and holding to Derek's arm -- he tried to reassure her that things would be alright. (R1268).

Anthony then tied up Kim and Michelle, ordered Derek to change

locations, and opened the cooler and directed the four employees into it. (R1269). Anthony and Jeff then left the cooler and stopped just outside of it. (R1269). Michelle was still crying. (R1270)[3]. Anthony and Jeff then came back into the cooler and directed the four employees into the freezer. (R1270). There was some discussion about turning off the refrigeration so that it would not be so cold in the freezer, but Anthony was concerned that that would set off some kind of alarm (R1287-8). All four were tied with their hands behind their back. (R1270).[4] Jeff then shot Gary in the chest and shot Derek in the face. (R1271). Jeff aimed at Derek's chest and pulled the trigger, but the weapon misfired. (R1271). Derek tasted blood in his mouth and went to the floor. (R1271). Derek then heard another shot, and saw Michelle fall to the floor. (R1271). Jeff next aimed the gun at Kim, but it misfired -- Anthony gave the knife to Jeff, who stabbed Kim while Anthony held her head down. (R1271).[5] Kim fell to the floor bleeding heavily, and the Farinas fled. (R1272). Derek and Gary were able to free themselves and call law enforcement. (R1272-3). Derek also tried to find Anthony's file in the Taco Bell office so he could give it to the police. (R1273).

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[3] Michelle was crying throughout the robbery. (R1274).

[4] No one's feet had been tied. (R1271).

[5] Jeff tried to hammer the knife into the back of Kim's skull, and, when that proved to be difficult, stabbed her in the back. (R1271).

The projectile that struck Derek entered between his lip and his nostril, and ended up lodged on the right side of his jaw just beneath the skin. (R1273).

Kimberly [Kim] Gordon was a shift manager at the Beville Road Taco Bell in 1992. (R1478-9). Kim knew Anthony from having worked at the Taco Bell in Holly Hill, Florida, where Anthony had also worked. (R1480). She saw Anthony before the store closed, and saw him again when he and Jeff entered the store holding weapons on Michelle and Derek. (R1481). Kim was counting the day's receipts at that time, and had totaled up about $2,000. (R1482). Anthony directed everyone to the back of the store, and told Kim that because she had the keys to the safe, she was going to go with him to the front of the store and get the money. (R1482). Kim did as she was ordered, and Anthony then directed her to put the money into plastic bags. (R1483). When she had finished putting the money into bags, Anthony ordered Kim to join the other employees -- she asked if she could smoke a cigarette first, and Anthony allowed her and Michelle to do so. (R1483-4). Anthony then tied up the two employees who were not smoking -- both Farinas had rubber gloves on their hands. (R1484). Anthony had recognized Kim and had called her by name. (R1484)[6]. Anthony was not under the influence of any intoxicant, appeared to be "in charge", and was doing all of the

[6] When he was tying her hands behind her back, Anthony said to Kim "I guess you never expected this from me." (R1486).

talking. (R1485; 1487).[7]

Kim asked Anthony if they were going to hurt anyone, and he replied that no one would be hurt so long as they cooperated. (R1487). All four Taco Bell employees were concerned for their safety, and Michelle was very afraid and was crying. (R1487). Anthony then ordered the four victims into the cooler, stepped out, and then returned saying "We have one more precaution to take, everybody get into the freezer". (R1488; 1512). As soon as the four victims were in the freezer, Jeff started shooting. (R1488)[8]. The four Taco Bell employees were asking the defendants not to hurt them. (R1489). Kim felt someone forcing her head down while someone else tried to drive a knife into her skull. (R1488-89).[9] Kim remembers passing out, and regaining consciousness four days later. (R1490-91).

Gary Robinson was a 19-year-old college student in May of 1992. (R1525). May 8, 1992, was his third day to work at the Beville Road Taco Bell. (R1526). After the store had closed, Gary was washing dishes when Derek and Michelle came into the store with

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[7] Kim stated that she never heard Jeff speak. (R1485).

[8] Because her back was to the defendants while in the freezer, Kim does not know if they tried to shoot her or not. (R1508).

[9] She could not tell which defendant was doing what, but she was certain that one person was holding her head and another was stabbing her. (R1489).

the defendants behind them holding weapons. (R1527). At that time, Jeff had a gun and Anthony had a knife. (R1527). The Taco Bell employees were ordered to the back of the room. (R1527). Michelle was crying and expressed her belief that they would be killed. (R1528).

Both defendants appeared calm and alert and did not seem to be under the influence of any intoxicant. (R1529-30). Both defendants also acted soliticiously toward Gary. (R1530). Anthony did most of the talking during the course of the robbery. (1543). When the four Taco Bell employees were put inside the freezer, the shooting started -- Gary was shot first, followed by Derek and Michelle. (R1531). The gun misfired when aimed at Kim's head, so she was stabbed. (R1531-2).[10] There was screaming and general panic once the shooting began. (R1531). After the defendants left, Gary freed himself -- Kim was lying on the floor in convulsions, and Michelle appeared to be dead. (R1533).

Former Daytona Beach Police Department Investigator Allison Sylvester testified that she arrived at the Beville Road Taco Bell in the early morning hours of May 9, 1992. (R1290-91)[11].

10

Gary described the gun being at point-blank range to Kim's head when it misfired. (R1532). He also described the efforts to pound the knife into the back of Kim's head. (R1532).

11

Investigator Sylvester's testimony was presented to the penalty phase jury in three discrete segments. It has been consolidated here for convenience.

Investigator Sylvester identified both defendants, and identified photographs of the four victims. (R1300-1305). She observed bruising on Michelle's wrist that was consistent with her having been tied up. (R1306). Bullets were recovered from Michelle and Derek -- the bullet which struck Gary was not removed from his body. (R1307). The firearm used by the Farinas was not recovered. (R1308).

Anthony Farina was developed as a suspect, and, between 11:00 AM and noon on May 9, 1992, officers from the Holly Hill Police Department stopped the Farinas at the Shell Station located at Mason and Ridgewood. (R1423-25). Jeff Farina had an identification card in his possession which identified him as "Buddy Chapman". (R1425-6). A partial box of pistol cartridges was located in the defendants' vehicle -- those cartridges were shown to have been purchased at a K-Mart at 11:58 AM on May 8, 1992, with a check drawn on the account of "Buddy Chapman". (R1427-1432). A receipt located in the vehicle also indicated that "Buddy Chapman" had purchased vinyl gloves and clothesline at 12:41 PM on the same day at the same K-Mart. (R1432-33)[12].

On May 11, 1992, the Farinas were transported to the Daytona Beach Police Department (pursuant to court order) to be booked for

[12] Fingerprints belonging to both Farinas were found on the receipt. (R1463).

Michelle's murder. (R1643).[13] A monitoring device was in the transport vehicle which allowed any conversation in that vehicle to be tape recorded. (R1644). In the recorded conversations, Anthony stated, *inter alia*, that they should have stabbed the victims and cut their throats. (R1656). Jeff stated that he had shot Michelle because he had a "boring day". (R1656).

Jeffrey Wiles was a patrol officer with the Daytona Beach Police Department in May of 1992. (R1315)[14]. He was literally across the street from the Taco Bell when the 911 call was received and dispatched from police headquarters. (R1316-17). Officer Wiles found Derek Mason when he entered the Taco Bell, and Derek told the officer that the suspects were gone, and that there were more victims in the cooler. (R1319; 1327). In the cooler/freezer, Officer Wiles found the bodies of two women with their hands tied behind their backs. (R1328). Kim Gordon had a pulse, and Michelle was breathing rapidly and her pupils were fixed and dilated. (R1329-30). Officer Wiles untied the two victims, cleared Kim's airway, and moved out of the way when emergency medical personnel arrived. (R1330; 1335). Derek identified one of the perpetrators as "Tony", who was a former employee of Taco Bell. (R1336). Officer

[13] Michelle died from the gunshot wound to the head on May 10, 1992. (R1643).

[14] This officer is now employed by the Volusia County Sheriff's Office. (R1315).

Wiles subsequently found Gary Robinson in the storage area of the store -- Gary had been shot, too, and Officer Wiles called for the medical personnel to assist Gary. (R1337).

Thomas Youngman is a crime scene technician with the Daytona Beach Police Department. (R1356-7). He processed the crime scene at the Taco Bell, and also processed the defendants' residence. (R1358; 1366). At the Taco Bell, Officer Youngman found a total of five pieces of rope and the "cylinder pin" from a revolver. (R1362). A revolver-type handgun is likely to misfire if the cylinder pin is missing. (R1364). At the defendants' residence (the Rollie's Court Motel), Officer Youngman recovered some spent .32 caliber shell casings from the motel trash in addition to six (6) live .32 caliber rounds. (R1367-8). Officer Youngman found $782 under the center cushion of the couch in the defendants' motel room, as well as finding $400 in a checkbook in the name of "Buddy Chapman"[15], $200 in the purse belonging to Anthony's girlfriend, and $220 in the purse belonging to the defendants' mother. (R1374-76).[16] A K-Mart receipt was found in the checkbook for the purchase of gloves and rope at 12:41 PM on May 8, 1992. (R1373-4). A partial box of .32 caliber cartridges was recovered from the defendants'

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[15] Jeff Farina uses the alias "Buddy Chapman", and the motel room was registered in that name. (R1388; 1392).

[16] Both purses were located in the vehicle occupied by the defendants at the time they were taken into custody. (R1376).

mother. (R1377). The total amount of money taken in the Taco Bell robbery was $2,069.19 -- $2,059 was recovered. (R1377).

Susan Komar is a senior crime laboratory analyst with the Florida Department of Law Enforcement's Orlando facility. (R1400-1). She was accepted as an expert in the field of firearm and toolmark examination. (R1403). Ms. Komar examined the projectiles recovered from Michelle's body and from Derek's face -- both bullets are .32 automatic caliber and were fired from the same handgun. (R1404-6). The projectiles have rifling characteristics of 10 lands and grooves, a pattern that is typical of inexpensive, foreign-made revolvers. (R1405). Ms. Komar also examined two spent .32 caliber cartridges and six live .32 caliber cartridges. (R1406-7).[17] One of the spent cartridges (the "Federal" brand one) had at least three separate firing pin impressions on its primer, indicating that the trigger had been pulled on that cartridge at least three times before it fired. (R1412). One of the live rounds also has at least two firing pin impressions on it, indicating that the trigger was pulled twice, but the cartridge did not fire. (R1413-5).

Michelle's death certificate was admitted into evidence, as

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17 One of the spent cases is a "Federal" brand cartridge. (R1407). The rest of the cartridges (both live and spent) are "Winchester-Western" brand. (R1407). The recovered box of cartridges was Winchester-Western brand, and five of the six live cartridges bore headstamp marks matching the cartridges in the box. (R1408-9).

were the judgements of conviction against Anthony and Jeff for the various crimes arising out of the Taco Bell robbery. (R1553-4).

The State also presented the testimony of some of Michelle's friends and family members which established the loss to the community and her friends and family as a result of her death. (R1556-1634). None of that testimony expressed any opinion about the crime, the defendants, or the appropriate punishment.

Michelle died on Mother's Day of 1992. (R1591). She was a good student at Warner Christian Academy, and wanted to be a pediatrician. (R1582-4). The testimony of her family and friends can fairly be described as showing Michelle to be a caring, generous person who was well thought-of by her friends and family, and whose death has had a profound effect on them.

In mitigation, Anthony presented lengthy testimony, which is set out below.[18]

Dale Heiser is a police officer in Monmouth, Illinois, and was so employed in June of 1987. (R1664-6). On June 23, 1987, Anthony came to the police department to report "child abuse". (R1667). James Brandt, Anthony's step-father, was the suspect in that incident, and was ultimately charged and adjudicated following entry of a guilty plea. (R1669-70). Monmouth police officers

[18] As this Court is well aware, the Farina brothers were tried jointly -- the mitigation evidence, with minor exception, is applicable to both of them.

frequently responded to domestic violence calls involving Brandt, the defendants, and their mother. (R1673). Both Anthony and Jeff were involved in criminal behavior at an early age. (R1679).

Tammy Lewis was Anthony's girlfriend, and is the mother of his son. (R1717-20; 1723). In her opinion, Anthony is a caring and loving person who has made a genuine conversion to religion. (R1724-31). Jeff looked up to Anthony. (R1746).

Cindy Comfort is the defendants' cousin, and has known them both all of their lives. (R1764-65). She testified that their home with their biological father was stable, but that when their mother divorced their father and married Brandt, the situation drastically deteriorated. (R1765-70). The witness has heard that Anthony sexually abused his little sister when she was four years of age. (R1780). Daniel Comfort is also related to the defendants, and testified to essentially the same facts as did Cindy Comfort. (R1786-91). He never tried to intervene in the "abuse", never reported it, and never allowed his wife (Cindy) to do so. (R1795). He did not think that the "abuse" was that bad at the time.(R1796).

Mary Grafwallner is the defendants' aunt. (R1796-7). She testified that the defendants' mother (Grafwallner's sister) lacked the mothering skills to raise the defendants. (R1802-3). The defendants had a stable home environment until their parents' divorce, and their father stayed away because of arguments with their mother. (R1807-8).

Edna O'Teri works at Park's Seafood, and knows both defendants. (R1809-10). Jeff (who she knows as "Buddy Chapman") worked with her at that restaurant. (R1810-11). She described Jeff as "very calm", normal and well-adjusted, and never saw him lose his temper. (R1816-17).

James Perry Davis is an ordained minister who is involved in a prison ministry. (R1818). Davis is also a former inmate. (R1819). He believes that Anthony's conversion to Christianity is sincere because he can spot a "scam" based on his own experiences. (R1823). In his opinion, life in prison is true punishment, even though that is better than being dead. (R1833; 1836).

David Sharp was a police officer in Monmouth, Illinois, and knows the defendants' former stepfather, James Brandt, from responding to various domestic violence complaints. (R1855-58). Sharp was later employed by the Department of Children and Families (in Illinois), and came in contact with Brandt in connection with an abuse complaint involving Anthony. (R1859).[19] Significantly, Jeff was not removed from the home -- Anthony was later removed because he sexually abused his sister. (R1871-2).

Tina O'Neil testified about some of the traveling about undertaken by the defendants and their family. (R1875-96). She also described how the defendants would steal items from area stores and

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[19] This is the abuse complaint referred to above.

their mother would later return the items for a refund. (R1913).

Steve McCollum is a retired Florida Department of Corrections chaplin who knows both defendants from his service at Union Correctional Institution. (R1918-19). Anthony is sincere in his faith and has never been a troublemaker or discipline problem. (R1923).

The defendants' mother, Susan Griffith, testified about their background and early life. (R1935, *et seq*). She testified that she tried to be a good mother to her children and never abused them. (R2011).

Dean Dearborn was a counselor at a residential facility where Anthony was housed in 1987-88. (R2026-28). He receives letters from Anthony which, in their opening and closing, are religious in tone. (R2035).

Clifford Lewis is a Ph.D. psychologist who was engaged to evaluate Anthony for the purpose of developing mitigation evidence. (R2110-2112)[20]. In his opinion, Anthony has an "emotional age" of "not over 14" (R2117), and had a "dysfunctional" childhood. (R2118). (R2118). In his opinion, Anthony has "dependent personality disorder." (R2123). Lewis also believes that Anthony would be a "positive influence" in the general prison population. (R2131). Lewis further testified that Anti-social Personality

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20 A mental state expert also testified for Jeff. (R2044). That testimony does not relate to Anthony, and is omitted here.

Disorder is his secondary diagnosis, that Anthony is neither insane nor mentally ill, and that the robbery was motivated by a desire for money. (R2139-40). The defendants had planned the robbery for weeks, and had discussed killing the witnesses before the robbery. (R2141).

Katrina Wandsnider is the defendants' younger sister. (R2160). She testified that her brothers send her letters from prison, and that those letters brighten her day. (R2160-62).

On May 1, 1998, a *Spencer* hearing was conducted. Kathy Cratin is a case counselor at the Volusia County Branch Jail -- she testified that both defendants are polite and have no disciplinary record. (R2452-56).

Anthony Farina also testified at the *Spencer* hearing. He admitted that the planning of the robbery began two or three weeks before it was committed, but maintained that there was never any intent to do anything other than rob the Taco Bell. (R2474; 2477). Anthony claimed that there was no plan to kill the Taco Bell employees (R2490; 2497), and that he did not think about being recognized by his former co-workers until two days after the robbery. (R2505). Anthony testified that he was not under the influence of any intoxicant at the time of the robbery. (R2511). The defendants went to K-Mart on May 8, 1992, planning to purchase cartridges, gloves, and rope. (R2515). The defendants had discussed killing the victims before the robbery was carried out, but,

according to Anthony, they were not going to kill the victims if they resisted -- instead, they were going to threaten or stab the victims with the knife. (R2516-17). Anthony did not try to stop Jeff from shooting the victims because he thought Jeff might shoot him. (R2522).

On May 7, 1998, the Volusia County Circuit Court sentenced Farina to death, finding the following aggravating circumstances: that Farina had previously been convicted of a felony involving the use or threat of violence; that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; that the capital felony was committed for pecuniary gain[21]; that the capital felony was especially heinous, atrocious, or cruel; and that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R356-7). The sentencing court gave great weight to the avoid arrest and cold, calculated, and premeditated aggravators, moderate weight to the prior violent felony and heinous, atrocious, or cruel aggravators, and substantial weight to the pecuniary gain aggravator. (R356-8).

In mitigation, the sentencing court gave moderate weight to the "no significant criminal history" mitigator; little weight to the "accomplice" mitigator; and moderate weight to the age

[21] The sentencing court merged the during the course of a robbery aggravator into the pecuniary gain aggravator. (R356).

mitigator. (R358-9). The court also considered and weighed various non-statutory mitigation. (R359-60). That Court found, at the conclusion of the weighing process, that the aggravation far outweighed the mitigation, and sentenced Farina to death. (R360). This appeal follows.

SUMMARY OF THE ARGUMENT

The *Neil* issue contained in Farina's brief is procedurally barred because Farina accepted the jury without renewing his objection to the State's use of its peremptory challenges. Alternatively and secondarily, this claim has no merit because the trial court did not abuse its discretion in granting the peremptory challenges at issue. The trial court was in the best position to determine the credibility of the reasons advanced for those challenges, and that credibility determination should not be disturbed.

The "post-arrest statement" of the defendant was properly admitted at the guilt phase of his capital trial, as this Court has previously determined. The jury in a resentencing proceeding is not expected to make its decision in a vacuum, and the admission of evidence that was properly admitted at the original guilt phase proceedings cannot be prejudicial. There is no basis for relief.

During the original direct appeal proceedings before this Court, the admissibility of certain statements made by the defendant was litigated and decided adversely to Farina. In the

resentencing proceedings, Farina filed a new motion to suppress those statements, which, in part, was based upon grounds that were not raised earlier despite having been available and known to the defendant at all times. That is a procedural bar to litigation of that claim. Moreover, Farina cannot demonstrate prejudice because the statements were properly admitted in the guilt phase of his capital trial, as this Court has previously determined.

The resentencing court properly denied Farina's motion to sever because the severance issue was resolved against Farina by this Court in the prior appellate proceedings. Because the statements on which the motion to sever is based have been determined admissible by this Court, there can be no prejudice.

The three-part "victim impact" issue is not a basis for relief because such evidence is admissible under prevailing law, as this Court found in the previous proceedings. The evidence at issue did not become a "feature of the trial", and, in fact, amounted to only a small portion of the evidence presented. Finally, the jury instruction issue is not a basis for relief because the jury was correctly instructed regarding the consideration of "victim impact" evidence.

The sentencing court properly found the heinous, atrocious, or cruel aggravating circumstance based upon the mental torture to which Michelle Van Ness was subjected before she was killed.

The sentencing court properly found the cold, calculated, and

premeditated aggravator based upon the evidence which established that the murder of the witnesses was an integral part of the robbery plan. The requisite heightened premeditation exists, and the sentencing court properly found this aggravating circumstance.

The sentencing court properly found the avoiding arrest (or "witness elimination") aggravator based upon the evidence which established that the victims knew and could identify the defendant, and that there was no other reason to kill (or try to kill) them other than to eliminate potential witnesses.

Death is not a disproportionate sentence in this case because Anthony Farina was a major participant in the robbery and murder -- without his active involvement, the murder would not have taken place. Death is the proper sentence.

Farina's multi-part challenge to the constitutionality of the Florida death penalty act does nothing more than advance arguments that have been repeatedly rejected by this Court.

ARGUMENT

I. THE JURY SELECTION ISSUE

On pages 22-34 of his brief, Farina argues at length that the State improperly used two peremptory challenges against black jurors. Farina alleges that this was in violation of *Neil v. State*, 457 So.2d 481 (Fla. 1984), and its progeny. This claim is procedurally barred, and, alternatively, meritless.

In his brief, Farina alleges that his trial attorney "timely

objected", and, to the extent that an objection was raised when the State exercised a peremptory challenge, that is a correct factual statement. (TR1106; 1125). However, Farina ultimately accepted the jury without renewing his challenges to the peremptory strikes at issue. (TR1149). Under settled Florida law, the failure to renew the challenge is a procedural bar to litigation of the claim on appeal. *See, Hudson v. State*, 708 So.2d 256, 262 (Fla. 1998) ("... this claim [is] procedurally barred because Hudson accepted the jury without renewing his challenge".); *Joiner v. State*, 618 So.2d 174 (Fla. 1993). Because this claim is procedurally barred, this Court should deny relief on that basis without reaching the merits of this claim.

Alternatively and secondarily, without waiving the procedural bar defense set out above, this claim is not a basis for relief because the trial court did not abuse its discretion in granting the peremptory challenge. *See, Turner v. State*, 645 So.2d 444 (Fla. 1994). The prosecutor stated valid, race-neutral reasons for the two peremptory strikes at issue, and, under settled Florida law, the trial court should be affirmed.

In addressing the procedure for handling a challenge to a peremptory strike, this Court stated:

> We recently clarified the guidelines concerning peremptory challenges. *See Melbourne v. State*, 679 So.2d 759 (Fla. 1996). In *Melbourne*, we stated that upon proper objection by the party opposing the other side's use of a peremptory challenge on racial grounds, [footnote omitted] the court must ask the proponent of the strike

> to explain the reasons for the strike. *Id*. The burden of production then shifts to the proponent of the strike to offer a race-neutral reason for the strike. *Id*. If the explanation is facially race-neutral and the court believes in light of the circumstances surrounding the strike the explanation is not a pretext, then the strike will be sustained. *Id.* **The court's focus is not on the reasonableness of the explanation but rather its genuineness, and the trial court's determination, which turns primarily on an assessment of credibility, will be affirmed on appeal unless clearly erroneous.** *Id.* at 764-64. Applying these guidelines to the instant case, we affirm the trial court's decision. *Accord Austin v. State*, 679 So.2d 1197 (Fla. 3d DCA 1996).

Smith v. State, 699 So.2d 629, 636-37 (Fla. 1997). [emphasis added]. When that standard is applied to the peremptory challenges at issue, there is no basis for reversal because there is no abuse of discretion.

<u>Juror Edwards</u>

During preliminary questioning by the Court, juror Edwards stated that her son "had a drug related charge in North Carolina four or five years ago". (R75). During *voir dire* by the State, she elaborated on that conviction:

> Mr. Tanner: Thank you. Ms. Edwards, I certainly don't want to embarrass you, but I would like to ask you just a question or two. You indicated your son had some trouble years ago. Can you tell us what his current status is? Has he come through those? Is he serving time somewhere?
>
> Ms. Edwards: He's in a camp.
>
> Mr. Tanner: In a camp?
>
> Ms. Edwards: Yes.
>
> Mr. Tanner: Is this a prison camp?

> Ms. Edwards: I just know he's in Seminole Johnson Camp. **I mean, he was with a group of guys that were supposed to be selling. They never caught them at anything, because he was there with them, as far as I know, they all went to a camp.**
>
> Mr. Tanner: Okay. They convicted them of selling dope or drugs?
>
> Ms. Edwards: Yes.

(R332-3). The State challenged Juror Edwards for cause on the following basis:

> Mr. Tanner: We would challenge [Ms. Edwards] for cause, Your Honor. She said her son has been placed in a camp. He's been there for five years for drug charges, along with all of the other people that were involved in the transactions. But she said that her son was really not guilty, and that he shouldn't be there.
>
> We don't think -- we don't believe that she could be fair and impartial in this matter because of the perceived injustice that was inflicted upon her son.

(R1102-3). The Court denied the cause challenge, and the State then exercised a peremptory strike against juror Edwards. (R1103-4). The prosecutor immediately stated the following reasons for that peremptory strike:

> Mr. Tanner: . . . She was quite hesitant, I felt, on her position with regard to the death penalty. She said that she could not 100 percent say that she was receptive or favorable to the death penalty. For those reasons, plus those stated in the cause [challenge], we would ask to peremptorily excuse her.

(R1104).[22] In sustaining the peremptory challenge, the trial court

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[22] Ms. Edwards had stated that "I've always had a pro and con" concerning capital punishment, and went on to say "So I've never really come to a 100 percent death penalty on it". (R214-5). While

stated:

> The Court: Well, the basis in the *Melbourne* decision is whether the -- the challenge is a good faith challenge, and not necessarily whether the Court agrees with it, or -- it's the credibility of the challenging attorney.
>
> And without regard to whether -- what race Ms. Edwards is, prosecutors very frequently challenge jurors for those types of reasons. So I find it to be a race/neutral reason that is very common in our system for challenging jurors.
>
> So I find that it's not a race based challenge. The reasons given are adequate. So I'll sustain the challenge.

(R1105-6). Those findings are not clearly erroneous, are in accord with *Melbourne* and *Smith, supra*, and should not be disturbed.

<u>Juror Hilton</u>

Farina also challenges the State's peremptory strike of juror Hilton. (R1122). As with juror Edwards, the State initially sought to challenge the juror for cause, and, when that challenge was denied, exercised a peremptory strike. (R1122). The reasons stated were as follows:

> Mr. Tanner: Your Honor, we would ask you to consider her for cause. She is the lady who was the juror who was late yesterday, and I think it was more than 30 minutes. It was closer to 40 or so minutes late. She held up the entire proceedings. And then, I'm not even sure who asked the question, but I was sitting at counsel table when one of the Defense lawyers asked her something yesterday about serving on the jury an she said, Yes, if someone would wake me up.

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somewhat cryptic, that final comment is, at the least, properly described as "hesitant", especially by one who had the benefit of observation of the juror rather than a cold transcript.

> That indicated to me that whatever that problem was had to do with her oversleeping. And we know what it costs us yesterday, nearly an hour's worth of work, and a lot of people waiting. In addition, she's very tentative about the death penalty. She is in a church which is very active in a prison ministry. When I asked her about Christian forgiveness, she seemed fine until the end. You know, Christian forgiveness versus law.
>
> And finally she said, but a little bit of that Christian forgiveness might creep in. And I think Christian forgiveness is a wonderful thing, but when it can't be separated from a juror's function, it's inappropriate. So for those reasons, I ask to excuse her for cause.

(R1122-1123)

In sustaining the peremptory strike, the trial court found that the State was not making a racially-motivated challenge, that the challenge was in good faith, and "I don't think he's lying to me". (R1126-7). Those findings of fact are not clearly erroneous, and should not be disturbed. *Melbourne*, *supra; Smith*, *supra.*

The jury selection issue contained in Farina's brief is procedurally barred and, alternatively, without merit. Relief should be denied.

<u>II. THE "POST-ARREST STATEMENT" CLAIM</u>

On pages 35-42 of his brief, Farina argues that the trial court should have granted his motion *in limine* to preclude the admission of a statement he made during the course of a conversation with his co-defendant brother. This Court previously held Farina's statement admissible, stating:

> In this case, Anthony Farina's own incriminating statements were admissible as admissions by a party-opponent. *See* § 90.803(18)(a), *Fla.Stat*. (1991).

> In these statements, Anthony recounted the crime in minute detail, including which victim died and the specific wounds inflicted upon specific victims. While most of Anthony's comments focused on Jeffery's actions, Anthony did admit that he tied up the victims. He also expressed regret that "[i]nstead of stabbing [the victims] in the back [I] should have sliced their fucking throats and then put something in front of the freezer door so they couldn't open them ... [and] cut the phone lines."

Farina (Anthony) v. State, 679 So.2d at 1157. In this proceeding, Farina's position is that the statement quoted above was not relevant to any aggravator, amounted to an inadmissible "lack of remorse" or "future dangerousness" argument, and that the prejudicial effect of the statement outweighed its probative value. This argument is based upon a misapprehension of controlling law, and is not a basis for relief.

Florida law is well settled that the jury in a resentencing proceeding is not expected to make its sentencing recommendation in a vacuum, and is entitled to receive evidence that serves to familiarize them with the facts of the underlying case. *Wike v. State,* 698 So.2d 817, 821 (Fla. 1997); *Lawrence v. State,* 691 So.2d 1068, 1073-4 (Fla. 1997); *Bonifay v. State,* 680 So.2d 413, 419 (Fla. 1996); *Teffeteller v. State,* 495 So.2d 744, 745 (Fla. 1986). The statement at issue served that function, and, contrary to Farina's apparent claim, was relevant to the penalty phase proceeding, and did not inject an improper "aggravator" into the proceedings. Moreover, and most significantly, **the statement was**

admitted at the original guilt phase proceeding. But for the fact that this was a resentencing proceeding, the statement at issue would have been before the jury as a result of the guilt phase testimony. For that reason, Farina cannot, by definition, show that he was prejudiced by the admission of the statement. *Lawrence, supra.* Because he cannot show prejudice, there is no basis for relief.

To the extent that further discussion of this claim is necessary, neither of the decisions relied upon by Farina are controlling. *Kormondy v. State*, 703 So.2d 454 (Fla. 1997) and *Derrick v. State*, 581 So.2d 31 (Fla. 1991) both dealt with original proceedings in which the evidence at issue was introduced, **for the first time**, in the penalty phase of the capital trial. That is not the situation here because Farina's statement was introduced during the **guilt** phase of his **first** trial. *Kormondy* and *Derrick* have nothing at all to do with the situation presented in this case. Farina cannot show prejudice, and, for that reason, there is no basis for reversal.[23]

III. THE DENIAL OF THE MOTION
TO SUPPRESS STATEMENTS CLAIM

On pages 42-49 of his brief, Farina argues that the trial court should have granted his motion to suppress his statements

[23] The State does not concede that there was any error associated with the admission of the statement. The fact that Farina can never establish prejudice trumps all other possible arguments.

that were recorded on May 11, 1992, between Farina, his brother, and John Henderson (the other defendant). The admissibility of these statements was raised on direct appeal and decided adversely to Farina. *Farina v. State*, 679 So.2d at 1154.[24] When Farina filed a new motion to suppress the statements, the State filed a Motion to Strike, which was granted. (R299; 585). For the reasons set out below, the trial court properly granted the motion to strike.

As this Court is well aware, Florida has a series of regularly applied and routinely enforced procedural rules which exist to insure that claims are raised and litigated at the first available opportunity. The "contemporaneous objection rule" is such a procedural rule, as is the component of *Florida Rule of Criminal Procedure* 3.850 which procedurally bars litigation in a collateral attack proceeding of claims that were or could have been raised on direct appeal. Rule 3.850(c), *Fla.R.Crim.P.* Yet another example of a procedural rule that functions to insure that claims are raised and litigated at the earliest opportunity is the longstanding (and rarely litigated) rule that a defendant cannot, in the context of a resentencing proceeding, relitigate issues which could have been raised during the first appeal. *Harvard v. State*, 414 So.2d 1032 (Fla. 1982). That is what Farina is attempting to do in this case.

Farina cannot legitimately argue that he did not litigate the

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[24] The primary issue in the first appeal was apparently whether a *Bruton* violation occurred. *Farina v. State*, 679 So.2d at 1155.

denial of the motion to suppress during his first appeal to this Court. Further, Farina cannot claim that the current basis for suppression was included in the first such motion, even though it was available and known at the time and could have been included therein had counsel chosen to do so.[25] Because that is so, it stands reason on its head to suggest that Farina can seek suppression of a statement on grounds that have long been available to him but yet were not raised at the first available opportunity in the course of the proceedings. Farina's tactics fly in the face of any concept of orderly litigation, and this Court should not countenance this attempt to engender confusion in an attempt to gain some advantage. Farina had the opportunity to seek suppression on these grounds but elected not to, apparently in favor of an argument that former counsel believed to be stronger. He is not entitled to a second bite at the apple, and the trial court should be affirmed.

To the extent that further discussion of this issue is necessary, there are several additional reasons that this claim is not a basis for relief. First, there can be no serious argument that the claim raised in brief is not procedurally barred for Rule 3.850 purposes because it could have been but was not raised on direct appeal. The result in the context of this case should be no

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[25] On page 44 of his brief, Farina asserts that the claims now raised "had not been litigated originally, contrary to the State's argument". In fact, the State argued that the claims **could have been or were** raised on direct appeal. (R299).

different -- a contrary rule would lead to a continual reopening of cases. That is the reason for the law of the case rule, and this Court should apply it here. Second, at least insofar as the statements made by Jeffrey are concerned, Anthony Farina has no standing to challenge their admissibility on the asserted grounds. Because that is so, there is no basis for suppression. The grounds asserted on appeal focus on an asserted deficiency as to statements made by Jeffrey Farina, and, for that reason alone, Anthony Farina's motion was properly stricken. Finally, to the extent that Farina attempts to refer back to Claim II, such argument is meritless because there can be no prejudice for the reasons set out above.

IV. THE DENIAL OF THE MOTION TO SEVER CLAIM

On pages 50-54 of his brief, Farina argues that the trial court erred in denying his motion to sever his case from that of his co-defendant. The motion is based upon the admission of the statements discussed in connection with issues II and III, above, and is not a basis for relief for the same reasons.

During his last appearance before this Court, Farina raised a similar issue. This Court denied relief, stating:

> Farina argues in Issue 6 that he was denied a fair trial because he was tried with a codefendant and that codefendant's incriminating statements were offered at trial when Farina could not cross-examine the codefendant. Police monitored conversations between Jeffery and Anthony Farina on two occasions while the Farinas were in custody and sitting in a police car. In these conversations, the Farinas discussed the crimes.

> We have held that a person in custody in the back of a police car has no right of privacy. *State v. Smith*, 641 So.2d 849, 851 (Fla. 1994).
>
> Anthony Farina argues that the admission of Jeffery's statements violated his Sixth Amendment right to confront witnesses as explained in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). We find no Confrontation Clause violation under the circumstances of this case.

Farina (Anthony) v. State, 679 So.2d at 1154-55. To the extent that the claim contained in Point IV of Farina's *Initial Brief* is the same issue that was raised in the prior proceeding, there is no basis for reversal because the statements at issue have already been found admissible.[26] Farina's argument to the contrary has no logical or legal basis because it ignores the fundamental fact that there can be no error in the admission of the statements at the resentencing proceeding because those statements were properly admitted at the original **guilt** phase. If the statements were admissible at the guilt phase, and this Court held that they were, there can be no error in the admission of the statements on resentencing. Any other result defies logic. Farina cannot demonstrate prejudice as a matter of law, *Harvard, supra*, and there is no basis for relief. The denial of the motion to sever should be affirmed in all respects.

To the extent that the asserted grounds for severance differ

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[26] Farina does not claim that the statements at issue in the resentencing differed in any respect from the statements that this Court found admissible in the prior opinion.

from the grounds that were previously before this Court, the law is clear that such relitigation of a previously-decided issue on new grounds is inappropriate. *See, Harvard, supra.*[27]

To the extent that Farina claims, on page 54 of his brief, that the admission of the statements deprived him of an "individualized sentencing process", that claim could have been but was not raised in the prior proceeding, and cannot be litigated for the first time on resentencing. *See, Harvard, supra.* In any event, this claim is a logical impossibility because the statements were properly admitted in the guilt phase proceeding. Further, the assertion that "[t]he trial court found that the Appellant was only an accomplice to the murder and that his role was minor" is incorrect. In the sentencing order, the trial court found as a fact that Farina was a "major participant" in the murder of Michelle Van Ness. (R358). The trial court should be affirmed in all respects.

V. THE "VICTIM-IMPACT" EVIDENCE ISSUE

On pages 54-69 of his brief, Farina argues that the trial court should have (1) granted his motion to exclude victim impact evidence, (2) not allowed that evidence to become a "feature of the trial", and (3) given his limiting instruction to the jury regarding such evidence. None of those "issues" are grounds for reversal of the trial court.

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[27] The motion was argued at (R226-238).

A. The Denial of the Motion to Exclude

The trial court properly denied Farina's motion to exclude "victim impact" testimony because, under the prior decision of this Court in this case, such evidence is admissible. This Court held:

> On remand, however, the State may present victim impact testimony that comports with the decision in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). *See also Windom v. State*, 656 So.2d 432 (Fla. 1995); *Burns v. State*, 609 So.2d 600, 605 (Fla. 1992).

Farina (Anthony) v. State, 679 So.2d at 1158. In the co-defendant's case, this Court addressed the issue in more detail:

> [O]n remand, the State should be allowed to present victim impact testimony that comports with the dictates of decisions from the United States and Florida supreme courts. The United States Supreme Court has held that
>
> > if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.
>
> *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991). In *Payne* the Court receded from holdings in *Booth v. Maryland*, [482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)],and *South Carolina v. Gathers*, [490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)] that victim impact evidence was inadmissible in capital sentencing proceedings. *Payne,* 501 U.S. at 830 n. 2, 111 S.Ct. at 2611 n. 2. **The only part of *Booth* that *Payne* did not overrule was "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."** *Id.*

> Thus, on remand, the State may present victim impact evidence that comports with *Payne*. *See Windom v. State*, 656 So.2d 432 (Fla.1995); *Burns v. State*, 609 So.2d 600, 605 (Fla.1992).

Farina (Jeffrey) v. State, 680 So.2d at 399 [emphasis added]. In light of the clear holding from this Court that victim impact evidence **is** admissible, the trial court would have committed error had it adopted Farina's argument and ruled to the contrary. Likewise, in *Bonifay*, this Court held:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and the role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. Therefore, we find this testimony relevant.

Bonifay v. State, 680 So.2d 413, 419-420 (Fla. 1996).The trial court properly denied the motion to exclude.

B. The "Feature of the Trial" Claim

The second component of this claim is Farina's claim that the victim impact evidence became a "feature of the trial". That argument simply has no factual basis. According to Farina, the victim impact testimony consisted of "over 67 pages worth of highly emotional, repetitive and prejudicial testimony." *Initial Brief* at 69. However, those **67** pages worth of testimony are contained in a transcript that, from opening argument to final summation, consists of 1172 pages. Stated differently, the testimony that Farina claims was a feature of the trial takes up about **six percent** of the

record. In contrast, the testimony of Farina's mother alone goes on for 82 pages. (R1935-2017). When the "victim impact" testimony is considered in the context of the entire trial, as it must be, it clearly did not become a feature of the trial. It was legal evidence that was properly admitted under controlling law.

To the extent that Farina argues that the jury's advisory sentencing recommendation was influenced by the victim impact evidence (*Initial Brief* at 69), that argument is wholly speculative and lacks any legal basis. In any event, and to the extent that this argument deserves a response, this Court has already held that victim impact evidence was improperly excluded in Farina's prior trial. *Farina, supra.*

To the extent that further argument is necessary, as Justice O'Connor stated in *Payne*:

> In my view, a State may legitimately determine that victim impact evidence is relevant to a capital sentencing proceeding. A State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community. A State may decide also that the jury should see "a quick glimpse of the life petitioner chose to extinguish," *Mills v. Maryland*, 486 U.S. 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988) (REHNQUIST, C.J., dissenting), to remind the jury that the person whose life was taken was a unique human being.

Payne v. Tennessee, 111 S.Ct. at 2611 (concurring opinion). Furthermore,

> "Murder is the ultimate act of depersonalization." Brief for Justice For All Political Committee et al. as

> *Amici Curiae* 3. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.

Payne v. Tennessee, *supra*, at 2612. The sentence should be affirmed in all respects.

C. The Jury Instruction Issue

The third component of this claim is Farina's claim that the trial court did not give "limiting instructions to the jury regarding its use of [the victim impact] evidence". *Initial Brief* at 68. This argument is based on an invalid factual basis, because the jury was specifically instructed that:

> **You have heard evidence concerning Michelle Van Ness from friends and members of her family. This evidence is neither an aggravating circumstance nor any part of an aggravating circumstance which you may consider in rendering your verdict. However, you may consider this evidence so far as it demonstrates her uniqueness as an individual human being and the resultant loss to the community's members by her death.**

(R343). That instruction, which was included in the final jury instructions, (R2409) is clearly a "limiting instruction" that informs the jury as to how victim impact evidence is to be utilized. That instruction is at least as detailed as the instruction that was upheld in *Alston v. State,* 23 Fla. L. Weekly S453 (Fla. 1998), and in all respects complies with *Windom, supra.* The contrary claim contained in Farina's brief is based upon an erroneous view of the record. The sentence should be affirmed in

all respects.[28]

VI. THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR WAS PROPERLY FOUND

On pages 70-73 of his brief, Farina argues that the sentencing court improperly found the heinous, atrocious, or cruel aggravating circumstance. For the reasons set out below, there is no error.

In finding that the heinous, atrocious, or cruel aggravator applied in this case, the sentencing court stated:

> The capital felony was especially heinous, atrocious, or cruel. To Michelle, this was not an instantaneous or near-instantaneous death simply because her death was by gunfire. The defendants subjected Michelle Van Ness to extreme terror and mental torture during her final consciousness. She begged for her life and cried knowing she was about to die. She verbally expressed her fears as she watched the defendants' preparations and contemplated her death. These thoughts and fears were reinforced as she was tied up for the execution and as she heard the first shots fired. The other intended victims may not have been as acutely aware of their impending death as Michelle, but she knew exactly what was about to happen, and her mental anguish was real and excruciating. The Court realizes that the cruel nature of this case focuses on the mental and emotional cruelty rather than on any physical torture. Accordingly, the Court only gave this factor moderate weight.

(R357). Those findings of fact are supported by the evidence, are not clearly erroneous, and should be affirmed in all respects.

The premise of Farina's argument seems to be that because this

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[28] The instructions reproduced at page 56 of the *Initial Brief* were pre-testimony instructions -- the final instruction given immediately before deliberations began is set out above. That instruction includes all of the concepts contained in the instruction that Farina wanted given **during** trial. Because he got what he wanted, he should not be heard to complain.

was a gunshot murder that was unaccompanied by "torture", the heinous, atrocious, or cruel aggravator does not apply.[29] Despite Farina's efforts to argue that the heinous, atrocious, or cruel aggravating circumstance does not apply, the facts in this case are little different from the facts of *Henyard v. State*, where this Court upheld the application of the heinous, atrocious, or cruel aggravator. In *Henyard*, this Court held:

> We have previously upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim. *See, e.g., Routly v. State*, 440 So.2d 1257, 1265 (Fla. 1983), and cases cited therein. Moreover, "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State*, 607 So.2d 404, 410 (Fla. 1992), *cert. denied*, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993). In this case, the trial court found the heinous, atrocious or cruel aggravating factor to be present based upon the entire sequence of events, including the fear and emotional trauma the children suffered during the episode culminating in their deaths and, contrary to Henyard's assertion, not merely because they were young children. (FN16) Thus, we find the trial court properly found that the heinous, atrocious, or cruel aggravating factor was proved beyond a reasonable doubt in this case.
>
> > (FN16) The sentencing order reads in pertinent part:
> >
> > After shooting Ms. Lewis, Henyard and Smalls rolled Ms. Lewis' unconscious body off to the side of the road. Henyard got back into Ms. Lewis' car and drove a short distance down the

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[29] Farina also briefly argues that there was no "intent" that the murder be heinous, atrocious, or cruel. The intent argument has been rejected by this Court. *Guzman v. State*, 721 So.2d 1155 (Fla. 1998).

> deserted road, whereupon Henyard stopped the car.
>
> Jasmine and Jamilya, who had been in continual close approximation and earshot of the rapes and shooting of their mother, were continuing to plead for their mother; "I want my Mommy," "Mommy," "Mommy."
>
> After stopping the car, Henyard got out of Ms. Lewis' vehicle and proceeded to lift Jasmine out of the back seat of the car, Jamilya got out without help. Then both of the pleading and sobbing sisters, were taken a short distance from the car, where they were then executed, each with a single bullet to the head.

Henyard v. State, 689 So.2d 239, 254 (Fla. 1996). The facts of this case are functionally identical to the facts in *Henyard,* and the result should be the same. Michelle's murder was especially heinous, atrocious, or cruel based upon the fear and emotional strain she suffered before she was shot in the head, after having been tied with her hands behind her back and having witnessed two of her co-workers being shot, knowing that she was next. The sentencing court properly found the heinous, atrocious, or cruel aggravator. The sentence of death should be affirmed in all respects.

Alternatively and secondarily, even if the heinousness aggravator should not have been found, any error was harmless beyond a reasonable doubt because, even without the heinous, atrocious, or cruel aggravator, death is still the proper sentence. *Demps v. State,* 714 So.2d 365, 367 (Fla. 1998); *Geralds v. State,*

674 So.2d 96, 105 (Fla. 1996); *Guzman v. State*, 721 So.2d 1155 (Fla. 1998); *Rolling v. State*, 695 So.2d 278 (Fla. 1997) (death sentence proportionate where trial court found that four aggravators, including HAC, prior violent felony conviction, murders during commission of burglary or sexual battery, and cold, calculated and premeditated outweighed two statutory mitigators and significant nonstatutory mitigation).

VII. THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS PROPERLY FOUND

On pages 74-78 of his brief, Farina argues that the trial court should not have found the cold, calculated, and premeditated aggravator. This aggravator was properly found for the following reasons.

In finding the cold, calculated, and premeditated aggravating circumstance, the sentencing court made the following findings:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The defendants went about planning to murder calmly and with cool reflection. No evidence even suggested the death was a product of an emotional frenzy, panic or a fit of rage. The defendants knew from the beginning of their Taco Bell plans that they would have to execute witnesses. Their target was Taco Bell because of Anthony's familiarity with the restaurant, its employees and procedures. Anthony further prepared by making a quick visit to the restaurant just before the robbery to see who was working. Their preparations included purchasing the bullets that killed Michelle -- bullets that were not weapons of convenience discovered at the scene at the last moment. The Court rejects as unbelievable the suggestion that the defendants' elaborate plans were made without thinking about the inevitable problem of employee/witnesses who would know them and could identify

> them. After Anthony's preliminary visit to the restaurant, but before the robbery, the Farinas discussed the fact that Anthony knew three of the employees who were working that night. The Court also rejects as unbelievable the explanation that the bullets were only to be used in self-defense, if necessary. Death of witnesses was an integral part of the defendants' plan at least as early as the purchase of the bullets and other supplies. Furthermore, the cold and calculated nature of their plan is demonstrated by the methodical way the defendants rounded up the victims. Herded them into a confined execution area where they were easier to control, tried to calm and control them with cigarettes and false words of comfort, and announced "one last precaution" before rounding them up and beginning to shoot. Anthony's comment, "Your call . . ." to Jeffery just before the shooting and stabbing began was further proof of the decision to carry out plans to kill. Heightened premeditation is clearly present in these facts, and none of the employees offered any resistance to give the defendants any pretense of self-defense or any other moral or legal justification. The Court has given this factor great weight.

(R357-8). Those findings of fact, and the credibility determinations contained therein, are not clearly erroneous, are supported by the record, and should be affirmed in all respects.

Under settled Florida law:

> While "heightened premeditation" may be inferred from the circumstances of the killing, it also requires proof beyond a reasonable doubt of "premeditation over and above what is required for unaggravated first-degree murder." *Walls* [*v. State*], 641 So.2d [381] at 388 [Fla. 1994]. The "plan to kill cannot be inferred solely from a plan to commit, or the commission of, another felony." *Geralds v. State*, 601 So.2d 1157, 1163 (Fla.1992).

Brown v. State, 721 So.2d 274 (Fla. 1998). However, as this Court has held:

> In order to prove the existence of the CCP aggravator, the State must show a heightened level of premeditation establishing that the defendant had a careful plan or

> prearranged design to kill. *Rogers v. State*, 511 So.2d 526, 533 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Here, the State proved such a prearranged plan to kill. **Cold, calculated, premeditated murder can be indicated by the circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course**. *Swafford v. State*, 533 So.2d 270 (Fla.1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989). . . . **Although West and Smith were not the actual subjects of the planning, this fact does not preclude a finding of cold, calculated premeditation. Heightened premeditation necessary for a CCP finding does not have to be directed toward the specific victim**. *Sweet v. State*, 624 So.2d 1138, 1142 (Fla.1993), *cert. denied,* 510 U.S. 1170, 114 S.Ct. 1206, 127 L.Ed.2d 553 (1994), *citing Provenzano v. State,* 497 So.2d 1177, 1183 (Fla. 1986), *cert. denied,* 481 U.S. 1024, 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987). The focus of the CCP aggravator is the manner of the killing, not the target. *Id.* In addition, we find no pretense of legal justification based on self-defense because there is no colorable claim that the murders were motivated out of self-defense. *See Christian v. State*, 550 So.2d 450 (Fla. 1989), *cert. denied*, 494 U.S. 1028, 110 S.Ct. 1475, 108 L.Ed.2d 612 (1990); *Banda v. State*, 536 So.2d 221 (Fla. 1988), *cert. denied*, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989). Here, the record clearly shows that the motivation for the murders was retribution.

Bell v. State, 699 So.2d 674, 677-8 (Fla. 1997) [emphasis added].

Likewise, the law is clear that:

> Pursuant to *Jackson,* the following four elements must be proven in order for the CCP aggravator to be applicable: (1) the murder must be the product of cool, calm reflection rather than prompted by emotional frenzy, panic, or a fit of rage; (2) the murder must be the product of a careful plan or prearranged design; (3) there must be "heightened premeditation," over and above the premeditation required for unaggravated first-degree murder; and (4) there must be no pretense of moral or legal justification for the murder. *Jackson*, 648 So.2d at 89; *Walls v. State*, 641 So.2d 381, 387-88 (Fla. 1994), *cert. denied*, 513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995).

The evidence presented at trial establishes that all four of these elements were present in this case and that the trial court properly found that the CCP aggravator applied to Monique Stow's murder. The evidence supports the State's theory that the murder was the product of cool, calm reflection rather than prompted by emotional frenzy, panic, or a fit of rage. When Jones went to San Pablo Motors on March 3, 1994, he had no money to pay for the car. Jones knew that Monique worked in the office with her father. After Jones retrieved his pistol from the car, he immediately sought her out while she was washing her hands in the bathroom and killed her so that there would be no witness to her father's murder. Jones shot her twice in the head at close range, an execution-style killing. Coldness exists beyond any reasonable doubt.

The evidence also established that Monique was not killed as an afterthought or during Jones' escape after he shot Ezra Stow but as part of a careful plan or prearranged design to kill Monique and then kill her father. Ezra Stow testified at trial that he heard two gunshots right before Jones came into his office and began shooting at him. Ezra Stow's testimony, in conjunction with the ballistics and crime scene evidence, proved that Jones shot Monique first and then went into the office and shot Ezra Stow before Ezra had a chance to pull his gun out of its holster. These facts show that the murder was committed in a calculated fashion.

The evidence adduced at trial further established that Jones killed Monique Stow with heightened premeditation. Although Jones went to the car lot for the alleged purpose of paying off the worthless check, he brought no money with him, and instead brought a pistol. He went to the car lot near closing time and waited to retrieve the gun from his car until he knew that only Stow and his daughter would be in the trailer. When he returned to the trailer after retrieving his gun, he immediately went to the bathroom and shot Monique Stow twice in the head and then proceeded to Ezra Stow's office to do the same to him. The evidence supports the trial court's finding that Jones formed his plan to murder the Stows in advance of March 3 and that his murder of Monique Stow was not a spur-of-the-moment act or one involving only a short period of premeditation. Heightened premeditation exists beyond any reasonable doubt.

> Additionally, there is absolutely no evidence present in the record suggesting that Jones had a legal or moral pretense of justification for murdering Monique Stow. Additionally, Jones' appellate brief does not assert the existence of a pretense of moral or legal justification for the murder. We therefore conclude that the trial court properly found that the CCP aggravator applied in this case.

Jones v. State, 690 So.2d 568, 571-2(Fla. 1996). *See also, Franqui v. State*, 699 So.2d 1312, 1324 (Fla. 1997) ("We agree this evidence supports the trial court's finding that not only was the robbery carefully planned in advance, but there was also a plan for Franqui to shoot and kill the bodyguard, the victim here. In sum, we conclude that the trial court did not err in finding the cold, calculated, and premeditated aggravator."); *Eutzy v. State*, 458 So.2d 755 (Fla. 1984) (firearm procured in advance, no sign of struggle, and victim shot once in the head execution-style). When the facts of this case are evaluated in accord with settled Florida law, it is clear that Michelle's murder was cold, calculated, and premeditated. The sentence should be affirmed in all respects.

Alternatively and secondarily, even if it was error to find the cold, calculated, and premeditated aggravator, any error is harmless because death is the appropriate sentence, anyway. *Demps, supra; Geralds, supra; Guzman, supra; Henyard, supra; Rolling, supra.*

VIII. THE "AVOIDING ARREST" AGGRAVATING CIRCUMSTANCE CLAIM

On pages 79-82 of his brief, Farina argues that the sentencing

court erroneously found that the murder was committed for the purpose of avoiding a lawful arrest. This aggravator was properly found for the reasons set out below.

In finding that Michelle was murdered for the purpose of avoiding a lawful arrest, the sentencing court entered the following findings:

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. The evidence proving this aggravating factor includes the defendants' knowledge that because of Anthony's previous employment at this Taco Bell some of the employees would know him. Anthony's visit to the restaurant shortly before the robbery to see who was working verified that the were in fact witnesses who could identify him if they carried out their plans. After receiving the money without resistance, the defendants methodically moved the victims to a small, confined area of the restaurant to facilitate their execution. Just before the killings the brothers discussed the need to eliminate the witnesses who knew them. This, coupled with the execution style shooting of the victim/witnesses clearly demonstrates the intent to eliminate witnesses to avoid detection and arrest. The Court gave this factor great weight.

(R356). Contrary to Farina's assertions, Michelle's murder is a classic example of a murder committed for the purpose of eliminating witnesses. This Court has repeatedly upheld the avoiding arrest aggravator in cases presenting substantially identical facts.

In upholding the trial court's finding of the avoiding arrest aggravating circumstance in a remarkably similar case, this Court stated:

> In *Riley v. State*, 366 So.2d 19 (Fla. 1978), this Court

> for the first time broadened the application of the avoid arrest aggravator to encompass the murder of a witness to a crime in addition to law enforcement personnel. However, this Court cautioned that
>
>> the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.
>
> Id. at 22; *see also Gore v. State*, 706 So.2d 1328, 1334 (Fla. 1997).
>
> In *Riley*, the defendant and an accomplice entered the business where the defendant worked for the purpose of robbing it. *See* 366 So.2d at 20. They then threatened the defendant's three present coworkers with pistols, forced them to lie on the floor, bound and gagged them, and then shot them in the head. *See id*. In light of the fact that the victims knew the defendant and were immobilized and rendered helpless, coupled with one of the perpetrator's expressed concern for subsequent identification, this Court found that the record supported only one interpretation -- that the victims were killed to avoid identification. *See id*. at 22.

Jennings v. State, 718 So.2d 144, 151 (Fla. 1998). The facts of *Jennings* are eerily similar to the facts of this case. In that case, this Court stated:

> Here, as in *Riley*, it is significant that the victims all knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator, *see Consalvo*, 697 So.2d at 819, there was further evidence presented that Jennings used gloves, did not use a mask, and stated that if he ever committed a robbery, he would not leave any witnesses.
>
> Also, the facts of the present case show that the victims had been bound. Victim Siddle's hands were bound behind her back with electrical tape when her throat was slashed. While the remaining two victims (Smith and Wiggins) had freed their hands, no evidence of their resistance (i.e., defensive wounds on Jennings, fingernail scrapings from the victims, etc.) was entered

> into evidence. Further, all three victims were confined to the freezer, and any immediate threat to Jennings could have been eliminated by simply closing and securing the freezer door. Instead, Jennings slashed the throats of all three victims.
>
> As recognized by the trial court, based on the evidence in this case there was no reason to kill at least two of the victims except to eliminate them as witnesses to the first murder. *See, e.g., Willacy v. State*, 696 So.2d 693, 696 (Fla.), *cert. denied*, --- U.S. ----, 118 S.Ct. 419, 139 L.Ed.2d 321 (1997); *Thompson v. State*, 648 So.2d 692, 695 (Fla. 1994); *Correll v. State*, 523 So.2d 562, 568 (Fla. 1988). Further, the manner of killing here (consecutive throat slashings) was not of a nature that could be considered reactionary or instinctive and further supports the finding that the dominant motive for killing at least two of the victims was to avoid identification. *Cf. Robertson v. State*, 611 So.2d 1228, 1232 (Fla. 1993) (finding insufficient evidence to support avoid arrest aggravator where "[t]he facts indicate that [the appellant] shot [the victim] instinctively and without a plan to eliminate her as a witness"). Accordingly, we find substantial competent evidence to support the trial court's finding that, beyond a reasonable doubt, the dominant motive for the murders of two of the victims was the elimination of witnesses in order to avoid prosecution.

Jennings v. State, 718 So.2d at 151.

All of the essential elements present in *Jennings* exist in this case, as well. Because that is so, Farina's argument that the avoiding arrest aggravator does not apply to him has no legal basis. Competent substantial evidence supports the findings of the sentencing court, and the sentence of death should be affirmed.[30]

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[30] Farina also argues that the trial court gave too much weight to this aggravator. The law is settled that the weight given to an aggravating circumstance is a matter for the sentencing court. *See, Wuornos v. State*, 644 So.2d 1012, 1018 (Fla. 1994); *Foster v. State*, 679 So.2d 747, 756 (Fla. 1992) ("Deciding the weight given

Alternatively and secondarily, any error was harmless beyond a reasonable doubt because death is the proper sentence even without this aggravator. *Demps, supra; Geralds, supra; Guzman, supra; Rolling, supra.*

IX. THE PROPORTIONALITY CLAIM

On pages 82-92 of his brief, Farina argues that his death sentence is disproportionate. The basis of that claim is somewhat unclear, but it appears to be based, at least in part, on an incorrect reading of the sentencing order.

The fundamental premise underlying the proportionality issue is Farina's claim that the sentencing court found as a mitigator that he "was an accomplice and his participation was relatively minor". *Initial Brief*, at 83. That is an inaccurate representation of the findings of the sentencing court. The relevant portion of the sentencing order reads as follows:

> The defendant was an accomplice in the capital felony committed by Jeffery Farina and his participation was relatively minor. The facts are as stated above. **The Court finds that Anthony did not fire the shot that killed Michelle Van Ness, but that his participation in the crime was major.** The defendant and Jeffery planned the evening as full partners. Anthony was the mastermind behind the plans; his need for money to move his children was the basic motivation for planning the entire evening. It was Anthony's familiarity with the Taco Bell

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to a mitigating circumstance is within the discretion of the trial court, and a trial court's decision will not be reversed because an appellant reaches the opposite conclusion. *See Dougan v. State*, 595 So.2d 1 (Fla.), *cert. denied*, 506 U.S. 942, 113 S.Ct. 383, 121 L.Ed.2d 293 (1992)."); *Bonifay, supra,* at n. 6; *Guzman, supra.*

> restaurant and its employees that provided the target of the plans. Anthony bought the bullets and held the gun as Jeffery tied up the male victims. After the gun misfired and the knife became the weapon of choice, Anthony stood beside his brother, held the gun and handed Jeffery the knife for the killing of Kim Gordon. According to at least one witness, it was Anthony who held Kim's head down while Jeffery tried in vain to shove the knife into her skull and then her spine. Anthony kept the victims relatively subdued with cigarettes and words of assurance as they were herded into the cooler for execution. Rather than being words of disclaimer or refusal to murder, as Anthony has claimed, his statement "Your call ..." to Jeffery was an indication of approval for Jeffery to begin the killing. Anthony was totally involved in the crime from beginning to end. Without Anthony and Heffery acting in concert, the death would not have occurred. Therefore, the Court has given his role as an accomplice little weight.

(R358). Those findings of fact are supported by competent substantial evidence, and should not be disturbed.

Florida law is well settled that the decision as to the relative weight afforded mitigating factors is a matter for the sentencing court to determine. *Wuornos v. State*, 644 So.2d 1012 (Fla. 1994); *Bonifay, supra; Foster, supra*. In this case, the most that Farina has done is demonstrate his evident disagreement with his sentence. He has presented no argument suggesting that the sentencing court improperly weighed the aggravators and mitigators, and is not entitled to relief. The true facts are that there are five valid aggravating circumstances to be weighed against the various matters presented in mitigation, and that, when fairly considered, death is the proper sentence. Once again, *Jennings* is substantially similar to this case:

> ...based on our review of all of the aggravating and mitigating factors, including their nature and quality according to the specific facts of this case, we find that the totality of the circumstances justifies the imposition of the death sentence, *see Porter*, 564 So.2d at 1064, and that this case is proportionate to other cases where we have upheld the imposition of a death sentence. *See, e.g., Stein* (affirming death sentences where, inter alia, murders were cold, calculated, and premeditated and committed during armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity); *LeCroy v. State*, 533 So.2d 750 (Fla. 1988) (affirming death sentence where, *inter alia*, murder was committed during course of armed robbery to avoid arrest, and defendant had no significant history of prior criminal activity).

Jennings v. State, 718 So.2d 144, 154 (Fla. 1998).[31] If death was a proportionate sentence in *Jennings*, and this Court held that it was, then it is the proper sentence for Farina. *See also, Bonifay, supra; Guzman, supra.*

To the extent that Farina raises an *Enmund/Tison* issue in his brief, the true facts are that the sentencing court found that Farina was a **major** participant in the murder, and that, without his involvement, **the murder would not have occurred**. (R358). Those findings are more than sufficient to fulfill the requirements of *Enmund* and *Tison.* For example, in *DuBoise v. State,* this Court held:

> DuBoise and his two companions decided to grab a woman's purse in order to get some money. As they passed the victim on the street, DuBoise left their car and attempted to snatch her purse. When she resisted, the other man came to assist DuBoise. The victim recognized

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[31] Jennings' co-defendant received a life sentence. *Id.*

> one of DuBoise's companions, and the three men put the victim in the car and drove to another area of town. There, while DuBoise raped her, the man whom the victim had recognized struck her with a piece of lumber. DuBoise's companions then raped the woman and both struck her with pieces of lumber.
>
> DuBoise was a major participant in the robbery and sexual battery. He made no effort to interfere with his companions' killing the victim. By his conduct during the entire episode, we find that he exhibited the reckless indifference to human life required by *Tison*.

DuBoise v. State, 520 So.2d 263, 266 (Fla. 1988).[32] Farina's sentence of death is proportionate, and should be affirmed in all respects.

X. THE CONSTITUTIONALITY OF THE DEATH PENALTY ACT CLAIM

On pages 92-95 of his brief, Farina raises eight separate challenges to the constitutionality of the Florida death penalty act. Each of the discrete claims has been rejected by this Court.

The first sub-claim is that the aggravating circumstances do not limit the "class of persons eligible for the death penalty". *Initial Brief*, at 92. This Court rejected that claim in *Shere v. State*, 579 So.2d 86 (Fla. 1991).

The second and third sub-claims contained in Farina's brief (sub-claims b and c) assert that the death penalty act unconstitutionally shifts the burden of proof to the defendant to

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[32] DuBoise's death sentence was reduced to life by this Court on a finding of *Tedder* error. However, this Court explicitly held that there was no constitutional impediment to imposing a sentence of death.

prove that death is not the proper penalty. This Court has repeatedly upheld the validity of the weighing provision of the sentencing statute, and the related jury instructions. *See*, *San Martin v. State*, 705 So.2d 1337, 1350 (Fla. 1997); *Arango v. State*, 411 So.2d 172 (Fla. 1982).

The fourth claim contained in Farina's brief is a claim that the aggravators contained in the sentencing statute are applied in an "arbitrary, capricious, inconsistent, and facially discriminatory" fashion. Such constitutional challenges have been repeatedly rejected. *See, e.g., Spencer v. State*, 645 So.2d 377 (Fla. 1994); *Thompson v. State*, 619 So.2d 261 (Fla. 1993); *Trawick v. State*, 473 So.2d 1235 (Fla. 1985); *Stano v. State*, 460 So.2d 890 (Fla. 1984).

The fifth challenge contained in Farina's brief is his claim that the "lack of notice" of the aggravators on which the State will rely creates a constitutional issue. This Court has repeatedly rejected this claim. *See, e.g., Vining v. state*, 637 So.2d 921 (Fla. 1994); *Preston v. State*, 444 So.2d 939 (Fla. 1984), *vacated on other grounds*, 564 So.2d 120 (Fla. 1990); *Johnson v. State*, 438 So.2d 774 (Fla. 1983); *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982).

Farina's sixth claim is that the death penalty act is unconstitutional because the "substance" of the terms of the statute is not set out therein, but rather is "defined" by this

Court. The constitutionality of the statute has been repeatedly upheld. *See, e.g., Proffitt v. Florida,* 428 U.S. 242 (1976); *Dobbert v. State,* 375 So.2d 1069 (Fla. 1979).

The seventh claim contained in Farina's brief is that the statute is invalid because it does not require specific findings by the jury as to which aggravators and mitigators were found and considered. This claim has been repeatedly rejected. *See, e.g., Hunter v. State,* 660 So.2d 244 (Fla. 1995).

The final constitutional claim contained in Farina's brief is a claim that execution by electrocution is cruel and unusual punishment. This claim has been rejected by this Court on numerous occasions. *See, Hunter, supra; Jones v. State,* 701 So.2d 76 (Fla. 1997). This claim is meritless.

CONCLUSION

For the reasons set out above, Farina's sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Jeffrey L. Dees, 1326 South Ridgewood Avenue, Suite 10, Daytona Beach, Florida 32114, on this _______ day of April, 1999.

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Of Counsel