IN THE SUPREME COURT OF FLORIDA

KEVIN DON FOSTER,

Appellant,

vs. **CASE NO. 93,372**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No. 0134101
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607
(813)873-4739

COUNSEL FOR APPELLEE

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Trial - Guilt Phase -- Volume XVII

Lee County sheriff's officer John Glowacki was patrolling the Pine Manor area on April 30, 1996, and was dispatched to a scene of a shooting at 11:36 p.m. and arrived minutes later at 1617 Cypress Drive. EMS personnel were working on a white male. He took two quick photos of the victim who was dead, asked two witnesses to remain in the area and secured the crime scene with tape (Vol. XVII, R. 983-989).

Theresa Spees heard two gunshots while taking groceries into the house, then heard a car with a loud muffler leave. She pointed where she had seen a parked car in photo Exhibit 1. She saw the victim's bloody face on the doorway and yelled to someone behind her to call 911 (Vol. XVII, R. 993-998).

Leona Rendziniak lived in Pine Manor and heard a bang at around 11:30 on April 30. Then she heard a second report. She looked out the window, saw a car go away and heard a lady yell to call 911 (Vol. XVIII, R. 1002-04).

Corey Younger, ER registered nurse and paramedic, arrived at Pine Manor at 11:37 p.m. at 1617 Cypress Drive. When he arrived the body from the waist up was inside the door and the legs were

across the threshold. The victim was face down. A picture was taken after the body was moved; the body was moved to determine if it was resuscitatible (Vol. XVIII, R. 1012-17). There was an obvious wound to the right buttock and a massive facial wound to the face and right side of the head. There was no attempt at resuscitation. He declared the deceased dead and turned the scene and body over to the sheriff's department. The witness and others put the body on a backboard to expedite removal. There was no pulse and Younger declared the victim dead (Vol. XVIII, R. 1018-23).

Richard Joslin of the Lee County Sheriff's department was the lead forensic investigator at the scene and arrived at approximately 1:00 a.m. (Vol. XVIII, R. 1026-28). The head wound was consistent with a shotgun injury and two spent shotgun shell casings were found there (Vol. XVIII, R. 1033). There were no latent fingerprints of value on the shells, which is not unusual (Vol. XVIII, R. 1039). Inside the front door there were blood stains on the floor and teeth laying around (Vol. XVIII, R. 1042). Behind the back wall in the space between the wall where the studs were, small metallic objects consistent with pellets from a shotgun cartridge were discovered (Vol. XVIII, R. 1047). There was some

money in the pants pocket and Joslin attended the autopsy conducted by Medical Examiner Dr. Wallace Graves, who has since retired (Vol. XVIII, R. 1055). Dr. Graves removed metallic items consistent with pellets from the victim's pelvic region and head (Vol. XVIII, R. 1056). The sport utility vehicle, a Bronco II registered to Mark Schwebes parked in front of the building, contained a blue plastic bag with gloves visible in the bag, canned goods, fire extinguisher and stapler (Vol. XVIII, R. 1064). The Wal-Mart bag also had rubber gloves (Vol. XVIII, R. 1065); inside the vehicle was a wallet containing sixty-five dollars belonging to the victim (Vol. XVIII, R. 1067). None of the items sent to the FDLE revealed evidence that tied Foster, Peter Magnotti, Christopher Black or Derek Shields or any other individual to the crime scene (Vol. XVIII, R. 1070).

Dr. Carol Huser of the medical examiner's office replaced Dr. Graves. She reviewed his autopsy report and file and opined that Mr. Schwebes died a homicide victim of shotgun wounds to his head and pelvis (Vol. XVIII, R. 1075-78). The head wound would have caused instantaneous death (Vol. XVIII, R. 1083).

Peter Magnotti, aged nineteen and currently residing in the Lee County jail, was a senior at Riverdale High School in April of

1996 (Vol. XVIII, R. 1085). Kevin Foster was his best friend. He and Foster were arrested on May 3, 1996 and Magnotti subsequently entered into a plea agreement with the State wherein he would testify truthfully for the prosecution in return for his plea to the offenses of conspiracy to commit first degree murder and various RICO crimes and thirty-two years in prison (Vol. XVIII, R. 1086-87). If he fails to tell the truth he could receive substantially more time. Magnotti became part of a group that called themselves the Lords of Chaos (Vol. XVIII, R. 1087) on or about April 13, 1996. Other members included Christopher Black and Kevin Foster; subsequently, others including Derek Shields, Christopher Burnette and Thomas Torrone became members. Appellant Foster thought up the name and the purpose or goal was to go around Fort Myers destroying whatever they could. Magnotti designed a symbol for the Lords of Chaos and the members had secret code names. Magnotti was Fried, Foster was God (Vol. XVIII, R. 1088-89). On Tuesday, April 30, 1996 he and other members Foster, Black, Shields, Torrone, Burnette, Russell Ballard, Brad Young and Lauriano Espino met in the afternoon at the Edison Mall (Vol. XVIII, R. 1090). Foster instructed Torrone and Burnette to steal a license plate from the parking lot and it was placed in the trunk

of Derek Shields' car. Foster was present when Burnette and Torrone returned with the plate and put it in the trunk. The same group then went to Taco Bell, then to the home of Brad Young on Palm Beach Boulevard (Vol. XVIII, R. 1091-92). The group decided to go to Riverdale High School to break the windows out of the auditorium and everyone went there except Espino whom Magnotti drove home before rejoining the group at school. Espino was not really a member of the Lords of Chaos because he wasn't involved in any of the crimes (Vol. XVIII, R. 1093-94). After students left the school, he, Foster, Black and Torrone walked into the school and stole some staples, canned goods and a fire extinguisher to use to break the auditorium windows (Vol. XVIII, R. 1094). Those outside watching included Shields, Young, Ballard and Burnette. Magnotti removed his car from the parking lot because the group wanted all of the cars out of the parking lot and out of sight while they committed vandalism (Vol. XVIII, R. 1095). A sport utility vehicle pulled up and blocked Magnotti's view of Black and Torrone standing at the pay phone but the witness saw Foster run from behind a column across the street towards him. The car stayed parked in front of Black and Torrone, then drove away. Afterwards, Black and Torrone walked across the street and joined them (Vol.

XVIII, R. 1096).

Black said that his teacher, band teacher Mr. Schwebes had pulled up and caught them with the gloves and stolen articles, had taken them and was going to turn them into the campus policeman in the morning. Black was angry and said "He has got to die". Foster got excited, he felt it could be done, that they could pull it off. Black wanted to follow Schwebes' car to his house but Foster interjected that it would be too late to follow since he was gone, that they could find his address in the phone book. They obtained the home address by calling information at a pay phone at Winn Dixie (Vol. XVIII, R. 1098-99). Magnotti gave a friend Sara Canett a ride home two miles away and then returned to the store where Foster, Black, Burnette and Torrone were[1] (Vol. XVIII, R. 1101). After taking Brad Young home, Magnotti was paged by Chris Black (he gave Foster's home phone number with the 666 behind it, a signal Black previously used). The symbol 666 is the sign of the Devil (Vol. XVIII, R. 1101-02). Magnotti went straight to Foster's home. Black, Shields and Foster were congregated around the living room table with a road map spread out in front of them. He didn't see

[1]He went back to Canett's house with Brad Young and stayed until 10:45.

anybody else there at the house; he didn't see either Ruby or Kelly Foster. They discussed a plan about Mr. Schwebes: the four of them would drive over to his house, Shields would knock on the door and when the victim opened it Foster would shoot him with a shotgun. Black would drive the car and Magnotti was just going to sit in the car. Magnotti expressed the view that the murder idea was too simple, i.e., going up and shooting the victim would lead to quick apprehension by the authorities but Foster wouldn't listen; he thought it was his plan, it would work (Vol. XVIII, R. 1102-05). Magnotti tried to avoid going, noting to Foster that he would serve no purpose but Foster told him he had to go and he did so. Burnette and Torrone did not go because it was thought Foster, Shields, Black and Magnotti were the most intelligent and capable. Foster had a ski mask, some gloves and a .12 gauge shotgun. They used Shields' car, a Cavalier with a loud muffler (Vol. XVIII, R. 1106-07). On the way, Foster was brooding, psyching himself up for the kill (Vol. XVIII, R. 1107). He acted sullen, then later on the ride he began singing a variation of Santa Claus is Coming to Town. Shields was reluctant about knocking on the door; Foster asked Magnotti to do it and the latter refused. They located the victim's house, Black and Foster changed the tags at a store (with

the same license tag stolen earlier in the day at the mall)(Vol. XVIII, R. 1108-09). Ultimately it was decided Shields would knock on the door. On the way to the house Foster loaded the shotgun with two green shotgun shells. The witness agreed that the Exhibit 31 shotgun looked substantially like the one Foster had (Vol. XVIII, R. 1110-13). Foster wore a black ski mask and carried the shotgun as he and Shields approached the house. Magnotti heard two gunshots, saw Shields come running back to the car followed by Foster (Vol. XVIII, R. 1114-15). Foster was carrying the shotgun and threw it on the floorboard in the back seat (Vol. XVIII, R. 1116). Shields was shaking, nervous and appeared sick; Foster seemed excited. They removed the tag, put the original tag back on, and the removed tag was thrown in the bushes (Vol. XVIII, R. 1117). Magnotti asked what happened and Foster quietly responded gone, gesturing with his hand in the middle of his face and off to the side. As to the second shot Foster said he shot him “in the ass” (Vol. XVIII, R. 1118). They separated and proceeded to their homes after arriving at Foster’s home close to midnight. The witness did not recall seeing the Ruby or Kelly Foster vehicles. There was a conversation that Black was supposed to receive credit for this because it was to make sure he wouldn’t get in trouble.

They had a group hug to celebrate a job well done. Magnotti went to his car and drove home (Vol. XVIII, R. 1119), arriving about midnight. The reason Schwebes was killed was because their friends were caught at school, he was going to turn them into the police and "we didn't want them turned into the police". After the killing appellant told the witness that as he was laying in bed thinking about the murder, he was masturbating. Foster also told him that he used a shotgun because it would leave no ballistics traces and the gun wouldn't be able to be identified. When arrested the shotgun was located in the trunk of Magnotti's car (Vol. XVIII, R. 1121), along with the ski mask, gloves, box of latex gloves, newspaper clippings (Vol. XVIII, R. 1122)(Exhibits 40, 39, 53). About six months after the arrest in a conversation at the jail with Foster, upon learning that Torrone and Burnette had entered into a plea agreement and agreed to cooperate with the State, Foster gestured in a way that the witness understood he was going to have someone kill them (Vol. XVIII, R. 1125-26).

Magnotti didn't try to stop the killing because he could not stop Foster from doing what he did. The witness didn't want to call the police because he didn't want to get in trouble (Vol. XVIII, R. 1126-27). Foster indicated to him the State would not

have a strong case against him (Foster) and he wanted Magnotti's lawyer to see if he could suppress Magnotti's prior statement to police and then join him in his story (Vol. XVIII, R. 1127). The witness thought it was a good idea at the time but he did not join in fabricating an alibi. Magnotti also got an anonymous letter from appellant's mother with a newspaper clipping, asking to tell his lawyer to get in contact with her and tell her where he really was on the night of the 30th (Exhibit 62)(Vol. XVIII, R. 1128-29). The witness gave it to his lawyer. He understood "mom" on the exhibit to be Ruby Foster who acted like a second mother to him (Vol. XVIII, R. 1130).

David Adkins saw Mark Schwebes around 9:30 p.m. that night at an ice cream social and they were going to go to dinner afterwards. As Adkins drove by the school he saw Schwebes' Bronco parked. Schwebes was outside the vehicle with two kids. They were not band kids and Adkins left. Another boy ran in front of him from the school with grocery bags whom he identified in court as appellant Foster (Vol. XVIII, R. 1159-64). Later at dinner Schwebes told him that he had told the boys he was going to tell on them and not to be surprised if Montgomery (a deputy sheriff) called them to the office tomorrow morning; Adkins never saw Schwebes alive again

after that evening (Vol. XVIII, R. 1165-66). The witness identified the victim depicted in Exhibit 3 (Vol. XVIII, R. 1167).

Bradley Young was with a friend, Christopher Burnette on April 30 in the afternoon at Edison Mall with others known as the Lords of Chaos. He recalled they needed an auto tag from another vehicle. Foster was present and Torrone and Burnette got the tag with Young's tools (Vol. XVIII, R. 1177-78). Later at his apartment they suggested tearing up the high school. They were going "mudding" (chew up the mud with four wheel drive trucks). Something was going on at night at the school and they decided to vandalize the auditorium. Young didn't want any part of that and stayed across the street. Foster, Torrone and Black went across the street with canned goods and gasoline cans. Schwebes had stopped them. The three came back and Black was upset that utensils were taken by Schwebes and told them not to be surprised if Montgomery visited them tomorrow (Vol. XVIII, R. 1176-83). Black said he has got to die tonight and Foster said "if you can't do it, I will" (Vol. XVIII, R. 1184). At the Winn Dixie phone Black was getting information on the number and address. He left with Magnotti to Sara Canett's house, then Magnotti drove him home (Vol. XVIII, R. 1185-86). The next day -- May 1 -- Burnette,

Foster, Black and Torrone came to his apartment. Foster admitted it was he who did it, hooting and hollering and bragging about the event. The news that triggered the reaction was the scene showing where Schwebes was murdered. Foster was the leader of the Lords of Chaos (Vol. XVIII, R. 1187). They were a militia-type vandalism gang. Foster told him if anyone talked to the police about what the group was doing he would dig a grave, two graves. (The witness' friend Lesh was present.) A couple of days later Foster showed him the shotgun he used to kill the victim (Vol. XVIII, R. 1188-89). The witness identified the Exhibit 31 shotgun (Vol. XVIII, R. 1189).

Christopher Burnette, age eighteen, got caught up in a group known as the Lords of Chaos, and has entered into a plea agreement wherein he agreed to testify truthfully in exchange for two years county jail time for non-homicidal offenses (Vol. XIX, R. 1197). Foster brought him into the group Lords of Chaos whose purpose was to perform criminal acts, vandalism. Foster and Magnotti came up with the name. Burnette's code name was "Red" (Vol. XIX, R. 1198). Foster had made threats that if anyone talked about the gang's activities they would be killed (Vol. XIX, R. 1199). On April 30, 1996, he was present when Tom Torrone stole a license plate from a

pick-up truck in the vicinity of the Edison Mall. Also present at the mall were Foster, Magnotti, Young, Black and Lauriano. The stolen tag was given to Foster and put in or on Derek Shields's car. The group went to a Taco Bell and returned to the high school to commit vandalism at Foster's suggestion (Vol. XIX, R. 1200). Foster had Burnette's gas can, a white plastic Clorox bottle; Foster asked him for a rag and Burnette found one and handed it to him. Black, Torrone and Foster went to the school and came back with stuff in their hands -- canned goods and a fire extinguisher (Vol. XIX, R. 1201-02). The witness saw Foster as the truck pulled away; Black and Torrone ran back, too. Black said he had to die, he knew too much. Foster said all right, we can do that (Vol. XIX, R. 1203-04). Black wanted to follow Schwebes but that didn't happen because Foster said it would be too hard to catch him; appellant wanted to find out where he lived. At the Winn Dixie Foster and Black looked in the phone book by the pay phone for his address and they learned its location (Vol. XIX, R. 1204-05). Shields and Magnotti took some people home. That night around eleven or twelve -- he was not sure of the time -- Foster telephoned him and said it's done, he couldn't talk about it on the phone and that he would talk to him tomorrow (Vol. XIX, R. 1205-

06). The next day, May 1st, Foster called around 6:00 p.m. and wanted him to watch the news and tell him what they said. The news reported the shooting and later at Foster's house appellant re-enacted the incident. Foster said it was great, he should have been there, that Derek knocked on the door and that Foster had stepped out from around the door and blasted the whole side of his head off. The witness identified Exhibit 31, the shotgun which Foster showed to him as the murder weapon (Vol. XIX, R. 1207-09). On May 4th, the witness at Foster's direction put the shotgun in Peter Magnotti's trunk. When Burnette and appellant were arrested in his truck, Foster's black ski mask was in the vehicle (Vol. XIX, R. 1209).

Richard Pagerie, a licensed private investigator working on behalf of Christopher Black, testified that after a conversation with Black he went to a wooded area of the Bell Tower and found a license tag, Exhibit 36. It was dusted for prints and he wasn't aware any were found (Vol. XIX, R. 1222-26). He learned the owner of the tag, Lee and Carol Kent (Vol. XIX, R. 1227).

William Kent testified that on April 30 a license plate was stolen off the truck he was driving owned by his father, at the Edison Mall. He reported it stolen when he first discovered the

fact two weeks later (Vol. XIX, R. 1231-34).

Thomas Torrone, another member of the Lords of Chaos, whose code name was “Dog”, testified that Foster was the leader of the group. At Foster’s direction he and Burnette stole the license plate on April 30 at the Edison Mall (Vol. XIX, R. 1243-45). The group decided to vandalize Riverdale High. Foster called him into a classroom and asked where he was going. Torrone told him he was leaving and Foster pulled a gun and told him he was sick of all you punks backing down expecting him to do everything by himself. Torrone grabbed a bag of canned foods and headed outside toward the auditorium where he was joined by Foster and Black. Foster was standing behind the pole and he had gasoline. The three of them (Torrone, Black and Foster) prepared to break the windows so Foster could start the auditorium on fire when Mr. Schwebes pulled up (Vol. XIX, R. 1246-47). Schwebes asked Black what they were doing there. Foster ran across the street and Torrone handed over the bag with the gloves and canned goods. Schwebes took the fire extinguisher and staplers. Schwebes asked Black if he knew him and Black answered he had a class. Schwebes told them to walk across the street where their friends were and not to be surprised if they get called to the principal’s office and talk to Officer

Montgomery, the school resource officer and police officer (Vol. XIX, R. 1247-48). Black started talking about how Schwebes had to die and Foster said yeah (Vol. XIX, R. 1251). Black called information for Schwebes' phone number, called his home and got a message line and recognizing the voice called information back and got his address (Vol. XIX, R. 1252). Later that night about 12:30 Foster phoned him and told him it was done. Torrone hung up. The next day at school the witness learned for certain that Schwebes was dead. Shields was in the lunch room crying and mourning the death of his band teacher (Vol. XIX, R. 1253). Later that night after school at Brad Young's house when the television news reported the murder Foster said "we done that". Torrone added that Foster admitted shooting him with a .12 gauge shotgun (Vol. XIX, R. 1254-55). Torrone was arrested -- he was not involved in the murder -- and entered into a written plea agreement wherein in return for his truthful testimony he received one year in jail, ten years probation, one hundred hours community service and restitution (Vol. XIX, R. 1256). Schwebes interrupted the plan to set the school on fire (Vol. XIX, R. 1272).

Ronald Murphy, an employee of the Lee County School Board, takes care of the fire extinguishers and fire suppression systems

for the schools. State Exhibit 23 was a fire extinguisher with serial number CE587753. State Exhibit 35, a print-out of a computer record of the fire extinguisher had the same serial number and the extinguisher came from hallway C of Riverdale High (Vol. XIX, R. 1273-76).

Christopher Black was arrested on May 3, 1996, and subsequently charged by indictment with the first degree murder of Mark Schwebes and with other charges. He pled guilty to the murder charge and entered into a plea agreement. He would be sentenced to life in prison without the possibility of parole and testify truthfully (Vol. XIX, R. 1279-80). Black was a member of the Lords of Chaos, a core central member of the organization formed April 12, 1996. On April 30 he and other members went to the Edison Mall to look for clothing to wear to the grad night trip for the senior class. A license tag was stolen at the mall. He, Magnotti, Shields and others went to Brad Young's apartment. Kevin Foster was leader of the Lords of Chaos -- his code name was God. Black's code name was Slim. Afterwards they went to Riverdale High School to smash windows (Vol. XIX, R. 1280-82). He later learned there was another purpose at the high school, to burn it down. Foster had a can or bottle of gasoline to throw inside (Vol. XIX, R.

1283). Black stole some canned goods and a fire extinguisher inside the school. He and Torrone went to Magnotti's truck to acquire some latex gloves, put them on, and proceeded back to the telephone in front of the auditorium (Vol. XIX, R. 1284). They were interrupted by Schwebes' arrival in his Bronco. Black and Shields were under his care in the band on two or three occasions. When Schwebes asked him questions the witness would be "a smart ass", providing evasive or untruthful answers. Black wore the gloves on his hands behind his back and tried to get them off. After the conversation he was concerned about what might happen with the school resource officer the next day. After Schwebes left in his Bronco, Black crossed the street, angry and afraid (Vol. XIX, R. 1285-86). He stated that he felt Schwebes had to die and Foster responded that they could do it. Black suggested a plan to follow him and make it look like a robbery. Foster responded no, that it was too late -- the victim had traveled too far to be followed (Vol. XIX, R. 1287-88). At Foster's direction Black phoned information to get his phone number, called that number and was connected to the victim's answering machine and again at Foster's direction called information to get the address (Vol. XIX, R. 1288-90). Afterwards, he and Shields went to Foster's home,

Black paged Magnotti to join them using the tag 666 at the end of the page. When they got to the Foster home Kevin had to disarm the burglar alarm to open the house (Vol. XIX, R. 1290-91). He did not see Ruby or Kelly Foster there. He and Shields looked through a street map to locate Schwebes' address and found it. Foster looked for things in the house and picked up a dark colored jacket, a black army style hat and a .12 gauge shotgun (stainless steel Mossburg, pump action with black stock)(Vol. XIX, R. 1292-93). Magnotti joined the three of them and drove in Shields' car which had a loud muffler. They stopped at a Circle K store to call the Schwebes home to see if he had arrived. They located the victim's vehicle at the address they had received but did not stop at that time; they circled the house once or twice, then drove to a furniture store. Foster changed the license plate with the stolen one acquired earlier that day. Foster said he needed someone to get Schwebes to open the door and come outside and another to drive the car (Vol. XIX, R. 1294-95). As Kevin decided, Shields was chosen to open the door and Black drove the car. On the way there Black saw a pair of matching three inch Winchester Remington shells, dark green in color, that Foster had. Foster loaded the green shots into the shotgun. They circled the victim's house once

or twice, then stopped on the east side (Vol. XIX, R. 1296-97). Shields and Foster exited the vehicle and the next thing he heard was the first shot from the shotgun, followed by his observing Shields running down the driveway disappearing from view and then a second shot. Shields did not have the shotgun (Vol. XIX, R. 1298). Shields ran back to the car without a shotgun and sat in the front passenger seat. Foster entered the car and Black heard something hit the back floorboard. Foster said go, go (Vol. XIX, R. 1298-99). They went to a side street next to the Bell Tower Shops where Foster removed the license plate, wiped fingerprints, tossed it in the woods and replaced the original on the car. The witness testified that Exhibits 8 and 9 looked like the shells Foster had and Exhibit 23 looked like the fire extinguisher he had at Riverdale High (Vol. XIX, R. 1300). Exhibit 31 appeared to be Kevin Foster's shotgun (Vol. XIX, R. 1302). The four of them went to the Racetrac on Colonial and Winkler, then arrived at Foster's house about 11:45 and had a group hug (Vol. XIX, R. 1303). Foster said they all did a good job, there weren't any major "fuck-ups". Foster didn't think any witnesses had seen anything (Vol. XIX, R. 1304). Black expressed a concern about leaving the shotgun shell casings and Foster said not to worry because they couldn't trace

them. The four dispersed and went home. The next day at about six in the evening at Brad Young's apartment the news reported the Schwebes homicide. Foster re-enacted the event, describing in detail the shooting. Foster said after Shields knocked on the door and it opened Shields ran and Foster looked at Schwebes in the face. The victim started to turn and appellant aimed at his right eye and shot. When it hit there was nothing but a red cloud, he flipped in the air, spun around and landed in a fetal position. Foster chambered the second round and shot him in the posterior (Vol. XIX, R. 1305-07). Foster said he was laughing when he came back. Schwebes was killed, according to the witness, because he was in their way (Vol. XIX, R. 1308). In a statement to the sheriff's department on May 3, 1996, he told them Foster had done the killing (Vol. XIX, R. 1362).

Harry Balke, a crime scene technician, testified that latent prints were recovered from the fire extinguisher but they were insufficient and no prints were on the canned goods or other items collected from the Bronco (Vol. XIX, R. 1364-66).

Kristina Amspacker, a crime scene specialist, testified that on May 4 a Nissan automobile was searched pursuant to a search warrant. The vehicle belonged to the Magnotti family (Vol. XIX, R.

1372). A box of latex gloves and an issue of the front section of the May 2 News Press were in the trunk (Vol. XIX, R. 1371-74). The shotgun also was in the trunk (Vol. XIX, R. 1375). The vehicle also contained a black ski-cap and baseball hat (Vol. XIX, R. 1381).

Latent fingerprint examiner Stephen Casper testified that there were no fingerprints of value on the Exhibit 30 license tag or the fire extinguisher but that a fingerprint off the left side of the shotgun matched that of the right ring finger of appellant (Vol. XX, R. 1394-1403). Appellant's print from his number one finger was on the plastic gloves box and his thumbprint was on the News Press newspaper dated 5-2-96 (Vol. XX, R. 1404-05).

FDLE crime lab analyst and expert in firearms, ballistics examination and tool mark, Billy Hornsby, explained that most shotguns have a smooth bore with no rifling, whereas rifling is placed in the interior of the barrels of rifles and pistols to stabilize the bullet in flight (Vol. XX, R. 1413-15). Normally it is not possible to match and identify the shotgun from the shell fired, unlike with pistols and rifles (Vol. XX, R. 1415). The witness explained that the Exhibit 31A shells were 7½ shot, a small shot used for birds such as quail or dove, or even squirrel

hunting. Number one buckshot is used on wild game such as deer and wild pigs (Vol. XX, R. 1420-21). State's Exhibits 8 and 9, the two fired green Remington number one buckshot shotgun shells were conclusively chambered and extracted from the Exhibit 31 Mossberg shotgun but he could not say whether they had been fired in that weapon (Vol. XX, R. 1422-23). The witness explained that when the shotgun is fired and pumped to eject, the shell casing comes back to the rear and hits a protruding piece of metal that hits it and pushes it out -- leaving ejector marks. Upon firing the marks made by the extractor -- striations or tool marks -- are individual in nature like a fingerprint (Vol. XX, R. 1425-26).

Micah Thomas, a former friend of appellant in high school who regularly went to his house before they stopped hanging around together in November of 1995, testified that Exhibit 31 looked similar to the shotgun he saw in Foster's possession (Vol. XX, R. 1433-36).

Richard Keith Notarianni, owner of Rick's Pawn Shop after he purchased Ruby Foster's pawn shop (Treasures Jewelry & Pawn) which included in the inventory a Pawn Master computer program, identified Exhibit 48, a print-out of the gun log and employee print-out. The Exhibit 31 shotgun with serial number K113536 was

purchased on August 24, 1991, that entry was voided and deleted by employee RC on January 29, 1992, with the word home in the comment section. In the employee code RC was Ruby Foster (appellant's mother)(Vol. XX, R. 1438-44).

Derek Shields entered a plea of guilty to all pending charges against him including the first degree murder of Mark Schwebes and agreed to testify truthfully in return for a life sentence without parole for the murder (Vol. XX, R. 1447-48). He too was a member of the Lords of Chaos whose members included Foster, Magnotti, Black, Burnette and Torrone (Vol. XX, R. 1448). Appellant Kevin Foster was the leader, unquestionably (Vol. XX, R. 1449). Shields' code name was Mob. The purpose of the group was to cause chaos and destruction (Vol. XX, R. 1450). On April 30, 1996, he met with others of the group at Foster's house about three or four in the afternoon, then went to Edison Mall in three vehicles. Foster told Torrone and Burnette to go get and bring back a license plate and the stolen tag was put on Shields' car (Vol. XX, R. 1451). Foster came up with the idea to vandalize the high school. Magnotti, Black, Torrone and Foster entered the school while the rest of them waited in the parking lot. Foster told them to take their vehicles across the street and park them at Riverdale Estates (Vol. XX, R.

1452-53). Shields' jazz band Teacher Mark Schwebes pulled up and stopped his vehicle where Black and Torrone stood in front of the auditorium (Vol. XX, R. 1455-56). After a couple of minutes the Bronco left. Foster popped up out of nowhere from the direction of the school. Appellant was upset and angry. Black and Torrone rejoined the group and they were also upset and angry. Black told them Schwebes had asked them what they were doing, that he didn't buy their explanation they were using the pay phone (which was all smashed) and he took the items they took from the school and the gloves they wore, and that Schwebes said he was going to report them to the school resource officer the next day (Vol. XX, R. 1458). Foster was the most upset with Schwebes' interference (Vol. XX, R. 1459). Foster came up with the idea to go to Winn Dixie. Foster said he had to kill Schwebes so that Black and Torrone would not get turned in to the police (Vol. XX, R. 1459-60). Foster's concern had to do with exposure of the Lords of Chaos. Black mentioned trying to follow Schwebes out of there but Foster indicated he couldn't follow him, that he wasn't ready and didn't have his gun (Vol. XX, R. 1461). They called information to obtain Schwebes' address. Shields left the Winn Dixie with Russell Ballard but returned thinking he could dissuade them and stop it

(Vol. XX, R. 1463). When he returned to the Winn Dixie Magnotti had taken Young home and Burnette and Torrone left. Shields, Black and Foster headed over to Riverdale to retrieve the stolen license plate previously discarded there. At Foster's direction he retrieved it and went to Foster's house. Shields saw the vehicles of appellant's mother and sister there (Vol. XX, R. 1464-65). The witness did not see Ruby or Kelly Foster there. They stayed about twenty to thirty minutes. He knew Foster was able to sneak out of the house without his mother knowing. Foster told Shields to get the shotgun outside his bedroom window. Shields saw the gun but didn't touch it. Foster placed the shotgun in the trunk of Shields' car. Magnotti returned to Foster's house after the shotgun was put in his trunk. They proceeded to Pine Manor; Shields was driving his car, Foster was in the front passenger seat, Black and Magnotti were in the back seat and the shotgun was in the trunk (Vol. XX, R. 1466-68). Foster had him pull into a convenience store and pulled out a map and found the desired road. They found Schwebes' house because they all saw the victim's Bronco. Foster had him drive around the block; they stopped to get the shotgun and other stuff out of the trunk (jacket, ski mask, and license plate). Foster had told Shields he had to knock on the

door. Shields initially refused as did Black and Magnotti. Foster directed that Shields knock on the door and that Black drive, that they would do as he said or die -- that “someone is going to die tonight” (Vol. XX, R. 1470-71). Exhibit 31 appeared to be Foster’s shotgun (Vol. XX, R. 1471). Shields’ maroon, red 1988 Chevy Cavalier had a bad muffler (Vol. XX, R. 1472). They drove back toward Schwebes’ house and Foster had the driver Black circle the block one more time. Foster put on a ski mask (Vol. XX, R. 1473). Shields went to the front door and Foster was a few feet back with the shotgun. Shields knocked on the door, Foster aimed the shotgun at him and the front of the door. The locks were undone and the door opened. Shields looked down and saw the victim’s legs. Schwebes said “May I help you” and Shields ran. The witness heard two gunshots (Vol. XX, R. 1474-76). He got back to the car first, followed by Foster. Magnotti asked if Schwebes was dead and Foster chuckled and answered “he sure the hell ain’t alive” (Vol. XX, R. 1477). They drove off and stopped at Racetrac convenience store for gas; at some point the stolen tag was removed. When they arrived at Foster’s house appellant said it was a job well done and asked for a group hug -- which request was granted (Vol. XX, R. 1478). After their arrest, appellant told him his mother would

provide his (Foster's) alibi (Vol. XX, R. 1479). Before Shields entered his guilty plea he found out that Magnotti had agreed to cooperate with the state and testify against the remaining members of the Lords of Chaos. He discussed this development with Foster and appellant remarked that once he gets up in court and testifies he better hope he kissed his parents one last time (Vol. XX, R. 1479-80).

After cross-examination, on redirect the state was permitted to play an excerpt of the witness' May 3, 1996 statement to the sheriff's department on the night of Shields' arrest, Exhibit 59A (Vol. XX, R. 1542-61). The witness testified that he had identified in the taped statement Foster as the shooter (Vol. XX, R. 1561-62). The state rested (Vol. XX, R. 1572) and the lower court denied appellant's motion for judgment of acquittal (Vol. XX, R. 1572-73).

Defense witness James Voorhees testified that appellant worked with him as an apprentice carpenter on April 30, 1996 (Vol. XX, R. 1578). He dropped Foster off at his house around 4:15 p.m. (Vol. XX, R. 1579). Appellant was a good friend of his now-deceased son Cody Voorhees (Vol. XX, R. 1580). The witness was a close personal friend of appellant's mother, visited with her shortly after

appellant's arrest and several times since then. He admitted the Foster family had a stainless steel shotgun (Vol. XX, R. (Vol. XX, R. 1581). Although he wasn't sure if he gave appellant a ride home that day, he knew Foster worked that day and when he left (Vol. XX, R. 1582-83).

Rodney Thibia, a carpenter, testified that to the best of his recollection appellant worked on Tuesday, April 30, 1996. He wasn't sure whether he gave him a ride home (Vol. XX, R. 1585-86). Foster was not with him the evening of April 30, 1996 after four o'clock and not sure if Foster rode with him that Tuesday (Vol. XX, R. 1589). The witness did not know Foster's reputation in the community for peacefulness or violence (Vol. XX, R. 1589).

Roberta Harsh, an employee of the Public Defender's Office, at defense counsel's request retraced the routes of some of the state's witnesses (Vol. XX, R. 1591-93). She admitted that the drive from Foster's address to Schwebes' address was about twenty-four minutes. The information as to where to stop and what routes to take came from defense counsel Jacobs (Vol. XX, R. 1601). She actually drove under the speed limit on the interstate and still was able to return to Foster's home before midnight (Vol. XX, R. 1602). Toni Smith claimed that appellant helped load a four

wheel all terrain vehicle between nine and ten o'clock on April 30, 1996 (Vol. XXI, R. 1607-09). On cross-examination, she admitted being a friend of Ruby Foster, had frequently purchased gold at her pawn shop, and acknowledged mistakes in her deposition a month earlier, including the claim that two four-wheelers were bought and loaded instead of one, and having seen appellant at the Foster pawn shop at 7:30. Since her deposition she has spoken to Ruby Foster. The witness also stated that the ATVs were determined to be stolen vehicles when her husband tried to sell them. She and her husband sold the stolen vehicles and were paid for them. She did not return the money to the purchasers (Vol. XXI, R. 1610-16). She did not come forward to law enforcement to provide the alibi information, nor did she contact the Public Defender's Office; it was something she and Ruby discussed (Vol. XXI, R. 1617). She maintained that she would not have said anything if the prosecutor hadn't brought her in for deposition even if appellant had been convicted and sentenced to death (Vol. XXI, R. 1618).

Christina Jones talked to appellant on the phone April 30, first at 5:30 or 6:00, then about 11:30 p.m. (Vol. XXI, R. 1621-22). The witness had been fishing earlier that evening at Matlacha (Vol. XXI, R. 1624) and claimed she saw appellant at the pawn shop

on April 30 about five o'clock (Vol. XXI, R. 1628). She admitted that when she talked to the police on May 9th after Foster's arrest she did not tell them of having talked to appellant on the phone the night of the murder (Vol. XXI, R. 1631).

Richard Fuller, a criminal defense attorney, had represented appellant on a driver's license suspended case and met with him in his office on May 1, 1996 (Vol. XXI, R. 1640-41). His demeanor was very calm, cool, no problem (Vol. XXI, R. 1642). Mrs. Foster asked if he would represent appellant on the homicide and reported back to her that the complexity and length of the case would be enormous on a sole practitioner and told her to contact defense counsel Jacobs (Vol. XXI, R. 1643). Mrs. Foster told him she had spoken to her son who was innocent and he advised to get the family together and review diaries and calendars to determine where appellant was on the date and time (Vol. XXI, R. 1644). Fuller did not recall the specifics of what he discussed with appellant at the jail (Vol. XXI, R. 1647). The witness assumed he would have told Mrs. Foster what he usually tells other defendants and had no specific recollection of telling Mrs. Foster about getting diary and calendar -- he just does that in every case where it is brought up (Vol. XXI, R. 1648).

Appellant's mother, Ruby Foster, testified that appellant phoned her at 4:30 p.m. on April 30 after returning home from work (Vol. XXI, R. 1652). She arrived at home at nine that night and appellant was home (Vol. XXI, R. 1654). She left the house at 9:45 and went to Toni Smith's house until 10:45 and returned home a little after eleven. Appellant was home (Vol. XXI, R. 1655-56). She and Kelly Foster went to the Circle K and returned about 11:20 and appellant was still home (Vol. XXI, R. 1656). Appellant phoned Lorri Smith and got off the phone around midnight (Vol. XXI, R. 1658-59).

On cross-examination Mrs. Foster testified appellant was not at her pawn shop at all the night of April 30 and assumed he was at home when he phoned her (Vol. XXI, R. 1667). The witness denied telling anyone that she wanted Kevin's stuff out of his room because she didn't want police going through his stuff (Vol. XXI, R. 1669). She gave appellant the stainless steel shotgun as a Christmas present in 1991 or 1992, out of the pawn shop (Vol. XXI, R. 1671). She and her daughter Kelly sat down to reconstruct events, using a calendar (Vol. XXI, R. 1672). She did not tell law enforcement officers the weekend when Kevin was arrested that he couldn't have done this because he was home with her or when

officers conducted a search pursuant to warrant of the house (Vol. XXI, R. 1673-74). She did not tell Brian Kelley, an investigator of the State Attorney's Office when he asked her questions that appellant didn't commit the murder because he was home that night (Vol. XXI, R. 1678). The witness went to dinner a few times with Christina Jones after appellant's arrest (Vol. XXI, R. 1679).

Lorri Smith testified appellant called on her answering machine a little after eleven on April 30, and talked to him again after midnight (Vol. XXI, R. 1694-95). On cross-examination she claimed Christina Jones was at her birthday party April 30 in Moore Haven (Vol. XXI, R. 1697-98). The second phone call from appellant could have been as late as 12:15 or 12:20 (Vol. XXI, R. 1700). In August of 1996 Smith, Ruby and Kelly Foster, and Christina Jones got together and had lunch at Denny's and they tried to figure out exactly how appellant got involved in this situation. Ruby Foster asked her a lot of questions and would write down the dates (Vol. XXI, R. 1701-02). She stated that Christina Jones' reputation for truthfulness in the community was "not good on some things" (Vol. XXI, R. 1704).

Kelly Foster, appellant's sister, has a degree in criminology and her professor was Major Bonsal of the Lee County Sheriff's

Office (Vol. XXI, R. 1708). She arrived home the night of April 30 at approximately 9:30 and saw Kevin (Vol. XXI, R. 1709). Kevin was still at the house when she and her mother went to the Circle K shortly after 11:00 and he was there on her return fifteen to twenty minutes later (Vol. XXI, R. 1711). On cross-examination she testified she did not tell Major Bonsal of the alibi and the witness did not have the term paper she claimed she was working on that night (Vol. XXI, R. 1716). The witness claimed she kept notes in a daily planner but threw away the original notes when they became worn, water-spilled and illegible (Vol. XXI, R. 1722). What she has now are recopies of those notes (Vol. XXI, R. 1723).

Appellant declined the opportunity to testify (Vol. XXI, R. 1726-27).

State rebuttal witness Elmer Roberts helped pack everything in appellant's room at Ruby Foster's home on the weekend of May 3, 1996. The witness stated that Ruby Foster wanted everything out of the room before the police would come back and put it into storage until Kevin got out of jail (Vol. XXI, R 1730-31). The defense elicited that Mrs. Foster also said her son was innocent and didn't do it (Vol. XXI, R 1734-35).

Sharon Magaskil of Austin, Texas is the niece of Ruby Foster,

didn’t want to be in court, but testified she traveled to Florida in early May of 1996 to be with her aunt after learning of the homicide charge. She came to lend support. She talked with Ruby and Kelly about the events leading up to appellant’s arrest. Magaskil made notes on a calendar of what their recollections were of appellant’s whereabouts on various nights. In her deposition she said Foster had told Ruby and Kelly the information (Vol. XXI, R 1737-41).

Rebecca Magnotti, mother of Peter Magnotti the co-defendant, identified Exhibit 62, a newspaper article, a letter Peter got in the county jail that someone had mailed to him. Peter showed it to her and it was signed mom but the witness did not write that. After a long period of time she called Ruby Foster on the phone and Kelly Foster stayed on the phone after calling her mother to the phone. Mrs. Foster said she couldn’t believe that Peter and the other guys were talking all these lies about appellant, and that she and Kelly and other friends would testify that Peter was in their house with Kevin the night of April 30. The witness did not agree with that because she was aware Peter did not spend the night -- he came home and she was waiting for him. She told Mrs. Foster that wasn’t true (Vol. XXI, R 1745-49).

Penalty Phase

State witness Robert Durham, director of student assignment for Lee County school system and former principal of Riverdale High School, knew the victim Mark Schwebes who described the demanding job of band director won by Mr. Schwebes and testified that the killing was devastating to the band, a shock to the school, community and parents. There was a significant drop off on school extra-curricular activity afterwards. Additional grief counselors were called to the school and the murder still effects members of the school district (Vol. XXIII, R. 1915-1922).

Defense witness Mary Ann Robinson, a neighbor, stated that appellant was helpful and volunteered for things (Vol. XXIII, R. 1925). Appellant's supervisor Robert Fike stated that Foster did "good work" but didn't socialize with him or know about his after work activity (Vol. XXIII, R. 1927-28). Red Voorhees, a friend and co-worker described appellant as reliable, a friend to his now-deceased son (Vol. XXIII, R. 1929-30). Raymond Williams, another friend, stated that Foster was kind to his son with spina bifida, but hadn't seen appellant since 1990 (Vol. XXIII, R. 1933-34). Patricia Williams described the friendship of her grandson with Foster and she has kept in contact via letters and phone calls with

appellant's mother (Vol. XXIII, R. 1937). As appellant got older he stopped writing (Vol. XXIII, R. 1939).

Robert Moore, retired law enforcement officer and neighbor, stated that appellant was well-mannered to him and cut his lawn (Vol. XXIII, R. 1942). Ronald Newberry, first husband of Ruby Foster, thought appellant was a real fine person but hadn't seen him much since he was a young boy. He wrote him a letter of encouragement after his arrest but Foster never wrote back (Vol. XXIII, R. 1944-46). Fifteen year old Ryan Martin knew defendant for eight or nine years and recalled stating in a deposition that they weren't really close friends (Vol. XXIII, R. 1947-49). Kevin Martin stated appellant was well-mannered but most of his dealings with the Foster family was through his wife and his relationship with Ruby Foster, not really with appellant (Vol. XXIII, R. 1951-52). Marsha Martin testified that Foster gave her son positive advice about avoiding drugs; she and Ruby Foster were very good friends and acknowledged that actions speak louder than words (Vol. XXIII, R. 1953-56). Peter Albert testified that appellant was helpful in taking care of the house and getting him food (Vol. XXIII, R. 1958-59). Carol Perrella whose son was appellant's closest friend stated that Foster cared about his friends, that if

it were proved beyond a reasonable doubt that he was guilty of first degree murder she would have to consider that, and agreed that fine young men do not murder innocent people (Vol. XXIII, R. 1960-65).

Joshua Perrella, a friend of Foster, had never seen him threaten anybody, but admitted he hadn't seen him much from March through the first of May and had little contact with him during that period (Vol. XXIII, R. 1966-69). Shirley Boyette, a close personal friend of appellant's mother, thought he was a very kind, helpful person; her opinion was not changed by the jury verdict although at deposition she said she would be shocked if appellant committed murder (Vol. XXIII, R. 1973-74). Brian Burns -- a former husband to appellant's mother -- opined that appellant was innocent and has always been a good boy. He admitted that since appellant's arrest, Ruby and Kelly Foster are living with him. What he knows is appellant acted polite around him (Vol. XXIII, R. 1976-79). Danny Stevens, whose daughter dated appellant, testified that Foster seemed very up front and honest; his impression was based on when Foster would come over to take his daughter out (Vol. XXIII, R. 1981-82). Diane Lopez -- a friend of Ruby Foster -- thought appellant was a good kid and admitted having been convicted of a

felony involving dishonesty or false statement (Vol. XXIII, R. 1985-86). Jan Frick testified regarding appellant's kind acts to Cody Voorhees and had stated at deposition that Foster was an acquaintance (Vol. XXIII, R. 1987-91). Jennifer Shear testified that appellant visited Cody Voorhees in the hospital (Vol. XXIII, R. 1992-93). Carol Shear thought appellant gentle, very polite and well-mannered (Vol. XXIII, R. 1994-96). Eric Smith, whose wife's father was appellant's stepfather, thought he was an average young kid based on the four or five times he'd seen him (Vol. XXIII, R. 1999). John Smith, appellant's stepsister, loved him but has never lived in the same house with him, didn't know him very well and saw him infrequently (Vol. XXIII, R. 2001-03). Cathy Ward, mother of Cody Voorhees, testified appellant was supportive of her son at the hospital for chemotherapy treatment. She too was a friend of Ruby Foster (Vol. XXIII, R. 2004-07). Through stipulation an affidavit of appellant's brother Joseph Foster stating that appellant was a hard worker with a job in construction (Vol. XXIII, R. 2009). Appellant's sister, Kelly Foster, stated that she loved and protected appellant, that he was a good worker and got his GED after dropping out of high school (Vol. XXIII, R. 2010). Appellant informed the court it was his decision not to testify after the

opportunity to discuss this with his lawyer (Vol. XXIII, R. 2013-14). Appellant's mother, Ruby Foster, testified that he won a high school award in French, achieved his GED, and completed an auto cad drafting award. His father had abandoned him and she explained family photos to the jury. The witness insisted her son did not commit this crime (Vol. XXIII, R. 2018-31). On cross-examination she testified appellant's father died when she was preparing to divorce him and that appellant had the advantages of having been to Europe, having kittens and dogs and a loving protective mother (Vol. XXIII, R. 2033-34).

SUMMARY OF THE ARGUMENT

ISSUE I: The lower court did not err in denying change of venue motions because of pretrial publicity. There was no inordinate difficulty in selecting a jury of competent people in a relatively short period of time. The contention that this Court should presume prejudice because of news articles must be rejected since most of the articles had occurred two years prior to the trial and thus sufficient time had passed for feelings of revulsion and whatever prejudice excused jurors may have had was individual in nature rather than a statement of the entire community. *See* Rolling v. State, 695 So.2d 278 (Fla. 1997).

ISSUE II: The lower court did not err reversibly in allowing alleged hearsay statements of co-defendants as the now-challenged statements either were not hearsay or constituted an exception to the hearsay rule or were offered to show the fact of the conspiracy or to show that a statement was made rather than to establish the truth of the matter asserted, or the claims were unpreserved below.

ISSUE III: The trial court did not prejudice appellant's case and did preside over it with an open mind. The court properly declined to be intimidated by defense counsel's unhappiness with the court's acceptance of this Court's precedents and the court's

attempt to be ready for a penalty phase should it eventuate was not improper.

ISSUE IV: The lower court properly instructed the jury on and found the presence of the avoid arrest aggravator as it was clearly a dominant motive in the killing of Mr. Schwebes to prevent members of the Lords of Chaos being discovered by law enforcement.

ISSUE V: The lower court did not fail to consider appropriate mitigating evidence; the order explains why age was being rejected as a mitigator and this Court can perform its function of meaningful appellate review by evaluating the sentencing findings in their entirety.

ISSUE VI: The sentence of death is proportionate for this premeditated assassination committed to avoid exposure of the gang, especially since appellant offered very little in the way of meaningful mitigation. Appellant was not disadvantaged, had no mental or emotional problems that might help explain his conduct. The testimony of family friends was insufficient to reduce the sentence to life imprisonment.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING MOTIONS FOR CHANGE OF VENUE ON THE BASIS OF PRETRIAL PUBLICITY.

(a) The instant record

The record shows that there was no inordinate difficulty in selecting a fair and impartial jury in the community. For example, among the first fifty people on the venire panel questioned, ten of them were selected to serve on the jury (Morrow, Martie, Balog, Waring, Cerny, Trammell, Gibbs, Robinson, Eschenbrenner, Weatherly) (Vol. XIII, R. 1 - Vol. XV, R. 450). All of these jurors indicated they could be fair and impartial and decide the case based on the evidence presented at trial and the instructions of the court (Vol. XIII, R. 39, 71-72, 140, 172; Vol. XIV, R. 254, 266, 311-312, 357; Vol. XV, R. 421, 444).[2] As to the remaining two jurors selected --

[2]Among these jurors, Morrow had not acquired any knowledge of the case from news media or any other source; he was too busy at work and saw no publicity (Vol. XIII, R. 37-43). Gibbs had only heard of Lords of Chaos two years earlier, after the crime, not recently (Vol. XIV, R. 315). Robinson was new to the state and had not heard anything until yesterday when reading a book; she did not see this morning's paper or television (Vol. XIV, R. 356, 362-63). Eschenbrenner doesn't get the newspaper (Vol. XV, R. 424). Weatherly was a recent resident of the county (15 months) and he did not hear about the case in his former residence (Vol. XV, R. 443, 448).

Quelet stated that he could put out of his mind previous newspaper articles and had not formed any fixed opinions as a result of the publicity (Vol. XVI, R. 704, 706) and Eertmoed had not heard anything about the case, did not take the newspaper, watched television only occasionally and was unaware that a teacher had been killed (Vol. XVI, R. 782-786).

When the defense had used its ten peremptory challenges the lower court generously awarded at least three additional challenges allowing the defense to peremptorily excuse prospective jurors Bernath, Wyant and Lueckenhoff (Vol. XVI, R. 676; Vol. XVII, R. 955).

(b) Legal analysis

The trial court properly decided before trial that it would be more appropriate to determine first whether a jury could be selected in the community and if that was not possible then to consider a change of venue (Vol. VI, R. 1003). *See* Davis v. State, 461 So.2d 67, 69, n 1 (Fla. 1984), cert. denied, 473 U.S. 913, 87 L.Ed.2d 663 (1985)(ruling on change of venue should not be made prior to jury selection because impartial jury may be seated if trial court finds credible the assurances of prospective jurors that they can set aside extrinsic knowledge and decide case on the

evidence); Manning v. State, 378 So.2d 274, 276 (Fla. 1979)(approving procedure where ruling on defendant's motion for change of venue is delayed until attempt has been made to select jury).

In one of the most celebrated pre-trial publicity cases in recent years, this Honorable Court determined in Rolling v. State, 695 So.2d 278 (Fla. 1997) that the trial court did not commit reversible error in failing to grant a change of venue. There the case had generated "massive pretrial publicity" over the three and one-half years between the crimes and trial, a sufficient passage to distance the community from most of the media coverage. This Court explained that a trial court must make a two-pronged analysis evaluating (1) the extent and nature of any pretrial publicity[3] and (2) the difficulty encountered in actually selecting a jury. This Court reiterated that awareness of the crime or even having a preconceived notion is insufficient:

> [7] [8] To be qualified, jurors need not be totally ignorant of the facts of the case nor do they need to be free from any

[3]This factor includes (a) the length of time that has passed from crime to trial and when the publicity occurred; (b) whether the publicity was factual or inflammatory; (c) whether news stories consisted of the prosecutor's version to the exclusion of the defense version; (d) community size; (e) whether defendant has exhausted all peremptory challenges.

preconceived notion at all:

> To hold that the mere existence of any preconceived notion as to the guilt of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961). Thus, if prospective jurors can assure the court during voir dire that they are impartial despite their extrinsic knowledge, they are qualified to serve on the jury, and a change of venue is not necessary. *Davis,* 461 So.2d at 69. Although such assurances are not dispositive, they support the presumption of a jury's impartiality. *Copeland,* 457 So.2d at 1017.

(Id. at 285)

* * *

However, even where a substantial number of prospective jurors admit a fixed opinion, community prejudice need not be presumed. For instance, in *Murphy,* the United States Supreme Court evaluated these percentages as follows:

> In the present case, by contrast, 20 of 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt. This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

> 421 U.S. at 803, 95 S.Ct. at 2037-38 (footnote omitted). Consistent with the *Murphy* rationale, courts of this state have found in other cases, where similar percentages of prospective jurors voiced a bias during voir dire, that a change of venue was not required because the partiality of certain individual venire members did not reflect a pervasive prejudice infecting the entire community. *See Provenzano; Copeland; see also Pitts v. State*, 307 So.2d 473 (Fla. 1st DCA 1975).
>
> (Id. at 285-286)

This Court in Rolling rejected the assertion that pretrial publicity presumptively prejudiced the entire Alachua County community against him and:

> We also find unpersuasive Rolling's related assertion that the responses of both prospective and actual jurors during voir dire further demonstrated a real, community-wide prejudice and animosity toward him. Not surprisingly, of course, every member of the venire had some extrinsic knowledge of the facts and circumstances surrounding this case. Also as expected, the responses of certain prospective jurors showed that their knowledge of the case prevented them from sitting impartially on the jury. Nevertheless, the animus toward Rolling expressed by these individuals reflected nothing more than their own personal beliefs or opinions. Contrary to Rolling's assertions, we find no reason to believe that certain prospective jurors who voiced a bias against Rolling--none of whom sat on Rolling's jury--somehow spoke for the entire Alachua County community.

> We also must reject Rolling's claim that the responses of actual jurors demonstrated a community-wide bias against him because we find it to be completely contrary to the evidence in the record. Rolling never challenged for cause any member of his actual jury based on bias or any other grounds; and the trial court found credible the assurances of every member of Rolling's jury that they could lay aside their extrinsic knowledge of the case and recommend a penalty based only upon the evidence presented in court.

(Id. at 287)

In the instant case, as in Rolling, none of the jurors actually selected to sit were challenged for cause based on bias or other grounds and while it is true that some prospective jurors were excused because of pre-formed opinions -- as in Rolling -- it was nothing more than personal beliefs or opinions, not speaking on behalf of the entire community.[4]

Appellant alludes in his brief to excerpts of newspaper accounts in support of the assertion that pretrial publicity inflamed the community rendering a fair trial impossible. (Brief,

[4]Appellee notes that the trial court permitted first individual voir dire on the topics of publicity and capital punishment views, then allowed generalized voir dire of the groups (Vol. XIII, R 11 - Vol. XV, R. 450; Vol XV, R. 453 - Vol. XVI, R. 682; Vol. XVI, R. 686 - Vol. XVII, R. 828; Vol. XVII, R. 834-960). And in contrast to Rolling, *supra*, the jury selection here only took three days (not three weeks) after voir dire examination of a mere seventy-five prospective jurors.

pp. 25-27). Foster refers to a few articles in May and June of 1996 -- shortly after the Schwebes' killing -- which included alleged plans of the Lords of Chaos to kill black people at Disney World and the loss of students at Riverdale High School who attempted to heal by writing poems in tribute to the victim. With respect to these articles, appellee points out that they were published almost two years prior to the jury selection and trial in March of 1998. Moreover, that members of the community may have emotions ranging from shock, and disbelief to anger contemporaneously to a particularly brutal and unnecessary murder should not seem surprising; indeed, it probably reflects at least a scintilla that the society remains healthy. Additionally, appellee cannot discern within the poems of these sensitive students any irrational call to the community that Mr. Foster or any other defendant's case should be removed from the courts and that justice should be achieved in some extra-judicial capacity.

Similarly, moving a step closer to the instant March 1998 trial, Foster notes that in 1997 the press reported that the other members of the Lords of Chaos had entered into plea agreements. That is true but the accounts were factual in nature and included quotes from Foster's trial counsel Bob Jacobs that "I expected it

from the beginning. I don't see any major shift. We've been preparing all along." (Vol. VI, R. 890, 893, 895, 897, 905, 908[5]). Obviously a factual news account regarding the entry of a plea including a disclaimer by defense counsel that it is not surprising -- almost six months prior to the instant trial cannot be deemed an incitement to the community to convict irrespective of the evidence presented.

Foster's final examples include the Sunday, March 1 editorial by Sam Cook (two days before the beginning of trial) and the March 2 factual account that the trial was about to start. Neither was of such an inflammatory nature sufficient to render the community incapable of adjudicating the case as the voir dire proceeding demonstrated.

It should be noted that many among the jurors who were excused by the state or defense had not been exposed to allegedly prejudicial publicity in the local newspaper. For example, prospective juror Wetmore was excused because of his "eye for an eye" beliefs (Vol. XIII, R. 16); juror Bennett did not receive the local paper, the News Press (Vol. XIII, R. 55); juror Dwyer doesn't

[5]These record citations appear to be from the same newspaper article on September 27, 1997.

get the newspaper and didn't see the recent (Sunday-Monday) articles (Vol. XIII, R. 68); juror Bella only heard about the case coming to trial today and didn't know anything about it (Vol. XIII, R. 77); juror Morris didn't get the paper or watch the news (Vol. XIII, R. 92); juror Griffin had a nephew involved with one of the co-defendants (Vol. XIII, R. 130); juror Grimm knew the victim (Vol. XIII, R. 132); juror Schuman did not see the newspaper (Vol. XIII, R. 149); juror Anselle had only been in Florida since October 1996 (seven months after the crime)(Vol. XIII, R. 163); juror Montes had not heard of the case, either about Foster or the Lords of Chaos (Vol. XIII, R. 195); juror Leger employed appellant's sister who told her appellant was innocent (Vol. XIV, R. 309-310); juror Stevens didn't believe too much what was in the paper or television (Vol. XIV, R. 322); juror Kaune knew people affected by the crime (Vol. XIV, R. 354-355); juror White was the father-in-law of the victim's sister (Vol. XVI, R. 726); juror Gould had not heard of Foster or the Lords of Chaos, is out of the state ninety percent of the time and was excused for family reasons (Vol. XVI, R. 727, Vol. XVII, R. 893); juror Simpson was a friend of the victim (Vol. XVI, R. 733); juror Ball was the parent of another death row inmate David Snipes (Vol. XVII, R. 810).

The lower court properly denied the defense request for change of venue. *See, generally* Pietri v. State, 644 So.2d 1347, 1351-52 (Fla. 1994)(although several people who served on the jury had read about the case, all said they had not formed an opinion and would consider only the evidence brought before them. A trial court's ruling on a motion for change of venue will not be reversed absent an abuse of discretion and pretrial publicity alone does not warrant a change of venue); Larzelere v. State, 676 So.2d 394, 406 (Fla. 1996); Farina v. State, 679 So.2d 1151, 1154 (Fla. 1996)(The fact of exposure to pretrial publicity is not enough to raise the presumption of unfairness. Although most people questioned during voir dire had heard about the case all of those ultimately chosen indicated they could base their verdicts on the evidence presented); Henyard v. State, 689 So.2d 239 (Fla. 1996); Cole v. State, 701 So.2d 845, 853-854 (Fla. 1997)(no palpable abuse of discretion shown in court's treatment of jurors on pretrial publicity); Wuornos v. State, 644 So.2d 1000, 1007 (Fla. 1994); Zile v. State, 710 So.2d 729, 735-736 (Fla. 4DCA 1998)(hundreds of pre-trial newspaper articles and many hours of television video -- much of the material inflammatory -- including comparing the defendant to the nationally publicized case of Susan Smith did not

require change of venue even though 80 of 141 potential jurors excused); United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir. 1992)(pretrial publicity calling the defendant a "drug kingpin" and "narco terrorist" and reference to the defendant's fascination with the Third Reich did not trigger a finding of presumed prejudice); Rolling, *supra*; Patton v. Yount, 467 U.S. 1025, 1035, 81 L.Ed.2d 847, 856 (1984)(The relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinions that they could not judge impartially the guilt of the defendant. It is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed).[6]

Appellant's claim is meritless and should be rejected.

[6]Appellant's reliance on Lozano v. State, 584 So.2d 19 (Fla. 3DCA 1991) is unavailing. That case is inapposite as there the incident that led to an officer charged with manslaughter for killing a motorcycle rider led to riots after the killing, threats of extensive riots if the defendant were acquitted and various jury members stated they were fearful of the consequences of an acquittal. There was no such fear the county would erupt into violence following verdict in the instant case.

ISSUE II

WHETHER THE LOWER COURT ERRED REVERSIBLY IN PERMITTING HEARSAY TESTIMONY TO BE INTRODUCED.

Appellant next contends that the lower court erred in permitting the introduction of hearsay testimony at trial.

(1) The testimony of witnesses Magnotti, Young and Shields regarding the conversation in which Christopher Black suggested Schwebes must die and the confrontation with Schwebes

Appellee notes that the declarant Christopher Black testified without objection to his statement and was available for full cross-examination.[7]

Foster first complains that witnesses Peter Magnotti, Brad Young, and Derek Shields offered hearsay testimony as to a

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[7]Black testified:

> Q. When you got back to the group did you make any statement about Mr. Schwebes to the group?
> A. Yes, sir.
> Q. What was that statement?
> A. That I felt that Mr. Schwebes had to die.
> Q. Was Kevin Foster in that group?
> A. Yes, sir.
> Q. Are [sic] do you recall whether or not he responded to that statement?
> A. Yes, sir.
> Q. What response did he make?
> A. That we could do it.
>
> (Vol. XIX, R. 1287)

conversation the group had after the confrontation with victim Mark Schwebes in which Christopher Black suggested to other members of the Lords of Chaos that the victim had to die (Vol. XVIII, R. 1097; Vol. XVIII, R. 1183; Vol. XX, R. 1458). With respect to the first challenge -- during Magnotti's testimony -- the trial court initially sustained the objection on hearsay grounds and at a bench conference the prosecutor explained:

> MR. LEE: Your Honor, at this point the statements that are going to be made are statements that co-conspirators made in furtherance of the conspiracy which is an exception to the hearsay rule. I believe this man will say that Christopher Black was angry and said he has to die.
> MR. JACOBS: Okay.
> THE COURT: So what's your objection other than that? Mr. Jacobs, do you have anything in addition?
> MR. JACOBS: No, sir.
> THE COURT: Okay.

(emphasis supplied)(Vol. XVIII, R. 1097)

Appellant below acquiesced to the Court's ruling and offered no further objection or complaint once the prosecutor explained the legal basis for admissibility.[8] Thus, appellant's complaint here is barred. *See* Lucas v. State, 376 So.2d 1149 (Fla.

[8]Appellant subsequently did not interpose an objection below on hearsay grounds that Magnotti related Black's reporting that Schwebes said he was going to turn them in to the campus policeman in the morning (Vol. XVIII, TR. 1098).

1979)(appellate court will not presume trial court would have made erroneous ruling if contrary authorities cited to his understanding of the law). *See also* Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Mordenti v. State, 630 So.2d 1080 (Fla. 1994); Florida Statute § 924.051(3) (1996). The argument advanced here *ab initio* that the co-conspirator exception to the hearsay rule is inapplicable is untimely and improper and barred for the failure to assert below. San Martin v. State, 705 So.2d 1337, 1345 (Fla. 1997).

Although Foster did not argue it below he now maintains that F.S. 90.803(18)(e) -- the hearsay exception for statements made by co-conspirators in furtherance of the conspiracy -- should not be deemed applicable because allegedly the state did not prove the existence of a conspiracy and each member's participation in it before the statement was introduced and that Black's statement was not in furtherance of the conspiracy. He is untimely in this just-announced contention. *See* Nelson v. State, 602 So.2d 550 (Fla. 2DCA 1992)(defendant must be diligent in insisting that state carry its burden to provide necessary independent evidence by objecting at the proper time, otherwise the state's failure in this regard will be deemed to have been waived by the defendant).

There was sufficient evidence -- apart from any hearsay

statements -- of a conspiracy to kill Mark Schwebes and of participation by Foster, Shields, Black, and Magnotti, through the testimony of the latter three co-conspirators and Torrone, Brad Young and Christopher Burnette. The state demonstrated by a preponderance of the evidence the conspiracy. Foster v. State, 679 So.2d 747, 753 (Fla. 1996); Larzelere v. State, 676 So.2d 394 (Fla. 1996); Christie v. State, 652 So.2d 932 (Fla. 4DCA 1995); Brown v. State, 648 So.2d 268 (Fla. 4DCA 1995).[9] Similarly, appellant's "furtherance" argument is meritless; the challenged statement by Chris Black that the victim has to die was not a post-arrest statement after the conspiracy had ended but rather the invitational remark seized upon by Foster to establish the conspiracy. Moreover, appellant's response that we can do it has no meaning unless married to the Black invitation. *See also* Echols v. State, 484 So.2d 568, 573 (Fla. 1985)(allowing post-murder videotape meetings of co-defendant Dragovich with Adams and undercover policeman -- rejecting defense argument that statements were not in furtherance of the conspiracy to murder Backovich -- since evidence was relevant to premeditated conspiracy to murder

[9]Of course, the admissibility of hearsay statements of co-conspirators is not dependent upon existence of a count charging a conspiracy. Tresvant v. State, 396 So.2d 733 (Fla. 3DCA 1981), review denied, 408 So.2d 1096 (Fla. 1981).

and corroborated other evidence showing premeditation between Dragovich and appellant to commit the murder).

With respect to the complaint of Brad Young's testimony at Volume XVIII, R. 1183, that Black was "upset that utensils were taken by Schwebes and he had, I guess, told them don't be surprised if Mr. Montgomery comes up to you tomorrow", appellee responds that it is not hearsay for a witness to describe his observation that another person is upset. *See* Layman v. State, 652 So.2d 373, 375 (Fla. 1995)(That the victim was in fear and crying were observations of physical demeanor and not hearsay comments). Moreover, Young's statement was cumulative to the unobjected-to Magnotti testimony at Volume XVIII, R. 1098, to the testimony of David Adkins at Volume XVIII, R. 1165-66 (see argument in subsection (3), *infra*), to the unobjected-to testimony of Thomas Torrone (Vol. XIX, R. 1247-48) and to the essence of Christopher Black's testimony that Schwebes was killed because he was in their way (Vol. XIX, R. 1308). Schwebes' remark to Lords of Chaos members about the potential visit from the school resource officer was admissible under Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987). Any error is harmless. *See* F.S. 924.051, Woods v. State, ___ So.2d ___, 24 Florida Law Weekly S183 (Fla. 1999).

A trial court's ruling will be affirmed if it is correct for

any reason. Dade County School Board v. Radio Station WQBA, ___ So.2d ___, 24 Florida Law Weekly S71 (Fla. 1999)(citing the "tipsy coachman" rule). Additionally and alternatively, appellee would argue that any testimony by Magnotti, Young, Shields or anyone else who related Mr. Black's comment to Foster and others in the group that Schwebes "has to die" is not hearsay at all. Florida Statute 90.801(c) provides that:

> Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> (emphasis supplied)

Black's statement that the victim had to die was not introduced to show the truth of the matter (that he had to die) but to show that the statement was made to listeners Foster, Black, Magnotti and others and that it explained their subsequent actions and conduct. *See* Peterka v. State, 640 So.2d 59, 68 (Fla. 1994)(An out-of-court statement may be admitted for a purpose other than proving the truth of the matter asserted if relevant to prove a material fact and is not outweighed by any prejudice); Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987)(An out-of-court statement is admissible to show knowledge on the part of the listener that the statement was made if such knowledge is relevant to the case). Black's suggestion regarding Schwebes' demise was relevant because it helps

establish the formation and existence of the conspiracy to kill by Lords of Chaos members and Foster's adoption and ratification of the idea and explains his actions to formulate, implement and execute a workable plan for its completion. *See also* United States v. Wolfson, 634 F.2d 1217 (9th Cir. 1980)(When a witness is present at a meeting between a group of conspirators and they orally in his presence agree upon the conspiracy, its objectives and its modus operandi, the witness testimony about what each of them said is not hearsay. It is not offered to prove that what the conspirators said is true, but to prove their verbal acts in saying it. This does not violate the hearsay rule.).

(2) The testimony of Derek Shields and the taped statement of Derek Shields

Foster also complains here about Derek Shields' summary of the Schwebes-Black confrontation including the remark that Schwebes was going to report them to the school resource officer (Vol. XX, R. 1458). Torrone had already testified without objection concerning Schwebes retrieval of the gloves, canned goods, fire extinguisher and staplers and Black had also testified about his evasive answers and trying to remove the gloves behind his back and not to be surprised if visited by the school resource officer (Vol. XIX, R. 1247, R. 1284-86). Black had testified -- also without objection -- that he told Foster and the others that Schwebes had to die and

appellant answered “we could do it” (Vol. XIX, R. 1287). Shields’ testimony at Volume XX, R. 1458 was admissible as previously argued under the co-conspirator exception and as relevant non-hearsay evidence of what the listeners heard prior to their homicidal actions. Shields’ testimony at Volume XX, R. 1458 was cumulative to other admissible evidence and certainly was harmless if there was any error.

In a related argument, appellant also now attacks the trial court’s having allowed on redirect examination questioning and introduction of Shields’ statement to law enforcement officers following his arrest on May 4, 1996, Exhibit 59A (Vol. XX, R. 1544-1561). It is important to note that during the defense cross-examination counsel inquired about Shields’ obligation under the plea agreement and inquired who decides whether or not he’s telling the truth, whether he had any other motivation than to tell the truth, whether the state attorney’s office made an agreement with him in the blind without knowing what he was going to say and that Shields had not committed himself in writing at the time of the deal (Vol. XX, R. 1486-87). Defense counsel examined Shields asking if he had sat down and given a formal statement to the state attorney’s office a week after the plea bargain and whether there had been any informal meeting with law enforcement or prosecutorial

authorities between the time of the plea and the formal statement. Counsel challenged the witness whether he just walked into the room and gave a taped statement without having discussed anything, and elicited that if the witness did not cooperate he would receive a life sentence and consecutive time on other charges rather than face the death penalty (Vol. XX, R. 1488-89).

The prosecutor argued below, relying on Chandler v. State, 702 So.2d 186 (Fla. 1997) and Cardali v. State, 701 So.2d 1241 (Fla. 3DCA 1997), that the defense cross-examination implied a favorable plea agreement motivating the witness to testify favorably warranted admission of a prior consistent statement to rebut the charge of improper influence, motive or recent fabrication under F.S. 90.801(2)(b). (Vol. XX, R. 1516). After listening to the tape (Vol. XX, R. 1519-37) and hearing argument, the court allowed an excerpt to be introduced into evidence and played to the jury (Vol. XX, R. 1544-61). The court also announced its reliance on the case of Anderson v. State, 574 So.2d 87 (Fla. 1991) (Vol. XX, R. 1568).

On appeal Foster maintains that defense counsel did not expressly or impliedly charge Shields with improper influence, motive or recent fabrication in the cross-examination. Appellee

disagrees.[10] The case law supports the trial court's ruling. Chandler, *supra*; Anderson, *supra* at 92 ("if Beasley's statements to Velboom were made before her alleged motive to falsify arose, the state was entitled to present Beasley's prior consistent statements to rebut the implication of recent fabrication"); Shellito v. State, 701 So.2d 837, 841 (Fla. 1997). Since Mr. Shields had truthfully informed law enforcement officers at his arrest on March 4 that Foster had killed Schwebes and since Shields testified at this trial and was subject to cross-examination, the state could permissibly utilize his prior consistent statement when the defense implied a favorable plea bargain months afterward motivated him not to be truthful.

(3) The David Adkins testimony

Prior to his testimony there was a short proffer, apparently one of the matters the court had determined previously should be proffered before the trial testimony (Vol. XVIII, R. 1157). The prosecutor represented that Adkins would say that at dinner hours prior to the shooting Schwebes mentioned the confrontation at the

[10]The defense closing argument not only impliedly charged an improper motive to Shields, it accused Shields of plotting and planning with Black to frame Foster (Vol. XXII, R. 1826), that he had ample time to plot and plan and didn't plead guilty until six months ago (Vol. XXII, R. 1828) and even accused Shields of firing the fatal shot (Vol. XXII, R. 1830, 1846).

school and that Schwebes told the boys he was going to turn them in. The court permitted it over defense objection (Vol. XVIII, R. 1158, 1165). The witness informed the jury that Schwebes related to him he told the boys don't be surprised if Montgomery (a school resource officer and deputy sheriff) called them to the office tomorrow morning (Vol. XVIII, R. 1166).[11]

Contrary to appellant's assertion this testimony did not constitute inadmissible hearsay. As stated in Peterka v. State, 640 So.2d 59, 68 (Fla. 1994):

> An out-of-court statement, however, may be admitted for a purpose other than proving the truth of the matter asserted, if the statement is relevant to prove a material fact and is not outweighed by any prejudice. See Secs. 90.402, 90.403, 90.801(1)(c), Fla.Stat. (1989).

The relevance and significance of Schwebes' remark is that he made the statement to the boys at the school, reconfirmed to Adkins; it really matters not what Schwebes' intent was or whether he would have followed through on it. The simple point is that because Schwebes had mentioned the possible visit by Montgomery, Foster and the other members of the Lords of Chaos had reason to be concerned that their criminal activities would be discovered, and prosecuted.

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[11]The witness explained that Schwebes didn't tell Adkins he was going to do something, just what he had told the boys (Vol. XVIII, R. 1165).

See also State v. Baird, 572 So.2d 904, 907 (Fla. 1990); Breedlove v. State, 413 So.2d 1, 6 (Fla. 1982); Koon v. State, 513 So.2d 1253, 1255 (Fla. 1987) (Magistrate statement at preliminary hearing that charge would have been dismissed against defendant had there been only one witness was not hearsay and was admissible to show that having heard the statement the defendant could have formed motive for eliminating by murder one of two prosecution witnesses). As the Koon court explained:

> An out-of-court statement is admissible to show knowledge on the part of the listener that the statement was made if such knowledge is relevant to the case.
>
> (text at 1255)

Even if this Court were to deem the remark impermissible, it was harmless, as merely cumulative to the testimony of Black, Young, Torrone, and Shields.

(4) The Rebecca Magnotti testimony

In the defense case appellant's mother Ruby Foster testified that appellant was not at her pawn shop at all the night of April 30 (Vol. XXI, TR. 1667) and when asked if she told anyone that Peter Magnotti was with Kevin that night answered that she did not see them (the boys) but her daughter heard them. Ruby Foster couldn't tell who was there (Vol. XXI, TR. 1678-79). State witness Peter Magnotti had testified that while in jail Kevin Foster had

approached him about establishing an alibi and that while initially he thought it a good idea he did not ultimately join in fabricating an alibi (Vol. XVIII, TR. 1127-28). Magnotti received a newspaper clipping with a note on it from appellant's mother asking him to get in contact with her and tell her where he really was on the night of the 30th (*See also* Exhibit 62, Vol. VIII, R. 1129).[12] Magnotti understood that the "Mom" signature on the note to be Ruby Foster (Vol. XVIII, TR. 1129-30).

The state called Rebecca Magnotti, Peter's mother, who identified the Exhibit 62 letter-newspaper article as the item shown to her by Peter and that she had not signed it (Vol. XXI, TR. 1745-47)). Mrs. Magnotti telephoned the Fosters and Mrs. Foster stated that she and Kelly and some other friends would testify Peter was in their home on the night of April 30 and that Peter spent the night over there. The witness knew he had not spent the night because she was waiting for him when he came home and told Mrs. Foster that wasn't true (Vol. XXI, TR. 1748-49).

The prosecutor could properly call, and elicit from, Rebecca Magnotti on rebuttal the testimony regarding the conversation with appellant's mother Ruby Foster as to the false alibi involving

[12]The Exhibit 62 note recites in part "you were not anywhere near Pine Manor. Just have your lawyer call."

Peter Magnotti -- after Ruby Foster was asked on cross-examination if she had told anyone that Peter Magnotti was with appellant that night (Vol. XXI, R. 1678-79). Appellant was not denied due process or a fair trial. Defense counsel could cross-examine witness Rebecca Magnotti about this incident if he chose to, or sought to recall Mrs. Foster if he deemed it appropriate. Furthermore, the introduction of the testimony by Mrs. Magnotti of the conversation with Mrs. Foster on the phone was not for the purpose of proving the truth of the matter asserted but rather the falsity of the matter asserted, i.e., that Peter Magnotti did not spend the night at appellant's house, and thus was not hearsay. *See, e.g.,* Anderson v. United States, 417 U.S. 211, 41 L.Ed.2d 20, 94 S.Ct. 2253 (1974); United States v. Fox, 613 F.2d 99, 101 (5th Cir. 1980); United States v. Bernes, 602 F.2d 716, 719 (5th Cir. 1979). A trial court's ruling on the admission of evidence will not be overturned absent an abuse of discretion. *See* Cummings v. State, 715 So.2d 944, 949 (Fla. 1998); Kearse v. State, 662 So.2d 677, 684 (Fla. 1995); Blanco v. State, 452 So.2d 520, 523 (Fla. 1984). Foster has failed to demonstrate an abuse of discretion.

Additionally, in light of the overwhelming evidence of guilt including the testimony of three witnesses present at the scene of the murder, any error is harmless.

ISSUE III

WHETHER COMMENTS OF THE COURT DURING GUILT PHASE DEMONSTRATE THAT THE COURT HAD PREJUDGED THE CASE AND DID NOT PRESIDE OVER THE TRIAL WITH AN OPEN MIND.

In a footnote observation (Brief, p. 37) appellant suggests that racism may explain the court's "animus" toward appellant. Foster notes that Judge Anderson is an African-American and that pretrial media coverage portrayed appellant as "a racist who wanted to kill black people and used a racial slur when talking to fellow members of the Lords of Chaos".

An observation is in order on this uncalled-for projection by appellant. Does it seem likely that a trial judge motivated by racial animus would have permitted a juror to sit on the case (Martie) who had a fixed, firm and unyielding opposition to the death penalty when to do so would risk sabotaging the prosecution's case at penalty phase (and even influencing other jurors in the guilt phase)? Juror Martie was one of the jurors selected and participated in the nine to three vote recommending a sentence of death (Vol. XXII, TR. 1886-87). Yet when questioned on voir dire as to her capital punishment views this colloquy ensued:

> MR. LEE: Now, the second part of the case or the second issue I want to ask you about is about the death penalty, and that's an emotional issue for most people. This case like every first degree murder case is

actually broken into two different parts.

In the first part the jury is asked to determine whether the defendant is guilty or not guilty of first degree murder. In the second part the jury is asked to make a recommendation of the penalty to the judge. Now, the possible penalty is either life in prison or the death penalty. Now, in that second phase the jury makes a recommendation to the judge, but the judge is the one who makes the final call on it, although the law does say he is to give great weight to what the jury recommends. Do you understand the two steps?

JUROR MARTIE: Right.

MR. LEE: What are your feelings about the death penalty?

JUROR MARTIE: I just don't believe in the death penalty. I just, you know --

MR. LEE: Okay?

JUROR MARTIE: I don't believe, you know, in taking someone else's --

MR. LEE: If you were on the jury could you recommend the death penalty to the judge under any set of circumstances?

JUROR MARTIE: I don't think so.

MR. LEE: Now, the judge will give you certain instructions in that second phase, what we call the penalty phase of the case, and those instructions are the law and you'd be required to follow that law. But with feelings that are strong like yours, do you feel that you could follow the law and recommend the death penalty if the aggravators were there, or do you feel that you just really could not recommend?

JUROR MARTIE: I just don't go for the death penalty.

MR. LEE: So is it fair to say that in your mind there is really no set of circumstances that could lead even if the judge instructs you, lead you to recommend the death penalty?

JUROR MARTIE: No.

MR. LEE: I have no further questions.

MR. JACOBS: If the judge told you, as Mr. Lee indicated, that you might not even get to that second phase of the trial where you'd have to consider a penalty, but you could, as you told us, consider whether a person was guilty or innocent based on the evidence, right, and the law?

JUROR MARTIE: Right.

MR. JACOBS: And if the judge told you that should you find a person guilty of first degree murder that you would be asked to hear evidence in what's called a penalty phase and determine whether or not the mitigating evidence outweighs the aggravating evidence, or vice versa, and give an opinion, give a recommendation to the Court on whether it should be life imprisonment without parole or the death penalty, could you do that, could you based on the judge's instructions, could you do that or you couldn't?

JUROR MARTIE: No, I don't think so. I just don't.

MR. JACOBS: Under no circumstances?

JUROR MARTIE: No, not for the death penalty. Life in prison for what he did, but I couldn't say.

MR. JACOBS: Nothing further.

(emphasis supplied)(Vol. XIII, TR. 72-74)

* * *

MR. JACOBS: And would you agree with us that you could follow the law if the judge gave you the law in the second phase and said I'm expecting a recommendation from the jury as to life without parole or the death penalty, could you listen to the judge's instructions and agree to follow the law?

JUROR MARTIE: Not if they wanted the death penalty. I just can't see.

MR. JACOBS: Nothing further.

(emphasis supplied)(Vol. XIII, TR. 75)

Turning to the specifics of Foster's complaint, he argues that the lower court expressed a prejudgment of the case with a "Tell it to the Supreme Court" remark (Vol. XX, TR. 1539). Reviewing the matter in context, the defense and prosecution had immediately beforehand argued on the admissibility of witness Shields' prior consistent statement made at the time of his arrest before his plea agreement with prosecutors negating the implication that his motive for the current testimony was the agreement. The lower court ruled in favor of the state and the court was apprised of two Supreme Court precedents, Chandler v. State and Anderson v. State (Vol. XX, TR. 1518, 1568). It would appear that the defense was baiting the court at an adverse ruling with the observation "you don't seem concerned, but I think it's highly improper" (Vol. XX, TR. 1539). Appropriately, the court could respond that if a party didn't like Supreme Court rulings that was the Court to address. Appellant relies on Porter v. State, 723 So.2d 191 (Fla. 1998) but that decision is inapposite. There, this Court granted post-conviction relief after determining that former Judge Richard Stanley had not displayed the impartiality required of a sentencer when he testified:

> I believe that if the same thing had happened, that I would have killed Mr. Porter. Mr.

> Porter wouldn't have had to be put to death. But if he had done that to my family, I'd a killed him.
>
> (723 So.2d at 197, fn 1)

In the instant case, there are no pre-trial or trial comments by Judge Anderson demonstrating that he prejudged either guilt or innocence or penalty. If a trial court may permissibly be badgered into ruling, or changing a ruling, to accommodate a party unhappy with this Court's precedents, the likely result will be that a timid judiciary will feel it is better not to apply the law lest it be accused of bias or racism by aggressive lawyers.

Appellant seeks further support for his libelous assault in footnote 19, pointing to the colloquy at Vol. XXI, R. 1685. During a recess luncheon prior to the testimony of the last two defense witnesses at guilt phase this colloquy ensued:

> THE COURT: What kind of aggravators are ya'll looking for, or anticipating?
> MR. MCGRUTHER: I would hate to start getting to that stage. That's a superstition.
> THE COURT: It ain't no superstition. It's something I got to work on. Because I have some concerns.
> MR. MCGRUTHER: I--
> THE COURT: <u>I want to be prepared for it.</u> I've done some preliminary research.
>
> (emphasis supplied)

A few pages later at Vol. XXI, R. 1692 this exchange occurred:

> THE COURT: I was asking, before you have

> got up here to the counter is what you mean? I was asking the State what aggravators, what they anticipate and they told me subparagraph I and subparagraph E, I thought under 92141.
>
> MR. JACOBS: CCP.
>
> THE COURT: Witness elimination, CCP, but the other one I think there is case law on both sides of that and they don't have any others I understand. What kind of record does your client got?
>
> MR. JACOBS: Nothing. Traffic.
>
> THE COURT: How old is he?
>
> MR. MCGRUTHER: Nineteen.
>
> THE COURT: Eighteen at the time of the offense. So I don't know. Never mind.
>
> MR. JACOBS: All right. Thank you, Judge.

Not only did appellant fail to contemporaneously object below to preserve the point for appellate review, Steinhorst, *supra*, the defense did not perceive any impropriety in the court's attempting to prepare itself in terms of jury instructions, etc. for the potentiality of a guilty verdict and the attendant consequences of proceeding to a second or penalty phase. *Cf*. Wainwright v. Witt, 469 U.S. 412, 83 L.Ed.2d 841, at 860 (1985)(J. Stevens concurring, n 4 explaining that the absence of objection at trial sheds important light on the significance of an alleged constitutional error even when it does not create an absolute bar to review citing cases that counsel perceived the asserted error not to be critical to his case). Obviously, a trial court is not required to be totally surprised at the return of a verdict and at that point

initiate a concern about preparing for court time, drafting possible jury instructions and other ministerial matters which consume much of the time of a busy trial judge.[13]

Thus, this claim is both barred and meritless.[14]

[13]Appellee notes that at a pre-trial hearing on January 26, 1998, the prosecutor seemed to agree with the defense that aggravator F.S. 921.141(5)(n) would be inapplicable for ex post facto reasons (Vol. VI, R. 980-81). The court could permissibly inquire whether this or any other matter not brought to his attention should be considered.

[14]The Court has noted prosecutorial misconduct in recent months with a frequency disturbing to both the Court and the state. See, e.g., Urbin v. State, 714 So.2d 411 (Fla. 1998); Ruiz v. State, ___ So.2d ___, 24 Florida Law Weekly S157 (Fla. 1999). It remains unclear however to the Bench and Bar whether a defense unsupported allegation that the trial judge is a racist represents desirable advocacy or merits similar scrutiny and condemnation by the Court as in Urbin and Ruiz.

ISSUE IV

WHETHER THE LOWER COURT ERRED IN SUBMITTING TO THE JURY AND FINDING THE STATUTORY AGGRAVATOR § 921.141(5)(e).

The trial court's sentencing findings recite in pertinent part (Vol. XII, R. 1475-76):

> 1. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. § 921.141(5)(e), Fla. Stat.
>
> From the evidence presented during the guilt phase of this trial, the Defendant was the ringleader of a group of young criminals known as the "Lords of Chaos." The purpose of the Lords of Chaos was, in the words of one of its members, to wreak havoc in the community and to "grab headlines." Founded by the Defendant and his best friend, Peter Magnotti, the Lords of Chaos was formed in early 1996. The Defendant's nickname was "God." Magnotti's nickname was "Fried." Other principals in the Lords of Chaos were Christopher Black and Derek Shields. Other members included Christopher Burnett and Tom Torrone. Magnotti, Black, Shields, Burnett and Torrone all testified against the Defendant at trial.
>
> On the evening of April 30, 1996, Lords of Chaos members Christopher Black, Tom Torrone and the Defendant attempted to vandalize and burn the auditorium at Riverdale High School. Their criminal plans were interrupted by school teacher and band leader Mark Schwebes, but the Defendant ran away before he could be caught. Christopher Black and Tom Torrone were stopped by Mr. Schwebes and

they were advised by him that he had also seen the Defendant.

After seizing incriminating evidence from them, Mr. Schwebes told Black and Torrone that they should not be surprised if they were called by the school resource officer, Deputy Montgomery of the Lee County Sheriff's Department. From that point forward the Defendant was inexorably connected to an imminent investigation of the Lords of Chaos. The potential for arrest and exposure was very real and quite worrisome to the Lords of Chaos.

When Christopher Black, apprehensive about his own pending arrest, angrily said "He's got to die," the Defendant immediately agreed and exclaimed "We can do it!" This statement by the Defendant clearly establishes that the dominant or sole motive for killing Mark Schwebes was to prevent or avoid arrest by Deputy Montgomery. The Defendant's statement was corroborated by fellow Lords of Chaos members in their testimony at trial. Indeed, Black in particular testified that they planned to kill Mr. Schwebes "So we all wouldn't get in trouble."

Derek Shields testified that the Defendant told him they had to kill Schwebes so Black and Torrone would not be turned into the school resource deputy, an event which could lead to the exposure of the entire Lords of Chaos gang and their leader, Kevin Foster. Indeed, each member of the Lords of Chaos knew that in the two months preceding the murder of Mark Schwebes, the group had been engaged in numerous criminal acts and each would be facing significant charges beyond those which might be

> presented by the exposure of their criminal conduct at Riverdale High School.
>
> The possibility of arrest and prosecution for all of the criminal actions which had been engaged in by the Lords of Chaos was a cold reality to the Defendant, especially if members of the Lords of Chaos were questioned and disclosed to law enforcement what the Lords of Chaos had done.
>
> Plainly, the evidence demonstrated that the dominant or sole motive for killing Mark Schwebes was to avoid or prevent a lawful arrest. Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992); Consalvo v. State, 697 So. 2d 805 (Fla. 1996). The Court hereby finds that based upon the evidence presented at trial and the verdict of the jury, the witness elimination aggravating circumstance was proven beyond a reasonable doubt and the Court affords it great weight.

The testimony adduced at trial fully supports the finding of the presence of this aggravator. This Court has held that the avoid arrest aggravator finding is satisfied by circumstantial evidence. Hall v. State, 614 So.2d 473, 477 (Fla. 1993), cert. denied, 510 U.S. 834, 126 L.Ed.2d 74 (1993); Wike v. State, 698 So.2d 817, 822-823 (Fla. 1997).

In Fotopoulos v. State, 608 So.2d 784 (Fla. 1992), this Court disposed of a similar contention that the witness-elimination aggravator should be deemed inapplicable:

As part of this claim, Fotopoulos contends that the trial court erred in finding that the Ramsey murder was committed for the purpose of avoiding or preventing a lawful arrest. (FN3) A motive to eliminate a potential witness to an antecedent crime, such as Fotopoulos' alleged counterfeiting, can provide the basis for this aggravating factor. Swafford v. State, 533 So.2d 270, 276 (Fla.1988), cert. denied, 489 U.S. 1100, 109 S.Ct. 1578, 103 L.Ed.2d 944 (1989). An arrest need not be imminent at the time of the murder. Id. Such a motive can be inferred from the evidence presented in this case. As explained by the trial court:

> Ramsey knew of the Defendant's illegal activities and planned to blackmail the Defendant. One of the dominant motives behind killing Ramsey was elimination of a witness hostile to the Defendant. The theme of witness elimination runs through this case, starting with Ramsey and ending with Chase.

[15] We reject Fotopoulos' contention that because the trial court found that witness elimination was but "one of the dominant motives" for Ramsey's murder, this aggravating factor does not apply. While it is true that Fotopoulos needed a victim for Hunt to shoot while being videotaped, the record supports the conclusion that the dominant reason Ramsey was chosen was because he knew of Fotopoulos' illegal activities and planned to blackmail him. Proof of Fotopoulos' intent to avoid being arrested in connection with these activities was "strong" enough to support this factor. Cf. Jackson v. State, 502 So.2d 409, 411 (Fla.1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Riley v. State, 366 So.2d 19, 22 (Fla.1978).

(emphasis supplied)(Id. at 792)

Accord, Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996)(A motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance; and it is not necessary that an arrest be imminent at the time of the murder. The aggravator can be supported by circumstantial evidence through inference from the facts shown); Swafford v. State, 533 So.2d 270, 276 (Fla. 1988)[citing a number of decisions both where the factor has been approved both on the basis of admissions by the defendant[15] and on the basis of circumstantial evidence without any such direct statement like Routly v. State, 440 So.2d 1257 (Fla. 1983) and Cave v. State, 476 So.2d 180 (Fla. 1985)]. As in Routly, *supra*, there is "no logical reason" for the killing of Schwebes and appellant's directing the details his confederates should employ in assassinating the victim at his home, other than to eliminate him from exposing "Lords" members to authorities and ultimately Foster himself.

---

[15]*See also* Kokal v. State, 492 So.2d 1317 (Fla. 1986)(approving finding of the avoid arrest aggravator where defendant admitted "dead men can't tell lies"); Wuornos v. State, 644 So.2d 1000 (Fla. 1994)(aggravator appropriate where defendant confessed she wanted victim to die because she could not afford to be arrested which would have resulted in her inability to continue working as a prostitute and thus jury question existed as to whether witness elimination was a dominant motive for the killing).

Appellant argues that no arrest was imminent and that Schwebes did not know Foster. As stated in Hitchcock v. State, 578 So.2d 685, 693 (Fla. 1990):

> Contrary to his current contention, we have never held that "[a]ctual, subjective awareness by the accused of an impending arrest must be proven beyond a reasonable doubt" before this aggravator can be found.

Accord, Fotopoulos, *supra*. As to the claim that there would be no need for concern by Foster about any Schwebes activity since he was not a student of the victim, consider that in fact witness David Adkins was able to identify Foster in court as one of the "boys" who ran in front of his car at the time of Schwebes' confrontation with Lords of Chaos members (Vol. XVIII, R. 1159-64). Quite apart from Adkins, the record is replete with testimony that the purpose or goal of the Lords of Chaos organization was to commit vandalism or destroy whatever they could in Ft. Myers (see Magnotti testimony Vol. XVIII, R. 1088-89; Brad Young testimony Vol. XVIII,. R. 1187; Burnette testimony Vol. XIX, R. 1198; Shields testimony Vol. XX, R. 1450). There was testimony that Foster had threatened to kill anyone who exposed the activities of the Lords of Chaos, according to Young (Vol. XVIII,. R. 1187) and Christopher Burnette (Vol. XIX, R. 1199). Magnotti testified that the reason for Schwebes killing was because their friends were caught at school and "we didn't want

them turned into the police" (Vol. XVIII, R. 1120). Torrone testified that Schwebes interrupted the plan to set the school on fire (Vol. XIX, R. 1272) and as Shields testified, Foster was concerned about exposure of the Lords of Chaos and said he had to kill Schwebes so that Black and Torrone would not get turned over to the police (Vol. XX, R. 1459-60). According to Black the victim was killed because he was in their way (Vol. XIX, R 1308). Burnette testified that Black said Schwebes had to die, he knew too much and Foster answered we can do that (Vol. XIX, R. 1203-04). Foster was the most upset with Schwebes' interference (Vol. XX, R. 1459). After the killing there was a conversation that Black was to receive credit for this because it was to make sure he wouldn't get in trouble (Vol. XVIII, R. 1119). In short, even if Foster were not immediately identifiable by Schwebes, the danger of disclosure of the group's activities should Schwebes follow through on informing resource officer and deputy sheriff Montgomery about Black and Torrone, that was too great a danger that the group's activities would face the light of day. Mr. Schwebes was executed because Foster feared he would reveal to authorities personnel and matters of the Lords of Chaos as surely as the victim -- murdered to eliminate a witness -- was in Alston v. State, ___ So.2d ___, 23 Florida Law Weekly S453 (Fla. 1998).

As to Foster's argument that it was Black who initiated the comment that Schwebes had to die, that is true but the overwhelming evidence is that Foster took over the planning and direction of the group. Foster rejected as impractical the idea of Black to follow Schwebes in his vehicle since the latter had already left (Vol. XVIII, R. 1098-99; Vol. XIX, R. 1204-05; Vol. XIX, R. 1287-88; Vol. XX, R. 1461. According to Shields, Foster said he wasn't ready and didn't have his gun). Instead Foster directed they learn the victim's address by calling information on the phone, met at his house with Magnotti, Shields and Black and formulated the plan of going to the victim's house, changing the license tag to one stolen earlier that day and utilizing Shields to knock on the door to get the victim in the open. When Magnotti expressed the view beforehand that Foster's idea was too simple, Foster wouldn't listen and maintained that it would work -- it was his plan (Vol. XVIII, R. 1102-05).

Perhaps the irony is that as matters transpired and appellant did not foresee he had good reason to be concerned about disclosure of the Lords of Chaos and their activities. After he murdered Schwebes with the lesser assistance of Shields, Black, and Magnotti and engaged in a celebratory "group hug" to acknowledge a job well done (Vol. XVIII, R. 1119; Vol. XX, R. 1478) and encouraging his

colleagues that there had been no major “fuck-ups” (Vol. XIX, R. 1304), the activities of the Lords of Chaos came to light following their arrests and his associates now are in prison for several years and Mr. Foster is on death row.

Finally, appellant’s disagreement with the trial court’s sentencing findings are *de minimis*. Foster contends that the Lords of Chaos group had been in existence less than one month and could not have been committing criminal acts for two months and that it was improper for the state to introduce at the Spencer hearing the twenty-seven count information charging RICO, conspiracy, and other offense (Vol. XI, R. 1304-06, 1324). Appellant below offered no objection either in its reply memorandum to the state’s sentencing memorandum disputing the two months contention (Vol. X, R. 1267C, Vol. XI, R. 1320-23) nor did the defense object at the sentencing hearing on June 17, 1998 (Vol. XII, R. 1452-72). The instant situation is unlike Porter v. State, 400 So.2d 5 (Fla. 1981) where the defendant did not have an opportunity to respond to facts relied on by the sentencing judge. And while it is true that the charging information submitted by the prosecutor at the Spencer hearing contained only allegations and not proof, the sentencing order does not reflect any consideration of improper material not presented at trial. Whether the court’s order recited that the

Lords of Chaos operated for two weeks or two months a remand would not serve any useful purpose and any error is harmless since Mr. Foster subsequently entered a plea to a number of the counts in the information and was adjudicated upon them in February of 1999. A remand to the court below would merely constitute “legal churning”. State v. Rucker, 613 So.2d 460, 462 (Fla. 1993).

ISSUE V

WHETHER THE SENTENCING ORDER WILL NOT SUPPORT THE SENTENCE IMPOSED BECAUSE THE COURT ALLEGEDLY FAILED TO PROPERLY CONSIDER MITIGATING EVIDENCE AND HIS FINDINGS ARE ALLEGEDLY UNCLEAR.

Appellant initially complains that the trial court should have found age as a mitigator. The court's order recites:

> The age of the Defendant at the time of the crime. § 921.141(6)(g), Fla. Stat.
>
> It is uncontroverted that the Defendant was eighteen years old at the time of the killing. Counsel for the Defendant has argued that the trial court must find that this mitigating circumstance has been proven. However, counsel cites no case where the Court is compelled to find that the age of the Defendant should be mitigating factor where the Defendant was neither a minor nor possessed a young mental or emotional age.
>
> To the contrary, based upon the evidence presented, it is plain to the Court that the Defendant was anything but young, mentally or emotionally or even chronologically. Indeed the Defendant had not attended school for some two years before the murder, had traveled overseas as an exchange student and had completed his GED requirement and had taken other courses in preparation for life as an adult.
>
> Parenthetically the Court observes that when an eighteen year old becomes the ostensible "leader" of a group of criminals known as the "Lords of Chaos," then meticulously plans and carries out the shotgun slaying of a man whose misfortune it was to be at the wrong place at the wrong time, that young man loses the right

> to have age taken into consideration when the Court imposes sentence. The jury obviously agreed as it was instructed on the statutory mitigator of age and rejected it by a vote of nine to three. The Court likewise finds that age is not a mitigator in this case.
>
> (Vol. XII, R. 1479-80)

Appellant relies on Mahn v. State, 714 So.2d 391 (Fla. 1998) but this Court's discussion of the age mitigator there clearly shows it to be distinguishable from the instant case:

> [11] [12] [13] We have long held that the fact that a defendant is youthful, "without more, is not significant." *Garcia v. State,* 492 So.2d 360, 367 (Fla.) *cert. denied,* 479 U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986). Therefore, if a defendant's age is to be accorded any significant weight as a mitigating factor, "it must be linked with some other characteristic of the defendant or the crime such as immaturity." *Echols v. State,* 484 So.2d 568, 575 (Fla.1985); *see also Sims v. State,* 681 So.2d 1112, 1117 (Fla.1996) (finding that "without more," defendant's age of twenty-four was not a statutory mitigator since no evidence showed that his "mental, emotional, or intellectual age was lower than his chronological age"). In this case, we conclude that the trial court abused its discretion in refusing to consider Mahn's age as a statutory mitigator because, unlike the defendant in *Sims,* there was much "more" than Mahn's chronological age to be considered and which should have compelled the trial court to link those factors to his age or maturity as mitigation. *Echols,* 484 So.2d at 575. Instead, the trial court rejected the statutory age mitigator by finding as follows in its sentencing order:

> The double murder took place on the Defendant's 20th birthday. (FN8) None of the doctors that testified said that the Defendant was retarded. The Defendant had recently received his GED. The Defendant knew the difference between right and wrong. The Defendant's age at the time of the crime is not a mitigating factor.
>
> However, the record shows that Mahn was far from a normal nineteen-year old boy at the time of the killings. Rather, Mahn had an extensive, ongoing, and unrebutted history of drug and alcohol abuse, coupled with lifelong mental and emotional instability. (FN9) Mahn's unrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse provided the essential link between his youthful age and immaturity which should have been considered a mitigating factor in this case. *Cf. Campbell v. State,* 679 So.2d 720, 725-26 (Fla.1996) (finding trial court erred in not giving requested jury instruction on age as a mitigating circumstance when expert psychological testimony linked defendant's age of twenty-one with his "significant emotional immaturity"). Therefore, we find that the trial court abused its discretion in rejecting Mahn's age as a statutory mitigating circumstance.

(Id. at 400).

Foster did not have the qualifying features of the age mitigator described above. *See* Kimbrough v. State, 700 So.2d 634 (Fla. 1994).

Appellant next asserts that the court's order fails to supply the minimal clarity needed to show that it is a reasoned judgment.

This criticism cannot be applicable to the court's discussion of aggravating factors (5)(e) and (i) of F.S. 921.141 as there is a lengthy description of their presence and the court's attributing great weight to each of them (Vol. XII, R. 1475-79).

Foster's primary complaint apparently is that he finds it difficult to ascertain what was found to be mitigating and the weight afforded to it. With respect to mitigation, the court's order recites (excluding the age mitigator mentioned, *supra*) (Vol. XII, R. 1480-84):

> 2. The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty.
>
> When the 1996 Legislature amended Florida Statute § 921.141 to include several new aggravators, it also added Florida Statute § 921.141(6)(h). This reclassified what had previously been considered non-statutory mitigation into a statutory mitigating circumstance. Although this subsection did not exist when the murder of Mark Schwebes was committed, it existed at the time of the Defendant's penalty phase trial. Accordingly, any mitigating aspects of the Defendant's background will be considered as statutory mitigating circumstances.
>
> This Court asked counsel for the Defendant to include in his sentencing memoranda all mitigation he believed had been presented in either the guilt phase or the penalty phase of the trial. I

will address each item raised in the memoranda in roughly the same order as they were presented.

(a) The imposition of the death penalty is disproportionate when this case is compared with other capital cases.

The Court does not take issue with defense counsel's assertion that proportionality review "requires discrete analysis of the facts" citing Terry v. State, 668 So. 2d 954, 965 (Fla. 1996).

However, it is not the function of the circuit court to engage in such review by comparing it with other capital cases which have been heard by this Court or any other throughout the State of Florida. That is solely within the province of the Florida Supreme Court and this Court will respectfully defer to the Supreme Court in that regard. Herring v. State, 446 So. 2d 1049 (Fla. 1984). Accordingly, the Court rejects this as a mitigating factor.

(b) The State's offer of a life sentence in exchange for a guilty plea.

The fact that the State may have offered the Defendant a term of life imprisonment in return for a guilty plea does not constitute a mitigating factor. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990), rev'd on other grounds, 505 U.S. 1215 (1992).

In addition, evidence of the offer or the potential plea is

inadmissible pursuant to Fla. R. Crim. P. 3.172(h). The Court also notes that it was not presented to the jury during the penalty phase of this trial. Accordingly, the Court rejects this as a mitigating factor.

(c) The prosecutor's closing arguments were improper and prejudicial.

Although counsel cites Urbin v. State, 23 FLW S 257(Fla. 1998), plainly this does not constitute a mitigating factor. Accordingly, the Court rejects this as a mitigator.

(d) The imposition of the death penalty is disproportionate when measured against the penalties which will be imposed against the Co-Defendants.

While it is true that the Co-Defendants Peter Magnotti, Christopher Black, and Derek Shields did not receive the death penalty, the Court does not find that this constitutes a valid mitigating factor. In the case of Magnotti, he testified against the Defendant in exchange for a sentence of 32 years in the Department of Corrections. In the case of Christopher Black, he testified against the Defendant in exchange for a life sentence without the possibility of parole. In the case of Derek Shields, he also testified against the Defendant in exchange for a life sentence without the possibility of parole.

Counsel's assertion that the Defendant is "not any more culpable than any of the other three" is patently ludicrous. It was

uncontroverted that the Defendant was the triggerman and that as the leader of the Lords of Chaos, it was his plan to kill that was implemented and ultimately resulted in the shotgun slaying of Mark Schwebes. Kevin Foster was the most culpable Defendant, and as such, a death sentence would not be disproportionate. Sliney v. State, 699 So. 2d 662 (Fla. 1997); Downs v. State, 572 So. 2d 895 (Fla. 1990). Accordingly, the Court rejects this as a mitigating factor.

(e) The imposition of the death penalty is disproportionate to the nature of the offense and to the character of the Defendant.

This is not a mitigator at all, but rather an allegation by the Defendant that the death penalty in this case would be violative of his constitutional rights as provided in the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution. Accordingly, the Court rejects this as a mitigator.

(f) The Defendant's positive personality traits and character.

Numerous witnesses testified for the Defendant in this regard. For instance, Mary Ann Robinson, an African American woman and a neighbor testified that the Defendant helped her when she had car trouble and assisted her with jobs around her home. She further testified that he was a "Nice young

man." Another witness, Robert Fike, testified that the Defendant performed "good work" and was a "good worker." Yet another witness testified that the Defendant was "A nice polite young man." In all, over twenty witnesses testified as to the Defendant's good character.

However, nearly all of them stated that it had been quite some time since they had had any contact with the Defendant. Two witnesses in particular testified that it had been four years since they had even seen the Defendant and had had no contact with him for over four years as of the day of the trial.

One witness, Carole Perrella, a former Riverdale High School teacher, described the Defendant as a "Very loving young man." She concluded her testimony by stating "I feel sorry for people who don't know Kevin." Of course Mark Schwebes didn't know Kevin Foster but that didn't keep Foster from shooting him in the face with a shotgun. Ms. Perrella also stated that, in her opinion, Kevin Foster could not have committed this crime. For the reasons set forth below, Ms. Perrella's opinion is not mitigation.

(g) <u>In all, the Defendant has identified 23 "Non-statutory mitigators" in his sentencing memorandum, all of which "Should be given great weight."</u>

The Court has considered each and every one of the non-statutory mitigators and provides each one of

them very little weight individually and very little weight collectively. They run the gamut from the sublime to the ridiculous. For example, the Defendant was a premature baby. He was abandoned by his natural father at one month old. He will adjust well to prison life. The Court has considered this particular mitigator and affords it absolutely no weight whatsoever. The others have been, as stated previously, duly considered and have been afforded very little weight.

In essence, the Defendant presented two personalities to the World. One side of the personality would allow the Defendant to look after a man confined to a wheelchair. The other would allow him to meticulously plan and carry out a cold, calculated and premeditated murder. None of the witnesses who testified in favor of the former personality were even remotely aware of the latter personality. It is that personality the Defendant exhibited on the evening of April 30, 1996 when he brutally executed Mark Schwebes.

(h) The Defendant has maintained his innocence in this case.

Although not specifically argued by counsel during the Spencer hearing conducted in this matter on May 28, 1998, the Defendant offered his affidavit into evidence. That affidavit is consistent with the alibi offered by the Defendant's mother, Ruby Foster, and the Defendant's sister, Kelly Foster. Lingering or residual doubt is not a

> mitigating factor under the law of the State of Florida. King v. State, 514 So. 2d 354 (Fla. 1987).
>
> Lest anyone misconstrue this statement by inferring that this Court has such a doubt, let me make it clear that I do not. The jury had no reasonable doubt about the Defendant's guilt. This Court has no doubt that the right person, Kevin Don Foster, has been tried, convicted, and is soon to be sentenced for this murderous act. The fact that the Defendant still protests his innocence is irrelevant to this proceeding. It is neither aggravating nor mitigating. The Court simply disregards all such testimony offered by these witnesses.

Many of the twenty-three proposed non-statutory mitigators were repetitious restatements of each other.[16] The trial court explained the rejection of positive personality traits and character in subsection f (Vol. XII, R. 1482-83) -- that among those who described his good character were witnesses who had not had contact with him in recent times. The court further explained that Foster had presented two personas, one that allowed him to

[16]For example, rehabilitation potential is covered by numbers (1) and (18); helpful to other people is enumerated in (2), (12), (16), (17), (19), (22) and (23); his character was asserted in (3), (5), (13); his friendship with family members and friends in (7), (15) and (20). *See* Reaves v. State, 639 So.2d 1, 6 (Fla. 1994)(judge could reasonably regroup several proffered mitigating factors into three).

look after one confined to a wheelchair and the other to meticulously plan and carry out a cold, calculated premeditated murder (this aggravator remains unchallenged in this appeal)(Vol. XII, R. 1483-84). As to the court's providing no weight to Foster's adjusting well to prison life, the lower court correctly acted since none of the defense witnesses testified that he would adjust well to prison life, unlike cases such as McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Carter v. State, 560 So.2d 1166 (Fla. 1990); and McCray v. State, 582 So.2d 613 (Fla. 1991) where the rehabilitation mitigator was supported by lay or expert testimony. That appellant was a premature baby is not a mitigating factor, absent some explanation why that fact alone serves to reduce the penalty from death to life imprisonment and no explanation was offered.[17]

The remaining non-statutory mitigators were considered and accorded very little weight both individually and collectively, which the trial court could permissibly accord. *See e.g.* Cave v. State, ___ So.2d ___, 24 Florida Law Weekly S17 (Fla. 1998); Blanco v. State, 706 So.2d 7 (Fla. 1997); Elledge v. State, 706 So.2d

[17]That Foster was abandoned by his father at age one month is discounted by the fact that John Foster adopted appellant following the abandonment (Vol. XXIII, R. 2025) and he was loved by "parents, friends, family, everything" (Vol. XXIII, R. 2033).

1340, 1347 (Fla. 1997).

Even if a trial court's order does not specifically address certain non-statutory mitigating circumstances and thus does not fully comply with Campbell v. State, 571 So.2d 415 (Fla. 1990), such error can be harmless. *See* Cook v. State, 581 So.2d 141, 144 (Fla. 1991)(after finding the death sentence proportionate since the defendant not his accomplices killed the victims, court concluded that sentence of death would stand even if the sentencing order had contained findings that each of the non-statutory mitigating circumstances had been proven); Thomas v. State, 693 So.2d 951, 953 (Fla. 1997)(trial court's sentencing order which failed to mention evidence that defendant was a "delightful young man", "very loving" with a "lot of good in him" constituted harmless error because the evidence in aggravation was massive in counterpoint to the relatively minor mitigation); Wickham v. State, 593 So.2d 191 (Fla. 1991)(evidence of abusive childhood, alcoholism and extensive history of hospitalization for mental disorders should have been found and weighed by the trial court but in light of the strong case for aggravation, the trial court's error could not reasonably have resulted in a lesser sentence); Barwick v. State, 660 So.2d 685, 696 (Fla. 1995)(any error in articulating particular mitigating circumstance was harmless).

Appellant’s claim is meritless; if any error, it is harmless.

ISSUE VI

WHETHER THE SENTENCE OF DEATH SATISFIES THE PROPORTIONALITY REQUIREMENT.

Appellant's final argument is that the death penalty is not proportionate. He contends that the killing was not "particularly heinous".[18] Foster fortifies his contention by urging that since the "avoid arrest" aggravator seems improper (to him)(Issue IV, *supra*), that leaves only one valid aggravator -- CCP -- which he believes to be trumped by the testimony of friends of Ruby Foster that he was compassionate, hardworking, non-violent who aided those less fortunate. He is also "Eddie Haskel" taken to the extreme. There is a reason why both judge and jury remained unimpressed by the proffered "nice guy" mitigation testimony presented; much of it was presented by witnesses who had little contact with him other than limited work occasions (Fike, Moore) or only noticed his good behavior during their friendship with his mother (Newberry, Kevin and Marsha Martin, Shirley Boyette, Brian Burns), or only saw

[18]He presumably means not "especially heinous," atrocious or cruel under this Court's capital jurisprudence because a shotgun blast to the face produces instantaneous death; Foster, of course, would be hard pressed to explain to laymen in society this was not a heinous killing. In any event the argument is a strawman since the state did not urge HAC and HAC is not a *sine qua non* to demonstrate proportionality.

appellant infrequently when he was well-mannered (Stevens, Lopez,[19] Carol Shear, Eric Smith, John Smith). Some simply refused to accept the notion that he was guilty (Shirley Boyette, Carol Perella). The trial court specifically noted in its findings that such witnesses had also testified that it had been a period of years since they had contact with or seen the appellant. That appellant was able to present one facade earlier in his life of a compassionate figure, his activities more recently showed the darker side of his nature concealed perhaps from family friends and acquaintances -- a group leader who adopted the nickname God, who ratified the idea and co-opted the plan to kill Schwebes and insisted on its implementation to more recalcitrant members (the plan including the discovery of the victim's address from the phone company, use of a stolen license tag on the vehicle used to take them there, the surveillance of the murder site, the selection of Shields to draw the victim outside, the use of Black as get-away driver, the insistence on Magnotti's presence although he served no specific role, appellant's use of his own shotgun which he thought would leave no ballistic evidence).

Appellant does not benefit from any comparison of his case to

[19]And Lopez had a conviction of a felony involving dishonesty or false statement (Vol. XXIII, R. 1985-86).

Jones v. State, 705 So.2d 1364 (Fla. 1998) and Nibert v. State, 574 So.2d 1059 (Fla. 1990). The former case was deemed disproportionate with a single aggravator (during a robbery for pecuniary gain) and copious unrebutted mitigation which included organic brain damage, borderline retardation with IQ of 76 and the mental age of a child, and who was distraught, hysterical and crying after the shooting. The jury recommendation was by the "narrowest of margins", seven to five. Jones admitted the shooting to police. In the latter case there was uncontroverted evidence of physical and psychological abuse by defendant who had a great deal of remorse and was overcome by revulsion at the crime. There was expert testimony supporting the two statutory mental mitigators, chronic alcohol abuse and a below average IQ.

In contrast, while Foster introduced family friends to suggest he was a nice guy, the facts of the case show otherwise. There was no abuse, no disadvantaged childhood, no alcoholism and no attempt to justify the crime by any perceived need for money. There was no brain damage, retardation and above all no remorse -- as Foster maintained at the time of sentencing that he was innocent and a victim of others. The jury's recommendation was a decisive nine to three (and juror Martie had indicated she could never vote for death).

Nor is appellant's case similar to Williams v. State, 707 So.2d 683 (Fla. 1998) or Johnson v. State, 720 So.2d 232 (Fla. 1998). Williams was another single aggravator pecuniary gain case (after removal of the under sentence of imprisonment factor), a killing when the victim resisted the robbery. Williams did not involve a planned assassination of a victim who had done no injury to the defendant; and the proportionality ruling of this Court did not emphasize the overwhelming weight of mitigators but rather a comparison to other mere robbery cases. Johnson too involved a comparison to other capital cases where the facts surrounding the homicide were unclear and aggravating circumstances were not extensive. Certainly the Court did not announce a rule that achievement of a GED must trump the fact of an execution-assassination.

A more appropriate comparison for proportionality purposes would be execution-style killings like Mordenti v. State, 630 So.2d 1080, 1085 (Fla. 1994); Downs v. State, 572 So.2d 895 (Fla. 1990); Kelley v. State, 486 So.2d 578, 586 (Fla. 1986)(J. Overton, concurring specially). Moreover, Foster was not merely the triggerman on Schwebes' execution; he was the leader of the group who had rejected the initial suggestion of following the victim as impractical and replaced it with the more sophisticated scheme of

finding the address by telephone, by selecting the particular roles to be utilized by his confederates, and by going to the victim's home late at night after changing and using the stolen license tag on the car. It was his plan, his scheme, his gun and his actions that caused the murder.[20]

Lastly, appellant contends that "equally culpable" co-defendants (Black, Magnotti and Shields) did not receive the death penalty. As the lower court pointed out they were not equally culpable:

> In the case of Magnotti, he testified against the Defendant in exchange for a sentence of 32 years in the Department of Corrections. In the case of Christopher Black, he testified against the Defendant in exchange for a life sentence without the possibility of parole. In the case of Derek Shields, he also testified against the Defendant in exchange for a life sentence without the possibility of parole.
>
> Counsel's assertion that the Defendant is "not any more culpable than any of the other three" is patently ludicrous. It was uncontroverted that the Defendant was the triggerman and that

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[20]Even less comparable to the instant case is Kramer v. State, 619 So.2d 274 (Fla. 1993) described by this Court as "nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." Id. at 278. Similarly, Urbin v. State, 714 So.2d 411 (Fla. 1998) was a mere robbery killing diluted not only by the defendant's age but the statutory mental mitigator of impaired capacity to appreciate the criminality of his conduct and extensive parental abuse and neglect (not applicable *sub judice*).

> as the leader of the Lords of Chaos, it was his plan to kill that was implemented and ultimately resulted in the shotgun slaying of Mark Schwebes. Kevin Foster was the most culpable Defendant, and as such, a death sentence would not be disproportionate. Sliney v. State, 699 So. 2d 662 (Fla. 1997); Downs v. State, 572 So. 2d 895 (Fla. 1990). Accordingly, the Court rejects this as a mitigating factor.
>
> (Vol. XII, R. 1482)

As in Sliney, this defendant was more culpable; it was his plan, his murder weapon and he was the triggerman. Magnotti was merely present and Foster directed Shields to be the one to knock on the door and when some indicated a lack of resolution Foster responded "someone is going to die tonight" (Vol. XX, R. 1470-71). *See also* Heath v. State, 648 So.2d 660, 665-666 (Fla. 1994).[21]

The instant case is one of the more aggravated and least mitigated cases for which the ultimate sanction is fully warranted and appropriate.

[21]The instant case is unlike Puccio v. State, 701 So.2d 858 (Fla. 1997) where the defendant played a lesser role than his colleagues in the planning and murder.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar I.D. No.: 0134101
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert F. Moeller, Assistant Public Defender, Post Office Box 9000, Drawer PD, Bartow, Florida 33831, this 20th day of May, 1999.

COUNSEL FOR APPELLEE