IN THE SUPREME COURT OF FLORIDA

ANTHONY FARINA,

Case No. SC05-935

Petitioner,

v.

James V. Crosby, Jr., etc.,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW the Respondents, and respond as follows to Farina's petition for writ of habeas corpus. For the reasons set out herein, the petition should be denied in all respects.

RESPONSE TO PRELIMINARY STATEMENT

The "Preliminary Statement" found on page 1 of the petition is admitted only insofar as it quotes Article 1, Section 13 of the *Florida Constitution*, and insofar as it sets out what citation forms are used in the petition. All other averments contained in the "Preliminary Statement" are argumentative and are denied.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The "Request for Oral Argument" found on pages 1-2 of the petition is neither admitted nor denied. The

Respondents defer to the preference of the Court with respect to oral argument.

RESPONSE TO INTRODUCTION

The "Introduction" set out on pages 2-3 of the petition is argumentative and misleading, and is denied.

RESPONSE TO PROCEDURAL HISTORY

The "Procedural History" set out on pages 3-8 of the petition is argumentative and is denied in all respects. The Respondents rely upon the following procedural history of this case, which is taken from this Court's decision on direct appeal following resentencing:

> Anthony Joseph Farina appeals the imposition of the death penalty upon resentencing. We have jurisdiction pursuant to article V, section 3(b)(1) of the *Florida Constitution*. For the reasons expressed below, we affirm the death sentence.
>
> Anthony [FN1] and his brother Jeffery Farina were convicted and sentenced to death for the fatal shooting of Michelle Van Ness during the robbery of a Taco Bell restaurant in Daytona Beach in 1992. The record shows that both brothers planned and participated in the robbery, but that Jeffery actually fired the fatal shot, shot two other restaurant employees, and stabbed the assistant manager in the back after his gun misfired.
>
> > FN1 Because the codefendant brothers share the same surname, this opinion will refer to the appellant and his codefendant by their given names to avoid confusion.

On appeal, this Court affirmed Anthony's conviction for first-degree murder, but vacated his death sentence and remanded for a new sentencing proceeding due to error in the jury selection process. *See Farina (Anthony) v. State,* 679 So. 2d 1151, 1157 (Fla. 1996). We also remanded codefendant Jeffery's case for resentencing due to the same error. *See Farina (Jeffery) v. State,* 680 So. 2d 392, 396-99 (Fla. 1996). On remand, a joint penalty proceeding was held before a new jury. By a vote of twelve to zero the jury recommended the death penalty for each defendant. The trial court followed the jury recommendation and sentenced both defendants to death.

In imposing the death penalty on Anthony, the trial judge found five aggravating factors: (1) defendant was previously convicted of another capital felony or felony involving the use or threat of violence based upon the attempted murders of the other restaurant employees; (2) the murder was committed to avoid arrest; (3) the murder was committed for pecuniary gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). The judge found three statutory mitigating factors (Anthony had no significant history of prior criminal activity; he was an accomplice in the capital felony committed by Jeffery and his participation was relatively minor; he was eighteen years old at the time of the crime) and fifteen nonstatutory mitigating factors (abused and battered childhood, history of emotional problems, cooperation with the police, involvement in Christianity and Bible study courses while in prison, good conduct in prison, remorse for what happened, assertion of a positive influence on others, no history of violence, abandonment by his father, poor upbringing by his mother, lack of education, good employment history, and amenability to rehabilitation). The trial judge concluded that the aggravating factors far outweighed the

> mitigating factors, and imposed the death penalty.

Farina v. State, 801 So. 2d 44, 49 (Fla. 2001). This Court described the aggravation and mitigation in the following way:

> In imposing the death penalty on Anthony, the trial judge found five aggravating factors: (1) defendant was previously convicted of another capital felony or felony involving the use or threat of violence based upon the attempted murders of the other restaurant employees; (2) the murder was committed to avoid arrest; (3) the murder was committed for pecuniary gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). The judge found three statutory mitigating factors (Anthony had no significant history of prior criminal activity; he was an accomplice in the capital felony committed by Jeffery and his participation was relatively minor; he was eighteen years old at the time of the crime) and fifteen nonstatutory mitigating factors (abused and battered childhood, history of emotional problems, cooperation with the police, involvement in Christianity and Bible study courses while in prison, good conduct in prison, remorse for what happened, assertion of a positive influence on others, no history of violence, abandonment by his father, poor upbringing by his mother, lack of education, good employment history, and amenability to rehabilitation). The trial judge concluded that the aggravating factors far outweighed the mitigating factors, and imposed the death penalty.

Farina v. State, 801 So. 2d 48-49.[1]

THE ISSUES RAISED ON DIRECT APPEAL

On direct appeal from his conviction and sentence, Farina raised the following issues, as framed by this Court:

> On appeal, Anthony raises twelve issues, including two claims presented in a supplemental brief which relate to the appropriateness of his death sentence now that Jeffery has been sentenced to life imprisonment. Anthony claims that: (1) the State improperly used peremptory challenges to strike two African-American jurors; (2) the trial court erred in denying his motion *in limine* to prohibit the introduction of his taped conversation with his brother Jeffery; (3) the trial court erred in denying his motion to suppress this taped conversation; (4) the trial court erred in denying his motion to sever his resentencing proceeding from Jeffery's; (5) the trial court erred in admitting victim impact evidence, in allowing the evidence to become the main feature of the trial, and in refusing to give a requested limiting instruction; (6) the HAC aggravating circumstance was improperly found; (7) the CCP aggravating circumstance was improperly found; (8) the avoid arrest/witness elimination aggravating circumstance was improperly found; (9) the death sentence is not proportionally warranted; (10) Florida's death penalty is unconstitutional on numerous grounds; (11) he is entitled to a new sentencing proceeding so that the judge and jury can consider Jeffery's life sentence under *Brennan* in determining the appropriate sentence for him; and (12) death is disproportionate in light of other

[1] In footnote 3 on page 6 of the petition, Farina argues that he "had the emotional maturity of a fourteen-year-old." For the reasons discussed in connection with Claim IV, *infra*, the "emotional maturity" argument has no basis in the law, and is meaningless.

> cases where the triggerman received a life sentence.

Farina v. State, 801 So. 2d at 49.

RESPONSE TO STATEMENT OF JURISDICTION

To the extent that the jurisdictional statement set out on pages 8-9 of the petition asserts that this Court has jurisdiction to consider this petition, the Respondents do not contend otherwise. To the extent that the jurisdictional statement claims that errors occurred during Farina's trial, that Farina is entitled to relief, or that this court should reach a particular result in this case, those averments are denied.

RESPONSE TO GROUNDS FOR RELIEF

I. THE "FAILURE TO RAISE MERITORIOUS ISSUES" CLAIM

On pages 9-47 of the petition, Farina argues that appellate counsel was ineffective for "failing" to raise various issues on direct appeal to this Court. However, contrary to the position taken by Farina in this proceeding, appellate counsel is not required to raise every conceivable issue to avoid a charge of ineffectiveness:

> []I cannot agree that the quality of counsel's performance can be judged much by the length of briefs or the number of issues raised. Especially in the death penalty context, too many briefs are too long; and too many lawyers raise too many issues. Effective lawyering involves the ability

> to discern strong arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly. The Supreme Court -- as today's court recognizes -- has never required counsel to raise every nonfrivolous argument to be effective. *See Smith v. Murray,* 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L. Ed. 2d 434 (1986). That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. *See Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices. Today's court disposes of the ineffective assistance of counsel claims on lack of prejudice grounds. So, what the court says about counsel's performance is *dicta*: language inessential to determining the case. Still, I worry that some of the *dicta* sends the wrong signal to lawyers.

Heath v. Jones, 941 F.2d 1126, 1141 (11th Cir. 1991) (Edmonson, J., concurring in denial of habeas relief). In evaluating an ineffectiveness of appellate counsel claim similar to the claims contained in Farina's brief, the United States Supreme Court held:

> After conducting a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983). It will often be the case

> that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland v. Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689.

Smith v. Murray, 477 U.S. 527, 535-536 (1986). In *Jones*, the Supreme Court had elaborated further on the responsibilities of the appellate advocate:

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:
>
> > "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [Experience] on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, *Advocacy Before the United States Supreme Court*, 25 Temple L. Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

> "Most cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, *Appellate Practice in the United States* 266 (1981). [FN5]
>
> FN5 Similarly, a manual on practice before the Court of Appeals for the Second Circuit declares: "[A] brief which treats more than three or four matters runs serious risks of becoming too diffuse and giving the overall impression that no one claimed error can be serious." Committee on Federal Courts of the Association of the Bar of the City of New York, *Appeals to the Second Circuit* 38 (1980).

There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. *See, e. g., Fed. Rule App. Proc*. 28(g); *McKinney's New York Rules of Court* §§ 670.17(g)(2), 670.22 (1982). Even in a court that imposes no time or page limits, however, the new *per se* rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the

> great advocate John W. Davis, "go for the jugular," Davis, *The Argument of an Appeal*, 26 A. B. A. J. 895, 897 (1940) -- in a verbal mound made up of strong and weak contentions. See generally, *e. g.,* Godbold, *Twenty Pages and Twenty Minutes -- Effective Advocacy on Appeal*, 30 SW. L. J. 801 (1976). [footnote omitted].

Jones v. Barnes, 463 U.S. 745, 754-753 (1983). Nevertheless, the brief filed by Farina's direct appeal counsel raised 10 individually-captioned issues, and was 96 pages in length. Counsel obviously had few pages to spare for additional issues, and, given that Farina seems to maintain that the issues raised on direct appeal continue to represent valid claims of error that play into his "cumulative error" claim (*Initial Brief*, at 49), it is not clear what Farina believes appellate counsel should have done. There is no suggestion that any issue raised on direct appeal should have been replaced with the issues raised in the habeas petition, and Farina has not explained how an additional 50 pages of argument could have been added to his brief on direct appeal. When fairly considered against the backdrop of *Smith* and *Jones*, there is no error -- appellate counsel selected the 12 issues he believed to be the most meritorious and pressed them on appeal. The fact that this Court affirmed Farina's death sentence does not mean that counsel was ineffective, and the fact that present counsel would have argued more issues on appeal

means nothing at all. Selection of the issues to be raised on appeal is the job of the appellate advocate, and narrowing the issues is, as the Supreme Court has held, the hallmark of effective appellate advocacy. When stripped of its pretensions, the most the habeas petition demonstrates is that present counsel would have used more pages to present additional arguments -- that does not establish ineffectiveness of counsel.

THE "FAILURE TO RAISE PROSECUTORIAL MISCONDUCT" CLAIM

On pages 12-30 of the petition, Farina asserts that the six-page cross-examination of Reverend James Davis constituted "introduction of evidence of biblical authority to impose the death penalty." (R1835-1842).[2] Despite the hyperbole of the petition, the claim contained in it was not preserved at trial, and appellate counsel cannot have been ineffective for not raising an unpreserved claim. *Zack v. State/Crosby,* 30 Fla. L. Weekly S591, 595 (Fla. July 7, 2005); *Hendrix v. State/Crosby*, 30 Fla. L. Weekly S564, 568 (Fla. July 7, 2005).

Florida law is settled that a specific objection is required in order to preserve an issue for review on appeal. *Dufour v. State/Crosby*, 905 So. 2d 42 (Fla. 2005);

[2] This claim is based solely on 6 pages of cross-examination -- it is **not** a closing argument claim.

Wright v. State, 857 So. 2d 338, 358 (Fla. 2003). In a remarkably misleading argument, Farina claims that his objection on relevance grounds (R1839) (which came part-way through the cross-examination at issue) was sufficient to preserve the claim now raised as a basis for the ineffectiveness of counsel claim. *Petition,* at 17-18. The true facts are that the objection based on relevance did not preserve the Constitutional claim contained in the petition, which is based on the First, Fifth, Sixth, Eighth and Fourteenth Amendments.[3] *See, Rodriguez v. State*, 609 So.2d 493, 499 (Fla. 1992) (relevancy objection not sufficient to preserve claim that testimony was "inherently prejudicial.")[4] In order to preserve the adequacy and integrity of Florida's settled contemporaneous objection rules, this Court should clearly state that the claims contained in Farina's petition were not preserved at trial and that, because those issues were not preserved, appellate counsel cannot have been ineffective for "failing" to raise such an issue.

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[3] No claims of ineffectiveness on the part of trial counsel which relate to any of these issues have ever been raised.

[4] At various points in his petition, Farina argues, in footnotes, about other instances of "error." Assuming that a footnote is sufficient to brief an issue for appellate review, none of those matters were preserved at trial, either, and cannot support an ineffectiveness of counsel claim.

Perhaps recognizing the tenuous character of this claim, Farina attempts to rescue it by casting it as a claim of "fundamental error." However, that reformulation of the claim itself does nothing to help him because the matters complained of are not error at all, and certainly do not rise to the level of fundamental error:

> it is well-settled that, in order to raise a claim of error on appeal, the alleged error must be objected to at trial when it occurs. *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). The purpose of requiring a contemporaneous objection is to put the trial judge on notice of a possible error, to afford an opportunity to correct the error early in the proceedings, and to prevent a litigant from not challenging an error so that he or she may later use it as a tactical advantage. *Crumbley v. State*, 876 So. 2d 599 (Fla. 5th DCA 2004); *Fincke v. Peeples,* 476 So. 2d 1319, 1322 (Fla. 4th DCA 1985). The only recognized exception to the contemporaneous objection requirement is in the event of fundamental error. *State v. Delva*, 575 So. 2d 643, 644-45 (Fla. 1991).
>
> Fundamental error is error that "goes to the foundation of the case or the merits of the cause of action and is equivalent to the denial of due process." *J.B. v. State*, 705 So. 2d 1376, 1378 (Fla. 1998). The fundamental error exception is very limited and "should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling case for its application." *Ray v. State,* 403 So. 2d 956, 960 (Fla. 1981).
>
> Defendant does not cite to any case which supports his position. Indeed, we have previously recognized that we are unaware of any reported case in Florida where the fundamental error exception has ever been invoked to cure an unpreserved evidentiary error at trial. *State v.*

> *Osvath*, 661 So. 2d 1252 (Fla. 3d DCA 1995). We do not find that the testimony concerning defendant's uncharged crimes was error that went to the foundation of the case or that it was so prejudicial as to vitiate the entire trial.

Wooten v. State, 904 So. 2d 590 (Fla. 3rd DCA 2005). Despite the arguments contained in Farina's petition, when the cross-examination at issue is read in context without twisting it to suit one's purpose, that cross-examination is wholly legitimate examination occasioned by the religious nature of the direct testimony of the witness. And, to the extent that further discussion is necessary, this Court has held statements that were far more serious did not amount to fundamental error:

> Ferrell's first claim involves comments made by the trial judge to prospective jurors. During voir dire, a prospective juror indicated that she was recalling biblical sources to help her with her personal feelings on the death penalty. The trial judge then interjected comments before the prospective jurors regarding the origins of the commandment "thou shalt not kill." Specifically, the trial judge stated:
>
> > THE COURT: Let me add one thing here, counsel, every time this comes up we have different opinions about it.
> >
> > This is not the first time this has come up during the course of a jury selection in a capital case.
> >
> > Inquiry has been made over the last twenty or thirty years that both Hebrew and Christian scholars, they tell us--these are students who have been studying it for long years--they tell

> us in the original Bible, in Greek, Hebrew, and Arabic, the Ten Commandments say "Thou shalt not commit murder." It doesn't say anything about "Thou shalt not kill." It says, "Thou shall not commit murder." It does not say, "Thou shalt not kill."
>
> That translation of the Hebrew, Greek and Arabic Bible have [sic] translated it from "murder" to "Thou shalt not kill." But in the original Bible it is, "Thou shall not commit murder."
>
> And also when you say--when attorneys ask you, can you sit in judgment, you are not talking about sitting in judgment of a person morally or socially or any other thing, but just make a determination of guilt or innocence. That is what you are asked to do, not with judgment.
>
> With that proceed.

Counsel for Ferrell did not object to these comments by the trial judge. Ferrell now seeks reversal, claiming that these prejudicial comments were designed to influence the positions of potential jurors as to the acceptability of capital punishment. Ferrell asserts that the judge's unethical and biased comments deprived him of a fair trial. Although Ferrell concedes that this issue has not been preserved for appeal due to the lack of an objection, Ferrell contends that reversal is required because the error is fundamental.

Without question, trial judges and attorneys should refrain from discussing religious philosophy in court proceedings. In a somewhat analogous situation, the California Supreme Court reviewed comments by a prosecutor, in which the prosecutor relied on this same commandment in seeking the death penalty.

> This is precisely the sort of appeal to religious principles that we have repeatedly held to be improper. As we explained recently in [*People v. Sandoval*, 4 Cal. 4th 155, 841 P.2d 862, 883-84 (Cal. 1992), *affirmed sub nom. Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)]: "What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority."
>
> . . . The primary vice in referring to the Bible and other religious authority is that such argument may "diminish the jury's sense of responsibility for its verdict and . . . imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." [*People v. Wrest,* 3 Cal. 4th 1088, 839 P.2d 1020, 1028 (Cal. 1992), *cert. denied*, 510 U.S. 848, 114 S. Ct. 144, 126 L. Ed. 2d 106 (1993)]. The prosecutor here invoked the Bible to demonstrate the legitimacy of capital punishment, and even implied that defendant deserved death under God's law: "God recognized there'd be people like Mr. Wash. . . . Who must be punished for what they have done . . . must forfeit their lives for what he's done." This was improper.

People v. Wash, 6 Cal. 4th 215, 861 P.2d 1107, 1135-36 (Cal. 1993)(citations omitted), *cert. denied,* 513 U.S. 836, 115 S. Ct. 116, 130 L. Ed. 2d 62 (1994). Although the Court strongly criticized the prosecutor's statements, it found them to be harmless when viewed in context with the entire record. **Further, as here, no objection was made to the comments and the error was consequently not preserved for review.** We likewise agree that the judge's brief discussion

> was harmless when viewed in light of the entire record. In fact, the judge's comment in this case was much less egregious than that being reviewed by the California Supreme Court in *Wash*. Consequently, we reject Ferrell's argument that this error is a fundamental one requiring reversal.

Ferrell v. State, 686 So. 2d 1324, 1328 (Fla. 1996). If there was no fundamental error in *Ferrell,* and that is the law, there can be no error here, given that the complained-of questions came during cross-examination of a minister who testified on behalf of Farina and placed religion before the jury to begin with. Without waiving the failure to preserve the issue, there is simply no improper argument, and no basis to support a finding of ineffectiveness on the part of appellate counsel for not raising this unpreserved issue on direct appeal.

To the extent that further discussion of this unpreserved claim is necessary, Farina's reliance on *Romine v. Head* overstates the holding in that case. That decision, as the Eleventh Circuit pointed out, was based on the particular facts of that case, which bear no similarity to the facts of Farina's murder:

> We have previously described why the improper argument here is closely analogous to the *Eberhart* quotation argument which we have found to be improper all seven times we have considered it. The scripture-quoting **argument** in this case, like the *Eberhart*-quoting **argument,** strikes at the heart of one of a Georgia jury's most

> important roles in a capital sentence proceeding, which is to make an individualized determination of whether mercy should be afforded in a specific case to a particular defendant. In six of the seven cases in which this Court has considered the *Eberhart* quotation argument, we have decided that its use rendered the sentence proceeding unfair, concluding that it undermined our confidence in the result to such an extent that habeas relief was required. *See Nelson*, 995 F.2d at 1557-58. We reach the same conclusion here. In view of all of the facts and circumstances, the prosecutor's improper argument in this case undermines our confidence in the sentencing result to such an extent that habeas relief is required as to the sentence. [FN21]
>
> > FN21 The circumstances of this case are unusual. We have no reason to decide, and do not mean to imply any view about, whether the same result would follow if the jurors had not been sequestered in a Baptist assembly and had not been told about getting a good sermon from Brother Caylor, or if the prosecutor's argument had come in reply to argument by the defense or had been responded to in kind by the defense, or if there had been a curative instruction, or if there had been no evidence that the argument had struck home with some jurors, or if the jury had not been initially deadlocked, or if the effect of a deadlock had been different under Georgia law, and so forth. We have decided this case, as we are required to do, based upon all of the specific facts and circumstances presented in it. *See Cargill*, 120 F.3d at 1382; *Gates*. 863 F.2d at 1503; *Brooks*, 762 F.2d at 1400.

Romine v. Head, 253 F.3d 1349, 1370-71 (11th Cir. 2001). (emphasis added). Because *Romine* was driven by its particular facts (which, to say the least, were unusual),

it is of limited precedential value generally, and is of no value at all in determining whether Farina's appellate attorney was ineffective. Given the differences between the facts, and the dispositive factor that the underlying claim in Farina's case was not preserved by proper objection, *Romine* does not support relief.[5]

THE "VICTIM IMPACT" CLAIM

On pages 30-37, Farina argues that appellate counsel was ineffective for failing to argue that the "substance" of the victim impact testimony fell outside the parameters of *Payne v. Tennessee,* and for "conceding at oral argument that the substance of what the victims said was not objectionable." *Petition*, at 30. With the exception of the part of this claim that is based on the transcript of oral argument (a tactic that the State does not agree is permissible), this claim is the same claim that was raised and decided on direct appeal. Pleading this claim as one of ineffectiveness of counsel does not avoid the preclusive effect of the prior decision of this Court.

[5] In the context of closing argument claims, the Eleventh Circuit has pointed out: "that no objection was made during the prosecutor's closing argument further supports our belief that the statement was not severe enough to render the sentencing hearing fundamentally unfair. *See Brooks*, 762 F.2d at 1397 n. 19 ('the lack of an objection is a factor to be considered in examining the impact of a prosecutor's closing argument.')." *Williams v. Kemp*, 846 F.2d 1276, 1283 (11th Cir. 1988).

In its direct appeal decision in this case, this Court held, with respect to the victim impact claim, that:

> In his fifth issue, Anthony makes three claims relating to victim impact evidence. He contends that the trial court erred in: (1) admitting victim impact evidence; (2) allowing the evidence to become the main feature of the trial; and (3) failing to give a requested limiting instruction. Anthony filed a pretrial motion to exclude victim impact evidence on a number of grounds. After hearing, the trial court denied the motion but cautioned that the victim impact evidence could not become the main feature of the trial. The court also ordered the State to provide defense counsel with a list of the proposed victim impact witnesses and their relationship with the victim, which the State provided. At the resentencing proceeding, twelve of Van Ness' friends and family members testified about the impact of her murder.
>
> Both the Florida Constitution and the Florida Statutes instruct that victim impact evidence is to be heard in considering capital felony sentences in our state. *See* art. I, § 16, *Fla. Const.*; § 921.141(7), *Fla. Stat.* (2000); *see also Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995). **The evidence presented in the instant case is the type of testimony that the United States Supreme Court held that a state may choose to admit without violating a defendant's constitutional rights.** *See Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991). This evidence, accordingly, complies with our decision in Anthony's original direct appeal. *See Farina*, 679 So. 2d at 1158 (explaining that on remand the State may present victim impact evidence as long as it comes within the parameters of Payne). Thus, we find no error in the admission of this evidence.
>
> Further, our review of the record does not bear out Anthony's assertion that this evidence became the central feature of the resentencing proceeding or that it was so unduly prejudicial

> that it rendered his trial fundamentally unfair. *See Payne*, 501 U.S. at 825. While such testimony may be inherently emotional, the United States Supreme Court has recognized that "victim impact evidence serves entirely legitimate purposes." *Payne*, 501 U.S. at 825. "There is nothing unfair about allowing the jury to bear in mind the harm [that the killing caused] at the same time as it considers the mitigating evidence introduced by the defendant." *Id*. at 826. Finally, we find no instructional error relating to the admission of the victim impact evidence. The jury was instructed that the evidence could not be considered as an aggravating circumstance, but should only be considered "insofar as it demonstrates [Van Ness's] uniqueness as an individual human being and the result of loss to the community and its members by her death." This instruction is entirely consistent with section 921.141(7) and complies with the guidelines that we explained in *Windom. See also Alston v. State,* 723 So. 2d 148, 160 (Fla. 1998) (approving following instruction regarding victim impact evidence: "You shall not consider the victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter."). Thus, no relief is warranted on this issue

Farina v. State, 801 So.2d at 52-3. (emphasis added).[6] This Court's finding, highlighted above, that the evidence admitted in this case is the sort of evidence that is admissible under *Payne*, is dispositive of the claim contained in Farina's petition. His attempt to create an

[6] On page 36 of the petition, Farina raises a "prosecutorial argument" claim. That claim is based on an inaccurate and out-of-context quote from the record. The record at R2364 demonstrates that Farina has wholly mischaracterized the State's argument, and, even if not already decided, there is no basis for relief.

"unraised" claim out of the facts of this case stands reason on its head. This claim has already been decided against Farina, and he can point to no law suggesting that this Court's prior decision is even open to debate. Because that is so, appellate counsel cannot have been constitutionally ineffective for "failing" to raise the issue contained in Farina's petition -- that issue is the same claim that was decided on direct appeal.[7]

The second component of Farina's claim is that appellate counsel was ineffective for conceding at oral argument that the victim impact testimony was admissible. Given that this Court found in its direct appeal decision that the testimony was properly admitted, Farina cannot demonstrate prejudice under *Strickland v. Washington*.

While this Court's finding that the testimony was admissible is dispositive of the issue, Farina also argues, based upon the transcript of oral argument, that appellate counsel was ineffective for conceding the admissibility issue. Putting aside for the moment any discussion of the tactical wisdom of conceding an unwinable issue, the fact remains that this is not a court of record, and, while oral

[7] The outer limit of *Payne* is that characterizations and opinions by the victim's family about the crime, the defendant, and the appropriate sentence are improper. *Payne v. Tennessee,* 501 U.S. at 830. *See also, Farina (Jeffrey) v. State*, 680 So. 2d 392, 399 (Fla. 1996).

argument transcripts have their value, submission as evidence is inappropriate. Annexing the transcript to the petition was improper, and this Court should not consider it for any purpose.

THE "PROSECUTORIAL MISCONDUCT" CLAIM

On pages 37-45 of his petition, Farina raises various instances of what he describes as "prosecutorial misconduct" during closing argument which, he asserts, should have been raised on direct appeal as grounds for relief. These various claims of misconduct are based upon out-of-context quotations from the record which do not support Farina's claims. Because the claims have no basis in fact, counsel cannot have been ineffective for not raising those various claims. To the extent that Farina argues that certain unobjected-to issues should have been raised as "fundamental error," that argument fails because there is no "error" that rises to the level of fundamental error. *See,* pages 13-17, above.[8]

Farina has created the "burden of proof argument" claim that begins on page 39 of the petition (which is unsupported by any citation to authority) by taking a

[8] The State does not concede that there was any error at all.

single sentence out of context. The argument in its entirety reads as follows:

> The State has the burden of proof in this case, as it does in every criminal case, and our burden is to prove beyond a reasonable doubt that aggravating factors in this case have been proven. Now, your duty is not proof that should make a certain recommendation. Our burden is not to prove beyond a reasonable doubt that these young men should be sentenced to death.
>
> . . .
>
> The burden upon the State is to prove beyond a reasonable doubt each aggravating factor that we believe will support a recommendation by you of the death penalty.

(R2348-50). When read in context, there is no error, and there was no claim that could have been raised on direct appeal with any hope of success. Appellate counsel, who had his credibility with this Court to consider, cannot be faulted for not raising this claim, which does not amount to error in the first place.

The next claim of error is related to the State's argument concerning the mental mitigating factors. This claim is also based on a quotation taken out of context. This argument reads as follows:

> We have another recognized mitigator, and that is if the defendants were under extreme mental or emotional disturbance. There was no testimony of that. In fact, each of the psychologists said each of the defendants knew what they were doing, were competent and sane, and had no significant

> mental disorder to be classifiable as an extreme [sic] mental or emotional disturbance.
>
> . . .
>
> Sanity is not an issue. If either of the psychologists found these men were insane, either now or at the time of the crime, there would be an insanity defense imposed and that's not an issue. What is an issue is whether or not there was extreme mental or emotional disturbance . . .

(R2358-59. Like the preceding claim, this claim has no basis in fact -- appellate counsel was not ineffective for not raising a claim that has no factual basis.

Farina's next claim is based upon the State's argument that **Jeffrey** Farina told the defendant that he (Jeffrey) didn't get the knife in far enough. This claim was not preserved by objection by Anthony's counsel, and, in any event, is irrelevant insofar as Anthony is concerned. Appellate counsel cannot be faulted for not raising an issue that had no relevance to his client. In any event, the jury was instructed to rely on their recollection of the evidence, thus curing any arguable error. (R2361).

Farina next argues that the State engaged in an "impermissible prosecutorial expertise" argument. This argument is also based on an out-of-context reference to the record. The complained-of argument, in its entirety, reads as follows:

> Even in a case that it appears right off the bat, so to speak, that surely there is a death penalty case, we go through a very laborsome process and we should. **It's an orderly process of first conviction beyond a reasonable doubt, and then the requirements that the State go even further and prove one or more aggravating circumstance [sic]. It would support the death penalty, and the legislature is even limited to what we can prove -- what would be aggravating circumstances. And to prove two, that it's mostly related, you will only get credit for one. So there's real control over this.**

(R2364). (emphasis added). The highlighted portion of the argument was omitted from Farina's petition -- that portion of the State's argument changes the "meaning" of the argument from the arguably objectionable "argument" quoted in Farina's petition to an argument that is an accurate statement of the law. Farina's claim to the contrary is convoluted and illogical, and, when the entire argument is read, appellate counsel quite properly declined to attempt to fabricate an issue where none existed.

Farina's argument that the following argument was somehow improper and should have been raised on appeal is virtually incomprehensible:

> The immaturity that you may want to ascribe to people below 20 years old does not mitigate what these two men determined to do and what they carried out. They have brought this judgment upon themselves by their choices, and your recommendation to this Court should be that they pay the ultimate penalty for their crimes.

(R2366). There is nothing improper about that argument when it is read without an eye toward fabricating an issue where none exists. Despite the assertions contained in Farina's petition, the State's argument was nothing more than a proper argument that the defendants had made their choices and should bear the consequences. That is not objectionable, and is certainly not "fundamental error" such that this claim could have been considered absent a timely objection. There is no basis for relief on ineffectiveness of appellate counsel grounds.

II. THE JUROR INTERVIEW CLAIM

On pages 47-48 of the petition, Farina argues that appellate counsel was ineffective for not raising a claim that *Rule of Professional Conduct* 4-3.5(d)(4), which prohibits post-trial juror interviews, is unconstitutional. This claim has been repeatedly rejected as meritless by this Court, *Elledge v. State/Crosby*, 30 Fla. L. Weekly, S429 (Fla. June 9, 2005); *Dufour v. State/Crosby*, 905 So. 2d 42 (Fla. 2005), and, in any event, was not preserved by timely objection at trial. For these two reasons, appellate counsel cannot have been ineffective for not raising this issue on appeal.

III. THE "CUMULATIVE ERROR" CLAIM

On pages 48-49 of the petition, Farina argues that he is entitled to relief based upon what he describes as "cumulative error" which, according to Farina, is based upon errors raised in the habeas petition, the Rule 3.851 motion, the contemporaneous Rule 3.851 appeal, and on direct appeal. A virtually identical claim is contained in Farina's appeal from the denial of his Rule 3.851 motion -- Florida law is settled that claims which are properly raised in a Rule 3.851 motion cannot be re-litigated in a habeas petition. *Atwater v. State/Crosby*, 788 So. 2d 223, 227 (Fla. 2001). Moreover, the "cumulative error" claim is insufficiently briefed because it does no more than refer to other proceedings which are either pending at this time, or have already been decided. Such incorporation by reference of each previously filed pleading is insufficient to place a claim before this Court. *Shere v. State*, 742 So. 2d 215, 218 (Fla. 1999).[9]

The only identifiable claims that are specifically briefed are set out in the first full paragraph found on page 49 of the petition. However, those claims are no more than a repetition of various ineffectiveness of appellate counsel claims contained in Claim II of the petition. This repetition of previously-briefed claims does not serve to present a "cumulative error" claim, and, in any event, none of these specifications of ineffectiveness have merit for the reasons set out in Claim II, *infra*. Finally, because there is no error, there is no error to "cumulate." This claim is insufficiently briefed, and is not a basis for relief.

[9] Farina's habeas petition is overlength as it is. This Court expanded the page limitation at Farina's request.

IV. THE *ROPER* CLAIM[10]

On pages 50-60 of the petition, Farina argues that "the landmark case of *Roper v. Simmons* establishes that [his] death sentence is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution."[11] Farina's argument is fundamentally flawed in several respects, and is not a basis for relief.

It is undisputed that Farina was over the age of 18 when he murdered Michelle Van Ness. *Petition*, at 54. By its terms, *Roper v. Simmons*, 125 S.Ct. 1183 (2005), does not apply to murderers, like Farina, who had passed their eighteenth birthday at the time of the capital offense. The *Roper* decision is clear: "a line must be drawn," and "[t]he age of 18 … is … we conclude, the age at which the line for death eligibility ought to rest." *Roper v. Simmons,* 125 S.Ct. at 1197-98. The United States Supreme Court described its holding as being that "the death penalty is

[10] This claim is contained in the 3.851 motion pending in the Circuit Court. This issue should be resolved in this habeas proceeding, and an order directing dismissal of the successive Rule 3.851 motion should be entered.

[11] *Roper* is based solely on the Eighth and Fourteenth Amendments. *Roper v. Simmons*, 125 S.Ct. at 1187. The Fifth and Sixth Amendments have nothing to do with that decision, nor do they have anything to do with the applicability of *Roper* to Farina's case.

disproportionate punishment for offenders under 18." *Roper v.* Simmons, 125 S.Ct. 1198. By its express terms, *Roper* is inapplicable to Farina -- *Roper* does not and cannot be applied to Farina's case.

To the extent that Farina argues that his "emotional age" was similar to a 14-year-old, that is not what *Roper* held.[12] *Roper* established a cut-off of 18 years of age -- Farina's attempt to graft an "emotional age" component onto the clear holding in *Roper* (which was based on chronological age) is an improper extension of the express, and limited, holding in *Roper.*[13] This Court should not accept Farina's strained reading of *Roper*. That decision does not necessitate further consideration of Farina's death sentence.[14]

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[12] Farina's argument is similar to that of the petitioner in *Moreno v. Dretke*, 362 F.Supp.2d 773 (N.D. Texas 2005), who argued that *Roper* should apply his case because he plotted the crime before his 18th birthday, but was over 18 at the time of the commission of the murder. The District Court refused to extend *Roper* to these facts.

[13] The United States Supreme Court considered the very arguments advanced by Farina in establishing 18 years of age as the age below which death is a disproportionate punishment. *Roper v. Simmons*, 125 S.Ct. at 1196-9.

[14] In footnote 12 on page 55 of the petition, Farina claims that the sentencing court found the "accomplice" statutory mitigator. That mitigator was given little weight by the sentencing court, who found that his participation was "major." *Farina v. State*, 801 So. 2d at 55-6.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the Respondent respectfully requests that this Court deny the Petitioner's Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Marie-Louise Samuels Parmer and David D. Bass,** Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ____ day of August, 2005.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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