IN THE SUPREME COURT OF FLORIDA

ANTHONY J. FARINA,

Appellant,

v. CASE NO. 93,050

STATE OF FLORIDA,

Appellee.

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

SUPPLEMENTAL BRIEF OF APPELLEE

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This brief is typed in Courier New 12 point.

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SUPPLEMENTAL BRIEF OF APPELLEE

Comes now the State of Florida, and, pursuant to this Court's order of August 6, 1999, files the following supplemental brief.

PRELIMINARY STATEMENT

Farina's brief contains two "supplemental" arguments, both of which are seemingly addressed to the proportionality of his sentence of death. The proportionality issue was contained in Farina's Initial *Brief* as Point 9. "Point One" in the supplemental brief addresses this Court's decision in *Brennan v. State, No. 90,279,* and its claimed applicability to Farina's co-defendant. "Point Two" in the supplemental brief is founded on the premise that *Brennan* is a final decision. However, as this Court is well aware, the State's motion for rehearing of the *Brennan* decision is pending at this time. Until such time as Farina's co-defendant actually receives a sentence less than death (which may never happen), the proportionality of his death sentence cannot be accurately assessed, and, therefore, the proportionality review sought by Farina should not be undertaken based upon an

incompletely developed record.

I. THE *BRENNAN* ISSUE[1]

On pages *1-3* of his supplemental brief, Farina argues that he is entitled to a new penalty phase proceeding because the Brennan v. **State, No. 90,279,** "decision renders it certain that Jeffery Farina's death sentence will be vacated and his sentence reduced to life imprisonment." *Supp. Brief,* at 2. However, this Court's decision in *Brennan* raises a number of questions, any one of which may well affect the final result in that case.[2]

For example, *Brennan* did not consider the amendment to the Florida Constitution that was approved on November 3, 1998, and modified Article I, Section 17 of the Florida Constitution to provide:

> Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the Legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, **shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.** Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by

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[1]This Court affirmed the death sentence given Brennan's co-defendant. *Nelson v. State, 24* Fla. L. Weekly S250 (May 27, 1999).

[2]Of course, the final outcome of *Brennan* affects the ultimate disposition of this case -- the effect, however, cannot be determined until *Brennan* is final for all purposes.

> the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. **This section shall apply retroactively.**

Fla. Const. Art. I § 17 (1999) . [emphasis added].

Based upon the clear language of the State Constitution, this Court is **required** to construe the state constitutional prohibition against cruel or unusual punishments in conformance with the United States Supreme Court's construction and interpretation of the Eighth Amendment to the Constitution of the United States. However, in *Brennan,* this Court stated that while mindful that the United States Supreme Court upheld the imposition of a sentence of death on an individual who was sixteen years old at the time of the murder in *Stanford v. Kentucky,* 492 U.S. 361, 380 (1979), that decision of the United States Supreme Court was "not binding on our state constitutional analysis". (Slip Op. at 14). In light of the November 1998 amendment to Article I, Section 17, *Stanford* clearly **is binding** on this Court's constitutional analysis. If this Court determines that *Brennan* is wrongly decided, and it appears that it is, then Anthony Farina receives no benefit from that decision because it does not affect the result in Jeffrey Farina's case, and, hence, does not affect the proportionality of Anthony Farina's death sentence.

A "conformity clause" amendment to the Florida Constitution

was approved in 1982, when Florida voters approved a modification to Article I, Section 12 of -the Florida Constitution which directed that the state constitutional right to freedom from unreasonable searches and seizures "shall be construed in conformity" with the Fourth Amendment to the United States Constitution. **This Court has repeatedly acknowledged that the conformity clause amendment absolutely binds this Court to follow the interpretations of the United States Supreme Court with regard to the Fourth Amendment.** *Rolling* v. State, 695 So.2d 278, 297 n. 10 (Fla. 1997); *Soca v. State, 673* So.2d *24, 27* (Fla. *1996); Bernie v. State, 524* So.2d 988, 990 (Fla. 1988).[3]

Based upon the plain language of Article I, Section 17 of the Florida Constitution, this Court is clearly required to follow the United States Supreme Court's decisions with regard to the construction of the state or federal protections from cruel and/or unusual punishment. There is no doubt that *Stanford v. Kentucky* is a decision from the United States Supreme Court which rejected a claim that it violates the Eighth Amendment to the United States Constitution to impose a sentence of death on a defendant who was sixteen years old when he committed the capital offense. With those

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[3]The 1982 amendment to Article I, Section 12 was held to be prospective in application because the amendment did not provide for retroactive application. **State v.** *Lavazzoli,* 434 So.2d 321 (Fla. 1983). The 1998 amendment to Article I, Section 17 expressly requires retroactive application.

two fundamental legal propositions well-established (and not truly open to argument), the only-conclusion possible is that *Brennan* is wrongly decided and does not control the result in this case.[4] Farina's sentence of death should not be disturbed.

To the extent that further discussion of the *Brennan* decision is appropriate in the context of this case, it appears that the *Brennan* decision ignores the Florida constitution's limitations on judicial interference with legislative responsibilities, which include the proscription of punishment. That decision ignored the fact that the only constitutionally significant fact concerning the frequency with which the death penalty has been carried out on sixteen year old offenders is that in a majority of death penalty jurisdictions, such offenders are death-eligible. *See, Stanford,* 492 U.S. at 373-4.

To the extent that the *Brennan* majority expressed concern that certain unspecified criteria are necessary in a determination that juvenile offenders should be tried as adults, the ultimate irony is that the Court relied upon -1997 changes to the transfer law which imposed greater culpability on younger defendants as a basis to conclude that imposing a death sentence on a sixteen-year-old murderer violates the Florida Constitution. See, *Laws of Florida,*

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[4]If the *Brennan* court does not clarify its opinion, it will be reasonable for the trial courts to conclude that that decision has been overruled by the change in the constitution effected by the 1998 amendment to Article I, § *17. See, State v. Ridenour, 453* So.2d 193 (Fla. 3d DCA 1984).

Ch. 97-238; *Fla.* Stat. § 958.225. That reasoning is faulty, and is yet another reason Brennan is not a basis for reversal of Anthony Farina's death sentence.

As the State has repeatedly pointed out herein, the Brennan decision upon which Farina relies is pending on rehearing and, thus, is not final. Because that is so, the State suggests that this case must be decided alongside the co-defendant Jeffrey Farina's case. Otherwise, the potential for inconsistent and irreconcilable decisions exists. However, to the extent that it is proper to do so in the context of this case, the State respectfully submits that this Court should grant the State's motion for rehearing in *Brennan,* and reinstate the death sentence in that case. Alternatively, the State submits that *Brennan* was wrongly decided and should be overruled.[5] In any event, Anthony Farina's death sentence should not be disturbed.

II. THE PROPORTIONALITY/LIFE SENTENCE ISSUE

On pages 3-6 of the supplemental brief, Farina **argues that his** death sentence is disproportionate **"compared to other cases where** the triggerman received a life sentence". *Supp. Brief,* at 3. This claim is, of course, based upon the premise that *Brennan* is the

[5]Because *Brennan* is not final, the State can do no more than argue in broad terms. If this Court ultimately determined to modify *Brennan* in some fashion, the State's argument would, of course, be affected in some manner.

law.[6] While the State's position is that *Brennan* was wrongly decided (and should either be changed on rehearing, or, alternatively, overruled), to the extent that it is possible to address the proportionality issue at this juncture, the State suggests that, should Jeffrey Farina somehow avoid a death sentence, this case is factually similar to *Larzelere v. State, 676* So.2d 394 (Fla. 1996), where this Court held:

> Nor do we find the death penalty in this case to constitute a disproportionate sentence even though two of the State's key witnesses were apparently not prosecuted despite their involvement in this crime and even though Jason was acquitted. When a codefendant (or coconspirator) is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment disproportionate. *Downs v. State, 572* So.2d 895 (Fla. 1990), *cert. denied, 502* U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); *Slater v. State,* 316 So.2d 539 (Fla. 1975). Thus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis. *Cardona v. State,* 641 So.2d 361 (Fla. 1994), *cert. denied,* --- U.S. ----, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995). Disparate treatment of a codefendant, however, is justified when the defendant is the more culpable participant in the crime. *Hayes v. State,* 581 So.2d 121 (Fla.), *cert. denied, 502* U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991).
>
> In this case, the trial judge specifically examined the appellant's culpability, stating:
>
> > The evidence established beyond a reasonable doubt that, although [the appellant] was not

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'Unless Jeffrey Farina's death sentence is reduced, Point Two in the supplemental brief is meaningless. The State respectfully suggests that any such discussion is premature at this point, and, moreover, can be of no help to the Court because there are simply too many variables involved in capital sentencing to make briefing in a vacuum anything more than a tedious academic exercise.

> the triggerman, she was present for the murder actively participating in carrying out the murder which she planned in a cold and calculated manner. Her participation was not relatively minor. Rather she instigated and was the mastermind of and was the dominant force behind the planning and execution of this murder and behind the involvement and actions of the co-participants before and after the murder. Her primary motive for the murder was financial gain, which motive was in her full control.
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> . . .
>
> ... Under no reasonable view of the evidence can it be said that the degree of culpability of Steven Heidle or Kristen Palmieri was equal to that of [the appellant]. [The appellant] was in charge and they were the subordinates with significantly lesser roles.

As indicated by the trial judge, we find that the evidence establishes beyond question that the appellant was the dominating force behind this murder and that she was far more culpable than the State's two key witnesses. Additionally, the evidence supports the judge's conclusion that the aggravating factors outweigh the mitigating factors. Consequently, we find that the appellant's sentence is not disproportionate. See, e.g., *Garcia v. State,* 492 So.2d 360 (Fla.) (prosecutorial discretion in plea bargaining with less culpable accomplices is not impermissible and does not violate the principles of proportionality), *cert. denied, 479* U.S. 1022, 107 S.Ct. 680, 93 L.Ed.2d 730 (1986). In making this determination, we note that Jason's acquittal is irrelevant to this proportionality review because, as a matter of law, he was exonerated of any culpability. [footnote omitted].

Larzelere v. State, 676 So.2d at 406-407.'

In addressing the relative culpability of the defendants in

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[7]"Jason" is the defendant's son. *Larzelere v. State, 676* So.2d at 398 n. 1.

this case, the sentencing Court recited the "minor participation" mitigator, and went on to state:

> **The Court finds that Anthony did** not **fire the shot theat killed Michelle Van Ness, but that his participation in the crime was major.** The defendant **[Anthony]** and Jeffery planned the evening as full partners. **Anthony** was the mastermind behind the plans; his need for money to move his children was the basic motivation for planning the entire evening. It was **Anthony's** familiarity with the Taco Bell restaurant and its employees that provided the target of the plans. **Anthony** bought the bullets and held the gun as Jeffery tied up the male victims. After the gun misfired and the knife became the weapon of choice, **Anthony** stood beside his brother, held the gun, and handed Jeffery the knife for the killing of Kim Gordon. According to at least one witness, it was **Anthony** who held Kim's head down while Jeffery tried in vain to shove the knife inter her skull and then into her spine. Anthony kept the victims relatively subdued with cigarettes and words of assurance as they were herded into the cooler for execution. Rather than being words of disclaimer or refusal to murder, as Anthony has claimed, his statement "Your call . .." to Jeffery was an indication of approval for Jeffery to begin the killing. **Anthony was totally involved in the crime from beginning to end.**

(R358). Those factual findings (the accuracy of which is not challenged) are quite similar to the findings quoted above from the *Larzafere* decision, and demonstrate that death is not disproportionate in this case.

In yet another co-defendant case, this Court stated:

> Henyard argues that his death sentences are disproportionate to the sentence received by his codefendant, Alfonza Smalls, and that the mitigating factors in his case outweigh the aggravating factors.
>
> Under Florida law, when a codefendant is equally culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant's punishment

disproportionate. *Downs v. State, 572 So.* 2d 895 (Fla. 1990), *cert. denied, 502* U.S. 829, 112 S.Ct. 101, 116 L.Ed.2d 72 (1991); *Slater* v. *State, 316* So.2d 539 (Fla.1975). Thus, an equally or more culpable codefendant's sentence is relevant to a proportionality analysis. *Cardona v. State,* 641 So.2d 361 (Fla. 1994), *cert. denied,* --- U.S.--115 S.Ct. 1122,. 130 L.Ed.2d 1085 (1995).

Like Henyard, Alfonza Smalls was tried on the same charges and convicted, but he was not subject to the death penalty because his age of fourteen at the time of the offense prevented him from receiving the death penalty as a matter of law. Rather, Smalls received the maximum sentence possible for his crimes--eight consecutive life sentences, with a fifty-year mandatory minimum for the two first-degree murder convictions.

In *Allen v. State, 636* So.2d 494, 497 (Fla. 1994), we held that the death penalty is either cruel or unusual punishment under article I, section 17 of the *Florida Constitution* if imposed upon a person who is under the age of sixteen when committing the crime. **That is, when a defendant is under the age of sixteen, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating circumstances as a matter of law.**[8]

In this context, then, Smalls' less severe sentence is irrelevant to Henyard's proportionality review because, pursuant to *Allen,* the aggravation and mitigation in their cases are per se incomparable. Under the law, death was never a valid punishment option for Smalls, and Henyard's death sentences are not disproportionate to the sentence received by his codefendant. *Cf. Larzelere v. State,* **676** So.2d 394 (Fla. 1996)(holding that codefendant's acquittal was irrelevant to proportionality review of defendant's death sentence because codefendant was exonerated from culpability as a matter of law).

We also find that the evidence in Henyard's case supports the trial court's conclusion that the four aggravating factors outweighed the mitigating factors set forth in

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[8]If this is an accurate **summary** of *Allen,* and this Court said that it **was,** then *Brennan* ignored that rule of law.

> the sentencing order, [footnote omitted] Finally, upon consideration of all of the circumstances, we further conclude that Henyard's death sentences are not disproportionate to death sentences imposed in other cases. See, *e.g., Walls v. State, 641* So.2d 381, 391 (Fla. 1994) (death sentence upheld for execution-style killing of woman after she witnessed boyfriend's murder), *cert. denied,* --- U.S. ----, 115 S.Ct. 943, 130 L.Ed.2d 887 *(1995); Cave* v. *State, 476* So.2d 180 (Fla. 1985), *cert. denied,* 476 U.S. 1178, 106 S.Ct. 2907, 90 L.Ed.2d 993 (1986) (death sentence proportionate where co-perpetrators abducted, raped, and killed victim; **defendant not actual killer).**

Henyard v. *State,* 689 So.2d 239, 254-55 (Fla. 1996). Farina's death sentence is not disproportionate, and should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Of Counsel