IN THE SUPREME COURT OF FLORIDA

JEFFREY ALLEN FARINA,	)	
	)	
Defendant/Appellant,	)	
	)	
versus	)	Supreme Ct. Case #93,907
	)	Circuit Ct. Case #92-32128CFAES
STATE OF FLORIDA,	)	
	)	
Plaintiff/Appellee.	)	

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DIRECT APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
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CERTIFICATE OF TYPE AND SIZE

I CERTIFY that this brief has been prepared using "Times New Roman" in type size 14.

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SUMMARY OF THE ARGUMENTS

Point I: The error set forth in this point has not been refuted by the State and a reversal and new penalty phase would be required but for this Court's holding in ***Brennan***, *infra*, which holds that a sixteen-year old offender cannot be sentenced to death as a matter of Florida law, as set forth more fully in Point V.

Point II: ***Bates***, *infra*, decided after the Initial Brief of Appellant was filed, apparently controls this issue as a matter of state law. Accordingly, when the death sentence is reversed based on ***Brennan***, *infra*, the only option available to the trial judge is a life sentence with parole eligibility after twenty-five years.

Point III: Although the State has failed to refute the argument set forth in this point, the improper use of the HAC factor has become moot due to ***Brennan*** as set forth more fully in Point V.

Point IV: The error concerning improper presentation of victim impact testimony requires reversal of the death sentence and, but for this Court's holding in ***Brennan***, *infra*, a new penalty phase would be required. Though the issue is technically moot due to ***Brennan***, as set forth in Point V, this substantial error should be addressed to provide guidance to trial courts in other cases.

Point V: Florida law precludes sixteen-year old offenders from receiving a death sentence, as correctly held by this Court in ***Brennan v. State***, 24 FLW S495 (October 21, 1999). This error was fully argued, objected to and preserved below. Because Jeffrey Farina was sixteen-years old when this homicide was committed, his death penalty must be reversed. The State's argument concerning the merits of the ***Brennan*** holding were fully considered and rejected by this Court.

Point VI: The State has failed to address the argument contending that the death penalty violates the public's right to be able to communicate with defendants who have committed first-degree murder. While the public's right may certainly be regulated, and regulated severely, the absolute total denial of communication on all topics for all time by all people has not been justified by the State's assertion that the goal of retribution supports a death sentence. Technology, science and the public media are not now as they were when the Constitution was written. Examination of this issue in the context of modern times is not foreclosed simply because it has not been addressed previously. The error forms an additional basis to reverse the death sentence for this sixteen-year old offender because the death penalty is unconstitutional as a denial of freedom of speech under state and federal law.

Point VII: The exclusion of relevant defense evidence has become moot if

this Court follows ***Brennan***, *infra*.

Point VIII: The jury selection errors taint the convictions and preclude imposition of a death sentence. The State is correct that the trial court did not have the authority to rule differently because the issue was controlled by this Court's holding on direct appeal. However, this Court has the power to now correct the error.

Point IX: Pursuant to ***Brennan***, the error presented in this point has become moot.

Point X: The State has not dealt with the substance of the argument presented in this issue. While the error is technically moot due to ***Brennan***, the erroneous standard jury instruction should none-the-less be addressed by this Court to keep this substantial error from recurring.

POINT I: THE TRIAL COURT'S ERRONEOUS BELIEF THAT IT WAS "BOUND" BY THE RULINGS MADE IN 1992 TAINTED THIS JURY'S RECOMMENDATION AND DENIED DUE PROCESS AND A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

This point concerns the denial of Due Process caused by a presiding judge's belief that rulings made at trial in 1992 *controlled* his rulings on similar (but not identical) motions made for a new penalty phase conducted in 1998. The State relies on one cryptic sentence in ***Harvard v. State***, 414 So.2d 1032 (Fla.1982) to argue that Farina's "argument is squarely foreclosed by ***Harvard*** . . . and is contrary to common sense." (AB at 22). The undersigned respectfully disagrees. ***Harvard*** is inapposite. It involved a violation of ***Gardner v. Florida***, 430 U.S. 349 (1973), where a trial judge was expressly ordered on remand to consider the effect that his improper *ex parte* consideration of confidential material had on the sentence he imposed. *See* ***Harvard v. State***, 375 So.2d 833 (Fla.1977). A new penalty phase was ***NOT*** involved. Here, however, a new penalty phase with a new jury was required. The judge's conclusion that he was "bound" by rulings made six years earlier on similar but not identical matters was an erroneous ruling of law that precluded fair resolution of legitimate legal issues, which was a denial of Due Process.

Simply said, *de novo* review of issues arising during a capital penalty phase is

an essential component of the heightened due process that attends the death penalty. A trial court has broad discretion to achieve a fair penalty proceeding. ***Preston v. State***, 607 So.2d 404 (Fla.1992). In that regard, evidence admitted at trial is not necessarily admissible at a penalty phase. *See* ***Castro v. State***, 547 So.2d 111, 115 (Fla.1989)("Substantially different issues arise during the penalty phase of a capital trial that require analysis qualitatively different than that applicable to the guilt phase."). A judge presiding over a remanded penalty phase proceeding must rule based on the dynamics of the proceeding as the issues arise. A judge who is "bound" by rulings made six years earlier on similar but not identical issues is not presiding over the proceeding in a meaningful way. *See* ***State v. Barber***, 24 FLW D2308 (Fla. 5th DCA 1999).

The State contends that a motion to recuse Judge Smith should have been filed. (AB at 23, fn.24) Judge Smith is a conscientious jurist who scrupulously adhered to the "law of the case" doctrine after the State erroneously convinced him that it controlled his rulings. There is no basis to recuse a judge simply because he or she rules against a defendant. *See* ***Gilliam v. State***, 582 So.2d 610, 611 (Fla. 1991)("Merely receiving adverse rulings is not a ground for recusal."). A motion to recuse Judge Smith would have been frivolous, indeed.

Judge Smith's conclusion that he had no discretion to rule on the merits of

issues created an absolute bias that prevented fair consideration of legal issues. To administer justice fairly in an area where heightened due process is required, a judge must have the power to contemporaneously evaluate what is occurring and to rule accordingly. That did not occur here. Judge Smith initially ruled that, to preserve a ruling made in 1992, the defendants could "stand by that motion that was previously ruled on, that [is the] law of the case and I don't have any jurisdiction to overrule the previous ruling." (I,163). He opined, ". . . that would also include a Motion to Sever." (I,163). Rather than renew the prior motion, each defendant moved for severance of the penalty proceeding. The State argued "there's no basis for severance" (III,396) because the law of the case doctrine usurped the court's power to rule differently on the related issues.[1] The new motion to sever was denied.

Thereafter, evidentiary rulings, such as use of the doctrine of completeness, were summarily and expressly based on the law of the case doctrine: "To the extent that the Judge in this case has previously excluded any material, that's law of the case and I'm bound by it. And I have no intention of overturning that which was previously done." (XIX,1695). The strict application of the law of the case doctrine

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[1] Assistant State Attorney Daly: "Well, that's the law of the case. So, even if this were in the context of a new slate, the bottom line is, that issue has already been raised and the Florida Supreme Court has said that evidence was properly admitted; remembering, of course, that the issue was raised in the context of a Motion to Sever." (III,395)

resulted in a stilted proceeding that denied Due Process and a fair proceeding.

A new penalty phase would be required but for ***Brennan v. State***, 24 FLW S495 (October 21, 1999), where this Court squarely held that a sixteen-year old offender in Florida cannot receive a death sentence, as set forth more fully in Point V, infra. The error set forth in this Point has become moot. Based on ***Brennan***, supra, the death sentence must be reversed and the matter remanded for imposition of a life sentence.

POINT II: THE TRIAL COURT'S ERRONEOUS REFUSAL TO INSTRUCT THE JURY THAT A LIFE SENTENCE WITHOUT PAROLE WAS THE ALTERNATIVE SANCTION TO THE DEATH PENALTY DENIED FUNDAMENTAL FAIRNESS AND DUE PROCESS.

After the Initial Brief of Appellant was filed, this Court decided ***Bates v. State***, 24 FLW S471 (Fla. October 7, 1999), and held that a defendant cannot waive the ex post facto protections involved with Florida's life without parole sanction for first degree murder. Jeffrey Farina respectfully maintains that, as a matter of federal constitutional law, a liberty interest existed in having the jury instructed that the alternative sentence to the death penalty was life without parole, and that a new penalty phase would be required but for ***Brennan***, supra, where this Court squarely held that a sixteen-year-old offender in Florida cannot receive a death sentence, as set forth more fully in Point V, infra. The error set forth in this Point has become moot. Based on ***Brennan***, supra, the death sentence must be reversed and the matter remanded for imposition of a life sentence. ***Bates*** apparently controls the sentencing as a matter of state law, so that the only option available to the trial court now is a life sentence, with the possibility of parole after 25 years.

POINT III: USE OF THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR WAS IMPROPER AND PREJUDICIAL WHERE THE EVIDENCE SHOWED THAT THE DEFENDANT DID ***NOT*** INTEND FOR THE VICTIM TO UNNECESSARILY SUFFER.

The State argues that, "the law in this State is clear that there is no such thing as an 'intent element' to the heinous, atrocious, or cruel aggravator - - that argument was put to rest in 1984 when this Court decided ***Stano v. State***, 460 So.2d 890, 893 (Fla.1984), and made clear that the heinous, atrocious, or cruel aggravator focuses on the means and manner in which death is inflicted." (AB at 30). The undersigned disagrees[2] and respectfully submits that the law governing Florida's especially heinous, atrocious or cruel ("HAC") factor is not clear at all. In the twenty-six years since ***State v. Dixon***, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943 (1974), the legal standard used to find and apply the HAC factor has vacillated on an ad hoc basis, proving the adage that bad facts make bad law.

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[2] It is interesting to juxtapose the State's "intent-is-irrelevant per ***Stano***" argument with language from other cases:

"As we have discussed before, heinous, atrocious or cruel pertains more to the nature of the killing and the surrounding circumstances while cold, calculated and premeditated pertains more to the state of mind, intent, and motivation." ***Stano*** ***Hamilton v. State***, 460 So.2d 890, 893 (Fla.1984)

"All seven members of the Court agreed that [HAC] did not exist because there was no 'substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims.'" ***v. State***, 678 So.2d 1228, 1232 (Fla. 1996).

The State's reliance on ***Brown v. State***, 721 So.2d 274 (Fla.1998) and ***Guzman v. State***, 721 So.2d 1155 (Fla.1998) is misplaced. The State fails to appreciate the distinction between a homicide committed by stabbing, as occurred in ***Brown*** and ***Guzman***, and a homicide by shooting, as happened here. A brief review of the consistent, inconsistent use of the HAC factor under the standards created by this Court in ***State v. Dixon***, 283 So.2d 1 (Fla. 1973) is in order. One of the standards used to apply the "HAC" factor involves a capital felony that is "accompanied by such additional acts[3] as to set the crime apart from the norm of capital felonies." ***Dixon***, 283 So.2d at 9.

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[3] An "additional acts" standard is nebulous. *See* ***Simmons v. State***, 419 So.2d 316, 318-319 (Fla.1982)("This Court has consistently held, however, that in order for a capital felony to be considered heinous, atrocious, or cruel it must be 'accompanied by such additional acts as to set the crime apart from the norm of capital felonies.'") In ***Simmons***, HAC was found by a trial judge where the victim had been bludgeoned in his own home. This Court rejected the HAC factor, expressly stating, "The fact that the victim was murdered in his own home offers no support for the finding." ***Simmons*** at 319. Two years later, however, this Court approved use of the HAC factor because "the fact that the victims were killed in their home sets the crime apart from the norm." ***Troedel v. State***, 462 So.2d 392, 398 (Fla.1984). Thus, a person being killed at home at times supports HAC. *See* ***Perry v. State***, 522 So.2d 817, 821 (Fla.1988) ("We note also that this vicious attack was within the supposed safety of Mrs. Miller's home, a factor we have previously held adds to the atrocity of the crime."). At other times, it does not. Compare ***Proffitt v. State***, 315 So.2d 461 (Fla.1975), *Aff.*, 428 U.S. 242 (1976) (HAC found and upheld where person stabbed to death while at home in bed) and ***Proffitt v. State***, 510 So.2d 896, 897 (Fla.1987) (HAC not found for same man being stabbed to death while at same home in same bed).

An "additional act" that supports the HAC factor appears to be death by any manner other than by gunshot. This Court "consistently" holds that homicides committed in just about any manner other than by gunshot justifies the HAC factor irrespective of the defendant's intent. A homicide by **STABBING** sets the crime apart from the norm. *See* ***Knight v. State***, 721 So.2d 287, 301 (Fla.1998)("This Court has *consistently* upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed."); ***Williamson v. State***, 681 So.2d 688, 698 (Fla.1996)("We have *consistently* upheld this aggravator in cases where the victim is repeatedly stabbed."); ***Finney v. State***, 660 So.2d 674, 685 (Fla.1995)("This Court has *consistently* upheld findings of heinous, atrocious or cruel where the victim was repeatedly stabbed."); ***Barwick v. State***, 660 So.2d 685, 696 (Fla.1995)("This Court has *consistently* upheld the finding of this aggravator where the victim was repeatedly stabbed."); ***Henry v. State***, 649 So.2d 1366, 1369 (Fla.1994)("This Court has *consistently* held that the heinous, atrocious, or cruel factor applies to murders where the victim was repeatedly stabbed."); ***Davis v. State***, 648 So.2d 107, 109 (Fla.1994)("This Court has *consistently* upheld a finding of heinous, atrocious, or cruel where the victim was repeatedly stabbed."); ***Derrick v. State***, 641 So.2d 378, 381 (Fla.1994)("This Court has *consistently* upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed."); ***Atwater v. State***, 626 So.2d

1325, 1329 (Fla.1993)("This Court has *consistently* upheld findings of heinous, atrocious, or cruel where the evidence shows the victim was repeatedly stabbed.")(italics added to all cites).

So, too, with a homicide by **STRANGLING** . *See* ***Robertson v. State***, 699 So.2d 1343, 1347 (Fla.1997)("This Court *consistently* has found this aggravator to apply where, as here, a conscious victim is strangled."); ***Doyle v. Singletary***, 655 So.2d 1120, 1121 (Fla.1995)("Murder by strangulation has *consistently* been found to be heinous, atrocious and cruel because of the nature of the suffering imposed and the victim's awareness of impending death."). So, too, with **BEATING** deaths. *See* ***Lawrence v. State***, 698 So.2d 1219, 1221 (Fla.1997) (We have *consistently* upheld HAC in beating deaths.").

This Court has not yet concluded that the HAC factor exists whenever a person is shot to death. Instead, the cases that deal with a homicide by gunshot focus on whether the defendant intended for the victim to suffer unnecessarily, thereby making the murder "pitiless or conscienceless." Thus, in ***Teffeteller v. State***, 439 So.2d 840 (Fla.1986), the fact that a victim shot and languished for hours was not determinative of the HAC factor because Teffeteller did not *intend* for the victim to suffer. And in ***Omelus v. State***, 584 So.2d 563 (Fla.1991), the defendant could not be vicariously charged with the co-defendant's actions because Omelus, who was not present when

the victim died, did not intend that the killer he hired make the victim suffer before killing him.

As argued in the Initial Brief at page 47, ***Donaldson v. State***, 722 So.2d 177, 186-187 (Fla.1998), ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990), ***Amoros v. State***, 531 So.2d 1256, 1260-1261 (Fla.1988), ***Lewis v. State***, 377 So.2d 640 (Fla.1979), ***Williams v. State***, 622 So.2d 456, 463 (Fla.1993) and ***Teffeteller***, supra, all hold that HAC may not be used absent a showing that the defendant intended that the victim suffer unnecessary pain and mental anguish. The State did not address these cases, and they control here.

Further analysis of the HAC factor, however, adds little to the ultimate, correct resolution of this case. While the improper use of the HAC factor by the judge and jury denied due process and a fair and reliable sentence in violation of article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the error has become moot. Based on ***Brennan***, *supra*, the death sentence must be reversed and the matter remanded for imposition of a life sentence. The ***Bates*** decision apparently dictates that the only option available to the trial court now is a life sentence, with the possibility of parole after 25 years.

POINT IV: REVERSIBLE ERROR OCCURRED WHEN THE VICTIM IMPACT EVIDENCE BECAME SUCH A FEATURE THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS AND A RELIABLE JURY RECOMMENDATION.

The State argues that 67 pages of victim impact testimony is only 6%[4] of an 1172 page record "from opening argument to final summation." (AB at 35). The State' numbers are wrong and skewed. Victim impact evidence covered more than 67 pages of the State's case, which presented the following twenty people:

1. Derek Mason (Taco-Bell employee/Michelle Van Ness' friend)
2. Allison Sylvester (policeman)
3. Deputy Wiles (policeman)
4. Detective Youngman (police evidence technician/custodian)
5. Susan Komar (FDLE firearms expert)
6. Kimberly Gordon (Taco-Bell employee/Michelle Van Ness' friend)
7. Gary Robinson (Taco-Bell employee/Michelle Van Ness' friend)
8. Hannah Glidden (Michelle Van Ness' friend)
9. Ashley LeFebvre (Michelle Van Ness' friend)
10. Louis Moro (Michelle Van Ness' boyfriend)
11. Deborah Wingard (Michelle Van Ness' teacher)
12. Steve Mahnke (Michelle Van Ness' uncle)
13. Tara Setzer (Michelle Van Ness' cousin)
14. Bonnie Van Ness (Michelle Van Ness' aunt)
15. Arthur Mahnke, Jr. (Michelle Van Ness' grandfather)
16. Dorothy Mahnke (Michelle Van Ness' grandmother)
18. Connie Van Ness (Michelle Van Ness' mother)
19. Larry Van Ness (Michelle Van Ness' father)
20. Sean Van Ness (Michelle Van Ness' brother)

[4]"There are three kinds of lies: lies, damned lies and statistics." Benjamin Disraeli (1804-81), as quoted in: Mark Twain, Autobiography, ch. 29 (ed. by Charles Neider, 1959).

Of the twenty state witnesses, thirteen (65%) gave *exclusively* victim impact testimony that failed to bear on *ANY* aggravating or mitigating consideration. Their highly emotional testimony was suffocating. The testimony was unfairly prejudicial because it inflamed the emotions of the jury and compelled a recommendation on a basis other than by careful and reasoned analysis of the comparative weight of the aggravating and mitigating considerations.

Although this error has become moot due to holding in ***Brennan***, supra, it is respectfully submitted that the trial judges of Florida require guidance. When testimony that historically and consistently has been recognized by courts as being highly prejudicial is to be presented, it is imperative that the trial judge, upon timely motion, review the testimony and determine whether the danger of unfair prejudice outweighs the probative value of the testimony. Informed choices can then be made by the state attorney and the affected witnesses as to how and what testimony can be properly presented. Such a procedure is more fair and considerate to the families and witnesses whose testimony is to be presented.

Based on ***Brennan***, supra, the instant death sentence must be reversed and the matter remanded for imposition of a life sentence as set forth in Point V. The ***Bates*** decision apparently dictates that the only option available to the trial court now is a life sentence, with the possibility of parole after 25 years.

POINT V: CAPITAL PUNISHMENT OF THIS 16-YEAR-OLD CHILD OFFENDER VIOLATES INTERNATIONAL LAW AND THE CONSTITUTION OF FLORIDA AND THE UNITED STATES.

The State agrees that ***Brennan v. State***, 24 FLW S495 (Fla. October 21, 1999) controls, but seeks to re-argue its merits. (AB at 38). The arguments the State makes were fully addressed and rejected by this Court in ***Brennan***. The arguments are otherwise without merit.

Specifically, the State claims that, "under Article 1, Section 17 of the Florida Constitution (as amended on November 3, 1998), the 'cruel or unusual' provision of the State constitution must be interpreted in conformity with United States Supreme Court precedent." (AB at 38). The State's claim is rejected in footnote 4 of the ***Brennan*** decision. The amendment to article I, section 17 of the Florida Constitution cannot apply here for at least two reasons. Foremost, it constitutes an *ex post facto* application of substantive law occurring in 1998 to a crime that was committed in 1992. Such retroactive application of substantive law is expressly proscribed by federal precedent and the *ex post facto* clause to the United States Constitution. *See* ***Gwong v. Singletary***, 683 So.2d 109, 112 (Fla.1996).

The amendment to article I, section 17 of the Florida Constitution is also invalid because it was accomplished through deceptive and misleading notice to Florida's voters. The notice given Florida voters failed to inform the voters that the amendment

to article I, section 17 would substantively impact on sentences other than the death penalty. The substitution of the word "and" for the word "or" was not adequately explained. The assertion that the amendment was for "preservation of the death penalty" was misleading, ambiguous and otherwise improper because the change involved far more than just the death penalty. The amendment is invalid as argued in ***Armstrong v. Harris***, No. 95,223 (Fla. March 31, 1999).

The State argues that, based on the 1998 change to article I, section 17, and applying federal precedent, this death sentence must be affirmed based on ***Stanford v. Kentucky***, 492 U.S. 361 (1989), where the United States Supreme Court held that Kentucky's death penalty statute was constitutional. (AB at 41). The fact that the United States Supreme Court in ***Stanford*** approved *Kentucky's* statute does not mean that Florida's statute is constitutional. Kentucky's statute is substantively different than Florida's. Florida's statute enables juveniles to be tried as adults in all respects, without individualized consideration of capital punishment. This fails to satisfy the Due Process concerns discussed in ***Thompson v. Oklahoma***, 487 U.S. 815 (1988), as noted by Justice Overton in his specially concurring opinion in ***Allen v. State***, 636 So.2d 494, 498 (Fla.1994). ***Stanford*** cannot carry the burden placed upon it by the State.

The State has not addressed the portions of this issue that are controlled by

international agreements entered into by the United States. The undersigned respectfully notifies this Court that, after the Initial Brief of Appellant was filed, the United States Supreme Court, in ***Dominguez v. Nevada***, 98-8327, [1999 WL 118777 (U.S. Nev.)] declined to exercise certiorari jurisdiction to review the decision of the Nevada Supreme Court that held in a 3-2 decision that state execution of sixteen-year old offenders does not violate the International Agreement on Civil and Political Rights. It should be noted, however, that the United States Supreme Court first invited the Solicitor General to file a brief in the case to express the views of the United States. *See* ***Dominguez v. Nevada***, ___ U.S. ___, 119 S.Ct. 2044 (June 7, 1999).

It is respectfully submitted that ***Brennan***, supra, was correctly decided and that a death sentence for a sixteen-year old offender in Florida violates article I, section 17 of the Florida Constitution, the Eighth and Fourteenth Amendments to the United States Constitution, and the dictates of ***Thompson v. Oklahoma***, *supra*, and ***Allen v. State***, *supra*. Accordingly, the death sentence must be reversed and the matter remanded for imposition of a life sentence, with no possibility of parole for 25 years in accordance with ***Bates***, *supra*.

POINT VI: THE DEATH PENALTY VIOLATES THE RIGHT TO FREE SPEECH UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The State's position is that, because this issue has never before been argued, it can have no merit. "The most that can be said against Farina's claim is that nothing can be said in favor of it." (AB at 45). The undersigned submits that the argument and authorities presented to the trial court and to this Court fully support the legal claim presented in good faith. The failure of the State to respond in a meaningful way on issues of such magnitude as the first amendment and the death penalty does a disservice to this Court.

The State points to ***Gregg v. Georgia***, 428 U.S. 153 (1976), which upheld the death penalty against an eighth amendment challenge, and states that "Farina is attempting to compare apples and oranges and come up with the silver bullet that ends capital punishment." (AB at 46). In reply, the undersigned maintains that the death penalty substantially interferes with the exercise of first amendment rights by totally preventing those[5] in society who would communicate with inmates from ever doing so after the sentence is carried out. The example mentioned in footnote 5, where

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[5] A local newspaper recently reported that "Jerry Springer, host of the nationally syndicated talk show, wants to interview notorious serial killer Danny Rolling. But the man convicted of the 1990 Gainesville murders is also wanted for an interview by **'American Justice,' a respected program for the Arts and Entertainment Network**." Daytona Beach News Journal, (November 2, 1999, front page)(Appendix A).

respected and less-than-respected media programs want to interview Danny Rolling, is clearly a first amendment issue. The first amendment right to communicate does not belong solely to the person who would speak, but also to the people in society who want to hear and make informed decisions.

The State notes in footnote 44 of its Answer Brief that Justice O'Connor, in her dissenting opinion in ***Carolina v. Gathers***, ___U.S. ___, 109 S.Ct. 2207, 2214 (1989) that, "[W]e have long recognized that retribution itself is a valid penological goal of the death penalty." The State totally misses the point, for if there were no valid purpose to the death penalty, it would violate the Due Process Clause. That claim is NOT being made. Rather, the issue here, left wholly unaddressed by the appellee, is whether the state's interest in imposing a death penalty on a sixteen-year old child offender outweighs society's interest in being able to communicate with that defendant in the future on all potential topics. It is respectfully submitted that the death penalty here violates the first and fourteenth amendments to the United States Constitution and article I, section 4 of the Florida Constitution.

POINT VII: THE EXCLUSION OF DEFENSE EVIDENCE DENIED DUE PROCESS AND A FAIR TRIAL UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The State contends that, by excluding defense evidence, "The trial court properly prevented Farina from improperly attempting to turn his trial into a political forum on capital punishment." (AB at 48). The excluded evidence would have enabled jurors to intelligently weigh the established mitigating considerations against the aggravating considerations. *See* ***Teffeteller v. State***, 495 So.2d 744, 745 (Fla.1986)("We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum."). The State may explain its evidence and place it into context. Due process requires that a defendant be permitted to do likewise.

The improper exclusion of relevant evidence denied due process and a fair and reliable sentence in violation of article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. However, the error has become moot. Based on ***Brennan***, *supra*, the death sentence must be reversed and the matter remanded for imposition of a life sentence. The ***Bates*** decision apparently dictates that the only option now available to the trial court is a life sentence, with the possibility of parole after 25 years.

POINT VIII: THE CONVICTION WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 2, 9, 16 AND 22.

The State argues that, because this issue was squarely presented to this Court by Farina on the initial direct appeal in ***Farina v. State***, 680 So.2d 392 (Fla.1998), it must now be denied. The undersigned agrees only that the trial court correctly denied the motion when it was presented below based upon the law of the case doctrine. However, this Court has the power to recede from its prior reasoning and grant relief. A new trial is required.

POINT IX: FLORIDA'S CAPITAL PUNISHMENT SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Rather than address the argument made in the Initial Brief of Appellant, the State string cites cases "reaffirming the constitutionality of the Florida capital punishment scheme." (AB at 50). The arguments set forth in the Initial Brief of Appellant that Florida's death penalty is being applied in an arbitrary and capricious manner are essentially unopposed by the appellee. However, this issue appears moot as to this defendant because, based on ***Brennan***, *supra*, the death sentence must be reversed and the matter remanded for imposition of a life sentence. The ***Bates*** decision apparently dictates that the only option available to the trial court now is a life sentence, with the possibility of parole after 25 years.

POINT X: FLORIDA'S STANDARD JURY INSTRUCTION REQUIRING THAT THE DEFENDANT MUST PROVE THAT THE MITIGATION "OUTWEIGH" THE AGGRAVATION IN ORDER TO RECEIVE A LIFE SENTENCE IS UNCONSTITUTIONAL.

The State contends that this issue is foreclosed by precedent from this Court and the United States Supreme Court. (AB at 52). The undersigned respectfully disagrees. The cases cited by the State to not address the specific objection and express argument made below and to this Court, specifically, that the standard jury instruction creates a burden of proof for defendants that is different (greater) than that for the State. Just because a standard jury instruction has at one time been upheld does not mean that the standard instruction cannot be faulty. *See* ***Yohn v. State***, 476 So.2d 123 (Fla.1985) (standard insanity instruction erroneous because it "confuses the burden of presenting some competent evidence as to insanity, commonly referred to as the burden of going forward with evidence, with the ultimate burden of proof.").

This issue deserves the immediate attention of this Court because it involves the legal standard to be used by jurors to determine whether a sentence of life or death should be imposed in accordance with the laws of the State of Florida. The standard jury instruction is wrong. It should be corrected.

CONCLUSION

Based upon the foregoing argument and authority set forth in the Initial Brief of Appellant and herein, the death sentence must be REVERSED and the matter remanded for imposition of a sentence of life imprisonment, with no possibility of parole for twenty-five years. Based on the argument set forth in Point VIII, the convictions must be reversed and a new trial granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to Jeffrey A. Farina, #725254, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 6th day of December, 1999.

Larry B. Henderson
Assistant Public Defender