IN THE SUPREME COURT OF FLORIDA

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

_____

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF TYPE AND SIZE:

I certify that this brief was prepared using CG Times, size 14.

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Larry B. Henderson
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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Prior to the penalty phase, Jeffrey Farina expressly moved to preclude imposition of the death penalty because the death penalty for a sixteen-year old offender violates the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution. (VI,693-694; Appendix A). The motion was extensively argued. (IV,430-503). The Court took judicial notice of Jeffrey Farina's birth certificate establishing that Jeffrey Farina was sixteen-years old at the time of the homicide. (IV,455). The trial court denied the motion. (VII,1019;Appendix B). The motion was repeatedly renewed throughout the proceedings and consistently denied.

SUMMARY OF ARGUMENT

The "cruel and unusual" clause of the Eighth Amendment to the United States Constitution and the "cruel or unusual" provision of article I, section 17 of the Florida Constitution are to be interpreted and applied using the "evolving standards of decency that mark the progress of a maturing society." ***Trop v. Dulles***, 356 U.S. 86, 101 (1958). Thus, the historic use of the death penalty is not determinative of whether the death penalty is appropriate in today's world. Society has evolved to the point where the death penalty is not used to punish criminal conduct that justified its use in the past. E.g. ***Enmund v. Florida***, 458 U.S. 782, 800 (1982); ***Coker v. Georgia***,433 U.S. 584 (1977); ***Buford v. State***, 403 So.2d 943 (Fla. 1981).

More than ten years ago, it was determined that society had evolved to the point that state execution of children offenders below 16 years of age was "cruel and unusual" punishment because executing children offenders below 16 years of age failed to further any legitimate state interest. ***Thompson v. Oklahoma***, 487 U.S. 815 (1988). The Court in ***Thompson*** clearly held that, to execute children offenders, a state legislature must make an express and factually-supported determination that the death penalty was intended to execute its child offenders.

Some states did. And their statutes have been upheld. See ***Stanford v.***

Kentucky, 492 U.S. 361 (1989) Florida, however, has NOT complied with the dictates of ***Thompson***. Accordingly, as noted by this Court in ***Brennan v. State***, 24 FLW S365 (July 8, 1999), the failure of the Florida Legislature to make an express determination subjecting its 16-year old child offenders to the death penalty prevents its use as a sanction here.

Civilized society has evolved to the point that execution of infant offenders who are 16 years of age is cruel and unusual punishment. A punishment cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. The execution of children offenders is without adequate penological justification. There is no deterrent value in executing children. Society's goal of rehabilitating an offender is thwarted by the death penalty, whereas it might be achieved by a different sanction. This is especially true with children, who are in their formative and vulnerable years. Retribution alone cannot justify the death penalty.

Whether the imposition of the death penalty on a 16-year old offender is justified by furthering a legitimate state interest is a determination that must be made by the state legislature based on a competent and well-reasoned foundation.
In Florida, the death penalty for 16-year old offenders violates the Eighth and Fourteenth Amendments and article I, section 17 of the Florida Constitution because execution of 16-year old children offenders is a cruel punishment and an unusual

punishment based on today's standards of decency. There has been no express legislative determination that a legitimate state interest is advanced by execution of juvenile offenders. In light of the heightened due process concerns that attend use of the death penalty, mere speculation that execution of juvenile offenders somehow furthers a valid state interest cannot satisfy the constitutional requirement of an express legislative process and determination. For those reasons and applying the holding of this Court in ***Brennan***, supra, the death sentence for this 16-year old offender must be vacated and a sentence of life imprisonment without parole imposed.

SUPPLEMENTAL ARGUMENT

POINT V

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

After the Initial Brief of Appellant was filed in this case this Court held, in ***Brennan v. State***, 24 FLW S365 (Fla. July 8, 1999), that state execution of 16-year old children who commit first-degree murder violates article I, section 17 of the Florida Constitution (1976). Applying the ***Brennan*** holding to the undisputed facts of this case, Jeffrey Farina cannot be executed by the State because he was 16-years old when he committed a homicide in 1992. He must instead spend the rest of his life in a Florida prison. The ***Brennan*** decision was correctly decided, as will be explored hereafter.

STATE EXECUTION OF 16-YEAR OLD CHILDREN IS UNUSUAL:

As occurred in ***Brennan***, the trial court received uncontested historical data (Appendix C; IV,457-461) showing that in the United States, as of March 11, 1998, state governments executed 19,221 people. Of those, 532 were for crimes committed by children under 18 years of age. During that same period, Florida executed 541 people, 14 of whom were under 18-years old when they committed their crime. Specifically, the Florida data is as follows:

1. Joseph Henderson was hanged on March 30, 1901. Henderson was 17-years old at the time of the crime and the time of his execution.

2. Irving Hanchett was hanged on May 6, 1910. Hanchett was 15-years old at the time of his crime and the time of his execution.

3. Rufus Chesser was electrocuted on March 23, 1927. Chesser was 17-years old at the time of his crime and 19-years old when executed.

4. Fortune Ferguson was electrocuted on April 27, 1927. Ferguson was 17-years old at the time of his crime and 19-years old when executed.

5. Monroe Hasty was electrocuted on September 16, 1935. Hasty was 16-years old at the time of his crime and 17-years old when executed.

6. Robert Hinds was electrocuted on July 23, 1917. Hinds was 17-years old at the time of his crime and when executed.

7. Ivory Lee Williams was electrocuted on November 11, 1940. Williams was 17-years old at the time of his crime and 18-years old when executed.

8. Willie B. Clay was electrocuted on December 29, 1941. Clay was 16-years old at the time of his crime and 19-years old when executed.

9. Edward Powell was electrocuted on December 29, 1941. Powell was 15-years old at the time of his crime and 18-years old when executed.

10. Nathaniel Walker was electrocuted on December 29, 1941. Walker was 15-years old at the time of his crime and 18-years old when executed.

11. James Davis was electrocuted on October 19, 1944. Davis was either 15- or 16-years old at the time of his crime and 16-years old when executed.

12. Lacy Stewart was electrocuted on October 25, 1946. Stewart was 17-years old at the time of his crime and 19-years old when executed.

13. Orion Nathaniel Johnson was electrocuted on September 28, 1954. Johnson was 16-years old at the time of his crime and 19-years old when

executed.

14. Abraham Beard was electrocuted on November 8, 1954. Beard was 17-years old at the time of his crime and 18-years old when executed.

(Appendix C; IV,458-461). An affidavit of Professor Michael Radelet from the University of Florida (Appendix D; IV,456-458) identifies the only four 16-year old offenders who, since ***Furman v. Georgia***, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), have been sentenced to death in Florida. None of those death sentences were affirmed. Thus, it has been 45 years since Florida last executed a 16-year old offender.

The nations that execute offenders under the age of 18 are Bangladesh, Barbados, Iran, Iraq, Nigeria, Pakistan, Bangladesh, Rwanda, Saudi Arabia, the United States of America, and Yemen. As detailed in the Initial Brief of Appellant at pages 61-70, the death penalty for child offenders is internationally condemned by the vast majority of world governments and organizations. From an objective standpoint, execution of a 16-year old child offender by civilized nations and governments is "unusual" however that term is normally defined.

The Eighth Amendment's prohibition of cruel and unusual punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." ***Trop v. Dulles***, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d

630 (1958). International standards of decency have evolved to the point that state execution of infant offenders is universally condemned by civilized governments. While that is not necessarily controlling, it is relevant as to what the evolving standards of decency are at any given time. See ***Brennan***, 24 FLW S365, fn.8 (Fla. July 8, 1999); ***Thompson v. Oklahoma***, 487 U.S. 815, 830, 108 S.Ct. 2687, 2696, 101 L.Ed.2d 702, fn.31 (1980).

From an article I, section 17 perspective, state execution of 16-year old offenders is unusual. It has not occurred in Florida in nearly 50 years and the Florida Legislature has ***not*** performed the individualized evaluation nor made the express determination that 16-year old children offenders are to be subjected to capital punishment. In the absence of that process, the death penalty for 16-year old offenders violates the Eighth and Fourteenth Amendments and article I, section 17 of the Florida Constitution. ***Thompson v. Oklahoma***, 487 U.S. 815, 108 S.Ct. 2687, 101 L.E.2d 702 (1988); ***Stanford v. Kentucky***, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989); ***Allen v. State***, 636 So.2d 494 (Fla. 1994).

STATE EXECUTION OF 16-YEAR OLD CHILDREN IS CRUEL:

> [T]he Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of

> of the Amendment. Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," ***the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering***.

Gregg v. Georgia, 428 U.S. 153, 182-183, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1976) (citations omitted) (emphasis added). Thus, to comport with the Eighth Amendment and article I, section 17 of the Florida Constitution, punishment must be justified by furthering a legitimate state goal.

Historically, the goals of punishment are retribution, rehabilitation of the offender and deterrence. See ***Harmelin v. Michigan***, 501 U.S. 957, 988-989, 111 S.Ct. 2680, 2698, 115 L.Ed.2d 836 (1991). When a death sentence is carried out there can be no rehabilitation of the offender.

> Death is a unique punishment in its finality and its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.

Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1989). However, rehabilitation (as a valid societal interest) is advanced by imposition of any sanction other than the death penalty. See ***Furman v. Georgia***, 408 U.S. 238, 306 (1978) (Stewart, J., concurring) ("death penalty denotes the absolute renunciation of all that is embodied in our concept of humanity."); ***Francis v. Dugger***, 514 So.2d 1097, 1098 (Fla. 1987) ("The

potential for rehabilitation constitutes a valid mitigating factor."). In that respect, a recognized goal of punishment is actually thwarted by imposition of the death penalty.

RETRIBUTION: As noted in ***Gregg***, "Retribution is no longer the dominant objective of the criminal law, but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men." ***Gregg***, 428 U.S. at 183 (citations omitted). That said, however, retribution alone cannot support imposition of the death penalty, for by focusing solely on the crime it avoids the individualized sentencing determination required by the Eighth Amendment. ***Woodson v. North Carolina***, 428 U.S. 280 (1976). Thus, in ***Gregg*** the Court concluded that it could not say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases was clearly wrong. There is no equivalent showing here that the Florida Legislature has performed any reasoned analysis and expressly concluded that the goal of retribution alone justifies execution of child offenders.

To say that, historically, capital punishment serves a valid purpose in the abstract is not determinative now because it ignores modern understanding of childhood and the deference children today are given by governments and courts:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly

> 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-116, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) (footnotes omitted). Execution of child offenders in the absence of any consideration of modern beliefs concerning the treatment and punishment of children places the goal of retribution above the constitutional requirement that the punishment be geared to society's evolving standards of decency.

DETERRENCE

Likewise, there is no showing that a reasoned and well-founded conclusion has been made by the Florida Legislature that imposition of the death penalty on 16-year old offenders will deter others from committing first-degree murder. In dealing with this question, the United States Supreme Court concluded that deterrence does not justify the death penalty for 15-year old offenders:

> For such a young offender, the deterrence rationale is equally unacceptable. The Department of Justice statistics indicate that about 98% of the arrests for willful homicide involved persons who were over 16 at the time of the offense. Thus, excluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders. And even with respect to those under 16 years of age, it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so

> remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century. In short, we are not persuaded that the imposition of the death penalty for offenses committed by persons under 16 years of age has made, or can be expected to make, any measurable contribution to the goals that capital punishment to achieve. It is, therefore, "nothing more than purposeless and needless imposition of pain and suffering," and thus an unconstitutional punishment.

Thompson v. Oklahoma, 487 U.S. 815, 837-838, 108 S.Ct. 2687, 2700, 101 L.Ed.2d 702 (1988) (footnotes and citations omitted).

Even assuming, without conceding, that legitimate state goals might in the abstract be achieved through capital punishment of children, it remains that the Florida Legislature has not expressly made that determination as it applies to 16-year old children offenders. A 16-year old person is a "child" under Florida statutes. Section 39.01(10), Florida Statutes (1997). As set forth in the Initial Brief of Appellant in Point V, governments have historically cared for and provided special protections to children due to a child's lack of maturity and judgment. The state is traditionally charged with protecting children that are presumed to be unable to care for themselves:

> The concept of parens patriae is derived from the English constitutional system. As the system developed from its feudal beginnings, the King retained certain duties and

> powers, which were referred to as the 'royal prerogative.' (Citations omitted). These powers and duties were said to be exercised by the King in his capacity as 'father of the country.' Traditionally, the term was used to refer to the King's power as guardian of persons under legal disabilities to act for themselves. For example, Blackstone refers to the sovereign or his representative as 'the general guardian of all infants, idiots, and lunatics,' and as the superintendent of 'all charitable uses in the kingdom.' In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States.

Hawai v. Standard Oil Co. of California, 405 U.S. 251, 257, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972) (footnotes omitted). It seems immoral and barbaric for a "civilized" government to forego its obligation to nurture and protect a child and to instead execute him or her as "punishment" for conduct occurring prior to adulthood. Internationally, children are viewed as necessarily being less culpable than an adult due to diminished maturity, understanding and judgment. Modern standards of decency condemn government execution of children.

Court's view children as "wards of the court" and look to the best interest of the child to resolve disputes concerning the rights of the child. ***Davis v. Davis***, 143 Fla. 282, 196 So. 614 (1940). Courts put the best interest of the child above the fundamental interests of parents. In doing so, Justice Terrell once remarked on the importance of child rearing and in doing so poignantly touched on the interplay between treatment of the child and the adult that results:

> Ever since man stood flatfooted and walked upright, he has been prone to trespass on the liberty of his fellow man. In his untamed state, he has always been the rampant autocrat. Energize him with intelligence, self discipline, a wholesome respect for the liberty of others and then quicken him to adjust readily to correct patterns of social development and you make of him the paragon of democracy. Socrates is alleged to have proclaimed that the "undisciplined life is not worth living." So democracy is self discipline, a willingness to submit to reasonable restraints and give up some portion of personal liberty when essential to advance the common good; in other words, to accept graciously the responsibility that liberty carries with it.

Pittman v. Pittman, 153 Fla. 434, 436 14 So.2d 671, 672 (1943). Whether or not one believes that behavior is learned, it is none-the-less axiomatic that children can and must be taught[1] to conform to society's rules. In that respect, this Court is well aware of, and has often commented on, the mitigating nature of the turbulent childhood typically experienced by the children who later, as adults, commit first-degree murder. E.g., ***Nibert v. State***, 574 So.2d 1059, 1062-1063 (Fla. 1990). A child's inherent ability to adapt and to be taught appropriate behavior is a consideration that renders the death penalty unacceptable as being in the best interest of the child. See ***Skipper v. South Carolina***, 476 U.S. 1, 7, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) ("a defendant's disposition to make a well-behaved and peaceful adjustment to life in

[1] "'Tis education forms the common mind. Just as the twig is bent, the tree is inclined." Alexander Pope (1688-1744), *Epistle to Cobham*.

prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.").

For the foregoing reasons, the death penalty cannot and should not be applied to 16-year old child offenders, for it is cruel and unusual punishment. The death sentence must accordingly be reversed and a sentence of life imprisonment without parole imposed.

CONCLUSION

For the foregoing reasons and those specified in the Initial Brief of Appellant, the death penalty cannot and should not be applied to 16-year old child offenders, for it is cruel and unusual punishment. The death sentence must accordingly be reversed and a sentence of life imprisonment without parole imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, this 17th day of September, 1999.

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APPENDIX TO
SUPPLEMENTAL BRIEF OF APPELLANT

A. MOTION TO PRECLUDE IMPOSITION OF DEATH PENALTY
B. ORDER DENYING MOTION TO PRECLUDE IMPOSITION, ETC.
C. AFFIDAVIT OF WATT ESPY, DIRECTOR
D. AFFIDAVIT OF PROFESSOR MICHAEL RADELET, Ph.D.