IN THE SUPREME COURT OF FLORIDA

JEFFREY ALLEN FARINA,

Appellant,

v. CASE NO. 93,907

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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This brief is typed in Courier New 12 point.

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STATEMENT OF THE CASE

The statement of the case set out on pages 1-4 of Farina's brief is argumentative and is denied. The State relies on the following statement of the case.

On April 18, 1996, this Court affirmed Farina's first degree murder conviction (among others), and remanded the case to the Volusia County Circuit Court for a new sentencing proceeding[1]. *Farina (Jeffrey) v. State,* 680 So.2d 392 (Fla. 1996). This Court denied rehearing on September 24, 1996, and the mandate of this Court was filed in the Circuit Court on October 31, 1996. (R1). Various preliminary motions were filed, and, on April 6, 1998, jury selection began. (TR1). Trial began on April 13, 1998, and, on April 20, 1998, the jury returned its unanimous advisory verdict recommending that Jeffrey Farina be sentenced to death. (R336). A *Spencer* hearing was conducted on May 1, 1998, and, on May 7, 1998, the Circuit Court followed the jury's recommendation and sentenced Farina to death. (TR2433; 2629).

Farina gave notice of appeal on September 9, 1998, and, on April 30, 1999, the record as supplemented was certified as complete. Farina filed his *Initial Brief* on May 25, 1999.

STATEMENT OF THE FACTS

The Statement of the Facts contained in Farina's brief is not

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[1] In this brief, reference to "Farina" is to the defendant in this case (Jeffrey Farina) unless otherwise specified.

only abbreviated, but also is argumentative, and, for those reasons, is not accepted by the State. Instead, the State relies on the following Statement of the Facts.

This Court summarized the facts of this crime in the following way during the original direct appeal proceedings[2]:

> [Jeffery] Farina and his brother, Anthony J. Farina, were tried together and convicted of fatally shooting seventeen-year-old Michelle Van Ness during the May 1992 robbery of a Taco Bell restaurant in Daytona Beach. *See also Anthony J. Farina v. State*, 679 So.2d 1151 (Fla. 1996). Jeffery Farina fired the shot to the head that killed Van Ness.
>
> The jury convicted Jeffery Farina of first-degree murder and recommended death by a vote of nine to three. The trial judge followed the jury's recommendation and sentenced Farina to death.
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> . . .
>
> Van Ness and the other three victims all worked at Taco Bell. After the restaurant closed early on May 9, 1992, Jeffery and Anthony Farina confronted Van Ness and Derek Mason, 16, while the two employees were emptying trash. Jeffery was armed with a .32-caliber pistol, Anthony carried a knife and rope, and both wore gloves.
>
> The Farinas ordered Van Ness and Mason into the restaurant, where they rounded up two other employees. Jeffery held three employees at gunpoint, while Anthony forced employee Kimberly Gordon, 18, to open the safe and hand over the day's receipts. Although there were assurances that no one would be hurt, the Farinas tied the employees' hands behind their backs and Anthony forced them into a walk-in freezer.

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[2] This Court referred to the *Jeffrey Farina* case for the recitation of the facts. *Farina (Anthony) v. State, supra,* at 1153. The State has done likewise, but has omitted certain sentencing facts related specifically to Jeffrey Farina.

> Survivors testified that Van Ness was shaking and crying as she entered the freezer and she was afraid she would be hurt. Shortly after the employees were led to the freezer, Jeffery shot Mason in the mouth. He then shot employee Gary Robinson, 19, in the chest, and finally shot Van Ness in the head. Gordon was stabbed in the back.
>
> The Farinas fled the restaurant, but were arrested later that day after another Taco Bell employee saw Anthony buying gasoline at a service station and called the police. When arrested, Jeffery had a receipt from a local store indicating that he had purchased .32-caliber bullets, gloves, and clothesline on May 8. The Farinas had $1,885 of the $2,158 that was taken from Taco Bell.
>
> Van Ness died on May 10. The Farinas were charged with first-degree murder and six other offenses.

Farina (Jeffrey) v. State, 680 So.2d 392, 394-5 (Fla. 1996).

The resentencing proceeding ordered by this Court began on April 6, 1998. During that proceeding, the following evidence was presented.

On May 8, 1992, Derek Mason was a 16-year-old high school junior who worked part-time at Taco Bell. (R1260-61). He had been working at Taco Bell since January 1992. (R1261). On May 8, 1992, Derek arrived at work at about 6:00 PM at the Taco Bell located at the corner of Clyde Morris and Beville Road in Daytona Beach. (R1262-3). Kim Gordon was the manager that night, and Gary Robinson and Michelle Van Ness were the other employees. (R1263). Michelle and Derek had worked together at the Beville Road Taco Bell since it opened in late January of 1992. (R1263). Derek knew Anthony Farina because he was also an employee of Taco Bell. (R1263).

Derek did not see Anthony during the early evening hours of

May 8. (R1264). The Taco Bell closed at midnight, and Derek and Michelle began taking the trash out. (R1264). After they had taken several bags out, two men got out of a car and approached them -- one person put a gun to Derek's back, and the other put a knife to Michelle. (R1265). Derek did not recognize either man at the time, but, once back inside the store, recognized Anthony and Jeff Farina. (R1265-6). Anthony ordered Derek to get the store manager (Kim), which he did. (R1266). Anthony then went with Kim to the part of the store where the safe was located. (R1266). Shortly thereafter, Anthony and Kim returned to the back of the store with a quantity of money, which was placed into a Taco Bell bag. (R1266). Anthony then offered cigarettes to the four employees, and then ordered anyone not smoking to "get up and come here". (R1267). Anthony gave some rope to Jeff, who tied Derek's hands behind his back, and then tied Gary in the same fashion. (R1267). Anthony was holding the gun while Jeff was tying Derek and Gary up. (R1269). During this process, Anthony was telling Jeff what to do. (R1268).

Derek asked Anthony if he and his brother were going to hurt anyone, and Anthony told him that if they (the Taco Bell employees) cooperated, everything would be "OK". (R1268). Michelle was crying and holding to Derek's arm -- he tried to reassure her that things would be alright. (R1268).

Anthony then tied up Kim and Michelle, ordered Derek to change locations, and opened the cooler and directed the four employees

into it. (R1269). Anthony and Jeff then left the cooler and stopped just outside of it. (R1269). Michelle was still crying. (R1270)[3]. Anthony and Jeff then came back into the cooler and directed the four employees into the freezer. (R1270). There was some discussion about turning off the refrigeration so that it would not be so cold in the freezer, but Anthony was concerned that that would set off some kind of alarm. (R1287-8). All four were tied with their hands behind their back. (R1270).[4] Jeff then shot Gary in the chest and shot Derek in the face. (R1271). Jeff aimed at Derek's chest and pulled the trigger, but the weapon misfired. (R1271). Derek tasted blood in his mouth and went to the floor. (R1271). Derek then heard another shot, and saw Michelle fall to the floor. (R1271). Jeff next aimed the gun at Kim, but it misfired -- Anthony gave the knife to Jeff, who stabbed Kim while Anthony held her head down. (R1271).[5] Kim fell to the floor bleeding heavily, and the Farinas fled. (R1272). Derek and Gary were able to free themselves and call law enforcement. (R1272-3). Derek also tried to find Anthony's file in the Taco Bell office so he could give it to the police. (R1273). The projectile that struck Derek entered between his lip and his

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[3] Michelle was crying throughout the robbery. (R1274).

[4] No one's feet had been tied. (R1271).

[5] Jeff tried to hammer the knife into the back of Kim's skull, and, when that proved to be difficult, stabbed her in the back. (R1271).

nostril, and ended up lodged on the right side of his jaw just beneath the skin. (R1273).

Kimberly [Kim] Gordon was a shift manager at the Beville Road Taco Bell in 1992. (R1478-9). Kim knew Anthony from having worked at the Taco Bell in Holly Hill, Florida, where Anthony had also worked. (R1480). She saw Anthony before the store closed, and saw him again when he and Jeff entered the store holding weapons on Michelle and Derek. (R1481). Kim was counting the day's receipts at that time, and had totaled up about $2,000. (R1482). Anthony directed everyone to the back of the store, and told Kim that because she had the keys to the safe, she was going to go with him to the front of the store and get the money. (R1482). Kim did as she was ordered, and Anthony then directed her to put the money into plastic bags. (R1483). When she had finished putting the money into bags, Anthony ordered Kim to join the other employees -- she asked if she could smoke a cigarette first, and Anthony allowed her and Michelle to do so. (R1483-4). Anthony then tied up the two employees who were not smoking -- both Farinas had rubber gloves on their hands. (R1484). Anthony had recognized Kim and had called her by name. (R1484)[6]. Anthony was not under the influence of any intoxicant, appeared to be "in charge", and was doing all of the

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[6] When he was tying her hands behind her back, Anthony said to Kim "I guess you never expected this from me." (R1486).

talking. (R1485; 1487).[7]

Kim asked Anthony if they were going to hurt anyone, and he replied that no one would be hurt so long as they cooperated. (R1487). All four Taco Bell employees were concerned for their safety, and Michelle was very afraid and was crying. (R1487). Anthony then ordered the four victims into the cooler, stepped out, and then returned saying "We have one more precaution to take, everybody get into the freezer". (R1488; 1512). As soon as the four victims were in the freezer, Jeff started shooting. (R1488)[8]. The four Taco Bell employees were asking the defendants not to hurt them. (R1489). Kim felt someone forcing her head down while someone else tried to drive a knife into her skull. (R1488-89).[9] Kim remembers passing out, and regaining consciousness four days later. (R1490-91).

Gary Robinson was a 19-year-old college student in May of 1992. (R1525). May 8, 1992, was his third day to work at the Beville Road Taco Bell. (R1526). After the store had closed, Gary was washing dishes when Derek and Michelle came into the store with

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[7] Kim stated that she never heard Jeff speak. (R1485).

[8] Because her back was to the defendants while in the freezer, Kim does not know if they tried to shoot her or not. (R1508).

[9] She could not tell which defendant was doing what, but she was certain that one person was holding her head and another was stabbing her. (R1489).

the defendants behind them holding weapons. (R1527). At that time, Jeff had a gun and Anthony had a knife. (R1527). The Taco Bell employees were ordered to the back of the room. (R1527). Michelle was crying and expressed her belief that they would be killed. (R1528).

Both defendants appeared calm and alert and did not seem to be under the influence of any intoxicant. (R1529-30). Both defendants also acted solicitously toward Gary. (R1530). Anthony did most of the talking during the course of the robbery. (1543). When the four Taco Bell employees were put inside the freezer, the shooting started -- Gary was shot first, followed by Derek and Michelle. (R1531). The gun misfired when aimed at Kim's head, so she was stabbed. (R1531-2).[10] There was screaming and general panic once the shooting began. (R1531). After the defendants left, Gary freed himself -- Kim was lying on the floor in convulsions, and Michelle appeared to be dead. (R1533).

Former Daytona Beach Police Department Investigator Allison Sylvester testified that she arrived at the Beville Road Taco Bell in the early morning hours of May 9, 1992. (R1290-91)[11].

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[10] Gary described the gun being at point-blank range to Kim's head when it misfired. (R1532). He also described the efforts to pound the knife into the back of Kim's head. (R1532).

[11] Investigator Sylvester's testimony was presented to the penalty phase jury in three discrete segments. It has been consolidated here for convenience.

Investigator Sylvester identified both defendants, and identified photographs of the four victims. (R1300-1305). She observed bruising on Michelle's wrist that was consistent with her having been tied up. (R1306). Bullets were recovered from Michelle and Derek -- the bullet which struck Gary was not removed from his body. (R1307). The firearm used by the Farinas was not recovered. (R1308).

Anthony Farina was developed as a suspect, and, between 11:00 AM and noon on May 9, 1992, officers from the Holly Hill Police Department stopped the Farinas at the Shell Station located at Mason and Ridgewood. (R1423-25). Jeff Farina had an identification card in his possession which identified him as "Buddy Chapman". (R1425-6). A partial box of pistol cartridges was located in the defendants' vehicle -- those cartridges were shown to have been purchased at a K-Mart at 11:58 AM on May 8, 1992, with a check drawn on the account of "Buddy Chapman". (R1427-1432). A receipt located in the vehicle also indicated that "Buddy Chapman" had purchased vinyl gloves and clothesline at 12:41 PM on the same day at the same K-Mart. (R1432-33)[12].

On May 11, 1992, the Farinas were transported to the Daytona Beach Police Department (pursuant to court order) to be booked for

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[12] Fingerprints belonging to both Farinas were found on the receipt. (R1463).

Michelle's murder. (R1643).[13] A monitoring device was in the transport vehicle which allowed any conversation in that vehicle to be tape recorded. (R1644). In the recorded conversations, Anthony stated, *inter alia,* that they should have stabbed the victims and cut their throats. (R1656). Jeff stated that he had shot Michelle because he had a "boring day". (R1656).

Jeffrey Wiles was a patrol officer with the Daytona Beach Police Department in May of 1992. (R1315)[14]. He was literally across the street from the Taco Bell when the 911 call was received and dispatched from police headquarters. (R1316-17). Officer Wiles found Derek Mason when he entered the Taco Bell, and Derek told the officer that the suspects were gone, and that there were more victims in the cooler. (R1319; 1327). In the cooler/freezer, Officer Wiles found the bodies of two women with their hands tied behind their backs. (R1328). Kim Gordon had a pulse, and Michelle was breathing rapidly and her pupils were fixed and dilated. (R1329-30). Officer Wiles untied the two victims, cleared Kim's airway, and moved out of the way when emergency medical personnel arrived. (R1330; 1335). Derek identified one of the perpetrators as "Tony", who was a former employee of Taco Bell. (R1336). Officer

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[13] Michelle died from the gunshot wound to the head on May 10, 1992. (R1643).

[14] This officer is now employed by the Volusia County Sheriff's Office. (R1315).

Wiles subsequently found Gary Robinson in the storage area of the store -- Gary had been shot, too, and Officer Wiles called for the medical personnel to assist Gary. (R1337).

Thomas Youngman is a crime scene technician with the Daytona Beach Police Department. (R1356-7). He processed the crime scene at the Taco Bell, and also processed the defendants' residence. (R1358; 1366). At the Taco Bell, Officer Youngman found a total of five pieces of rope and the "cylinder pin" from a revolver. (R1362). A revolver-type handgun is likely to misfire if the cylinder pin is missing. (R1364). At the defendants' residence (the Rollie's Court Motel), Officer Youngman recovered some spent .32 caliber shell casings from the motel trash in addition to six (6) live .32 caliber rounds. (R1367-8). Officer Youngman found $782 under the center cushion of the couch in the defendants' motel room, as well as finding $400 in a checkbook in the name of "Buddy Chapman"[15], $200 in the purse belonging to Anthony's girlfriend, and $220 in the purse belonging to the defendants' mother. (R1374-76).[16] A K-Mart receipt was found in the checkbook for the purchase of gloves and rope at 12:41 PM on May 8, 1992. (R1373-4). A partial box of .32 caliber cartridges was recovered from the defendants'

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[15] Jeff Farina uses the alias "Buddy Chapman", and the motel room was registered in that name. (R1388; 1392).

[16] Both purses were located in the vehicle occupied by the defendants at the time they were taken into custody. (R1376).

mother. (R1377). The total amount of money taken in the Taco Bell robbery was $2,069.19 -- $2,059 was recovered. (R1377).

Susan Komar is a senior crime laboratory analyst with the Florida Department of Law Enforcement's Orlando facility. (R1400-1). She was accepted as an expert in the field of firearm and toolmark examination. (R1403). Ms. Komar examined the projectiles recovered from Michelle's body and from Derek's face -- both bullets are .32 automatic caliber and were fired from the same handgun. (R1404-6). The projectiles have rifling characteristics of 10 lands and grooves, a pattern that is typical of inexpensive, foreign-made revolvers. (R1405). Ms. Komar also examined two spent .32 caliber cartridges and six live .32 caliber cartridges. (R1406-7).[17] One of the spent cartridges (the "Federal" brand one) had at least three separate firing pin impressions on its primer, indicating that the trigger had been pulled on that cartridge at least three times before it fired. (R1412). One of the live rounds also has at least two firing pin impressions on it, indicating that the trigger was pulled twice, but the cartridge did not fire. (R1413-5).

Michelle's death certificate was admitted into evidence, as

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[17] One of the spent cases is a "Federal" brand cartridge. (R1407). The rest of the cartridges (both live and spent) are "Winchester-Western" brand. (R1407). The recovered box of cartridges was Winchester-Western brand, and five of the six live cartridges bore headstamp marks matching the cartridges in the box. (R1408-9).

were the judgements of conviction against Anthony and Jeff for the various crimes arising out of the Taco Bell robbery. (R1553-4).

The State also presented the testimony of some of Michelle's friends and family members which established the loss to the community and her friends and family as a result of her death. (R1556-1634). None of that testimony expressed any opinion about the crime, the defendants, or the appropriate punishment.

Michelle died on Mother's Day of 1992. (R1591). She was a good student at Warner Christian Academy, and wanted to be a pediatrician. (R1582-4). The testimony of her family and friends can fairly be described as showing Michelle to be a caring, generous person who was well thought-of by her friends and family, and whose death has had a profound effect on them.

In mitigation, Jeffrey presented lengthy testimony, which is set out below.[18]

Dale Heiser is a police officer in Monmouth, Illinois, and was so employed in June of 1987. (R1664-6). On June 23, 1987, Anthony came to the police department to report "child abuse". (R1667). James Brant, Anthony's step-father, was the suspect in that incident, and was ultimately charged and adjudicated following entry of a guilty plea. (R1669-70). Monmouth police officers

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[18] As this Court is well aware, the Farina brothers were tried jointly -- the mitigation evidence, with minor exception, is applicable to both of them.

frequently responded to domestic violence calls involving Brandt, the defendants, and their mother. (R1673). Both Anthony and Jeff were involved in criminal behavior at an early age. (R1679).

Tammy Lewis was Anthony's girlfriend, and is the mother of his son. (R1717-20; 1723). In her opinion, Anthony is a caring and loving person who has made a genuine conversion to religion. (R1724-31). Jeff looked up to Anthony. (R1746).

Cindy Comfort is the defendants' cousin, and has known them both all of their lives. (R1764-65). She testified that their home with their biological father was stable, but that when their mother divorced their father and married Brandt, the situation drastically deteriorated. (R1765-70). The witness has heard that Anthony sexually abused his little sister when she was four years of age. (R1780). Daniel Comfort is also related to the defendants, and testified to essentially the same facts as did Cindy Comfort. (R1786-91). He never tried to intervene in the "abuse", never reported it, and never allowed his wife (Cindy) to do so. (R1795). He did not think that the "abuse" was that bad at the time.(R1796).

Mary Grafwallner is the defendants' aunt. (R1796-7). She testified that the defendants' mother (Grafwallner's sister) lacked the mothering skills to raise the defendants. (R1802-3). The defendants had a stable home environment until their parents' divorce, and their father stayed away because of arguments with their mother. (R1807-8).

Edna O'Teri works at Park's Seafood, and knows both defendants. (R1809-10). Jeff (who she knows as "Buddy Chapman") worked with her at that restaurant. (R1810-11). She described Jeff as "very calm", normal and well-adjusted, and never saw him lose his temper. (R1816-17).

David Sharp was a police officer in Monmouth, Illinois, and knows the defendants' former stepfather, James Brandt, from responding to various domestic violence complaints. (R1855-58). Sharp was later employed by the Department of Children and Families (in Illinois), and came in contact with Brandt in connection with an abuse complaint involving Anthony. (R1859).[19] Significantly, Jeff was not removed from the home -- Anthony was later removed because he sexually abused his sister. (R1871-2).

Tina O'Neil testified about some of the traveling about undertaken by the defendants and their family. (R1875-96). She also described how the defendants would steal items from area stores and their mother would later return the items for a refund. (R1913).

Steve McCollum is a retired Florida Department of Corrections Chaplin who knows both defendants from his service at Union Correctional Institution. (R1918-19). Anthony is sincere in his faith and has never been a troublemaker or discipline problem. (R1923).

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[19] This is the abuse complaint referred to above.

The defendants' mother, Susan Griffith, testified about their background and early life. (R1935, *et seq*). She testified that she tried to be a good mother to her children and never abused them. (R2011).

Dean Dearborn was a counselor at a residential facility where Anthony was housed in 1987-88. (R2026-28). He receives letters from Anthony which, in their opening and closing, are religious in tone. (R2035).

Harry Krop is a Ph.D. psychologist who was hired to evaluate Jeffrey. (R2044-55)[20]. Jeffrey has never offered excuses or denied his involvement in Michelle's murder, and admitted that he was the one who actually fired the fatal shot. (R2057; 2080). At the time of Krop's evaluation of Jeffrey, "neurologically he was pretty much intact." (R2060). Krop believes that Jeffrey has an impulse control disorder referred to as "intermittent explosive disorder". (R2079). Jeffrey was sane and competent when he murdered Michelle. (R2082). Jeffrey is fairly bright, and was not a drug user. (R2083; 2085). He did not have a problem with alcohol abuse at the time of the crime, and obtained the gun that was used in advance of the Taco Bell robbery. (R2086-7). Jeffrey and Anthony had at least two discussions, prior to the robbery, about killing the victims, and, in fact, knew, before the robbery, that Anthony was known to three

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[20] A mental state expert also testified for Anthony. (R2110). That testimony does not relate to Jeffrey, and is omitted here.

of the four victims. (R2092-3; 2106). Jeffrey knew that three of the four employees knew and could identify Anthony. (R2093). Jeffrey has no major mental illness, no "full-blown personality disorder", no psychoses, no schizophrenia, and no hallucinations. (R2095).

Katrina Wandsnider is the defendants' younger sister. (R2160). She testified that her brothers send her letters from prison, and that those letters brighten her day. (R2160-62).

On May 1, 1998, a *Spencer* hearing was conducted. Kathy Cratin is a case counselor at the Volusia County Branch Jail -- she testified that both defendants are polite and have no disciplinary record. (R2452-56).

On May 7, 1998, the Volusia County Circuit Court sentenced Farina to death, finding the following aggravating circumstances: that Farina had previously been convicted of a felony involving the use or threat of violence; that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; that the capital felony was committed for pecuniary gain[21]; that the capital felony was especially heinous, atrocious, or cruel; and that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R356-7). The sentencing court gave great weight to

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[21] The sentencing court merged the during the course of a robbery aggravator into the pecuniary gain aggravator. (R356).

the avoid arrest and cold, calculated, and premeditated aggravators, moderate weight to the prior violent felony and heinous, atrocious, or cruel aggravators, and substantial weight to the pecuniary gain aggravator. (R356-8).

In mitigation, the sentencing court gave moderate weight to the "no significant criminal history" mitigator; little weight to the "accomplice" mitigator; and moderate weight to the age mitigator. (R358-9). The court also considered and weighed various non-statutory mitigation. (R359-60). That Court found, at the conclusion of the weighing process, that the aggravation far outweighed the mitigation, and sentenced Farina to death. (R360).

SUMMARY OF THE ARGUMENT

Farina's "law of the case" claim is foreclosed by settled precedent which prohibits relitigation, in the context of a resentencing proceeding, of issues which could have been or were raised in the first appeal.

Farina's claim that he is entitled to relief because the trial court refused to instruct the jury that Farina had "waived all parole eligibility" is foreclosed by binding precedent, which clearly establishes that life without possibility of parole was not a sentencing option in this case.

The sentencing court properly found that the murder of Michelle Van Ness was especially heinous, atrocious, or cruel. There is no "intent element" to this aggravating circumstance under

well-settled Florida law. The fact that this was a gunshot murder does not mean that the heinous, atrocious, or cruel aggravator is not applicable when, as is the case here, the actual killing is preceded by substantial mental and emotional cruelty.

Farina's claim that "victim impact" evidence became a "feature" of the trial is not supported by the record. His subsidiary claim that the jury instructions regarding victim impact evidence were deficient is based on a misrepresentation of the instructions that the jury was given.

Farina's claim that it is unconstitutional to execute him because he was "only 16" when he murdered Michelle Van Ness is based upon an incorrect legal premise. The United States Supreme Court has decided that 16-year-old killers can constitutionally be executed, and this Court is bound to follow that precedent.

The claim that the death penalty is unconstitutional because of the "heavy burden" that it places on communication is meritless as a matter of law. The United States Supreme Court has held that the death penalty is constitutional, and that holding is dispositive.

The exclusion of defense evidence claim is not a basis for relief because the evidence at issue was properly excluded because it was not relevant to the sentencing decision.

Farina's claim that his **conviction** is in some way invalid is not before this Court. The conviction was affirmed in 1996, and

cannot be relitigated now.

Farina's claim that the Florida death penalty act is unconstitutional has no legal basis, and is foreclosed by binding precedent.

Farina's claim that the jury instruction given on the weighing of the aggravators and mitigators is unconstitutional is foreclosed by binding precedent.

ARGUMENT

I. THE LAW OF THE CASE CLAIM

On pages 28-41 of his brief, Farina argues that the trial court erroneously considered itself bound by the "rulings" made during the defendant's first trial in 1992. While the precise nature of Farina's complaint is not always easy to discern, what is apparent is that Farina's intent is to litigate not only his sentence, but also his guilt. Despite Farina's attempt to expand the scope of this appeal, his guilt was decided in 1996, and cannot be relitigated now.

In his original direct appeal, Farina raised the following six issues, as framed by this Court:

> Whether (1) it is unconstitutional to execute a sixteen-year-old; (2) serious errors undermined the fairness and impartiality of the jury; (3) the trial court improperly overruled defense objections to the placement of the television camera, victims, and victims' families close to the jurors and prospective jurors; (4) intentional prosecutorial misconduct denied Farina a fair trial; (5) the trial court should have given Farina's specially-requested jury instructions; and (6) Florida's death penalty statutes are unconstitutional.

Farina v. State, 680 So.2d 392, 395 n. 1 (Fla. 1996). This Court granted penalty phase relief based on claim two, declined to address claim 1, found that the disposition rendered claims 5 and 6 moot, and denied relief on claims 3 and 4. *Id.*

In the context of a resentencing proceeding, the law is well-settled that the defendant cannot relitigate issues which could have been raised on the first appeal. *Harvard v. State,* 414 So.2d 1032 (Fla. 1982). The issue of guilt is not subject to litigation. *Chandler v. State,* 534 So.2d 701 (Fla. 1988); *King v. State,* 514 So.2d 354 (Fla. 1987); *Sireci v. State,* 399 So.2d 964 (Fla. 1981). Moreover, the State can present evidence of guilt (rather than relying on the judgment of conviction), and can introduce evidence relevant to the nature of the crime. *Chandler, supra; King, supra; Teffeteller v. State,* 495 So.2d 744 (Fla. 1986). Under settled law, a **resentencing** proceeding is an entirely new proceeding:

> This Court has applied the "clean slate" rule to resentencing proceedings. We have held that a resentencing is a completely new proceeding and a resentencing judge is not obligated to find mitigating circumstances found by the first judge. *See King v. Dugger,* 555 So.2d 355, 358 (Fla.1990). *See also Teffeteller v. State,* 495 So.2d 744 (Fla.1986) (resentencing should proceed *de novo* on all issues bearing on the proper sentence). In *King,* we held that "a mitigating circumstance in one proceeding is not an 'ultimate fact' that collateral estoppel or the law of the case would preclude being rejected on resentencing." *King,* at 358. Moreover, we have held that a trial judge may properly apply the law and is not bound in remand proceedings by a prior legal error. *Spaziano v. State,* 433 So.2d 508, 511 (Fla. 1983), *aff'd,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Preston v. State, 607 So.2d 404, 408-9 (Fla. 1992).[22]

However, while the foregoing holds true for the new penalty phase proceeding, it does not follow that Farina is entitled to litigate **guilt** phase issues that he did not even bother to raise in his original appeal. In his brief, Farina tips his hand that his true motivation is endless relitigation of all imaginable claims when he states:

> ... a trial judge presiding over a new penalty proceeding is not "bound" to make the same ruling that was made six years earlier **to resolve legal questions that have never been expressly presented to nor addressed by an appellate court. When, as here, issues arise that have never been expressly reviewed by an appellate court, the trial judge's duty is to entertain and attempt to timely, correctly resolve them on the merits.**

Initial Brief, at 29-30. That argument is squarely foreclosed by *Harvard* (which Farina does not mention), and is contrary to common sense. What Farina tries to conceal as a legitimate argument is, in fact, an argument that the grant of a new penalty phase throws open the guilt phase for complete relitigation, even though that has never been the law, with good reason. If the law were as Farina wants it to be, the concept of procedural bar would mean nothing because, at least in the context of this case, Farina would be given the opportunity to litigate guilt phase issues for the first

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[22] The "error" referred to in *Spaziano* occurred at the penalty phase, and the decision stands for the wholly unremarkable proposition that a legal error in the vacated penalty phase proceeding need not be repeated on remand.

time, when he did not raise those claims at the first available opportunity (his first direct appeal).[23] Farina's claim that he should be allowed to litigate previously un-raised guilt phase issues is contrary to settled law, and is frivolous. Such claims are procedurally barred for collateral attack purposes under *Florida Rule of Criminal Procedure* 3.850 -- the fact of the resentencing does not change that legal conclusion. The claims that could have been but were not raised during Farina's original direct appeal cannot be resurrected now.

To the extent that Farina charges that the presiding judge was biased, as evidenced by the fact that he followed Florida law as discussed above, that claim is frivolous, and has no place in this proceeding. There can be no reason for arguing such a claim other than a gratuitous insult directed toward the sentencing judge. Following the law simply cannot demonstrate bias.[24]

In his brief, Farina complains about various "evidentiary" rulings. None of those "claims" are timely, and none of them provide a basis for relief.

The first evidentiary complaint raised by Farina is his claim that the sentencing court denied his motion to suppress his

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[23] Farina had the same public defender attorney during the first direct appeal.

[24] Of course, if Farina thought the trial court was biased, he could have moved for disqualification. One is left to wonder whether this issue is being held in reserve for presentation at some later time.

inculpatory statements. **By Farina's own admission, he raised this claim for the first time on remand.** *Initial Brief* at 31. Farina's co-defendant brother, however, **did** raise the statement issue in his first appeal. **This Court found no error in the admission of the statements.** *Farina (Anthony) v. State,* 679 So.2d 1151, 1157 (Fla. 1996). When Jeffrey Farina's failure to even raise this claim on appeal is coupled with this Court's affirmative finding of no error as to the statements in the co-defendant's case, it requires little analysis to conclude that the statements are admissible in this resentencing proceeding. Farina's claim to the contrary is frivolous, and, moreover, if deemed of such importance should have been raised in the first appeal. None of the suddenly significant grounds for suppression were not known at the time of the first appeal, and each such claim could have been raised then. The fact that such claims were not raised previously indicates either that they were not previously regarded as highly significant, or that they are being raised herein in an effort to engender confusion. Whatever the case, the sentencing judge correctly refused to entertain the motion to suppress.

In his brief, Farina argues that *Preston, supra,* and *State v. Tamer,* 475 So.2d 918(Fla. 3 DCA 1985), stand for the proposition that a motion to suppress is always properly before the trial court, at least in a capital case. However, regardless of the holdings in those cases, they are of no help to Farina because

Preston and *Tamer* are facially distinguishable from Farina's case. First, neither of the cases upon which Farina relies presented a co-defendant who **had** litigated the denial of the motion to suppress and had the denial of such motion affirmed on appeal. Second, and of the most significance to the ultimate disposition here, the defendants in the cases relied on by Farina **had raised the suppression issue in a timely fashion on appeal**. That timely litigation of the suppression claim stands in stark contrast to Farina's dilatory tactics of not concerning himself with the suppression issue in his first appeal to this court, and then placing primary importance on it in his appeal following resentencing. Farina is foreclosed from litigating this issue at this late date because it could have been but was not raised in his first appearance before this Court.[25]

In a remarkably confusing bit of argument that begins on page 34 of his brief, Farina complains that he was prevented from presenting certain tape-recorded statements. From the record, it appears that the State had no objection to allowing the introduction of the statements at issue. (R1694-1702). The true facts are that the defendants had objected to the introduction of

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[25] On page 33 of his brief, Farina adds, with no introduction, a claim concerning the denial of his motion to sever. Like the motion to suppress, Farina did not mention the motion to sever in his first appeal. It is not a basis for relief for the same reasons that the denial of the motion to suppress is not a basis for relief.

the unredacted tapes at the time of the first trial, and the court had sustained the **defense** objection[26]. (R1702). It is disingenuous in the extreme to attempt to place the trial court in error for adhering to a prior ruling that was made **at the request of the defendant.**[27]

Perhaps the most telling evidence about Farina's litigation strategy is found in the completely inconsistent nature of this claim. In one component of this claim, Farina argues that he is entitled to a new sentencing proceeding because the court declined to consider and grant his renewed motions to suppress and to sever. In the same breath, Farina argues that he is entitled to relief because the court would not set aside a prior ruling that **granted** a defense motion to suppress[28]. Farina obviously wants to pick and choose from the prior proceeding, selecting what he likes, and

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[26] The original motion to suppress (which was granted) apparently did not attempt to exclude the taped statement from the guilt phase and introduce it at the penalty phase.

[27] It is significant that the State did not object to Farina placing the statements at issue before the jury. (R1695). It is absurd to fault the trial judge for following a ruling that granted the defense's motion -- the adage to be careful what you ask for because you might get it comes to mind.

[28] In his brief, Farina argues that the taped statement was relevant to mitigation. This argument was never made to the trial court, who was given no information about the claimed relevancy of the tape to the issues. Good faith would seem to suggest that if the Court was being asked to set aside a previous ruling (that was made at the request of the defense), the defense should be forthcoming with the court and state a reason.

discarding what he does not. Such a result is absurd, especially in the context of this case, where many of the "complaints" were not raised in Farina's first appeal to this Court. This claim is disingenuous in the extreme, and is not a basis for relief of any sort.[29]

II. THE LIFE WITHOUT PAROLE SENTENCING OPTION CLAIM

On pages 42-45 of his brief, Farina argues that it was error for the trial court to refuse to instruct the jury, over the State's objection, that Farina had "waived all parole eligibility", with the result that the advisory sentencing options were either death or life without possibility of parole. This claim is another disingenuous effort to cloud the issue before this Court. There is no basis for relief.

This issue is a claim that the death sentence must be reversed because the trial court did not instruct the advisory jury that Farina would accept a life without parole sentence and, in the event that he received such a sentence, would waive all future direct and collateral review of such sentence. As this Court is well aware, Farina's offense occurred in 1992, well before the 1997 change in § 775.082(1) of the *Florida Statutes* which modified the

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[29] Farina's shrill complaints about the "tactics" of his co-defendant's attorney are frivolous -- this Court upheld the denial of the motion to sever in Anthony Farina's case, and Jeffrey Farina did not raise that claim on direct appeal. That claim is not available to him now for the reasons set out herein.

available sentences for capital crimes by replacing the life sentence/25-year mandatory minimum with the option of life without parole. Obviously, the life without parole amendment did not apply to Farina's case by its plain terms, which made its application prospective only.[30] Despite Farina's obfuscation, the true facts are that he attempted to place what was, in fact, his plea bargain offer before the jury in an effort to evade the death sentence that the jury unanimously recommended he receive. There is no rule of law which requires that the jury be instructed as to the terms of such a plea bargain[31], and, at the very least, the facts of this peculiar case do not demonstrate an abuse of discretion on the part of the trial court. Of course, parole eligibility is not a jury issue, and, in any event, the life without parole option did not exist as a matter of law for this defendant. While the State presumably could have accepted the "parole waiver", there is no mechanism by which it can be forced on the State. Life without parole was not an available sentencing option in this case, and the trial court properly refused to confuse the jury with such an

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[30] The co-defendant made no such attempt to agree to such an improper sentence. At the very least, the potential for confusing the jury with various sentencing options existed.

[31] This issue presents the converse of the issue in *Hitchcock v. State*, 578 So.2d 685 (Fla. 1990), where the defendant wanted to present the terms of a plea offer that he had rejected as "mitigation". In *Hitchcock* this Court held that the plea offer was a nullity because it was rejected -- in this case, it is a nullity, as well.

illegitimate issue. There was no abuse of discretion, and there is no basis for reversal.[32]

To the extent that further discussion of this issue is necessary, it makes no sense to attack the trial court, as Farina does, when a decision of this Court on this precise issue had been released shortly before this trial began. In *Hudson,* this Court stated:

> In his ninth issue, Hudson argues that the trial court erred in refusing to instruct the jury that if he were sentenced to life in prison, his sentence would be without any possibility of parole, as section 775.082, Florida Statutes, provided at the time of the resentencing in 1995. (FN6) In addition to finding this claim to be procedurally barred, **we note that the trial court was correct in applying section 775.082, Florida Statutes (1985), which was in effect at the time of the crime in 1986 and which provides that if the jury does not impose a death sentence for a capital felony conviction, it shall impose a sentence of life imprisonment without possibility of parole for twenty-five years. The amended statute cannot be applied retroactively.**

Hudson v. State, 708 So.2d 256, 262 (Fla. 1998). This claim is meritless, and does not supply a basis for reversal.[33]

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[32] Obviously, a defendant is not permitted to pick the statute that applies to his case. This issue is another example of Farina's continuing efforts to fabricate error when none exists.

[33] Interestingly, Farina does **not** argue, in connection with this issue, that his death sentence should be reversed and a life without parole sentence imposed (even though he does make such argument elsewhere). His current position on the waiver issue has apparently been kept murky for some reason.

III. THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE CLAIM.

On pages 46-51 of his brief, Farina argues that the heinous, atrocious, or cruel aggravator is unconstitutionally vague as written (mysteriously citing *Espinosa v. Florida* in support of that claim), and, further, that that aggravator does not apply in this case because he did not **intend** for his victim to suffer. Neither of those claims has any legal basis.

As this Court is well aware, the United States Supreme Court's *Espinosa v. Florida*, 505 U.S. 1079 (1992) decision addressed the constitutionality of the **jury instruction** given on the heinous, atrocious, or cruel aggravator. The constitutionality of the aggravator **itself** is well-settled. *See generally, Guzman v. State,* 721 So.2d 1155 (Fla. 1998). Further, 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. To the extent that further discussion of the "intent" component is necessary, this Court's most recent comments on the issue are clear:

> We also reject Guzman's argument that the HAC aggravator should not apply because there is no evidence that Colvin was intentionally made to suffer. The intention of the killer to inflict pain on the victim is not a necessary

> element of the aggravator. As previously noted, the HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another. *See Kearse; Cheshire.*

Guzman v. State, 721 So.2d 1155, 1160 (Fla. 1998). Likewise, in another case decided on the same day, this Court held:

> ...the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. *Stano v. State*, 460 So.2d 890, 893 (Fla. 1984).

Brown v. State, 721 So.2d 274, 277 (Fla. 1998). Based upon clear precedent, Farina's argument in favor of an "intent" element to the heinous, atrocious, or cruel aggravator is meritless as a matter of law. This claim is based upon an invalid (and false) legal premise that is not a basis for relief. Farina's death sentence should not be disturbed.

To the extent that Farina's brief includes a claim that the heinous, atrocious, or cruel aggravator is not supported by the evidence, that claim likewise has no merit. In finding the heinous, atrocious, or cruel aggravator, the sentencing court stated:

> The capital felony was especially heinous atrocious or cruel. To Michelle, this was not an instantaneous or near-instantaneous death simply because her death was by gunfire. The defendants subjected Michelle Van Ness to extreme terror and mental torture during her final consciousness. She begged for her life and cried knowing she was about to die. She verbally expressed her fears as she watched the defendants' preparations and contemplated her death. These thoughts and fears were reinforced as she was tied up for the execution and as she heard the first shots fired. The other intended victims may not have been as acutely aware of their impending death as Michelle, but she knew exactly what was about to happen, and her mental anguish was real and

> excruciating. The Court realizes that the cruel nature of this case focuses on the mental and emotional cruelty rather than any physical torture. Accordingly, the Court only gave this factor moderate weight.

(R1093).

Those findings of fact are supported by the record and should not be disturbed.

The basic premise of Farina's argument is apparently that because this was a gunshot murder that was not accompanied by "torture", the heinous, atrocious, or cruel aggravator does not apply. However, despite Farina's efforts to argue against the application of the heinousness aggravator, the facts of this case are little different from the facts of *Henyard v. State,* where this Court upheld the application of the heinous, atrocious, or cruel aggravating circumstance. In *Henyard,* this Court held:

> We have previously upheld the application of the heinous, atrocious, or cruel aggravating factor based, in part, upon the intentional infliction of substantial mental anguish upon the victim. *See, e.g., Routly v. State,* 440 So.2d 1257, 1265 (Fla. 1983), and cases cited therein. Moreover, "[f]ear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous." *Preston v. State,* 607 So.2d 404, 410 (Fla. 1992), *cert. denied,* 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 178 (1993). In this case, the trial court found the heinous, atrocious or cruel aggravating factor to be present based upon the entire sequence of events, including the fear and emotional trauma the children suffered during the episode culminating in their deaths and, contrary to Henyard's assertion, not merely because they were young children. (FN16) Thus, we find the trial court properly found that the heinous, atrocious, or cruel aggravating factor was proved beyond a reasonable doubt in this case.
>
> FN16. The sentencing order reads in pertinent

part:

> After shooting Ms. Lewis, Henyard and Smalls rolled Ms. Lewis' unconscious body off to the side of the road. Henyard got back into Ms. Lewis' car and drove a short distance down the deserted road, whereupon Henyard stopped the car.
>
> Jasmine and Jamilya, who had been in continual close approximation and earshot of the rapes and shooting of their mother, were continuing to plead for their mother; "I want my Mommy," "Mommy," "Mommy."
>
> After stopping the car, Henyard got out of Ms. Lewis' vehicle and proceeded to lift Jasmine out of the back seat of the car, Jamilya got out without help. Then both of the pleading and sobbing sisters, were taken a short distance from the car, where they were then executed, each with a single bullet to the head.

Henyard v. State, 689 So.2d 239, 254 (Fla. 1996). The facts in this case are functionally identical to the facts in *Henyard*, and the result should be the same. Michelle's murder (which resembled an execution, complete with the last cigarette) was especially heinous, atrocious, or cruel based upon the fear and emotional strain (which was, in reality, torture) she suffered before being shot in the head, after having been tied with her hands behind her back and having witnessed two of her co-workers being shot, knowing that her turn was coming. Michelle's murder was especially heinous, atrocious, or cruel under the facts as proven -- Farina's sentence of death for her murder should not be disturbed.

Alternatively and secondarily, even if the heinousness

aggravator should not have been found, any error was harmless beyond a reasonable doubt because, even without the heinous, atrocious, or cruel aggravator, death is still the proper sentence. *Demps v. State,* 714 So.2d 365, 367 (Fla. 1998); *Geralds v. State,* 674 So.2d 96, 105 (Fla. 1996); *Guzman, supra; Rolling v. State,* 695 So.2d 278 (Fla. 1997) (death sentence proportionate where trial court found that four aggravators, including HAC, prior violent felony conviction, murders during the commission of burglary or sexual battery, and cold, calculated, and premeditated outweighed two statutory mitigators and significant nonstatutory mitigation).[34]

IV. THE VICTIM IMPACT EVIDENCE CLAIM

On pages 52-60 of his brief, Farina complains about the presentation of victim impact evidence during the resentencing proceeding.[35] While the precise scope of Farina's claim is not clear, it appears to be that the evidence complained of became a "feature" of the trial, and that the jury was not adequately instructed. When the record is fairly viewed, both claims collapse.

Farina's brief suggests that victim impact evidence was presented at every turn, and that the pages of the transcript, from

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[34] On page 50 of his brief, Farina engages in a fanciful version of the facts wherein he speculates that the jury included the stabbing of Kim Gordon under the "HAC umbrella". There is simply no support for this claim. The evidence of Michelle's extreme fear (and crying) establishes the heinous, atrocious, or cruel aggravator.

[35] Victim impact evidence was wrongfully excluded from the first penalty phase proceeding. *Farina (Jeffrey), supra.*

start to finish, literally drip with emotional, inflammatory testimony. The truth is far from that. The complained-of victim impact testimony consumed **67 pages** of a transcript that, from opening argument to final summation, is 1172 pages long. To put the issue in different terms, the testimony that Farina claims became a feature of the trial actually takes up some **six percent** of the record. In contrast, the testimony of Farina's mother alone goes on for 82 pages. (R1935-2017). When the "victim impact" testimony is considered in the context of the entire trial, as it must be, that testimony clearly did not become a feature of the trial. It was legally admissible evidence that was properly before the jury under controlling law.

To the extent that Farina's argument is that the jury was in some way improperly affected by the admission of 67 transcript pages of victim impact evidence, such an argument ignores the horrific facts of this case. The defendants quite literally executed Michelle Van Ness, as well as trying to execute her three co-workers. The facts of this crime (which was planned well in advance and carefully carried out) are such that death is the only appropriate sentence. Farina received a sentence of death because it is the sentence that this crime deserves -- the jury would have recommended that sentence with or without the victim impact testimony.

To the extent that further argument is necessary, as Justice

O'Connor stated in *Payne v. Tennessee*:

> In my view, a State may legitimately determine that victim impact evidence is relevant to a capital sentencing proceeding. A State may decide that the jury, before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community. A State may decide also that the jury should see "a quick glimpse of the life petitioner chose to extinguish," *Mills v. Maryland,* 486 U.S. 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988) (REHNQUIST, C.J., dissenting), to remind the jury that the person whose life was taken was a unique human being.

Payne v. Tennessee, 111 S.Ct. 2597, 2611 (1991) (concurring opinion). Furthermore,

> "Murder is the ultimate act of depersonalization." Brief for Justice For All Political Committee *et al.* as *Amici Curiae* 3. **It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person.** The Constitution does not preclude a State from deciding to give some of that back.

Payne v. Tennessee, supra, at 2612. [emphasis added]. Sixty-seven pages of a record that is more that 1100 pages long is, in the final analysis, no more than the "quick glimpse" into Michelle's life that Justice O'Connor referred to in *Payne*. It in no way became a "feature" of Farina's trial, and in no way deprived him of a fair sentencing. The fact that the advisory jury knew some small amount of information about Michelle Van Ness is not a basis for reversal of Farina's sentence of death.

To the extent that Farina includes a claim that the jury instruction concerning victim impact evidence was inadequate, that

claim is based upon a false premise. The jury was specifically instructed that:

> **You have heard evidence concerning Michelle Van Ness from friends and members of her family. This evidence is neither an aggravating circumstance nor any part of an aggravating circumstance which you may consider in rendering your verdict. However, you may consider this evidence so far as it demonstrates her uniqueness as an individual human being and the resultant loss to the community's members by her death.**

(R343). That instruction, which was included in the final jury instructions (R2409), is clearly a "limiting instruction" that informs the jury as to how it is to utilize victim impact evidence. That instruction is at least as detailed as the jury instruction that this Court approved in *Alston v. State,* 723 So.2d 148 (Fla. 1998), and in all respects complies with *Windom v. State,* 656 So.2d 432 (Fla. 1995). Farina's claim to the contrary has no basis because it is based on a false premise. The death sentence should be affirmed in all respects. Finally, even if there was some error, it was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986).

V. THE AGE AS BAR TO EXECUTION CLAIM.

On pages 61-70 of his brief, and in his supplemental brief filed on or about September 20, 1999, Farina argues that his death sentence should be set aside because he was 16 years old when he murdered Michelle Van Ness, and that, because of the fact of his age at that time, it would be unconstitutional to execute him. For

the reasons set out below, Farina is not entitled to relief.

According to Farina, he is absolutely entitled to relief based upon this Court's July 8, 1999, decision in *Brennan v. State,* 24 Fla. L. Weekly S305 (July 8, 1999). However, for the reasons set out below, *Brennan* is wrongly decided, and should be overruled. In *Brennan,* this Court relied on *Allen v. State,* 636 So.2d 494 (Fla. 1994), for the proposition that a defendant who was 16 years old at the time of committing a death-eligible murder cannot be executed as a matter of law. *Brennan* extrapolated the *Allen* decision to apply to 16-year-old murderers, even though *Allen* did not, by its plain terms, decide the death-eligibility of that group of killers. Moreover, while this Court stated in *Brennan* that it did not base *Allen* on United States Supreme Court case law, the fact is that *Allen* reached the same result as *Thompson v. Oklahoma,* 487 U.S. 815 (1988), which held that a defendant who was fifteen at the time of the crime could not constitutionally be executed. Further, 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. Under such precedent, it is not "cruel or unusual" to impose a sentence of death on a defendant who was 16 years old at the time of the murder giving rise to the sentence of death. This Court should do as it is required to do under the Florida Constitution, and follow Federal constitutional precedent

on this issue. *Stanford v. Kentucky,* 492 U.S. 361 (1989).

The *Brennan* decision 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 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, supra,* 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.

A "conformity clause" amendment to the Florida Constitution was approved in 1982, when the 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).[36]

Based upon the plain language of Article I, Section 17 of the Florida Constitution, this Court is clearly required to follow the

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[36] 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.

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 two fundamental 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.[37] Farina's sentence of death should not be disturbed.

In the *Brennan* decision, this Court made much of the fact that few 16-year-old killers are sentenced to death, and that, of the recent defendants falling into that category, all three have had their sentences vacated. *Brennan, supra,* at 13. While that statement is true as far as it goes, the Court did not recognize that Jeffery Farina had been sentenced to death in Volusia County, and that Rodderick Ferrell was under a death sentence from Lake

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[37] 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).

County[38]. Both of those cases were pending on direct appeal when this Court decided *Brennan*, and neither case was taken into account therein.[39] Obviously, the advisory juries in this case and in the Ferrell case believed that death was the appropriate punishment **despite the age of the defendant at the time of the crimes**. The age of the defendant was given effect as mitigation, which is the proper place for such consideration.

While it may be true that no modern execution has been carried out in a case in which the defendant was under 17 at the time of the offense, that is only half of the analysis -- without more, no conclusion regarding the existence of any "consensus" is possible. The relative dearth of 16-year old defendants is likely explained by the relatively small number of first-degree murders committed by such individuals rather than by any reluctance to punish such defendants capitally.[40] If the "infrequency of the imposition of the

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[38] The *Brennan* court also ignored the fact that the **only** fact of constitutional significance concerning the frequency with which the death penalty is 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.

[39] Farina's first death sentence was vacated based upon a jury selection error, not because of any reason related to his age. *Farina v. State,* 680 So.2d 392, 399 (Fla. 1996).

[40] According to Appendix C to Farina's supplemental brief, only 14 persons have been executed in Florida (during this century) for crimes committed when they were 16. The relevancy of that document is questionable, and, moreover, it is "evidence" that is presented here for the first time. Further, no information is provided about

death penalty on juveniles who were sixteen at the time of the crime" indicates anything at all (assuming a number of prosecutions of such defendants that resulted in first-degree-murder convictions, but no death sentence), the most that has been shown is that age, as a mitigator, is being given effect by Florida juries and judges, who follow the law and reserve the death penalty for the most aggravated and least mitigated of first-degree murders. While it may be "unusual" for a defendant who was 16 at the time of the crime to receive a death sentence, it is also "unusual" for a 16-year-old to commit such a crime in the first place. That does not render the imposition of a sentence of death unconstitutional when a 16-year-old commits a first-degree murder that is eligible for a sentence of death, and which is so heavily aggravated and unmitigated that the death sentence withstands proportionality review.

To the extent that Farina relies on the affidavit of Michael Radelet, the statistical information contained in that document is not only dated, but also incomplete. The Radelet affidavit is dated June 13, 1997, more than two years ago -- no effort has been made to update the information contained therein. That document does not indicate the basis upon which any of the listed defendants received a sentence less than death, and, moreover, does not even include

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the nature of the crime committed by those individuals, an omission that further reduces the value of that document.

the Ferrell case, which is now pending before the Court.[41]

To the extent that Farina relies on various treaties, this Court is bound to follow United States Supreme Court precedent, which, as set out above, compels the affirmance of Farina's death sentence. To the extent that further discussion of the treaty issue is necessary, the very treaty upon which Farina bases his argument purports to forbid the imposition of a sentence of life without parole on an offender under the age of 18. *Initial Brief,* at 62. It is, to say the least, ironic that the very sentence that Farina argues **for** is "proscribed" by the treaty that he claims bars his execution. One can only speculate as to whether Farina would attempt to challenge a life without parole sentence, should he receive one, based upon the same treaty.[42] Farina's sentence of death should be affirmed in all respects.

VI. THE FREE SPEECH CLAIM

On pages 71-76 of his brief, Farina argues that the death penalty is unconstitutional because of the "heavy burden that the

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[41] Farina claims that **all** of the post-*Furman* 16-year-old death sentences are included in the Radelet affidavit. That statement is incorrect because the affidavit does not include Roderrick Ferrell, who is represented by the same public defender's office as is Farina. Ironically, Ferrell has (improperly) attempted to adopt Farina's supplemental brief as his own.

[42] To the extent that Farina argues that the United States is the only "civilized" country that imposes death sentences on juveniles, that is a purely political argument that is based upon the value judgments of Farina's attorney. Whether or not a country is "civilized" is not a matter for this Court to decide.

death penalty places on communication". *Initial Brief* at 76. According to Farina, the "focus of this argument is on an aspect of free speech that is unappreciated -- the contemporaneous, reciprocal right of others to hear." *Initial Brief* at 71[43]. This claim is meritless for the reasons set out below.

As Farina admits, his claim that the death penalty is unconstitutional because of its "impact on free speech" has never been addressed by any Court. Because that is so, the most that can be said against Farina's claim is that nothing can be said in favor of it. As Justice Scalia wrote in *McKoy v. North Carolina*:

> Nothing in our prior cases, then, supports the rule the Court has announced; and since the Court does not even purport to rely upon constitutional text or traditional practice, nothing remains to support the result. There are, moreover, some affirmative indications in prior cases that what North Carolina has done is constitutional. Those indications are not compelling -- **for the perverse reason that the less support exists for a constitutional claim, the less likely it is that the claim has been raised or taken seriously before, and hence the less likely that this Court has previously rejected it. If petitioner should seek reversal of his sentence because two jurors were wearing green shirts, it would be impossible to say anything against the claim except that there is nothing to be said for it -- neither in text, tradition, nor jurisprudence.**

McKoy v. North Carolina, 494 U.S. 433, 466-67 (1990). [emphasis added]. Those observations are especially applicable to this claim, which has apparently never been addressed by any court, and,

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[43] Farina relies on an out-of-context quotation from one of the dissenting opinions in *McClesky v. Kemp,* 481 U.S. 279, 343 (1987), to support this proposition.

presumably, has never been seriously pressed before.

Despite Farina's effort to fit the square peg of the death penalty into the round hole of the First Amendment, his argument is a *non sequitur* -- the United States Supreme Court has unequivocally held that the death penalty is constitutional, and that it serves valid penological interests. The answer to the question posed by Farina's "issue" is found in *Gregg v. Georgia* -- Farina is attempting to compare apples and oranges and come up with the silver bullet that ends capital punishment. That effort fails, because

> In part, ... capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

Gregg v. Georgia, 428 U.S. 153, 183 (1976). As *Gregg* also held:

> 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.**

Id.[44] Based upon the clear constitutionality of the death penalty as a criminal sanction, there is no colorable argument that the infliction of a sentence of death violates the First Amendment rights of some unspecified person "to hear" what a death sentenced

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[44] As Justice O'Connor pointed out in her dissenting opinion in *South Carolina v. Gathers,* 109 S.Ct. 2207, 2214 (1989), "[W]e have long recognized that retribution itself is a valid penological goal of the death penalty."

inmate might say. Farina's argument has no legal basis, and is not a basis for relief. The death sentence should be affirmed in all respects.

VII. THE EXCLUSION OF DEFENSE EVIDENCE CLAIM

On pages 77-79, Farina argues that the trial court improperly excluded certain "defense evidence". Apparently, the "evidence" at issue consisted of "treaties and international agreements condemning capital punishment for juveniles" and a brochure from the Florida Department of Corrections that "concerned Nine Misconceptions about Florida Prisons." *Initial Brief*, at 77-78. The exclusion of both documents was proper for the reasons set out below.

The portion of the *Florida Statutes* defining non-statutory mitigation provides that "[t]he existence of **any other factors in the defendant's background** that would mitigate against imposition of the death penalty" shall be considered in mitigation. §921.141(6)(h), *Fla. Stat.* [emphasis added]. This Court has explicitly held that non-statutory mitigating factors are "factors that, in fairness or in the totality of the defendant's life or character may be considered as **extenuating or reducing the degree of moral culpability for the crime committed.**" *Rogers v. State*, 511 So.2d 526, 534 (Fla. 1987). [emphasis added].

In *Johnson v. State*, this Court addressed "mitigation" of the same character as that at issue herein, and upheld its exclusion:

> Johnson next argues that mitigation was improperly restricted by the trial court's refusal to let counsel argue and present evidence (1) that the death penalty does not operate well as a deterrent and (2) is more expensive than life imprisonment. We find that these are not proper mitigating factors for two reasons. First, they do not meet the definition of a "mitigating factor" -- matters relevant to the defendant's character or record, or to the circumstances of the offense proffered as a basis for a sentence less than death. *Rogers v. State*, 511 So.2d 526, 534 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978)).
>
> **Second, they are not legal arguments but rather political debate that in essence attack the propriety of the death penalty itself.** Once the legislature has resolved to create a death penalty that has survived constitutional challenge, it is not the place of this or any other court to permit counsel to question the political, sociological, or economic wisdom of the enactment. Article II, section 3 of the *Florida Constitution* specifies a strict separation of powers, *B.H. v. State*, 645 So.2d 987 (Fla. 1994), *cert. denied*, --- U.S. ----, 115 S.Ct. 2559, 132 L.Ed.2d 812 (U.S. Feb. 21, 1995), which effectively forecloses the courts of this state from attempting to resolve questions that are essentially political in nature. Rather, political questions -- as opposed to legal questions -- fall within the exclusive domain of the legislative and executive branches under the guidelines established by the *Florida Constitution*. Art. II, Sec. 3, *Fla. Const.* Accordingly, the trial court did not err in refusing Johnson's request here, which would have illegally interjected the judiciary into political questions.

Johnson v. State, 660 So.2d 637, 646 (Fla. 1995). [emphasis added]. The same applies to the matters at issue in this case. The trial court properly prevented Farina from improperly attempting to turn his trial into a political forum on capital punishment. That result would have clearly been error, and the trial court should not be

criticized for following the law. Nothing that Farina sought to introduce falls within the definition of non-statutory mitigation because none of those matters reduce or extenuate Farina's culpability in the murder of Michelle Van Ness. There is no basis for reversal.[45]

VIII. THE HOMICIDE CONVICTION CLAIM

On pages 80-82 of his brief, Farina argues that he is entitled to relief because his **conviction** is in some way invalid. This claim is not available to Farina because it was raised in his first appeal to this Court and decided adversely to him. Despite Farina's evident dissatisfaction with this Court's affirmance of his conviction in the 1996 opinion, that is the result of that appeal. His conviction is final for all purposes, and he may not relitigate that result no matter how unhappy he is with that ruling. As set out at pages 20-27, above, Florida law is clear that issues that were decided on the initial appeal may not be relitigated on appeal from a resentencing proceeding. Farina lost on his jury composition issue in 1996, and cannot resurrect that issue at this late date. The conviction is not an issue in this appeal, and this issue is not a basis for relief of any sort.

IX. THE FLORIDA CAPITAL PUNISHMENT CLAIM

On pages 83-94 of his brief, Farina argues that the Florida

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[45] Alternatively, any error was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986).

death penalty act is unconstitutional because it "operates in an arbitrary and capricious manner." While Farina has devoted a substantial portion of his brief to this claim, it is easily disposed of based upon the numerous decisions of the United States Supreme Court and this Court reaffirming the constitutionality of the Florida capital punishment scheme. *See, Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 380 (1984); *Hildwin v. Florida,* 109 S.Ct. 2055 (1989); *Sochor v. Florida,* 504 U.S. 527, 112 S.Ct. 2114 (1992); *Guzman v. State,* 721 So.2d 1155 (Fla. 1998); *Hunter v. State,* 660 So.2d 244 (Fla. 1995); *Fotopoulos v. State,* 608 So.2d 784 (Fla. 1992). Farina has put forward no argument to call any of those decisions into question, and, in fact, does not even acknowledge that the Statute has repeatedly withstood constitutional challenge.

To the extent that this claim deserves further argument, the linchpin of Farina's claim is that "sentencing factors [must] be **precise and rigid.**" *Initial Brief,* at 86. However, when this claim is stripped of its pretensions, the fact remains that the "rigid" application of sentencing factors is squarely contrary to Eighth Amendment jurisprudence. At least since *Lockett,* the law has been that

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized

> decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.

Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978). The **individualized** sentencing required by *Lockett* and subsequent cases cannot be reconciled with the mechanistic scheme advocated by Farina.[46] The true facts are that the "factors" upon which Farina bases his claim of unconstitutionality reflect the individualized (and constitutional) nature of capital sentencing under Florida's scheme.

On page 94 of his brief, Farina argues that he is entitled to relief based upon the Court's "use of this unconstitutional factor." The aggravator at issue is, presumably, the cold, calculated, and premeditated aggravating circumstance, given that the preceding few paragraphs are devoted to complaining about that aggravator.[47] Despite Farina's shrill complaints, the cold, calculated, and premeditated aggravator has been upheld against constitutional challenge. *Jackson v. State*, 648 So.2d 85 (Fla.

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[46] The "precise and rigid" scheme that Farina "advocates" seems similar to the scheme that the United States Supreme Court invalidated in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

[47] The State questions whether burying a claim concerning an aggravator within a claim that the Florida death penalty act is unconstitutional is proper appellate practice. Nonetheless, because the claim is raised, the State has responded to it.

1994); *Jones v. State,* 690 So.2d 568 (Fla. 1996).[48]

X. THE "WEIGHING" JURY INSTRUCTION CLAIM

On pages 95-99 of his brief, Farina argues that the standard jury instruction on the weighing of aggravators and mitigators is unconstitutional. Despite the graphing of this "claim" that is included in Farina's brief, the fact is that this claim is foreclosed by precedent from this Court and from the United States Supreme Court. *See, Ferrell (Jack) v. State,* 680 So.2d 390 (Fla. 1996); *Gamble v. State,* 659 So.2d 242 (Fla. 1995); *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190 (1990); *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078 (1990). Farina does not acknowledge any of those cases, nor does he even attempt to show why they should be overruled. This claim is not a basis for relief because it is based upon a false premise -- the Florida jury instruction on weighing aggravators and mitigators is constitutional. *Stewart v. State,* 549 So.2d 171 (Fla. 1989); *Arango v. State,* 411 So.2d 172 (Fla. 1982). There is no basis for reversal.

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[48] Farina has not claimed that the sentencing court improperly found the cold, calculated, and premeditated aggravator. The only possible inference from all of the facts is that Michelle was killed to eliminate her as a witness. *Correll v. State,* 523 So.2d 562 (Fla. 1988). *See also, San Martin v. State,* 705 So.2d 1337 (Fla. 1997). To the extent that this claim can be construed as a challenge to the heinous, atrocious, or cruel aggravator, that matter is addressed at pages 30-34, above.

CONCLUSION

Based upon the foregoing arguments and authorities, Farina's conviction and sentence of death 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 Larry B. Henderson, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this 1st day of October, 1999.

Of Counsel