IN THE SUPREME COURT OF FLORIDA

ANTHONY FARINA,

Case No. SC07-1551

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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RESPONSE TO REQUEST FOR ORAL ARGUMENT

The State defers to the judgment of this Court as to the necessity of oral argument in this particular case. It is true that oral argument is often held in capital cases, but it is also true that not all capital cases present issues worthy of oral argument. This is one of those cases.

STATEMENT OF THE CASE

This is an appeal of the summary denial of Farina's successive motion for post-conviction relief which was filed on or about May 10, 2005. (V.1, R33-52). The circuit court entered an order directing a response by the State, and then rescinded that order. (V.1, R970100). On May 12, 2006, the circuit court entered an order staying the case until such time as Farina's appeal before this Court was decided. (V.1, R101).

This Court affirmed the denial of relief, denied Farina's petition for writ of habeas corpus, and issued the mandate on September 20, 2006. The circuit court ordered the State to respond to the successive motion on October 17, 2006. (R.1, V102-103). The State filed its response to the successive motion on November 30, 2006. (V.1, R106-118). A case management conference was conducted on January 2, 2007, (V.1, R1-32), and, on June 21, 2007, the circuit court entered its order denying all relief. (V.1, R175-78). This appeal follows.

STATEMENT OF THE FACTS

The Prior Proceedings

In Farina's last appeal, this Court summarized the facts underlying his conviction and sentence of death in the following way:

> Anthony Farina, a prisoner under sentence of death, appeals an order of the circuit court denying his motion for postconviction relief under *Florida Rule of Criminal Procedure* 3.851. Farina also petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), *Fla. Const*. As we explain below, we affirm the denial of Farina's postconviction motion and deny the habeas petition.
>
> I. FACTUAL AND PROCEDURAL BACKGROUND
>
> After a Taco Bell restaurant closed early on May 9, 1992, Jeffrey and Anthony Farina confronted Michelle Van Ness, 17, and Derek Mason, 16, while the two employees were emptying trash. [FN1] Jeffrey had a .32-caliber pistol, Anthony carried a knife and rope, and both wore gloves. [FN2]
>
> > [FN1] In Farina's first direct appeal, we referred to his brother's direct appeal for the factual and procedural background of the case. *Farina v. State*, 679 So. 2d 1151, 1153 (Fla. 1996). Therefore, the facts are taken from the direct appeal of Jeffrey Farina, *see Farina v. State*, 680 So. 2d 392, 394 (Fla. 1996), as well as Anthony's direct appeal, *Farina*, 679 So. 2d at 1153, and Anthony's second direct appeal. *See Farina v. State*, 801 So. 2d 44, 48-49 (Fla. 2001).
> >
> > [FN2] Because appellant and his brother share the same last name, and because several of the issues refer to both individuals, to avoid confusion we will refer to Anthony and Jeffrey Farina by their first names.
>
> The Farinas ordered Van Ness and Mason into the restaurant, where they rounded up two other employees.

Jeffrey held three employees at gunpoint while Anthony forced employee Kimberly Gordon, 18, to open the safe and hand over the day's receipts. The Farinas then tied the employees' hands, and Anthony forced them into a walk-in freezer. Jeffrey then shot Mason in the mouth. He also shot employee Gary Robinson, 19, in the chest and Van Ness in the head, and stabbed Gordon in the back. The Farinas fled the restaurant, but were arrested later that day. Van Ness died on May 10. The Farinas were charged with first-degree murder and six other offenses.

The jury found Anthony guilty of first-degree murder. At the penalty phase, the jury recommended death by a vote of seven to five. The trial judge followed the recommendation, finding five aggravators and minimal nonstatutory mitigation. On appeal, Anthony raised ten issues. We affirmed the convictions and sentences for the noncapital offenses, but we vacated the death sentence and remanded for a new sentencing proceeding because the trial court erroneously excused for cause a prospective juror who was qualified to serve. *See Farina*, 679 So. 2d at 1157-58.

On remand, a joint penalty proceeding was held before a new jury. The jury unanimously recommended the death penalty for both Anthony and Jeffrey. Regarding Anthony, the trial judge found five aggravating factors, three statutory mitigating factors, and fifteen nonstatutory mitigating factors. [FN3] Following the jury's recommendation, the judge concluded that the aggravating factors far outweighed the mitigating factors and imposed the death penalty.

> [FN3] The aggravating factors were: (1) prior violent felony based upon the attempted murders of the other restaurant employees; (2) the murder was committed to avoid arrest; (3) the murder was committed for pecuniary gain; (4) the murder was heinous, atrocious, or cruel (HAC); and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP). *Farina*, 801 So. 2d at 48. The statutory mitigators were: "Anthony had no significant history of prior criminal

> activity; he was an accomplice in the capital felony committed by [Jeffrey] and his participation was relatively minor; he was eighteen years old at the time of the crime . . . ." *Id*. at 49. The nonstatutory mitigators were: "abused and battered childhood, history of emotional problems, cooperation with the police, involvement in Christianity and Bible study courses while in prison, good conduct in prison, remorse for what happened, assertion of a positive influence on others, no history of violence, abandonment by his father, poor upbringing by his mother, lack of education, good employment history, and amenability to rehabilitation[]." *Id.*
>
> Anthony appealed, but we denied all claims and affirmed the death sentence. In April 2003, Anthony filed a rule 3.851 motion for postconviction relief, raising thirteen claims. The circuit court denied relief on all of them. Anthony now appeals the court's order denying relief. He raises six issues, several of which contain additional subparts. He also petitions this Court for a writ of habeas corpus, raising four claims.

Farina v. State, 937 So. 2d 612, 617 (Fla. 2006).[1]

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[1] The second claim contained in Farina's successive motion was decided in this habeas petition: "Claim 4 (*Urbin v. State*, 714 So. 2d 411 (Fla. 1998), when read in conjunction with the United States Supreme Court's recent holding in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), warrants a reweighing of the age mitigator) is procedurally barred because Anthony should have raised it on direct appeal. *See Johnson*, 593 So. 2d at 208 ("Issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack."). Furthermore, the trial judge at resentencing did not violate *Roper* because Anthony was already 18 years old when he committed his crimes. *See Roper*, 543 U.S. at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.")." *Farina v. State*, 937 So. 2d at 626 n.7. The circuit court denied this claim (in the

The Issue in this Appeal.

The sole issue before this Court is whether the circuit court properly denied relief on Farina's "brain mapping" claim without an evidentiary hearing. The circuit court's order reads as follows:

> The Defendant argues that relief should be granted based upon newly discovered evidence. The Defendnat contends that the study "Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood" (the Study) published in May 2004, in the *Proceedings of the National Academy of Sciences of the United States of America*, is newly discovered evidence which would produce a life sentence at retrial. The Defendant argues that the Study, which found that portions of the brain do not develop until an individual is 25, will prove that the Defendant's brain was even less developed than that of the average 18 year old, thereby establishing additional mitigation at sentencing.
>
> In order to qualify as newly discovered evidence, the evidence must have been unknown to the parties, counsel, and the trial court at the time of trial, and "must be of such a nature that it would probably produce an acquittal on retrial." *Robinson v. State*, 865 So. 2d 1259, 1262 (Fla. 2004), *citing Torres-Arboleda v. Dugger*, 636 So. 2d 1321 (Fla. 1994) and *Jones v. State*, 709 So. 2d 512 (Fla. 1998).
>
> The Court finds that the Study, even if accepted as true, and applied to this case, would not probably produce an acquittal or life sentence on retrial. At the sentencing hearing the trial court found the following aggravating factors: 1) previous conviction of a felony involving the use or threat of violence; 2) the capital felony was committed during the commission of an armed robbery; 3) the capital felony

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successive motion) on *res judicata* grounds –- Farina does not raise any related issue in this appeal.(V.1, R177).

> was committed with the purpose of avoiding lawful arrest by eliminating witnesses; 4) the capital felony was committed for pecuniary gain; 5) the capital felony was especially heinous, atrocious, or cruel; and 6) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner. These aggravating factors were so overwhelming in outweighing the mitigating factors that the introduction of this Study would not have any significant effect on the sentence. Therefore, this Court specifically finds that, although unknown at the time of retrial, this Study does not qualify as newly discovered evidence.

V.1, R176-77).

SUMMARY OF THE ARGUMENT

In summarily denying relief, the circuit court followed the precedent of this Court, which holds that the study relied on by Farina as basis for relief does not satisfy the newly discovered evidence standard. Further, that study, as the trial court found, would not change the sentencing outcome. And, that study is no more than a repackaging of information that has been known for years. Alternatively, assuming that this sort of information was not available at the time of Farina's trial, it is not "newly discovered" because it was not in existence but unknown at that time.

ARGUMENT

I. SUMMARY DENIAL WAS PROPER[2]

[2] Farina overlooks the fact that the issue before this Court is exclusively whether or not summary denial was proper -- the merits the claim, and the merits of the claims that have already been decided adversely to Farina, are not before this Court.

Florida law is settled that "[a] trial court's summary denial of a motion to vacate will be affirmed where the law and competent substantial evidence supports its findings." *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998).

The trial court's ruling follows the law.

This Court has already considered the "brain mapping" study at issue in this case, and has held that the study does not satisfy the newly discovered evidence standard for relief. In *Grossman*, this Court held:

> Martin Grossman appeals an order of the circuit court summarily denying a successive motion for postconviction relief under *Florida Rule of Criminal Procedure* 3.851. On appeal to this Court, Grossman challenges the validity of his death sentence based on alleged newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), and the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).
>
> The decision in *Roper* that the Eighth Amendment bars execution of persons under eighteen at the time of the offense applies only to a defendant's chronological age. Grossman was nineteen at the time of the offense. Accordingly, *Roper* does not apply. **The newly discovered evidence claim is based on a 2004 study of brain mapping of individuals between ages 4 to 21 establishing that the temporal lobe of the brain matures last. Even accepting the findings of this study as true, we conclude that there is no probability of a different sentence on retrial and thus the study does not satisfy the standard set forth in *Jones*.** The circuit court's order is hereby affirmed.

Grossman v. State, 932 So. 2d 192 (Fla. 2006) (unpub. op.) (emphasis added). Since the law in this State is that the Study

at issue does not satisfy *Jones* because it does not create a reasonable probability of a different result, the circuit court can hardly be faulted for following the decisions of this Court and denying relief. Farina's complaints about the circuit court's order, and the specificity of it, are unfounded. The circuit court's summary denial of relief was proper, and should not be disturbed.

The Study is not "Newly Discovered Evidence."

In deciding this case, the circuit court assumed that the Study was true, and found that it would not change the outcome, just as this Court did in *Grossman.* That analysis is sufficient, in and of itself, to support the denial of relief. However, the State does not concede that the study satisfies the unavailability prong of the newly discovered evidence standard, either.

At least to some extent, the study relied on by Farina is nothing more than a repackaging of information that has long been known. As the United States Supreme Court pointed out in *Roper*:

> as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson, supra*, at 367, 125 L. Ed. 2d 290, 113 S. Ct. 2658; *see also Eddings, supra*, at 115-116,

> 71 L. Ed. 2d 1, 102 S. Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra.*

Roper v. Simmons, 543 U.S. 551, 569 (2005). Given that *Roper* cites to a 1992 study about adolescents and "reckless behavior," Farina can hardly claim that this sort of information was unknown and unavailable at the time of his trial. When stripped of its pretensions, Farina's "newly discovered evidence" claim is no more than an attempt to obtain another proportionality review by this Court, which is not the purpose of postconviction review.

Further, to the extent that Farina asserts that the study was not available because it did not exist at the time of his trials, that assertion (if it is accurate) is an admission that the study is not "newly discovered." This Court has clearly held that newly discovered evidence is evidence that was in existence but **unknown** at the time of trial. *Wright v. State*, 857 So. 2d 861, 871 (Fla. 2003), *cert. denied*, 541 U.S. 961 (2004); *Porter v. State*, 653 So. 2d 374, 380 (Fla. 1995), *relief granted on other grounds*, 723 So. 2d 191 (Fla. 1993). If, as Farina

asserts, the study did not exist at the time of trial, then he cannot satisfy the newly discovered evidence standard, and he is not entitled to relief.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State submits that the lower court's denial of relief 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: **Marie-Louise Samuels Parmer** Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619 on this ____ day of January, 2008.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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