IN THE SUPREME COURT OF FLORIDA
CASE NO. SC15-1659
L.T. No. 2000-CF-00323
DEATH PENALTY CASE

DAVID BEASHER SNELGROVE
Appellant,
v.
STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE 7TH JUDICIAL CIRCUIT FOR FLAGLER COUNTY,
STATE OF FLORIDA

REPLY TO ANSWER BRIEF OF APPELLEE

RICHARD E. KILEY
ASSISTANT CCRC-M
FLORIDA BAR NO. 0558893

ALI ANDREW SHAKOOR
Florida Bar No. 0669830
CAPITAL COLLATERAL
REGIONAL COUNSEL MIDDLE
REGION
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
(813) 558-1600
COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

This pleading addresses arguments from Issue I of Mr. Snelgrove's Initial Brief. As to all other claims and arguments not mentioned in this pleading, Mr. Snelgrove relies on the Initial Brief. No claims are being waived or abandoned. Reference to the trial transcript will be: (FSC ROA Vol.___p.#). The Spencer Hearing transcript will be referenced as: (Sp. Hrg. __p.#) The post-conviction record shall be referenced as: (PCR Vol. ___p.#).

CLAIM I

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL LOUISE MACK AS A MITIGATION LAY WITNESS DURING THE PENALTY PHASE. MS. MACK'S TESTIMONY HELPS SUPPORT THE POSITION THAT MR. SNELGROVE IS INELIGIBLE FOR CAPITAL PUNISHMENT UNDER ATKINS AND HALL, AND MANY OF HIS SCHOOL RECORDS WERE DESTROYED. MOREOVER, MS. MACK'S TESTIMONY AS A LAY WITNESS WOULD HAVE PERSUADED THE JURY TO RECOMMEND A LIFE SENTENCE, BY A REASONABLE PROBABILITY. THIS ALL DEPRIVED MR. SNELGROVE OF A FAIR TRIAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

First of all, the appellant refutes the way the state categorizes this

claim in Issue I of their Answer Brief, by writing as follows:

> *WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL A SCHOOL EMPLOYEE AS A WITNESS IN SUPPORT OF SNELGROVE'S INTELLECTUAL DEFICIENCY CLAIM WHERE THIS WITNESS HAD VERY LITTLE CONTACT WITH SNELGROVE AND ADDED LITTLE, IF ANY SUPPORT TO SNELGROVE'S INTELLECTUAL DISABILITY CLAIM?*

This heading from the state fails, as it comes to the notions of accuracy and completeness. The witness in question Christine Mack, was not a mere "school employee." Ms. Mack was actually a program specialist at Miami Central Senior High School, and knew the appellant as a student there. At the evidentiary hearing, Ms. Mack testified and described her duties as follows:

> BY MR. SHAKOOR:
>
> Q. So you're saying you were a program specialist when David Snelgrove was in high school there.
>
> Could you describe what that entailed as far as your occupation at that time?
>
> A. The program specialist was the quasi administrator for all special education students.
>
> The program specialist took care of scheduling, worked with the counselors, handled discipline problems, and in general, held meetings and took care of anything that had to do with special education of the students.
>
> (PCR Vol. III p. 129)

Calling Ms. Mack a mere employee, fails to provide proper insight into her role and

viewpoints regarding Mr. Snelgrove's life. The appellant also vehemently disagrees with the state's characterization in its heading that Ms. Mack had very little contact with Mr. Snelgrove, and "added little, if any support to Snelgrove's Intellectual Disability claim." In fact, Ms. Mack's testimony further illuminates why Mr. Snelgrove is entitled to relief.

Ms. Mack testified under oath that based on her experience, there was a possibility there could be an occasion where a student could have an IQ below 70, yet still be placed in the class for the emotionally handicapped. (PCR Vol. III p. 136). She stated that it did happen on occasion, although not frequently. (PCR Vol. III p. 136). Ms. Mack's testimony vitiates the state's and the lower court's reliance on the fact that the appellant was placed in ESE/EMO classes as the deciding factor, which they believe refutes the assertion that Mr. Snelgrove's Intellectual Disability (ID) condition manifested itself prior to age 18. It was error for the lower court to close the door on the matter of pre age 18 manifestation, based solely on ESE/EMO placement; particularly in light of the fact that Mr. Snelgrove's school records were destroyed in 1999. (PCR Vol. III p. 18).

The state cites the trial court's order denying post-conviction relief on page 29 of it's Answer, which relied on this Court in *Snelgrove v. State*, 107 So.3d 242, 249-50 (2012) in stating that "it would have been illegal to place a mentally retarded child

in classes for emotionally handicapped children." Stating what would have been illegal, does not mean it did not happen. Mr. Snelgrove has always been intellectually disabled; at least since the period of time where he suffered a severe head injury as a toddler, followed several years later by his ingestion of dangerous quantities of Haldol. (Sp. Hrg. p.11-15).

Trial counsel failed to find Ms. Mack and secure her testimony. Ms. Mack stated at the evidentiary hearing, that if she had been called by trial counsel to testify on behalf of Mr. Snelgrove in front of the jury, she would have been able and willing. (PCR Vol. III p. 142). Trial counsel Valerino testified at the evidentiary hearing. He concedes that his legal team not only failed to find Christine Mack closer in time than post-conviction counsel, but he also doe not recall notifying a supervisor in his office about needing assistance for locating mitigation witnesses near the appellant's former home in Miami, where Ms. Mack worked and resided. (PCR ROA Vol. III p. 56-57). It was ineffective assistance of counsel for trial counsel to fail to find Christine Mack and present her testimony to the jury.

Lastly, any reliance on the testimony of Dr. Gregory Prichard by the state and lower court is misplaced, as Dr. Prichard conceded during the evidentiary hearing that he failed to do any formal testing for adaptive functioning after he opined a then current IQ score of 75 for the appellant after testing him. (PCR ROA Vol. III p. 95,

103). His testimony should be disregarded based on his failure to do a complete evaluation of the appellant. Appellant won't belabor what has already been stated concerning early manifestation of his condition prior to age 18 and why this Court should not rely on the lower court, the state, or Dr. Prichard as it pertains to category (3) of Fla. Stat. 921.137; Fla. R. Crim. P. 3.203 (b). However, by completely disregarding category (2), which are deficits in adaptive behavior, Dr. Prichard failed to conduct a legitimate ID evaluation. His opinions should be disregarded. Mr. Snelgrove's deficits in adaptive behavior are reflected in the record. Mr. Snelgrove has concurrent deficits in adaptative behavior based on his placement in EMO-ESE classes (which indicates maladaptive behavior to a marked degree in some combination of five areas which are transferable to adaptive behavior) (Sp Hrg p. 70-71), his inability to take care of his own basic needs, and his inability to work a basic manual labor job, unsupervised. (Sp. Hrg. p. 20-22, 28-31).

Regarding category (1) of Fla. Stat. 921.137; Fla. R. Crim. P. 3.203 (b), Mr. Snelgrove suffers significantly subaverage general intellectual functioning. At the time of his trial in the lower court, in order to measure his intellectual functioning, Mr. Snelgrove was tested by Dr. Bloomfield with the Wechsler Adult Intelligence Scale III test. This test revealed a verbal scale of 69, and a performance scale of 76. Mr. Snelgrove had a full scale IQ of 70.

Dr. Prichard, who testified on behalf of the state, also tested the appellant's intellectual functioning. Via the Standard-Binet 5 test, Dr. Gregory Prichard found a verbal score of 73, a non-verbal score of 79 and a full scale IQ score of 75. This gives rise to curiosity as to why the state is "unclear" on page 25 of its Answer, as to why Appellant cites *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014). The citing of *Hall* should be obvious. *Hall* explicitly holds that Florida can no longer rely on a bright line IQ score of 70 as the deciding factor on whether or not a person suffers from ID. Dr. Prichard's, and most importantly, the lower court's reliance on his IQ score of 75 as a reason to find that the appellant is not intellectually disabled, is error. *Hall* is relevant and binding on this court and the Dr. Prichard administered test with produced a full IQ score of 75, is within the standard error of measurement accepted in *Hall*. For the reasons mentioned above and in the appellant's Initial Brief, this Court should accept the fact that Mr. Snelgrove's intellectual disability puts him in a class of person's barred from capital punishment eligibility.

Finally, the state is incorrect in its opining on page 36 of its Answer, in attempting to read into the reasoning behind Appellant's sub-claim based on the fact that Ms. Mack should have been called as a lay witness during the penalty phase. The claim is obvious and clear on its face. Trial counsel had the opportunity to find and secure Ms. Mack's testimony as an additional lay witness in addition to what her

insights add to the ID issue. The familial witnesses provided by trial counsel for mitigation, would clearly have an interest in trying to save Mr. Snelgrove's life. Their testimony could have been, and should have been supported by the non-related Christine Mack. Ms. Mack's relevant lay testimony is quoted as follows:

> BY MR. SHAKOOR
>
> Q. And are you familiar with the name David Beasher Snelgrove?
> A. Yes, I am.
> Q. And how do you know Mr. Snelgrove?
> A. Mr. Snelgrove was a student at Miami Central Senior High School – I believe it was in the eighties – when I was a program specialist there.
> Q. So you're saying you were a program specialist when David Snelgrove was in high school there.
>
> Could you describe what that entailed as far as your occupation at that time?
> A. The program specialist was the quasi administrator for all special education students.
>
> The program specialist took care of scheduling, worked with the counselors, handled discipline problems, and in general, held meetings and took care of anything that had to do with special education of the stusents.
> Q. And what do you remember particularly about Mr. Snelgrove?
> A. Mr. Snelgrove, I remember what he looked like. He was a tall skinny young man. He was pleasant. He was not a disruptive student.
>
> He did have a tendency to be truant.
> Q. Truant meaning he missed class a lot?
> A. He missed school a lot. Yes.
> Q. Okay. And do you remember what type of classes that Mr. Snelgrove took or what kind of programs he was

placed in?
A. Mr. Snelgrove was placed in the class for the emotionally handicapped students.
Q. And –
THE COURT: Excuse me. I did not hear your last answer. Would you give that again, please?
THE WITNESS: Yes. Mr. Snelgrove was placed in a class for students with emotional handicaps.
THE COURT: Thank you.
BY MR. SHAKOOR:
Q. And, ma'am, do you have any knowledge about how the assessment was make regarding how and when Mr. Snelgrove – or I should say why Mr. Snelgrove was placed in a class for emotionally handicapped students?
A. The placement was made before he came to Miami-Central. I have no idea in what grade.
Usually, such placement is precipitated by problems if they're continuous. It's not just one problem that will lead to a student being placed.
It involved a psychological and a social history taken by a social worker, from the parent, teacher input, and so on.
Q. And by placing Mr. Snelgrove at some point in the – in a class for emotionally handicapped students, does that exclude – would that exclude any other possible problems or – or illnesses or special needs that Mr. Snelgrove might have?
A. At that time there were no dual placements. Some students had other problems, but the students were placed upon what the psychologist and the – what was called the M team, the team of professionals including the parents, who met, decided was the best placement at that time for that student.
Q. So was emotional handicapped – being emotionally handicapped, that was Mr. Snelgrove's primary condition?
A. Yes, it was.
Q. And does – could there also have been any secondary

conditions, or do they make placements based on just a primary condition?

MS. CALHOUN: Objection Calls for speculation.

THE COURT: All right. I'll overrule the objection.

You may answer it if you can, ma'am. Go ahead.

A. On occasion, there were other conditions, but the students were placed in what was considered the best setting for them at that time.

I have no idea if he had any other conditions. I don't remember.

By MR. SHAKOOR:

Q. Okay. And do you recall what his disposition was? You mentioned him being truant and not being a troublemaker.

Could you describe for the Court how he took care of himself physically?

A. He was a little disheveled- looking. He was a pleasant young man.

Q. Okay. And do you have any knowledge of what his IQ score was back then?

A. I do not know.

Q. And how did you become involved with this case at this present juncture?

A. With this case now?

Q. Yes, ma'am.

A. Yes. I would – the investigators came to Miami and went to Miami Central High School.

And when they mentioned that David was in special education, they were told to find me because I was in charge of the program at that time.

Q. And did an investigator from my office eventually contact you by the name of Grita Perry?

A. Yes. Ms. Perry did.

Q. And have you been amenable to working with her and working with our office on this case?

A. I have no problem working with anybody.

Q. And did you do an independent search for records and

school records pertaining to David Snelgrove?
A. Yes. I did. I did a computer search, but, apparently, his records are not on the computer –
well, I know they're not on the computer.

It could be that he – when he was in Dade County, that we were not computerized yet. That's the only thing I can think of.

Q. But you were unable to find any school records?
A. I – I could not find any records. You did supply me with some class records, the transcript from the classes he took, which were merely the titles of the classes and his grades.
Q. Ma'am, were you –
A. And –
Q. I'm sorry?
A. –attendance information on there, too.
Q. And were you working in Miami in January of 2008 through June of 2009?
A. Yes. I was.
Q. And were you working in the same – in a similar field of work as you are now and as you were back in the eighties?
A. I – I – I was. In 2008 and 2009, I was in the same position that I am now at Lindsey Hopkins.
Q. Okay. And if one of Mr. Snelgrove's attorneys or an investigator – if one of Mr.Snelgrove's prior attorneys or prior investigators were to contact you about testifying in front of the jury in 2008 about some of these same matters, would you have been able and willing to testify?
A. Yes.
Q. And how about June of 2009 in front of the judge; would you have been able and willing to testify about some of these same issues?
A. Yes.
Q. And are you familiar with the term educable mentally handicapped?
A. Yes, I am.

Q. And is that another way of saying mentally retarded or what was once known as mentally retarded?
A. Yes, it was, back in the eighties where students with an IQ below 70, 70 or below.
Q. And based on your experience, was it ever a possibility of there could be an occasion where a student could have an IQ below 70, yet still be placed in the class for emotionally handicapped?

MS. CALHOUN: Objection. Calls for speculation.

THE COURT: You know, I think this is rather speculative, but I will overrule the objection and see if the witness is able to answer the question.

You may proceed, ma'am.

A. Yes. On occasion, that did happen. It was not a frequent occurrence, but it did happen when the psychologist and the team look at the – student's progress deemed – that emotionally handicapped placement was in his best interest.
BY MR. SHAKOOR:
Q. Okay. And –

MS. CALHOUN: I didn't hear all of that answer, your Honor. I'm sorry to interrupt.

Could the witness repeat her last answer? It was breaking up, at least on our monitor.

THE COURT: It appears some of the audio was disrupted. Can you repeat your last answer, please?

THE WITNESS: Certainly. Can you hear me okay now?

THE COURT: Yes. That's better. If you could speak a little slowly and again, please. Thank you.

THE WITNESS: Could you repeat the question again?

THE COURT: Sure.
BY MR. SHAKOOR:
Q. Sure, ma'am.

MR. SHAKOOR: I want to be completely accurate. Could the court reporter read that last question into the

record?

THE COURT: If she can get to a microphone. Abby, could you pass the microphone over? I'll have the court reporter read back the question.

THE COURT REPORTER: "QUESTION: And based on your experience, was it ever a possibility or there could be an occasion where a student could have an IQ below 70, yet still be placed in the class for emotionally handicapped?"

THE WITNESS: Yes. It was a possibility. It did happen on occasion, although not frequently.

That would happen when the psychologist and the team looking at the evaluation considered the emotional handicap to be the primary handicap.

BY MR. SHAKOOR:

Q. Thank you, ma'am. And did you have trouble speaking with Mr. Snelgrove or communicating with him at all?

A. No.

Q. And in your role over the years as an educator and as an administrator, have you ever had the occasion to have discussion with children that you know for sure have been diagnosed educable mentally handicappped or mentally retarded?

A. Have I ever – repeat that again.

Q. Sure. I'm sorry. It's a long question.

In your –have you ever had the occasion to engage in a conversation with a student that you know for sure has been diagnosed educable mentally handicapped or mentally retarded?

A. Absolutely, many times.

Q. And on some of those students, were you also able to have discussions where you understood each other?

A. Absolutely.

MR. SHAKOOR: That's all for now, your Honor. I pass the witness. Thank you. (PCR Vol. III p.128-137)

The above-quoted testimony only would have helped Mr. Snelgrove with the

trial jury. There is no downside or double edged sword to the testimony. For an objective education professional to take time out of her life, in order to testify as a mitigation witness would speak volumes to the jury. It provide more insight into who and how Mr. Snelgrove came to be. A mere eight to four jury recommendation is causing the appellant to sit on death row. There is a reasonable probability that at least two more jurors who have voted for a life sentence, but for trial counsel's ineffectiveness. The appellant prays that this Court decides that his mentally challenged, intellectually disabled, life is worth saving. Relief is proper.

CONCLUSION

Wherefore, in light of the facts and arguments presented in this Reply and the facts and arguments presented in the appellant's Initial Brief, Mr. Snelgrove hereby moves this Honorable Court to:

1. Vacate the convictions and sentence of death.
2. Order a remand for a new trial and/or penalty phase proceeding.
3. Order a remand in consideration for justice deemed appropriate by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Answer Brief of Appellee has been furnished via electronic transmission to Scott Brown, Office of the Attorney General, Assistant Attorney General, Scott Browne Scott.Browne@myfloridalegal.com, CapApp@myfloridalegal.com, and to David B. Snelgrove, DOC# 442564, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 5th, day of May 2016.

/s/ Richard E. Kiley
RICHARD E. KILEY
ASSISTANT CCRC-M
FLORIDA BAR NO. 0558893

/s/ Ali A. Shakoor
ALI A. SHAKOOR
ASSISTANT CCRC-M
FLORIDA BAR NO. 669830
CAPITAL COLLATERAL
REGIONAL COUNSEL MIDDLE
REGION
12973 N. Telecom Parkway
Terrace, FL 33637-0907
(813) 558-1600
COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Answer Brief of Appellee, was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

/s/ Richard E. Kiley
RICHARD E. KILEY
ASSISTANT CCRC-M
FLORIDA BAR NO. 0558893

/s/ Ali A. Shakoor
ALI A. SHAKOOR
ASSISTANT CCRC-M
FLORIDA BAR NO. 669830
CAPITAL COLLATERAL
REGIONAL COUNSEL MIDDLE
REGION
12973 N. Telecom Parkway
Terrace, FL 33637-0907
(813) 558-1600
COUNSEL FOR PETITIONER