

IN THE SUPREME COURT OF FLORIDA

REYNALDO FIGUEROA-SANABRIA,

Appellant,

v.

**CASE NO. SC21-1070
L.T. NO. 2013-CF-06490
DEATH PENALTY CASE**

STATE OF FLORIDA,

Appellee.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows:
The record on direct appeal will be referred to as “R.____” followed by the page number. References to the trial transcripts from the direct appeal will be referred to as “T.____” followed by the page number.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on this appeal. Argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

Reynaldo Figueroa Sanabria was charged by indictment on April 18, 2013 with two counts of premeditated/felony first-degree murder for the deaths of victims John and Germana which occurred on John's houseboat in the nighttime hours between April 11 and 12, 2013. (R. 89-90). Following the murders, Appellant attempted to flee to New York but was captured in North Carolina and extradited back to Pinellas County, Florida (R. 95) to stand trial.

GUILT PHASE

The State's first witness was Officer Richard Johnston. He was the first law enforcement officer on the scene, arriving at approximately 11:10 am the morning of April 12, 2013 and he described the general condition of the crime scene and his actions in securing it. He also learned that a person named "Rey" was employed by the victims as a handyman to do various repairs to the boat (T. 1025-2055).

Charles Johnson, an electrical engineer, then testified. He had an appointment to meet with John, the boat's owner, to do some electrical work for him. He arrived around 10:20 am and was waiting when Karen Tolbert, the massage therapist arrived. Charles Johnson

called 911 when he entered the boat and realized the victims were dead. Through this witness the recording of the 911 call was played (T. 1057-1080).

Karen McCalla Tolbert was a massage therapist who normally treated both John and Germana once a week. She arrived a few minutes after 11:00. She saw Charles Johnson waiting in his car. The boat was quiet, no lights were on, no evidence of breakfast, and the newspaper had been delivered but was untouched. She knocked on the door and called out John and Germana's names but there was no response. She entered the boat but it was dark, so she asked Charles Johnson to investigate with her because she was scared. The two of them entered the darkened bedroom. The light switch did not work so Karen opened the curtains. It was at that point she saw the two victims. There was blood everywhere. This witness testified that she knew Appellant, had met him before, he worked occasionally for victim John (T. 1081-1106).

Donald Hulbert was a friend of the victims. He lived on a boat a few slips down from them, and he visited them the night before the murders and had dinner with them. He was familiar with Appellant as someone who worked for the boat's owner although he never spoke

with Appellant. Mr. Hulbert arrived around 7 pm on April 11 and Appellant was present, but he left within a few minutes after this witness arrived. Mr. Hulbert left the two victims around 9 pm, by then there were only the three of them on the boat. He walked his dog later that night but noticed nothing out of the ordinary. The next morning as he was preparing to leave he met with police who were at the marina (T. 1116-1131).

John Yaitanes had an office at the Loggerhead Marina, he was a yacht broker and also ran an electronics company. He said Appellant worked for Global Marine at the marina, doing general handyman work for them. On the morning of the murders, this witness noticed that Appellant was not around so he called him. Appellant seemed to already know that police were at the marina, he said he was going to help his brother and was taking care of a few things. The call was fairly short, around half a minute, and Appellant seemed agitated when told the police wanted to talk to him. He said he would talk to them when he returned (T. 1132-1145).

Robert Hodge was a boat broker who rented office space at Loggerhead Marina. Sometime in 2010 he hired Appellant as a handyman to help with odd jobs around the marina. Appellant's

duties included detailing, painting, cleaning, and moving boats as needed. He described a time a few weeks before the murders when Appellant had an argument with victim John over how much Appellant was supposed to be paid. Appellant was so upset that he walked off the job. Not long afterwards, however, this witness saw Appellant around the victim's boat so he assumed they had worked things out (T. 1145-1169).

Officer Karl Sauer was assigned to search the dumpster and trash receptacles at a specific 7-11 store in St Petersburg. He found bloody clothes including two t-shirts, one white and the other grey, and a pair of jeans. (T. 1170-1181).

Melissa Huffman was a forensic services technician for the St. Petersburg Police department. She was assigned to take photographs and look for fingerprints and DNA evidence that might be related to the homicides being investigated. She collected evidence from Appellant's apartment, the Whitehall Gardens, which was located a short distance to the north from the Loggerhead Marina. She also examined Tessa Cooper's white van, where she used swabs to collect samples from what she said looked like blood inside the vehicle. The areas she swabbed included a stain she observed on the front

passenger carpet and door panel. Initial presumptive testing indicated the presence of blood in those areas. This witness described what she said were female clothes located in Appellant's apartment. None of that clothing looked as if it had been in an altercation or anything like that. Later, this witness travelled to David Reynolds jewelry store and photographed a figaro-style gold bracelet and a necklace. She also met with Officer Sauer and took possession of the bloody clothes he found in the dumpster. She indicated the t-shirts were size extra-large, and the jeans were a size 40 with a 30 inseam (T. 1185-1230).

Paul Miller was assistant manager of the 7-11 store where the bloody clothes were found. His duties include taking trash to the dumpster, and on one of those trips he observed clothing that appeared to have bloodstains on them. He contacted law enforcement and showed them where to find the clothes. He did not see who put the clothes in the dumpster (T. 1245-1251).

Stephen Cline worked at David Reynolds Jewelry and Coin when Appellant came in. He purchased two figaro-style gold chains from Appellant, paying him a total of \$2569. This witness also identified photographs of the two chains that were in evidence.

Appellant also wanted to sell two rings, but because they contained diamonds as well as gold, Mr. Cline was unable to make an offer until someone else verified the value of the jewels. Appellant elected not to wait and put the two rings back in his pocket. This witness identified photographs of the two rings that were in evidence as being the same two rings shown to him by Appellant. He also testified that some of the cash he gave to Appellant, \$2,000 of it, was still in a paper strap, just as it came from the bank. The strap was purple and had the name of the bank printed on it. This witness also authenticated a video of the entire transaction, from the time Appellant emerged from the white van to the time he left (T. 1251-1288).

David Santos was the gemologist for Diamonds Direct, a retail jewelry store in St Petersburg; as such, he appraised diamonds and did all the buying for that store. Victim John was a well-known customer, and Diamonds Direct had custom-made some of the jewelry belonging to him. This witness gave appraisals for a long list of jewelry later identified as belonging to John but missing after his death. Included were the two figaro-style chains, the large diamond ring that Mr. Cline described, and a Rolex watch that John frequently wore. Of the items he examined that were stolen by Appellant, he

provided replacement values which, if totaled, exceeded \$300,000 (T. 1289-1318).

Ashley Buzzy was the paramour of Jason Figueroa, Appellant's brother who lived in Utica, New York. Jason was on parole at that time. Ashley was in jail on narcotics charges when law enforcement first contacted her, but was able to resolve her charges in exchange for her assistance as a witness. She described receiving a 13-pound FedEx box around April 16, 2013 that had been mailed from Appellant to Jason. This witness said that inside it was a black bag containing a large quantity, over one hundred, individual pieces of jewelry including diamonds, gold, expensive watches. One item in particular was a large canary-colored diamond ring. "Who wouldn't like that?" she said.

Ashley rented a storage unit in her name so the jewelry would not be found in the place where she and Jason were living. Over time she and Jason sold everything for a total of approximately \$30,000. They spent the money on new furniture, clothes, computers, a new flat screen television, a car, and a vacation. Jason's parole officer in New York eventually inquired about the box he had received from Appellant. Jason and Ashley put together a collection of clothes,

shoes, a camera, whatever they could find that weighed 13 pounds and showed it to the parole officer. During this time, Ashley said, Jason had no discernible health issues. He was “healthy as a horse” (T. 1321-1366).

Philip Steppello owned a pawn shop in New York and described some of the jewelry he purchased from Ashley and Jason. There were two large transactions on different days, totaling \$22,000. One of the items this witness purchased was a charm that had the name “John” written in diamonds (T. 1376-1399).

Officer Robert Kopek was with the Utica Police Department. He described his investigation into Jason Figueroa and Ashley Buzzy, documenting the renting of the storage unit along with the transactions described by Philip Steppello. When Jason and Ashley brought the 13-pound box of random items to his parole officer, this witness took it into evidence. Ashley, who was in jail at the time he spoke to her, admitted she had knowledge relating to the murders but would not speak unless her criminal charges were worked out. This witness communicated with the prosecutor and Ashley’s attorney. After she was released he took a videotaped statement from her (T. 1400-1419).

Douglas Tarlton was the property manager for Whitehall Gardens where Appellant was renting an apartment. In March of 2013 Appellant was given notice that his rent was late. Appellant paid it two days later. In April Appellant once again got a notice that his rent for the month of April was late. Appellant wrote a check for the rent amount on April 11, 2013. The next morning this witness saw Appellant, dressed more nicely than usual, and Appellant told him that his brother in New York was in the hospital and he was going to go see him for a few days. He was traveling by rental car. Later that same day law enforcement showed up because of the murders at the marina. This witness spoke with Appellant over the phone, told him the police were looking for him, that someone had been murdered at the marina, and Appellant said he would talk to the police in a few days when he returned. Mr. Tarlton gave law enforcement all the identifying information he had in his files including a copy of Appellant's driver's license and social security number (T. 1429-1461).

Michelle Robinson was John's step-daughter by his first wife Judy. She described various items of jewelry that had either been recovered or were missing at the time of trial. She said that the

victims always locked their houseboat at night (T. 1462-1482).

Kim Kato worked at Enterprise Rentals where Appellant first tried to rent a car. He was unable to do so because Enterprise requires a credit or debit card to rent a vehicle. She provided law enforcement with surveillance video showing Appellant at her business the morning of April 12, 2013. (T. 1500-1510).

Yousef Yousef owned a car rental company in south St Petersburg. Appellant rented a 2004 gold-colored Ford Taurus from him on April 12, 2013. Appellant needed it for a week, he said, but he was not permitted to leave Florida with the car. Some time after Appellant's arrest, this witness received notice that his car was in North Carolina, and he made arrangements to retrieve it from there (T. 1512-1521).

Officer Travis Holloman worked for the North Carolina Highway Patrol and was on duty when his office received a BOLO for a gold Ford Taurus. This witness and Trooper Dail waited by the north-bound side of I-95 and eventually observed Appellant's car. They executed a traffic stop and took him into custody. Search of Appellant's car revealed a cell phone with the battery removed. Appellant had a bank band in his pocket which this witness let

Appellant keep in his pocket. After transporting him to the jail, however, Officer Holloman searched Appellant again and was unable to find the band. He looked outside and found it tucked behind a rain gutter, near the spot he had directed Appellant to wait while he secured necessary paperwork. When asked about the whereabouts of the bank band, Appellant said “guess you needed that, huh” (T. 1528-1572).

Trooper Steven Dail was Trooper Holloman’s shift partner, and his testimony was similar to Holloman’s (T. 1573-1582).

Scott Frankland was a crime scene investigator with St. Petersburg Police. He described some of the hundreds of photographs of the crime scene that he took and various types of evidence he collected over the course of several days. His work included collecting swabs for later DNA testing as well as dusting for latent fingerprints. Of particular note is the absence of any damage to any of the locks observed by this witness. Mr. Frankland also described the process used for collecting DNA and fingerprints. DNA swabbing is done first, he said, to prevent the possibility of cross-contamination that might be caused by using a fingerprint brush at a crime scene. (T. 1583-1765).

Dr. Dollett White was the medical examiner who conducted the autopsies of the two victims. She described her observations of the scene and inspection and removal of the two victims from the bedroom of the houseboat. Both victims died of multiple sharp force injuries, the manner of death being homicide. Both victims were bound with duct tape.

Injuries to the female victim included a deep cut to her throat measuring twenty centimeters long. Her jugular vein was severed and the wound was deep enough to strike the bones of her spine. She could not have survived this injury without immediate medical attention. She was also stabbed twice in the chest, both times deep enough to penetrate into her lungs- one stab wound was approximately three inches deep, the other two inches. She also received an incised wound to her arm, possibly made while the killer's knife was at her throat. An abrasion to her face indicated that this victim may have been dragged by her ankles across a rough surface, like the carpet (T. 1790-1830).

Dr. White arrived at the scene at 4:15 pm on April 12, 2013. Based on lividity and the stage of rigor mortis, Dr. White opined that both victims had been dead for at least six hours prior to her arrival.

The male victim received a total of eleven stab or incised wounds to his chest. He was stabbed in the left armpit area, approximately two inches deep which caused a lot of bleeding, but this was not the fatal wound. A series of six other stab wounds perforated the lungs three times; one of these wounds indicated that the victim was either stabbed more than once in the same place, or the killer stabbed him and repositioned or twisted the knife before withdrawing it. Two lower stab wounds cut into the victim's heart in two locations; this caused massive bleeding and they were the fatal wounds. Other injuries this victim received was a four-inch-deep stab wound that approached the heart, two stabbing injuries that penetrated soft tissue only, and a slashing wound across the chest. He received several cuts to his hand and fingers and an assortment of bruises to his face and other parts of his body (T. 1830-1852).

Dr. White explained that comparing the amount of blood on the bed identified as coming from the female victim with that on the floor supported a conclusion that she was first stabbed on the bed before being moved to where her body was ultimately found. The injuries to her throat were not performed in one single movement, but appeared to have been made through three separate cuts (T. 1853-1860).

Officer William Schorn described his involvement in the investigation which included securing Tessa Cooper's white van and having it towed to a secure facility for processing, and his observations while it was being processed. He also assisted in searching the dumpster where Appellant's bloody clothes had been found. He spoke to the apartment manager at Whitehall Gardens, obtained what information he had on Appellant, and assisted in searching Appellant's apartment. Finally, he described being present while divers from the local fire department searched the water under the houseboat. Nothing of value was found there (T. 1873-1892).

Crime scene investigator Emil Nikolov described his involvement in processing the scene. He took photographs, collected swabs for later DNA analysis, and dusted for fingerprints (T. 1893-1903).

Melinda Clayton worked as a latent fingerprint examiner for the St. Petersburg Police Department. She examined fingerprints collected and submitted to her by technicians Frankland and Nikolov. She also obtained Appellant's finger- and handprints personally at the beginning of trial. She examined documents from David Reynolds jewelry store and confirmed that the thumbprint

taken by that store matched the known print taken from Appellant. She also identified a palm print belonging to Appellant that was retrieved from what she said was the “northeast pole” of the boat. Most of the prints collected were not useable for various reasons, and this witness did not match Appellant’s fingerprints to any of the other useable prints collected by law enforcement (T. 1917-1938).

Detective David Wawrzynski with the St. Petersburg Police Department described his investigation of the scene. His testimony was largely cumulative of other witnesses but he described locating the victim’s computer in the office and found that one of the screens showed the combination to the safe in the office. This witness also described the marina’s outdoor security camera as well as the motion-sensitive lights outside of the victim’s houseboat. The front doors to the cabin were unlocked and the keys to that lock, as well as to the victim’s car, were never located. The victim’s wallet was never found, either (T. 1940-1986).

Tessa Cooper lived with Appellant at the time of the murders in an apartment at Whitehall Gardens which is located across the street from the Loggerhead Marina. She suffered from an addiction to pain pills at the time. She relied on two men, Sam Alkass and Thomas

Crawford, to provide her with money and pills. She also regularly deleted messages to and from these men from her cell phone to keep Appellant from learning about them. Tessa first met the victims in January of 2013 when Appellant was working for them as a handyman. At one point Appellant was given permission to use John's car, he drove to Vero Beach to bring Tessa back to St. Petersburg in late January of 2013. Appellant also used John's golf cart to get back and forth from the apartment to the marina on a few occasions. She was aware that John was helping Appellant to start his own business detailing boats and that the victims helped Appellant with the initial money he needed to rent the apartment at Whitehall Gardens. Appellant worked at the marina seven days a week. About a month before the murder, the victims left to go on a cruise and gave Appellant a key to the houseboat so he could work on it in their absence (T. 1995-2034).

A few weeks before the murder, Tessa's parents let her use their white Astro van because she had just successfully completed a "detox" program. Tessa then described a dispute between Appellant and victim John over the amount of money he was owed, which resulted in Appellant staying away from the houseboat for a few days.

Eventually he returned to work for them (T. 2035-2039).

On April 11, 2013 Appellant returned to the apartment around 7 pm. He had been on the victim's houseboat; they had a guest visiting. She fell asleep around 1 am with Appellant in bed next to her. Around 4:30 am Appellant called her from his cell phone, sounding frantic, asking her to come pick him up. Tessa met him on the "main road," near an area where there were trails leading from the road south to the marina. Appellant was wearing jeans and a black hooded sweatshirt, and he was also carrying what looked like a backpack under his sweatshirt. He sat in the front passenger seat of the van and Tessa took him back to the apartment where he immediately grabbed a towel and some clothes and went into the bathroom (T. 2040-2061).

When Appellant emerged after taking a shower he had on clean clothes and now was carrying two backpacks, one of which looked fairly heavy. He told Tessa his brother in New York was sick and he needed to go visit him right away. They left the apartment, Appellant carrying the two backpacks and some Publix bags, and they were initially going to the airport. Appellant was talking to his brother on his cell phone and by the time they neared the airport Appellant had

decided not to fly and instead wanted to rent a car. They pulled into a 7-11 off Roosevelt Boulevard where Tessa saw Appellant throw the Publix bags into a dumpster while Tessa vacuumed the van at Appellant's suggestion. They returned to the apartment because it was too early in the morning to rent a car. Appellant left briefly to return the golf cart to the marina (T. 2061-2071).

The second time they left the apartment they headed towards Madeira Beach, where Appellant dropped Tessa at the beach access for around 20 minutes. From there they tried to rent a car from Enterprise and then another rental place without success. Appellant was driving and they went to David Reynolds jewelry store where Tessa, who was lying down in the back seat, saw Appellant take some heavy gold chains she had never seen before out of one of the backpacks. Appellant went into the store for perhaps 15 minutes after which they went to Appellant's bank. From there they drove to find a rental car and Appellant eventually succeeded in renting a gold Ford Taurus. He took both backpacks with him, told Tessa that if anyone asked she was to say only that he rented a car to go see his brother, and then Appellant left. Tessa returned to the apartment. She also recalled that while they were driving towards the airport,

she saw Appellant had a knife in his lap he was covering with one hand, which scared her (T. 2071-2089).

At the apartment, Tessa began to notice police activity at the marina and then a police officer looking at her van. She mentioned Appellant's name and the officer asked her to give a statement which she did. Tessa showed them the 7-11 and the dumpster. She also called Appellant to find out where he was. After giving the statement the police let her retrieve some clothing from the apartment and then she stayed the night at a friend's house. Tessa was shown clothing in open court which she identified as belonging to Appellant, she had never seen bloodstains on them before (T. 2090-2123).

Lieutenant Matthew Furse worked for the St. Petersburg Police Department. He investigated a man named Arthur Basile, who owned a boat at the marina and at some point in the past had argued with victim John over a ladder. This witness spoke with Mr. Basile and took a buccal swab from him for DNA comparison (T. 2168-2172).

Officer Chris McClure worked for St. Petersburg Police and described his involvement with victim John's computer- he removed the hard drive, created an image of it that could be studied later, and then replaced the drive (T. 2173-2177).

Sam Alkass testified to knowing Tessa, denied knowing the victims or ever being around the Loggerhead Marina. He wore size 32 pants, much smaller than the size 40 pants found in the dumpster. Those clothes, he said, were not his. He admitted to having been intimate with Tessa in the past and gave her money at times, even permitted her to pawn one of his rings when she needed some cash (T. 2178-2190).

Detective Rodney Tower described how, through discussions with residents of the marina, Appellant's name was mentioned frequently. This led to the Whitehall Gardens Apartments to the north where Tessa and her white Astro van were located. With Tessa's cooperation, officers located the bloody clothes in the dumpster. Through further investigation they were able to corroborate everything Tessa told them about where she and Appellant had been, including Enterprise car rentals, the jewelry store, the bank deposit, and ultimately the car rental agency where Appellant was able to rent the gold Taurus he was later arrested in. With this information Detective Tower obtained an arrest warrant for Appellant and the BOLO they issued was focused on the roads he might use to reach New York, particularly I-95. When Appellant was arrested in North

Carolina, Detective Tower was one of the officers who went to return Appellant to custody in Pinellas County (T. 2190-2211). This witness obtained a buccal swab from Appellant for DNA comparison. A consensual search of the Ford Taurus revealed a Garmin GPS unit, a cell phone with the battery removed, and some clothing inside a JanSport bag. The jeans were size 38/30, the t-shirts were size extra large, the same size as the shirts found in the dumpster. Clothing Appellant was wearing at the time of his arrest was of similar size, his pants being a size 40 waist. Detective Tower arranged to subpoena cell phone records from the various providers. He also initiated the investigation into Appellant's brother Jason and Ashley Buzzy as well as securing records from a Pak-N-Post located near Jacksonville from which Appellant shipped a package to his brother Jason (T. 2211-2249).

Daniel Gleba worked delivering newspapers at the time of the murders. Victim John asked him to drop the newspaper on his boat because, previous to that, his papers had been disappearing. Papers were supposed to be delivered by 6 am. This witness testified that his normal practice was to step up near the boat so he could put the paper on the deck around 6:00 am but no later than 6:30 if he was

running late. Then one morning he arrived and the boat was surrounded by yellow crime scene tape, which stood out in his mind (T. 2280-2287).

Thomas Crawford testified that he is on disability and was born with one arm shorter than the other. He worked as a maker of paving stones until he was injured at work some time in 2009 after which he was unable to work. He was prescribed pain medication which, after he met Tessa Cooper, he sometimes gave to her (T. 2288-2311).

Emil Nikolov returned to testify that he obtained a buccal swab from Sam Alkass, and to clarify that he took a DNA swab from the handle of the victim's opened safe (T. 2313-2316).

Scott Frankland returned to testify regarding a razor knife he collected, as well as to clarify the method he used to swab the roll of duct tape he collected from the scene (T. 2317-2324).

Marta Strawser worked for the Florida Department of Law Enforcement in the trace materials section. She examined the duct tape that was used to bind the victims and was able to determine by examining the fracturing of the various ends that all of the tape came from one roll, which was the roll collected by Scott Frankland (T. 2327-2359).

Sergeant Kenneth Miller responded to the scene shortly after the discovery of the bodies. He directed the various investigations, including the search of the apartment shared by Tessa Cooper and Appellant, as well as all the other places Appellant went during the hours before he left St. Petersburg. Testimony from this witness was largely cumulative of others except for his collection of the Loggerhead Marina's surveillance video. It did not show the victim's boat, but it was recording that area, including the times when a light near the boat was activated by a motion detector.

Sergeant Miller testified that on April 11, 2013 that light shut off around 10:42 pm, and did not turn on again until nearly four hours later, at 2:29 am April 12, 2013. The light would be activated by someone crossing the gangplank to enter the victim's boat, but would not respond to, for example, a motor vehicle passing by on the driveway or a boat traveling the waterway behind any of the boats. The light turned off again at 3:49 am, and remained off the remainder of the night. This witness also noted that the light did not react when Mr. Gleba delivered the newspaper, perhaps because he did not step on the gangplank to enter the boat but instead dropped the newspaper onto the deck. The implication of this testimony was to

show what time the killer entered and then left the victim's boat (T. 2360-2393).

Detective Thaddius Coffin testified to the examination of the contents of Appellant's cell phone after a search warrant was obtained by Sergeant Miller. He described examination of the various calls and texts made by Appellant the day before and after the homicides. Text messages from Appellant to his brother Jason, of which there were several, appear to have been deleted. This witness also examined the victim's computer collected from the houseboat, and was able to determine that the most recent date and time it had been used to access the victim's contact list was at 3:43 am the morning of the homicides. A previous witness, Detective Wawrzynski, had testified that the combination to the victim's safe was found in the victim's list of contacts (T. 2417-2435, 1966).

Michael Celona, an intelligence analyst, testified regarding historical cell site location information obtained from Appellant's service provider. He explained how the cell phone and tower system operates including that each tower is divided into sectors. A cell phone user will typically be routed through the closest tower. If the device is turned off or the battery removed, the provider is no longer

in contact with that device. Mr. Celona said the last call Appellant made on April 11, 2013 occurred around 9:15 pm. The next call he made occurred at 4:15 am April 12, 2013. Appellant also had numerous calls with his brother Jason (T. 2436-2461).

This witness also described which towers were being used by Appellant's phone. When his calls were made from the apartment, they typically used Tower 631. But the call Appellant made at 4:15 am to Tessa used a different tower. Appellant's provider only retains location data for voice calls; tower location for text messages is not available. Analyst Celona then showed the jury a map revealing the various towers used by Appellant's cell phone between the evening of April 11, 2013 through the following day. He noted that during the time period between 4:30 am and approximately 8:00 am, Appellant's phone used three different towers although it remained in the same general area. Because the device automatically moved to the strongest signal, a phone at the Loggerhead Marine might use the tower to the south or the one to the north without necessarily indicating any movement of the user (T. 2461-2480).

Mr. Celona showed the jury a map of all the towers Appellant's phone used during the relevant time, also explaining that this does

not necessarily show where he was but gives a general idea that he was in that vicinity. This information showed that Appellant remained in the St. Petersburg area until around 11:00 am on April 12. After that, he was travelling towards the east coast of Florida and then northwards until he was apprehended in North Carolina. This witness also provided similar information for Tessa Cooper's cell phone during the times she testified she was travelling with Appellant. In particular, he noted that merely because Tessa's phone used the same cell tower near her apartment was not conclusive evidence that she did not leave the apartment (T. 2481-2501).

Beth Ordeman was the DNA analyst working for the Florida Department of Law Enforcement. She received DNA samples from both victims as well as from Appellant, Tessa Cooper, and some others associated with the case (T. 2545-2548). She first analyzed the clothing recovered from the dumpster. On the white t-shirt she identified the blood as coming from both victims. She also found a third contributor and was unable to exclude Appellant as being the source (T. 2550-2552, 2555). Testing of the blue jeans showed areas stained with the DNA of both victims (T. 2563). Testing of the belt revealed a mixture of Appellant and Tessa Cooper; neither of them

could be excluded as contributors (T. 2565). Testing of clippings from the carpet in the white Astro van showed presence of victim John's DNA (T. 2569).

Testing of the duct tape on victim Germana included her own DNA and occasionally that of victim John (T. 2572). Duct tape removed from victim John, similarly, included mainly his own DNA (T. 2579). Other testing of different areas of duct tape found on the bed revealed a combination of DNA from several sources; this witness could not exclude Appellant, victim John, or victim Germana from that combination (T. 2582). Finally, this witness tested swabs taken from both inside, including the cardboard along with the sticky sides of the roll, and the outside non-sticky side of the roll of duct tape found near the bodies. All of these swabs contained DNA which conclusively matched Appellant's (T. 2585-2586). A wad of discarded duct tape found nearby was also found to carry Appellant's DNA (T. 2588-2589). The remainder of samples recovered from the bedroom matched only the two victims; none of the other individuals in this case, including Tessa Cooper's, was found in that room (T. 2590-2595).

Anna Cox was the State's blood spatter expert, and her

testimony revealed the various ways blood was deposited throughout the murder scene (T. 2631-2713).

Following Anna Cox the State rested its case. The defendant argued for judgment of acquittal which was denied (T. 2717). Appellant then testified. He described meeting Tessa and moving to the St. Petersburg area because she was addicted to pills and her parents were here to help with that. Appellant has an ex-wife in Puerto Rico; he contested the divorce but his wife obtained a restraining order which he apparently violated, resulting in his being arrested here and incarcerated in Puerto Rico for two years. On his release he returned to St. Petersburg and once again worked for Global Marine.

Appellant met the victims John and Germana through the harbormaster at Loggerhead Marina and he began working for John. He would paint, clean, detail the boat, whatever it needed. He described the argument he had with John as being over the timing of certain jobs John wanted done. Appellant walked away from the argument. About a week later John apologized and Appellant worked for him again.

The day before the victims were killed was a typical work day

for Appellant, he did some painting and after, while he was eating with them, a friend dropped by and Appellant went home. The time was around 7 or 7:30. Tessa was gone and Appellant was tired, so he went to bed. Tessa came home while he was asleep. He woke up again around 4:00 am and she was gone, so was his debit card. He called and she explained she was out getting gas and cigarettes and would be back soon. When she did return, she asked to be taken for drug treatment, so they drove north to the facility. By the time they arrived, she had changed her mind so they pulled in at a 7-11, where Tessa gave him some Publix bags to throw away while she vacuumed the van.

They returned to the apartment for a while, then Tessa wanted to visit with her parents before they left for work so Appellant took her to Madeira Beach where they live. She visited with her father a few minutes and then they returned to the apartment. Appellant had a golf cart he needed to return so he left briefly to take it back to victim John's boat, then he returned to the apartment. When he arrived, Tessa had a backpack and was apologetic because she had sold Appellant's Jeep while he was jailed in Puerto Rico, and she gave him a gold chain for him to sell to make up for that. She said she had

other jewelry and she asked Appellant to help her sell it. Appellant did not know where she got it from but he did not ask to avoid a confrontation. Instead, he went to sell the chain to David Reynolds jewelry. Of the money he received he gave \$2,000 to Tessa and he kept the rest. He had been paid recently, so he deposited money in the bank to cover the rent check he had written the previous day.

With Tessa's help he found a place where he could rent a car and he left, going to Walmart first to buy a Garmin GPS to help find his brother's address in New York, where he was going. He left, heading for the other coast towards I-95. Near Jacksonville he stopped to mail the jewelry package Tessa had given him to his brother. He received many phone calls from people associated with the marina. Shortly before he was stopped in North Carolina, he accidentally dropped his phone and the battery came out. Then he saw blue lights behind him, he pulled over and was arrested.

On cross examination, Appellant admitted having a key and access to the entire boat. He denied knowing anything about any safe, denied being out of the apartment the morning of the homicides, and claimed instead that he was driving the van that entire morning, not Tessa. He denied owning the clothing that was found in the

dumpster although he admitted it was the same size as clothes he was wearing at the time of his arrest. Asked about his DNA being on the duct tape used to bind the victims, Appellant merely responded, “that’s what they say.” Confronted with conflicting statements he made to Detective Tower, that the chains he sold earlier that day had belonged to him for a long time, Appellant did not recall what he told the detective (T. 2732-2818).

On rebuttal, the State re-called Detective Furse, who took a statement from Appellant shortly after his arrest. Appellant said he was on his way to see his brother in New York who was sick with cancer. The night before the murders, Appellant had gone to bed around 10:00 pm, woke up around 5:00 am at which time he drove to a nearby 7-11 where he bought coffee and then later he went to McDonalds. Appellant did not deny selling anything to David Reynolds but claimed he had owned the jewelry for a long time. He could not explain where the money was, except to say he deposited some of it in the bank, gave some to Tessa, and spent the rest for food (T. 2823-2832). Following this testimony, the State rested.

Appellant moved for mistrial based on the State’s mention that Appellant was in jail, which was denied (T. 2836-2839). After closing

argument (T. 2856-3013) the jury was instructed (T. 3017-3051) and returned a verdict of guilty as charged (T. 3058-3059).

PENALTY PHASE

Appellant waived mitigation and successfully moved to dismiss counsel, who was appointed to stand by during penalty phase. The State presented testimony from Dr. Emily Lazarou, who explained that Germana would have been vulnerable given her smaller size plus the fact that she was awakened in the middle of the night. Victim John was 75 years old when he died, suffered from diabetes and multiple health problems, and needed a cane to walk. He too would have been vulnerable to an attack from someone like Appellant (T. 3124-3129). The State then presented victim impact testimony (T. 3136-3148).

Appellant persisted in his desire to waive mitigation. Penalty phase counsel was re-appointed to represent him when the jury returned with questions about the verdict forms, then ultimately returned a verdict recommending a sentence of death (T. 3149-3236). At the Spencer¹ hearing the defense presented the testimony of Dr.

¹ Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Eisenstein (T. 3703-3809) and Dr. Wu (T. 3823-3931) in an attempt to establish the two statutory mitigators of extreme mental or emotional disturbance and impaired capacity. The State presented testimony from Dr. Holder (T. 3967-4046), Dr. Gamache (T. 4053-4117) and Dr. Lazarou (T. 4118-4203). The court also accepted and considered a pre-sentence investigation prepared by Colleen Quinn Investigations for DOC (R. 4276-4358).

The trial court rendered its sentencing order on July 2, 2021. It found that the State had established aggravators that included avoid arrest, financial gain, HAC, CCP, and that the victims were vulnerable due to advanced age and disabilities. The court considered and weighed the two statutory mitigators, finding that they had not been established but nevertheless giving some weight to them, plus eight non-statutory mitigators including Appellant suffered from brain injury when he was a child, was raised in a poor and drug-infested neighborhood, abuse by his father, the mother's mental health and abandonment of the family, good employment history, Appellant's medical ailments, his good family relationships, and low risk of future dangerousness if confined to prison. The court sentenced Appellant to death (R. 2614-2641). This appeal follows.

SUMMARY OF THE ARGUMENT

1. Appellant has no right to any particular relationship with counsel. Appellant makes no showing that counsel's ability to represent him was impaired by his limited visits with Appellant.

2. The State's use of historic cell site location information without a search warrant is not improper where the surveillance covered no more than a few hours. In any event, the provider information was used to corroborate other testimony and was merely cumulative.

3. There was no contemporaneous objection to the lower court's ruling regarding waiver of mitigation and the error is not fundamental. Appellant wanted no mitigation presented to the jury and he achieved that goal.

4. The lower court did not err by failing to advise Appellant regarding the effect his decision to waive mitigation might have on the timing of appellate review. Appellant was acting pro se and had standby counsel who could have advised him had he asked. In any event, Appellant has no specific right to have his appeal commence at any particular time.

5. The trial court did not err in exercising its discretion not

to appoint independent counsel for the purpose of presenting mitigation during penalty phase.

6. The jury was properly instructed and is presumed to have followed those instructions. Moreover, there was no contemporaneous objection to the verdict form and the error is not fundamental.

7. The trial court's sentencing order demonstrates that it independently weighed the aggravators and mitigating factors.

8. This Court no longer conducts proportionality review.

9. Death was the appropriate sentence for Appellant's crime where he killed two elderly victims by stabbing them to death.

10. The record establishes sufficient evidence to support the jury's verdict of guilt.

ARGUMENT

ISSUE I

THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN APPELLANT AND DEFENSE COUNSEL WAS ADEQUATE FOR THE PURPOSES OF THE SIXTH AMENDMENT.

Appellant first contends that he is entitled to relief because he did not enjoy what he views as a "good relationship" with defense counsel, primarily because counsel did not visit as often as Appellant might have preferred. Appellant asserts that his relationship with counsel was so dysfunctional that it violated his constitutional rights. This claim is mere speculation with no record support.

The Sixth Amendment guarantees the right to effective assistance of counsel. In Appellant's case, defense attorney Keith Hammond was appointed after a conflict of interest disqualified the Public Defender's office. Shortly after his appointment, Appellant began voicing complaints about the lack of communication with this new attorney; he now complains that the failure to establish good communication with counsel violated his Sixth Amendment right to effective representation. Appellant's claim in this regard lacks merit.

Generalized allegations of dissatisfaction with appointed counsel, including lack of communication, are insufficient to merit

relief, and a trial court is acting within its discretion in declining to appoint new counsel when confronted with such a complaint. Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), Morrison v. State, 818 So. 2d 432 (Fla. 2002). No relief is warranted for a disagreement over trial strategy, McKenzie v. State, 29 So. 3d 272 (Fla. 2010), or a claimed conflict of interest in the absence of specific record evidence showing that the defendant's interests are being actively compromised. Taylor v. State, 87 So. 3d 749 (Fla. 2012).

To his credit, Appellant concedes (Initial Brief pp. 27-28) that he is not asking this Court to address a claim of ineffective assistance of counsel on the face of the record or any claimed failure by the lower court to make the appropriate inquiry pursuant to Nelson. His claim is limited to whether, on the record presently before this Court, a Sixth Amendment violation is established based on an alleged lack of communication between client and attorney. It seems to the State that this issue has been thoroughly parsed by this Court over the years, but Appellant, in the hope that this Court might adopt a lower standard, directs our attention to Martel v. Clair, 565 U.S. 648 (2012).

In Martel, the Court concluded that discharge of counsel should

be granted when the movant establishes that it is in the "interests of justice" to do so. But Martel was interpreting a specific federal statute governing appointment of postconviction counsel to state habeas litigants in capital cases, which the Court noted was not governed by the Sixth Amendment. Id at 662. The Martel Court felt resolution of such a fact-specific claim necessarily required an assessment of certain factors including timeliness, the adequacy of the lower court's investigation, and the asserted cause underlying the motion seeking substitution of counsel. The complaint in Martel, however, alleged ineffective assistance of habeas counsel which, in the postconviction federal habeas context, places Martel well outside of the constitutional framework governing the trial court in Appellant's case. Nevertheless, Martel is instructive because even outside the Sixth Amendment strictures, the court always returns to the question of harm; under the admittedly vague "interests of justice" standard, a defendant's request for appointment of new counsel is not granted without some inquiry into why present counsel is not satisfactory, which necessarily leads to the question of effectiveness.²

² The state court opinions cited by Appellant generally incorporate the Martel criteria along with one crucial addition- the extent to

Indeed, in reviewing the denial of a motion seeking to withdraw or discharge counsel based on an alleged breakdown in communication, this Court has focused on what effect the lack of communication has on counsel's effectiveness in representing the defendant. Schoenwetter v. State, 931 So. 2d 857, 870 (Fla. 2006) ("General loss of confidence or trust standing alone will not support withdrawal of counsel.") The United States Supreme Court has held that there is no right to a meaningful relationship between client and counsel; and, as in Schoenwetter, the focus in cases alleging generalized failure in the attorney-client relationship is the degree to which the adversarial process is impeded. Morris v. Slappy, 461 U.S. 1, 14 (1983), United States v. Cronin, 466 U.S. 648, 657 (1984).

And while the State agrees that the rules governing attorney behavior in Florida provide certain mandates regarding communication between attorney and client, it is important to remember that the standard of effective representation is not and never has been measured in terms of whether counsel has complied

which the relational impediment prevents counsel from advancing an adequate defense; the State views this as nothing more than a restatement of the standard of effectiveness announced in Strickland v. Washington, 466 U.S. 668 (1984).

with what is required by a bar association's rules of conduct. Breach of an ethical standard, the United States Supreme Court has said, does not necessarily rise to the level of a Strickland violation, Nix v. Whiteside, 475 U.S. 157, 165 (1986). Indeed, the Nix Court cautioned against what it called the "constitutionalizing" of a state bar's rules governing conduct of counsel.

Finally, there are policy reasons not addressed by Appellant. First, a trial-level request for new counsel such as advocated by Appellant necessarily requires the trial court to assess counsel's effectiveness. The difficulty lies in the need for counsel to maintain client confidentiality as to both strategy and communication. Appellant appears to invite trial courts to conduct a granular examination of counsel's strategy and preparation for trial, but Florida already has postconviction mechanisms in place for this that do not run the risk of untimely disclosure of strategy and client confidences.

Second, there is the slippery slope. There is no need to replace otherwise effective counsel merely because the quality of communication is not to the defendant's liking. If this Court were to hold that lack of communication alone is sufficient, we can expect

substantial delay in resolving criminal cases where, in many cases, delay is the defendant's best and perhaps only strategy. The State has no doubt that many incarcerated defendants might prefer frequent strategy sessions with their appointed counsel, but as a general rule, experienced counsel is perfectly capable of providing effective representation because in most cases the brunt of counsel's work must be done in the field, rather than inside the jail.

In the end, the real question to be resolved here is not whether attorney Hammond was able to keep his client happy by visiting with him more frequently, but what harm did Appellant suffer? Despite Appellant's dramatic protestations that his relationship with counsel was "toxic," the State suggests that such a conclusion is not borne out by the record because we have no clear idea of what happened outside the courtroom. This question is best addressed in postconviction proceedings, where the consequences of the alleged failure in communication can be explored.

ISSUE II

THE STATE WAS NOT REQUIRED TO OBTAIN A SEARCH WARRANT TO OBTAIN HISTORICAL CELL SITE LOCATION INFORMATION (CSLI) COVERING A SHORT PERIOD OF TIME, AND IF THERE WAS ERROR, IT WAS HARMLESS.

Appellant next argues that the State's use of historical cell site location information (CSLI) violated the Fourth Amendment. Analysis of the validity of this claim requires review of the facts.

Sometime between the hours of 2:30 and 4:00 am on April 12, 2013 the two victims, John and Germana, were murdered on their houseboat which was moored at the Loggerhead Marina, located at 5821 32nd Way South in St. Petersburg. Appellant worked as a handyman for the victims and in that capacity was frequently in and around the marina; he lived in an apartment complex across the street to the north (T. 1167) at 3301 58th Avenue South with his paramour Tessa Cooper. Shortly after the victims were discovered the morning of April 12, law enforcement contacted Tessa at Appellant's apartment. She cooperated and described in detail Appellant's relationship with the victims as well as information regarding Appellant's actions on April 11 and 12.

Because Appellant worked on the houseboat frequently, he had

his own key (T. 2034). Tessa, a few weeks before the murders, had acquired a white Chevrolet Astro van from her parents (T. 2035). On the day before the murders, Tessa communicated several times with Appellant by text. Appellant came home from work shortly before 7 pm (T. 2051). Tessa and Appellant went to bed around 1 am (T. 2054). Around 4:30 am, Tessa was awakened by a call from Appellant; he sounded stressed and demanded that she come pick him up right away. Tessa took her van and met Appellant out by the main road which, she said, was 31st Street (T. 2054-2056, 2058). The marina was located south of 31st Street on the other side of the road.

Appellant entered the passenger side of the van and was wearing a dark hoodie under which Tessa could see a lump which looked like a backpack. They returned to the apartment where Appellant showered and changed clothes. Tessa saw that he now had two backpacks, one of which looked very heavy. Appellant said his brother was sick and he needed to go to New York right away to see him and they began discussing whether he should fly. When they left the apartment for the airport, Appellant was carrying the two backpacks and some Publix bags (T. 2060-2064).

Tessa and Appellant began driving towards the St Petersburg-

Clearwater Airport via the Interstate. Appellant was on the phone with his brother. By the time they reached the airport, however, Appellant had decided to rent a car and drive. They stopped at a 7-11 and Tessa vacuumed the van while Appellant threw the Publix bags in the dumpster. Tessa did not know what was in the bags. And because it was too early to rent a car, they returned to the apartment (T. 2065-2071).

Some time later, Tessa and Appellant left the apartment, now looking for a rental car. Tessa was laying down in the back seat when Appellant parked at a store identified as David Reynolds Jewelry and Coin. He reached into one of the backpacks and pulled out some heavy gold chains Tessa had never seen before and went into the store with them. Approximately fifteen minutes later they left, stopping at Bank of America, which Tessa said was where Appellant usually banked (T. 2079-2083).

From there, they drove to various rental agencies until they found one with a car to rent. Appellant took the two backpacks and drove away in a gold Ford Taurus. Before he left, Appellant told Tessa that if anyone asked, the only place she took him was to the rental place (T. 2087-2088). Tessa did not see Appellant again after that (T.

2084-2085).

Later that day Tessa, now back at the apartment, noticed a lot of activity at the marina, and a police detective looking at her van. Tessa described Appellant's activities that day to law enforcement, gave a recorded statement and showed them the different places where they had gone, including the 7-11 dumpster (T. 2092).

On April 18, 2013 law enforcement subpoenaed historical cell site location information from MetroPCS for Appellant's cell phone number (R. 713-716). Documents received in response to that subpoena were subsequently admitted into evidence during Appellant's trial in 2019. On inquiry from the defense, the State indicated that while a warrant was obtained to search the cell phone, Appellant's historical CSLI was obtained by subpoena. Appellant complained that a recent United States Supreme Court opinion required a warrant for that type of information. The lower court explained that the matter would be preserved for appellate review (T. 225-229). The State notes that the affidavit and search warrant mentioned by the prosecution are not in the record.

At trial, Analyst Celona testified regarding the information obtained from Appellant's cell phone company regarding which

towers his phone was using at various relevant times on April 11-12 of 2013. He explained that when using what he called "real time" analysis, it is possible to locate a person's exact location by latitude and longitude at the time that person is in possession of a cell phone. Historical data, however, records only which particular cell towers were being used at the time, thus providing only a general geographical location (T. 2441).

Celona discussed the call logs, which showed multiple calls between Appellant and his brother Jason on April 11, 2013; the last call on that date occurred around 9:15 pm. There were no calls until the following morning, when at 4:15 am Appellant called Tessa Cooper (T. 2457-2458). It was the State's theory of the case that this was shortly after the victims were killed. Celona explained that this call appeared to have used a different cell tower, located farther south of the tower used when Appellant was calling from the apartment (T. 2452).

In terms of mapping Appellant's location, Celona explained that most of the calls made by Appellant (except for the one made at 4:15 am) used the same cell tower in south St. Petersburg up until around 5:00 am. Then at 5:07 his calls began tracking through different

towers outside that area (T. 2462). Appellant did not leave the Tampa area until 11:34 am (T. 2464). Detective Celona also discussed historical CSLI records obtained for Tessa Cooper's cell phone. Both Tessa's phone and Appellant's appear to have travelled together except for a period of time shortly after 10:45 am, which other records establish was when Appellant was in Walmart, purchasing a Garmin GPS unit (R. 2116). Tessa testified that Appellant dropped her off near Madeira Beach during this time period; he was gone approximately 20 to 30 minutes (T. 2074-2075). Overall, Celona's testimony was used by the State to corroborate Tessa Cooper's testimony.

On cross examination, defense counsel established that while it is normal for a cell phone to use the closest tower, various circumstances may cause it to shift to a different tower- if there are too many people using one tower or if there is an intervening building blocking the signal, a person's cell phone might switch to the next closest tower (T. 2506-2507).

On appeal, Appellant contends that the historical CSLI was improperly obtained by the State because it failed to secure a search warrant as is required under Carpenter v. State, 138 S. Ct. 2206

(2018). While the State recognizes the holding in Carpenter, there are several reasons why Appellant is entitled to no relief. Initially, there is the question of whether this claim was properly preserved because there was no motion to suppress and the only basis for raising the claim rests on the fact that Appellant apparently asked counsel why Carpenter had not been raised. To preserve an issue for appeal, the legal argument must be raised and ruled on by the lower court. Rhodes v. State, 986 So. 2d 501 (Fla. 2008). However, recognizing that this Court may conclude that the record at least arguably establishes that the claim was preserved, we next address the merits of Appellant's claim.

First of all, the record shows that the historical CSLI used in Appellant's trial was obtained through use of a subpoena that was issued by the clerk's office on request of the prosecutor on April 18, 2013, five years before Carpenter was issued (R. 713-716). This was considered standard procedure at the time and because cell phone service providers were third parties, the prevailing theory of the day was that private persons have no legitimate privacy interests where unknown third parties were involved in handling their information. See Mitchell v. State, 25 So. 3d 632 (Fla. 4th DCA 2009) and Johnson

v. State, 110 So. 3d 954 (Fla. 4th DCA 2013). By the time Carpenter was decided, the State had been in possession of Appellant's historical CSLI for approximately five years.

Despite Appellant's argument to the contrary, Carpenter is distinguishable from the instant case. The defendant's location in Carpenter was tracked over a period of months in order to establish his connection with a series of electronics store robberies. Such extensive monitoring, the Court held, violated Carpenter's Fourth Amendment rights. The Court examined its previous rulings in similar cases and noted that it was not merely the fact of government's tracking of a defendant that controlled, but rather the length of time over which the tracking occurred. For example, in United States v. Knotts, 460 U.S. 276 (1983) law enforcement installed a tracking device in a container of chloroform which they knew would eventually come into the defendant's possession, and with its aid allowed them to locate him in a remote cabin. This, the court said, did not violate the Fourth Amendment because of the limited duration. Significantly, Carpenter did not overrule Knotts; the court said "[t]his case is not about using a phone, or a person's movement at a particular time. It is about a detailed chronicle of a

person's physical presence compiled every day, every moment, over several years." Id at 2220. The State suggests, therefore, that Carpenter does not hold, as Appellant asserts, that law enforcement must secure a warrant every time they are looking for historical CSLI, and most emphatically, it does not hold that the minimal examination of a few hours' worth of data violates Appellant's Fourth Amendment rights to the point where we must consider application of the Exclusionary Rule. Moreover, if this Court were inclined to adopt Appellant's extreme interpretation of Carpenter, the State suggests that this case is not the best vehicle for doing so, primarily because regardless of how we view the State's use of a subpoena to recover Appellant's historical CSLI, harmless error analysis precludes relief.

It is important to bear in mind that Celona's testimony tracking which cell towers Appellant's phone operated through during the hours immediately following the murders was used largely to corroborate testimony of other witnesses who either met with or saw Appellant during the hours immediately following the murders. Appellant's strongest argument suffers from the same flaw. In the State's closing argument, the prosecutor argued that the call made

to Tessa Cooper at 4:15 am used tower 156 which, the State said, was south of tower 631, the implication being that when Appellant made that call he was closer to the marina at 4:15 am instead of in his apartment in bed, as he asserted in his testimony. But Tessa Cooper testified that she was alone in the apartment when she answered the 4:15 am call, and a few minutes later when she met Appellant, it was at a location to the south of the apartment complex, and in the direction of the marina where the murders occurred. Moreover, the State did not need the historical CSLI to establish Appellant's guilt. Review of some of the other evidence establishes this.

Shortly after Appellant was identified as a suspect, law enforcement located a white Astro van outside Appellant's apartment that was impounded. Testing of the front passenger area showed the presence of blood. Swabs were collected for later DNA testing (T. 1192-1195, 1202). Testing of the bloody clothes found in a dumpster identified by Tessa showed the presence of both John and Germana's DNA (T. 2551-2552, 2560-2561). John's blood was also found inside the Astro van (T. 2569). At the crime scene, law enforcement found a roll of duct tape which was significant, as the victims were bound

with tape taken from that roll. Appellant's DNA was found both on the inside cardboard side as well as on the grey non-sticky exterior of the roll (T. 2584-2585). Appellant's DNA was also found on a wad of discarded duct tape found nearby (T. 2587-2588).

The State's theory of the case was that all the duct tape used in restraining the victims came from the roll found in the room, and discovery of Appellant's DNA on the outside of the roll *after* the victims had been restrained with it was of extreme significance. Examination of the entire length of duct tape, as well as the roll bearing Appellant's DNA, established that the tape used to restrain the victims was torn from the same roll (T. 2345). In short, the State presented strong evidence of Appellant's guilt independent of the historical CSLI. Further complicating Appellant's claim is the fact that he testified in his own behalf, resulting in numerous inexplicable inconsistencies between his sworn testimony and the circumstantial evidence linking him to the offense.

The defense theory of the case was that Tessa Cooper was the killer. To that end, Appellant testified that he arrived home the evening before the murders around 7 pm, and Tessa was not home. He went to bed around 9, Tessa arriving later while he was asleep.

Around 4 am Appellant woke up and Tessa was gone with Appellant's debit card. He called her and she said she was getting gas and cigarettes and would be home soon (T. 2757-2758). He further explained that Tessa, who had a problem with pain pills, asked to be taken to Operation Par, which is a facility in St Petersburg located next door to the 7-11 where Appellant's bloody clothes had been found in the dumpster. They stopped briefly at the 7-11 so Tessa could get change for laundry and she gave him a Publix bag to throw away in the dumpster (T. 2759-2762). Tessa by that time had changed her mind about going to Operation Par, and asked Appellant to drive her to Madeira Beach so she could visit with her family, who lived in that area. Appellant and Tessa returned to the apartment around 7 am and he left briefly to return the golf cart that belonged to victim John (T. 2763-2764).

On his return, according to Appellant, Tessa produced a backpack containing jewelry that she asked him to help her sell. This included the gold chains that Appellant sold to David Reynolds. Of that money, he gave Tessa \$2,000 and kept \$560. After selling the jewelry Appellant went to the bank and deposited money earned by working at the marina (T. 2768-2770). He rented a car, took the

backpack containing the jewelry from Tessa and went to Walmart to purchase a GPS to help him locate his brother's address in New York. Tessa was not with him at this point. After buying the GPS Appellant began driving north. When he reached the east coast of Florida he stopped to mail the jewelry to his brother because he was planning to visit his mother first (T. 2773-2774). When he crossed into North Carolina, he was pulled over and arrested (T. 2779). Appellant denied killing the two victims (T. 2780).

On cross examination Appellant said that he had no idea how blood from victim John came to be found in the front passenger area of Tessa Cooper's white van (T. 2793). Appellant denied that the bloody clothes Tessa told police he had put in the dumpster were his, even though they were the same size as clothes found in the car he was driving when arrested in North Carolina (T. 2796-2797). He could not explain how blood from both victims came to be found on those clothes (T. 2798). Appellant could not explain how his DNA came to be found on the outside of the roll of duct tape recovered from the houseboat, after the State's expert testified that approximately 22 feet of tape from that roll had been removed and used to restrain the victims; his only response to the State's query was "that's what they

say” (T. 2799-2800).

When asked why he told Detective Tower that the gold chains he’d sold to David Reynolds belonged to him, Appellant merely said he did not recall having said that (T. 2801). When reminded that the State’s evidence showed the combination to the safe was accessed around 3:45 am, that shortly thereafter a number of text messages were exchanged between Appellant and his brother in New York, and that all of those messages had been deleted, Appellant denied knowing anything about the safe or that he had deleted anything- he was asleep at that time (T. 3809).

The defense theory of the case was to blame Tessa Cooper; the historical CSLI supported Appellant’s trial testimony regarding his call to her at 4:15 am, their various movements that morning, including his renting a car to go visit his brother. But Appellant’s trial testimony was inconsistent with what he told police shortly after his arrest. Whereas at trial he reported that his brother wasn’t sick, he just had a girl, like Tessa, who had an addiction problem and Appellant was travelling to help him with that. But on the day he was arrested, he told Detective Tower and Matthew Furse that his brother had cancer. The gold jewelry he sold earlier that day did not come

from Tessa Cooper, it was his own property, had it for years. And he only gave Tessa \$300, but he deposited some in the bank and could not account for where the remaining money went, other than he'd bought food during the trip (T. 2828-2830). Finally, law enforcement saw no signs of forced entry and Appellant admitted that he had a key to the houseboat.

In short, Appellant's defense was weak, and the combination of DNA evidence on the duct tape used to restrain the victims with Tessa Cooper's testimony made the State's case quite strong. As the State argued to the jury, there was only one way Appellant's DNA could have been found on the outside of that roll, and that was if Appellant was in that room at the time the two victims were killed. None of this evidence would be impacted by exclusion of Appellant's historical CSLI. This Court should affirm.

ISSUE III

THE TRIAL COURT'S RULING WITH REGARD TO WAIVER OF MITIGATION WAS NOT PRESERVED FOR APPELLATE REVIEW.

Appellant next complains that the lower court erred by refusing to accept his waiver of mitigation which resulted in Appellant's decision to dismiss counsel and proceed pro se. Because this claim was not preserved and the error is not fundamental, he is entitled to no relief.

Appellant clearly wanted his penalty phase attorney to present no mitigation on his behalf. Penalty phase counsel had prepared a substantial mitigation case and was ready to present it. Appellant protested to the court that he wished to waive mitigation, but the trial court refused to permit him to do so, indicating that it would permit penalty phase counsel to present mitigation regardless of Appellant's waiver. While the State acknowledges a defendant's right to waive mitigation, no objection to this ruling was made below. Jackson v. State, 983 So. 2d 562 (Fla. 2008). The error is clearly not fundamental because, in the end, Appellant got what he asked for—the defense presented no mitigation to the penalty phase jury.

Similarly, Appellant has the right to proceed pro se. For

example, in Hamblen v. State, 527 So. 2d 800 (Fla. 1988), the defendant opted to waive mitigation as well as counsel and the lower court properly allowed him to do so while also considering what mitigation was available elsewhere in the record.

While Appellant cites to Boyd,³ Hojan,⁴ and Bell,⁵ all of these cases merely establish that a defendant has the right to waive mitigation, which is not in dispute here. The State's position is that the error claimed by Appellant was not fundamental. Even if this Court were inclined to grant relief, it would come in the form of another penalty phase trial, where the same evidence would be presented by the State while Appellant and counsel stand by and observe. Granting relief would not benefit Appellant in any conceivable way. Marquardt v. State, 156 So. 3d 464 (Fla. 2015). Accordingly, no relief is warranted.

³ Boyd v. State, 910 So. 2d 148 (Fla. 1983).

⁴ Hojan v. State, 3 So. 3d 1204 (Fla. 2009).

⁵ Bell v. State, 336 So. 3d 211 (Fla. 2022).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN FAILING TO EXPLAIN THAT PRESENTING THE MITIGATING EVIDENCE WOULD NOT DELAY APPELLANT'S APPEAL.

Next, Appellant contends that the lower court “compounded” the error explored in the previous issue. The record indicates that Appellant expressed several reasons for his decision not to advance mitigation. He did not wish the jury to think he was begging them for mercy for a crime he did not commit (T. 3073), he did not want to “put his family in this situation” (T. 3081), and he wanted to “finish all this so I can go with my appeals” (T. 3088). In advancing this claim, Appellant focuses only on the last reason given, but clearly there were multiple reasons. Regardless, Appellant correctly reminds us that when a defendant waives mitigation, the sentencing court must order a PSI which normally takes several months extra to complete. Thus by waiving mitigation, Appellant, whether wittingly or not, effectively delayed his direct appeal. And in Appellant’s view, the lower court had a duty to advise him of this fact. The State disagrees, even if that were the sole reason for Appellant’s decision to waive mitigation.

The trial court had no duty to advise Appellant regarding the timing of his appeal at a time when Appellant had elected to proceed pro se. Appellant had standby counsel available to answer any questions he might have regarding procedure. See, e.g., McKenzie v. State, 29 So. 3d 272, 284 (Fla. 2010) (discussing the role of standby counsel in a capital case).

In any event, Appellant suffered no prejudice as a result of the lower court's actions because while he may have preferred to seek appellate review as expeditiously as possible, he has no right to that particular goal. As noted in the previous issue, Appellant elected to proceed pro se. The instant claim assumes the merit of the previous one, but in any event, was not preserved because neither Appellant nor defense counsel, who was re-appointed shortly before the penalty phase jury returned with its verdict, objected below, and the error is not fundamental. Rhodes v. State, 986 So. 2d 501 (Fla. 2008). This Court should affirm.

ISSUE V

THE TRIAL COURT HAD DISCRETIONARY AUTHORITY TO APPOINT INDEPENDENT COUNSEL; ITS FAILURE TO EXERCISE IT DOES NOT AMOUNT TO REVERSIBLE ERROR.

This claim is based entirely on speculation by Appellant that the trial court was ignorant of this Court's decisions relating to the appointment of independent counsel. Where a defendant waives mitigation the trial court is required to order preparation of a pre-sentence investigation (PSI), which was done here (R. 4276-4358). Appointment of independent counsel for the purpose of presenting mitigation is discretionary with the court. Muhammad v. State, 782 So. 2d 343, 354 (Fla. 2001), Robertson v. State, 187 So. 3d 1207 (Fla. 2016). No relief is warranted.

ISSUE VI

APPELLANT'S DEATH SENTENCE WAS LAWFUL BECAUSE THE JURY WAS PROPERLY INSTRUCTED REGARDING THEIR DUTY REGARDING AGGRAVATORS AND MITIGATORS AND THE JURY IS PRESUMED TO HAVE FOLLOWED ITS INSTRUCTIONS.

Here, Appellant directs our attention to what he perceives as various errors in the verdict form and asserts that the form's failure to mention the weighing of aggravators and mitigators renders it a "non-verdict" which entitles him to relief. Appellant's claim lacks merit, however.

Appellant's jury was instructed by the trial court that it was required to find and weigh aggravators and mitigators in assessing whether a death sentence was appropriate (T. 3197-3199). Appellant expressly waived any mention of statutory mitigators in the jury instructions (T. 3133). Despite this, even though the verdict form about which Appellant complains is not standard, no relief is warranted. Appellant's jury was asked to find existence of at least one aggravator; it found a total of five as to each victim (R. 2429). According to the verdict form, the jury found that the aggravators were sufficient to warrant a death sentence, and that the Appellant should be sentenced to death. The jury was directed to consider

mitigators in the context of weighing them against the aggravators; accordingly, the finding that the aggravators were “sufficient” to merit a death sentence necessarily required them, as per their instructions, to weigh aggravators against mitigators. The jury is presumed to have followed its instructions. Crain v. State, 894 So. 2d 59, 70 (Fla. 2004).

Finally, the State notes that no objection to the verdict form was made below, and the error is not fundamental. Cruz v. State, 320 So. 3d 695, 722 (Fla. 2021). Accordingly, no relief is warranted here.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN IMPOSING SENTENCE BECAUSE IT WEIGHED THE AGGRAVATORS AND MITIGATORS INDEPENDENTLY.

Appellant asserts that because he waived mitigation, the trial court erred in giving the jury's sentencing recommendation great weight. Appellant correctly directs our attention to Muhammad v. State, 782 So. 2d 343 (Fla. 2001), where this Court reversed after the trial judge erroneously gave great weight to the jury's sentencing recommendation despite the defendant's waiver of mitigation. Appellant also notes that the vitality of the holding in Muhammad is uncertain in light of subsequent decisions, including Reynolds v. State, 934 So. 2d 1128 (Fla. 2006). Relief should be rejected, however, as examination of the sentencing order demonstrates.

The lower court received the jury's sentencing recommendation and subsequently held a Spencer⁶ hearing, at which penalty phase counsel (who, at Appellant's request, was now re-appointed to represent him) proceeded to present to the court the evidence of mitigation that he had intended to offer the jury. The lower court also

⁶ Spencer v. State, 615 So. 2d 688 (Fla. 1993).

accepted and considered a PSI which had been ordered when Appellant announced his intention to waive mitigation.

In the sentencing order, the trial court acknowledged all of these resources, and weighed the factual findings made by the jury regarding aggravators of (1) avoid arrest (moderate weight) (2) financial or pecuniary gain (great weight) (3) HAC (great weight) (4) CCP (great weight) and (5) the victims were vulnerable because of advanced age (some weight).

The lower court then turned to mitigators, gave “some weight” to both statutory mitigators, that (1) the defendant was under the influence of extreme mental or emotional disturbance and (2) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Regarding other mitigators, the court gave “some weight” to evidence that Appellant suffered head trauma in an accident he sustained at age eight, “moderate weight” to evidence Appellant grew up in a poor, drug-infested neighborhood in Puerto Rico, “moderate weight” to evidence that Appellant’s father was physically and emotionally abusive, “moderate weight” to evidence that his mother left when he was ten years old and her extreme mental health issues

impacted him, “moderate weight” to evidence that Appellant had maintained lawful employment as an adult, “moderate weight” to the Appellant’s various health problems, “some weight” to evidence Appellant has sustained loving family relationships with some of his family and “some weight” to Appellant’s showing that he was a good candidate for life in prison.

In imposing sentence, the trial court reviewed the five aggravators and all mitigation, but ultimately concluded that the aggravators far outweighed the mitigating circumstances, and specifically noted that the HAC and CCP aggravators were themselves alone sufficient to persuade the court that death was the proper sentence. And while the court gave great weight to the jury’s advisory verdict, the court also concluded that despite this, and independent of the jury’s verdict, the aggravators far outweighed the mitigation. Even if the lower court erred in giving the jury’s sentencing recommendation great weight, it is clear that the court also weighed the aggravators and mitigating factors independently in deciding that death was the proper sentence. No relief is warranted.

ISSUE VIII

FLORIDA NO LONGER CONDUCTS PROPORTIONALITY REVIEW.

Next, Appellant bemoans this Court's decision in Lawrence v. State, 308 So. 3d 544 (Fla. 2020) to end proportionality review. This Court has repeatedly rejected similar arguments and should similarly reject those advanced here. Davidson v. State, 323 So. 3d 1241 (Fla. 2021); Bell v. State, 336 So. 3d 211 (Fla. 2022); Joseph v. State, 336 So. 3d 218 (Fla. 2022).

ISSUE IX

THERE IS NO REASON TO REDUCE APPELLANT'S DEATH SENTENCE MERELY BECAUSE FLORIDA NO LONGER CONDUCTS PROPORTIONALITY REVIEW.

Because this Court no longer conducts proportionality review, consideration of whether the facts of Appellant's case demonstrate that it is not among the least mitigated of murders is similarly a non-issue. Lawrence v. State, 308 So. 3d 544 (Fla. 2020). This Court should affirm. Even if this Court were to conduct a review of proportionality, the State notes that Appellant's jury found a total of five aggravators, two of which were HAC and CCP. The two victims were bound with duct tape and the medical examiner's testimony revealed that both victims suffered multiple non-fatal stabbing injuries before the final, fatal injury was inflicted, thus supporting a conclusion that the victims were tortured over a period of time. In addition, it is quite clear that while it is not known which of them died first, at least one of the victims must have been aware that the other was being tortured and ultimately killed, before the killer turned his pitiless attentions to the remaining victim. That the killer restrained his victims first before killing them establishes CCP.

This Court found a death sentence to be proportionate in

Guardado v. State, 965 So. 2d 108 (Fla. 2007) where the defendant stabbed the victim to death and the similar aggravators, including HAC and CCP, were found. The court also noted these two aggravators to be the “weightiest” of all aggravators found in Florida’s sentencing scheme. Accordingly, even if this Court were to conduct proportionality, there is ample evidence to support a finding that death was appropriate here.

ISSUE X

THERE IS SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED BOTH MURDERS TO SUSTAIN A CONVICTION.

Although Appellant did not raise it here, this Court reviews sufficiency of the evidence in capital cases. Ferguson v. State, 417 So. 2d 639, 642 (Fla. 1982). Sufficiency is measured by whether there is competent and substantial evidence to support the verdict. See Blake v. State, 972 So. 2d 839, 850 (Fla. 2007). “In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.” Bradley v. State, 787 So. 2d 732, 738 (Fla. 2001); see also Simpson v. State, 3 So. 3d 1135, 1147 (Fla. 2009) (applying competent, substantial evidence standard to determine sufficiency of the evidence).

In this case, the State presented evidence that the two victims, John and Germana, were killed in the bedroom of their houseboat by multiple stabbing wounds. Both victims were bound with duct tape. Appellant was a handyman employed by the victims. There was no forced entry, and Appellant admitted that he had been given a key to

the boat. Primary evidence of Appellant's guilt came through DNA analysis; his DNA was found on a roll of duct tape found at the murder scene, and fracture analysis showed that approximately 22 feet of tape removed from the same roll had been used to bind the two victims. The presence of Appellant's DNA on the outside of the roll strongly indicated that he was present in the room at the time the victims were bound and then killed. In addition, in the hours following the murders, Appellant appeared at a local jewelry store where he sold gold chains belonging to the victims and inquired as to the value of a distinctive gold ring also demonstrated as having belonged to one of the victims. After selling the gold, Appellant then rented a vehicle and attempted to flee the state; during his flight he shipped a package containing 13 pounds of gold and other jewelry to his brother Jason in New York. Items received and sold by Jason were identified as belonging to the victims.

Appellant's defense was to accuse Tessa Cooper, who lived in the apartment with Appellant. He implied that she wore clothes the same size as his to commit the murders, later giving them to Appellant in the plastic Publix bag to discard. On the stand, while admitting the bloodstained clothing was the same size as his own,

Appellant complicated his defense by denying ownership of them. He testified that he woke up around 4 am the morning of the murders, found Tessa missing, and when he called her she claimed to be out buying cigarettes and gas. On her return the two travelled to a drug treatment center where Tessa was initially going to admit herself; on arrival the couple pulled into the parking lot of the 7-11 near the treatment center. Tessa no longer wanted treatment, but instead gave Appellant a plastic Publix bag which he put in the dumpster while Tessa vacuumed the interior of the van. Appellant and Tessa then returned home before travelling to Madeira Beach where Tessa supposedly spent a little time visiting with her father before returning home. After that, Appellant rented a car and began the drive to New York to visit his brother. Appellant claimed that Tessa gave him the bag containing jewelry stolen from the victims that Appellant then mailed to his brother's house in Utica, New York.

On cross examination by the State, when confronted with the fact that his DNA, not Tessa's, was found on the incriminating roll of duct tape, Appellant's response was a terse "that's what they say." The jury rejected Appellant's defense, likely because blaming Tessa failed to account for how his DNA came to be found where it was,

why none of Tessa's DNA was found at the crime scene, how Tessa gained access to the boat when Appellant had a key, and perhaps oddest of all, why Tessa, had she committed the murders to enable her to steal jewelry worth over \$300,000 would then give all of it to Appellant and then remain behind while he tried to leave the state.

The record establishes sufficient evidence of Appellant's guilt and this Court should affirm.

CONCLUSION

Appellee respectfully requests this Court affirm Appellant's convictions and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June, 2022, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Steven L. Bolotin, Assistant Public Defender, Tenth Judicial Circuit Public Defender's Office, Post Office Box 9000-Drawer PD, 255 North Broadway, Bartow, Florida 33831,

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CERTIFICATE OF WORD COUNT AND FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, and the word count is 14,433 words in compliance with Fla. R. App. P. 9.045 and 9.210.

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