IN THE SUPREME COURT OF FLORIDA

DAVID B. SNELGROVE,

Appellant,

vs.

CASE NO. SC02-2242
Lower Tribunal No. 00-00323-CFA

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF THE APPELLEE ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT IN AND FOR FLAGLER COUNTY, FLORIDA

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PRELIMINARY STATEMENT

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STATEMENT OF THE CASE AND FACTS

The appellant's statement of facts contains the argument of appellate counsel. Consequently, the State provides the following statement of facts.

Heinz Rhienhold lived next door to Alice Snelgrove and across the street from the residence of victims, Glyn and Vivian Fowler. (V25, 62). He knew the Fowlers and David Snelgrove. (V25, 62). David Snelgrove came to his front door on Friday, June 23, 2000 at "15 minutes after 11 at night." Snelgrove said "that he just got off work and he wanted me to cash a check for him." (V25, 63). Rheinhold shook Snelgrove's right hand and did not notice any bandage, band-aid, or anything else unusual. (V26, 63). He did not observe any blood on Snelgrove's hand, or his own hand after shaking Snelgrove's hand. (V25, 63-64). Rheinhold told Snelgrove he could not cash a check, testifying: "I told him, I don't have any money for, you know, cashing a check, and by that I started closing the door and he turned around and walked away, and then he said real loud, dammit, and he walked away." (V25, 64).

On Sunday morning, June 25, Alice Snelgrove rang his door bell and said she thought something was wrong with the Fowlers. She wanted Rheinhold to go with her to check on them. Rheinhold and his wife walked over and noticed a newspaper or two were

still on the drive way. He walked around the house and noticed the pool screen enclosure was open and he walked around the pool area. He noticed a broken window near the back of the house with blood on the window sill and the curtain hanging out. (V25, 65). Rheinhold's wife left to call the police. (V25, 66). Rheinhold tried to enter the house through the sliding glass door at the pool, but the door was locked. (V25, 68). He observed blood on the kitchen floor by looking though a window. (V25, 69).

Flagler County Sheriff's Deputy Laurie-Ann Federico was the first officer to arrive at the Fowler's residence. (V25, 72). She arrived after 11:00 a.m. and talked with Rheinhold and Ms. Snelgrove, who advised her that a window was broken on the side of the house. (V25, 72-73). She went around the house to inspect the window and observed that the window was broken, there was glass on the sill and blood appeared to be on the curtain and broken glass. (V25, 73). She checked all the doors of the house with a pen and found them locked. She observed blood inside the window and blood from the back sliding glass door and noticed blood in the kitchen. (V25, 73). Deputy Federico was present when medical personnel made entry into the home by forcing open the sliding glass door. (V25, 74, 77-78). They found the Fowlers inside deceased. The medical personnel

left and the scene was secured for processing by the Florida Department of Law Enforcement. (V25, 75).

Deputy Jamie Roster testified that he was called out with his blood hound to the Fowler residence on June 25, 2000. He was asked to find a travel direction leading from a broken window of the residence. (V25, 89-90). He had hundreds of hours of training in scent discrimination and experience in handling a bloodhound "for missing persons," "direction of travel," and "suspect identification." (V25, 90-91). Deputy Roster has worked throughout the state with his dog, Brandon, for nine years. (V25, 91).

When they arrived at the Fowlers' residence he checked the perimeter for "safety reasons" and then put Brandon on a scent at the broken window. (V25, 91). Brandon followed the scent around the back of the house, around the pool area, along a vacant lot to Bayshore past the intersection of Bayside and Bannbury. (V25, 93-94). They passed a vacant lot then went right up to the front door of a residence. "The dog is trailing, he's typically nose to the ground and he's just working whatever scent is left from whichever individual left it from that window where I asked him to pick it up and start it at. He then goes up to the - - just follows along right up to that residence." Brandon went right up to the front door, and

smelled the air coming out from underneath the door. (V25, 95). Then he went to the window and jumped up on it. Brandon let Deputy Roster know that whichever scent he picked up "was in that area." (V25, 95-96). He then went back to the Department and let them know that Brandon had followed the scent to a residence across the street from the victim's house.

Brandon was placed back on the scent at 86 Bayside and he was authorized to go in with Brandon.[1] There was a small dog inside and they asked the residents to secure the animal. (V25, 96-97). As Deputy Roster entered the residence he noticed a male leaving the home outside the porch, with his back toward the officer. (V25, 97). Brandon started to alert and move toward the individual but Deputy Roster held him back, due to the fact that he was a big dog and did not want to startle the individual. (V25, 97). Deputy Roster asked Brandon to go through the house, room to room, looking for scent. He showed a little activity on the washing machine then went to a back bedroom where a male was laying, Jeff McRae. Brandon did not have any interest in that individual. (V25, 97). He took Brandon out of the house and asked that they remove their own

[1]Brandon was never taken off of scent or track mode. "The animals are trained when they're in harness and I've asked him to locate one thing, he stays on that scent until I take him out of harness or until I tell him it's over." (V25, 99).

dog from the bathroom so that he could take Brandon through it. (V25, 98). When he reentered the residence the individual who earlier had left the residence [appellant] was sitting on the couch in the living room. (V25, 99). Brandon showed a lot of interest in the bathroom, putting his head in the trash where Deputy Roster found some old bandages and a bottle of peroxide on the sink. "He was actually very interested in that area." (V25, 99).

Brandon did not show any interest in Alice Snelgrove when he came out of the bathroom. Brandon did notice the individual on the sofa: "He walked over to him, basically put his front feet up on him." Deputy Roster explained that this was an "alert" on that individual. The fact Brandon jumped up on that individual means "this is it." (V25, 100). Snelgrove was the individual identified by Brandon. (V25, 100-01).

Florida Department of Law Enforcement Analyst Allen Miller testified that in June of 2000 he had been with the department for 20 years. (V25, 113). As a senior crime laboratory analyst he responded to the victims' residence to process the crime scene. (V26, 113). Upon examining the master bedroom, it was apparent victim Vivian Fowler had been moved: "With the victim's - - with the mark on the wall between the dresser in photograph number seven, the mark on the wall, and with the position of the

victim's hair, pulled up above her head, in order to open this closet door going into the right closet, the victim had to be drug across the floor, just a short distance." (V25, 142). The lamp was pushed over and had blood on it. (V25, 144). Blood was found on the victim's purse and on its contents. (V25, 144). Various prints in blood found on the floor appeared to be those of a person barefoot or in socks. (V25, 149). From observation, the footprint marks appeared to be of the same pattern. (V25, 152). A bloody print was apparently located on the mirror and was submitted for analysis. (V26, 162-63).

Miller processed a number of items in the victims' home for analysis.[2] Blood from the victims' clothing was cut away, the bottom or backs of their clothes had become soaked through with blood. The upper and lower parts of their clothing were packaged separately. (V26, 186). Mr. Miller also took a cutting from the curtain, which appeared to be the point of entry. (V26,

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[2]Two jewelry boxes from the closet in the master bedroom were processed. (V26, 165). A dental receipt was processed, found in the top drawer of a chest in the master bedroom. (V26, 168-69). The chest was located between the closet and the victim's head. (V26, 169). A purse found on the bedroom floor near the bedroom was processed. Blood appeared on the front of the purse. (V26, 174). A wallet was connected to the purse and was also processed. (V26, 175). Mr. Miller took a scraping from the toilet seat. (V26, 176). Blood was collected from the ankle and knee of Vivian Fowler. (V26, 179). He cut out samples from the carpet which he identified as likely being bloody tracks. (V26, 183). Also, a track from the carpet at the base of Mrs. Fowler's foot was removed for analysis. (V26, 184).

187). Miller noted that bloody tracks led from the Master Bedroom to the broken window. (V26, 196-97).

Blood spatter evidence suggests that the closet door was closed when Mrs. Fowler was struck but that she was moved and the door opened after the attack. (V26, 234). The blood spatter tells the following about Mr. Fowler: "That he was on the floor and that there was a great amount of force that was applied to a bloodied area, either through repeatedly or one fell swoop, to create enough blood, enough splash, to project blood some six feet across the back of the bed." (V26, 236). Mr. Fowler might have been hit first on the bed and then slid down to the floor during the attack. (V26, 237). He found two cigarette butts outside the point of entry. (V26, 240). It was possible that Mr. Fowler was standing up when struck and stabbed, hit the bed, and was beaten down so that blood projected to the drapes on the side of the room. (V26, 260).

William Tucker, a senior crime laboratory analyst with the Florida Department of Law Enforcement, testified that he has 23 years experience in latent fingerprint analysis. (V27, 296, 365). His training and experience included not only finger, but palm and footprints. (V27, 296). He examined Exhibit 17, which was the purse and its contents and compared them to known standard fingerprints of Glyn Fowler (31) and Vivian Fowler.

(37). Tucker also took standards from Snelgrove. (V27, 308). He processed prints on the wall mirror with suspected blood on it. He used a protein dye stain which left an impression which Tucker believed to be of value for comparison purposes. (V27, 313). He identified the right palm of Snelgrove as having made the impression on the mirror. (V27, 314-15). The print in smeared blood was that of David Snelgrove. Tucker explained: "Well, in the over 140 years that fingerprints have been used as a means of identification there has never been a case of the fingerprints of two different individuals ever being found to be the same." (V27, 315).

Tucker examined items from the second drawer of the chest in the master bedroom. A paper item (weight reduction form printout) in the drawer was processed with a chemical which reacts with amino acids. (V27, 301). One fingerprint of value was found and it matched Snelgrove. (V27, 319). The broken glass recovered at the point of entry was examined and the only identifiable print was Snelgrove's left footprint. (V27, 322, 324). A Florida Pawnbroker's transaction form from Value Pawn and Jewelry, dated June 24, 2000, contained Snelgrove's right thumb print. (V27, 343). Tucker did not find any fingerprints in the home or its contents which could be linked to the known standards taken from Jeff McRae. (V27, 328-29).

Charles Coughlin, a professor at the University of North Florida in Jacksonville, testified that he was previously employed as an analyst with the Florida Department of Law Enforcement, in the Serology Section. (V28, 492-93). In this case, Coughlin used SDR testing to test blood or mixtures of blood. (V28, 494). SDR testing allowed for a more sensitive determination of a mixture of blood than FLFP testing. (V28, 495). Coughlin testified that his job in this case was to examine various items collected from the victims or victims' residence, determine if human blood was present, take a sample, and submit it to an analyst for DNA conduct typing. (V28, 496). From the various exhibits, Coughlin would take a blood sample from it, or create a "baby" or "subsample" to submit to a DNA lab for testing. (V28, 496, 500).

Timothy Petree, a senior crime lab analyst in the DNA and Serology Department of FDLE, testified that he performed STR DNA testing on items submitted to his lab relating to Snelgrove. (V29, 620-22). STR [short tandem repeat] is a type of PCR or polymerase chain reaction testing. (V29, 622). He tested known samples and developed standards for Glyn Fowler, Vivian Fowler, David Snelgrove, and Jeffrey McCrae. (V29, 626). He utilized those standards as part of his examination and comparison for other items submitted for forensic examination. (V29, 626-27).

The combined work of Coughlin and Petree revealed that blood matching appellant's DNA profile was found at the point of entry to the Fowler's house [the broken window]. Coughlin looked at item six, containing six cuttings at the point of entry and detected human blood on all six. (V28, 499-500). Upon examination, items 6A, B, C, cuttings from curtain, matched the DNA profile of Snelgrove. (V29, 629). Appellant's blood [DNA Match] was also found in the victims' bathroom, from a scraping taken from the toilet seat. (V28, 510-11; V29, 627-28).

Blood matching appellant's DNA profile was found at numerous points in the victims' master bedroom, where the victims' bodies were located. Appellant's DNA was found on blood on the floor near the victims' bodies[3], on Mrs. Fowler's ankle[4], on Mrs. Fowler's purse, on items found in the purse, on a wallet, on items contained in chester drawers, on a leather briefcase, and on a jewelry box. (V28, 502-540; V29, 627-29) Coughlin took samples from the mirror [Ex. 28] in the master bedroom on which he found two stains which reacted positively on a chemical test designed to detect blood. (V28, 498). Blood on the mirror

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[3]The blood stain on the floor near the female victim, matched David Snelgrove's DNA profile. (V29, 644). His profile would only be found in 1 in 330 quadrillion Caucasions. (V29, 644).

[4]Coughlin took a "a swabbing from the right ankle of Vivian fowler. (V28, 504). This blood swabbing matched Snelgrove's DNA profile.

matched the DNA of Vivian Fowler.[5] (V29, 635-36). Appellant's bloody palm print was found on this mirror. (V27, 314-15).

Item 29, a $20.00 bill from Corneilius Murphy tested positive for human blood. (V28, 519). The DNA profile of a cutting from this $20.00 bill matched Snelgrove. (V29, 629). The knife handle tested positive for the presence of blood. (V28, 516). A swabbing from the knife (item 63), matched Snelgrove's DNA profile. (V29, 629). Item 61-1, 2, 5, 7, 8, cuttings from the red shorts, matched Snelgrove's DNA profile. (V29, 631). Item 52A-1, 4, 7, cuttings from the t-shirt matched David Snelgrove. (V29, 631). Item 49, cutting from jean shorts, matched David Snelgrove. (V29, 631). Item 2-D, two cuttings from Tennessee Volunteers shirt, both cuttings matched Snelgrove's DNA profile.[6] (V29, 631-32).

Five cuttings taken from the red shorts revealed Snelgrove's DNA pattern, from those cuttings submitted. (V29, 661-62). Those

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[5]Vivian Fowler's blood was found on her shirt, the mirror, and swabbings taken from her right knee. (V29, 656). The probabilities of a match within the Caucasian population was 1 in 1 trillion. (V29, 636).

[6]Two t-shirts were recovered from the attic of Alice Snelgrove's home. They both were in a blue Publix bag. The shirts were wet in a liquid which smelled like ammonia. (V28, 421-22). Evidence Technician Stephen Yelvington testified that if two items are found with blood and ammonia in a bag, it could make it difficult to determine the source of any blood on those two items. (V29, 602).

results are not from the entire amount of blood, but from the cuttings provided. (V29, 662). The fact that he didn't find Snelgrove's or McCrae's blood on something does not mean that they didn't touch somebody. "I'm just talking about one particular swabbing or cutting from these items that I tested." (V29, 667).

The only person who might have the identical DNA profile to Snelgrove would be an identical twin, not a cousin or other close relative. (V29, 632-33). The frequency of Snelgrove's DNA profile among Caucasions is approximately "1 in 330 quadrillion," "1 in 1.5 quintillion blacks" and "1 in 860 quadrillion southeast Hispanics." (V29, 633).

Only three mixtures were detected, the right knee of Vivian Fowler, contained the blood of both Glyn and Vivian. The purse and red shorts also had a mixture. The primary DNA profile on the purse was Snelgrove, the other contributors excluded were Jeffrey McCrae, Vivian Fowler and Glyn Fowler. (V29, 652-53). The primary contributor on the red shorts was Snelgrove, but Jeffrey McCrae could not be excluded as the secondary contributor. (V29, 653).

The Fowler's daughter, Pamela Fowler Norko, testified that she talked to her parents on June 23, 2000. (V27, 366-67). She called them from California at 6:30 p.m., California time [3

hours difference], and talked to her mother for 30 minutes. (V27, 367). She called again the next morning at 10:00 [eastern time], Saturday, June 24th, and got a busy signal. (V27, 367-68). She tried calling again approximately six times and each time she called the line was busy. (V27, 368). Her brother, Randy, gave their mother a "silver herringbone-type necklace" for her birthday three years prior to her death. (V7, 368). Pamela was responsible for collecting her parents' belongings after their deaths. The herringbone necklace was not among their personal effects. (V27, 368). Vivian wore a wedding band and Pamela had never observed her wear it underneath or turned around on her finger. (V27, 371).

Tom Coulter of the Flagler County Sheriff's Department interviewed Snelgrove on June 25, 2000. (V27, 380). He provided Snelgrove with his Miranda warnings orally and in writing. (V27, 381-82). He taped Snelgrove's statement and also received a written statement taken by another Deputy from his department. (V27, 382). The tape was played for the jury. (V27, 387).

When asked what he did over the weekend, Snelgrove said: "Pretty much nothing, sat home most of the weekend, except for Friday, when I walked over my cousin's friend's house. Other than that, I was home." (V27, 387-88). Snelgrove claimed that last Monday when he was working for Greenskeeper he was "doing

some trimming some hedges and when I was cutting one of the hedges, one of the sheers ran by, I cut my finger and I had my hand kind of a little too close as I was trying to guide it." (V27, 392-93). He said that his boss, Rich, was there when he cut himself. (V27, 394). In fact, Snelgrove said that his boss wanted to call it a day after he was injured; however, Snelgrove said "no, man, I need to work the rest of the day. So I just took a rag and tied it around my fingers and I went back to work."[7] (V27, 402). When asked if his boss could verify this information, Snelgrove said: "Oh, yeah." (V27, 402). When asked about other cuts, specifically on his arm, he claimed: "Just from working, old cuts, all over my legs." (V27, 402).

The next day, Snelgrove said, he was let go by his boss, who claimed it was getting slow. (V27, 393). Snelgrove said "[t]he only thing I can come up with was he found somebody to work a little cheaper." (V27, 393). The last day he was paid was Monday and Snelgrove claimed he was paid cash. (V27, 396). Snelgrove asserted he was home all day on Friday until he went over to a friend's house [Don Silva]. (V27, 396). He began walking over to Don's house when his aunt picked him up and gave him a ride. (V27, 397). Snelgrove claimed he just sat on the

[7]Snelgrove was right handed and did not explain how he could cut his right hand and trigger the hedge cutter at the same time. (V27, 418-19).

porch with Jeff and Don: “We were all sitting on the porch, or should I say, just me, Don and Jeff were sitting on the porch. The kids were in there on the computer.” (V27, 398). Snelgrove said that he remained at Don’s until 12:30 and arrived home at 1:00. (V27, 398). Jeff [McCrae] drove him home. (V27, 399). When he arrived home [his Aunt’s house], he went outside, smoked a couple of cigarettes and then went to bed. (V27, 399). Snelgrove said that he slept on the couch. (V27, 400). Snelgrove claimed that he remained in the house and did not go anywhere else. (V27, 403).

Snelgrove admitted that he knew the Fowlers from across the street. (V27, 405). He claimed the last time he saw them was Friday afternoon outside by their garage. (V27, 405). Snelgrove said that he had been in the house a couple of times. (V27, 406). One time, apparently when he was just visiting, a few months back Mr. Fowler asked “me to help him take and move some dressers from - - I don’t remember which room it was, but it was one of them.” (V27, 406-07). It might have been one of the bedrooms, but Snelgrove claimed not to remember. (V27, 407).

When told that they had his blood and fingerprints in the house, Snelgrove said “I know I’ve been in the house.” (V27, 409). However, he denied he was bleeding at the time he was in the Fowlers’ home. (V27, 409). When told that they had his

blood in the house, Snelgrove said: “It’s not mine.” (V27, 409). When the detectives told Snelgrove his print was on the mirror, he claimed “I don’t remember there being a mirror.” (V27, 411).

At first, he denied attempting to get another neighbor to cash a check on Friday evening, but, recalled, “Oh, Horace’s, directly to the right of us?” “Yeah, I went over there.” (V27, 412). Then, Snelgrove remembered cashing his paycheck the next day [Saturday] at Publix, “I forgot.” (V27, 412). The Lieutenant then observed that Snelgrove earlier said he was paid in cash by his employer. Snelgrove explained: “Yeah, he doesn’t - - normally pays in cash, but that day he wrote me a check.” (V27, 412).

Donald Silva, Jr., testified that he observed Snelgrove in the late evening of Friday, June 23, 2000 into the early morning hours of Saturday, June 24, 2000. Silva’s residence was about a mile or mile-and-a half from the home of Alice Snelgrove. (V27, 275-76). Silva testified that he was sitting on the porch drinking beer with Jeff McRae when Snelgrove showed up at between 11:30 and 12:30. (V27, 275). They left his residence at between 12:30 and 1:00 in McCrae’s mother’s Taurus. (V27, 276-77).

Snelgrove did not drink any beer in Silva’s presence. (V27, 281). He did not observe Snelgrove fall down or injure himself.

Nor did Silva observe any blood coming from Snelgrove's hand or any other scratch or mark on him. (V27, 282).

Richard Trumble testified that he was a landscaper and that Snelgrove worked with him for a short period of time in June 2000. (V27, 287). Snelgrove stopped working for him on or about June 19, 2000. (V27, 287). Snelgrove got paid on Friday which is the normal pay day. (V27, 288). Snelgrove was paid in the afternoon, between five and six in the evening. (V27, 289). When he observed Snelgrove he did not notice any injury to his hand and he was not bleeding. (V27, 289). Nor did Snelgrove have any other marks on him. Trumble worked with Snelgrove on his last day, picked him up, and took him home. (V27, 289-90). Snelgrove sat in the front seat and Trumble did not observe any blood on him. Nor did Snelgrove mention that he had cut or injured himself in any manner. (V27, 290).

The State introduced photographs of Snelgrove documenting recent injuries to his hands, arms, and foot. Snelgrove appeared to have fresh cuts on his hand and scrapes along his fingers, along the knuckles. (V27, 419). Photographs of Snelgrove were taken Sunday, June 26th. They documented cuts, scrapes, and scrathes, along the hands up to the arms of Snelgrove. (V27, 420). Blood appeared to be present on Snelgrove's underwear. (V27, 420). Photographs of Snelgrove's

feet were introduced which reflected knicks and gashes on his feet. (V28, 422). Snelgrove's right forearm revealed a scratch or laceration on the top. He also had a laceration on one of his legs. (V29, 610). Photographs depicting abrasions and lacerations to his feet, including the shin, were admitted into evidence. (V29, 610-11).

Jeffrey McCrae testified that he lived at 86 Bayside Drive in June of 2000.[8] (V28, 449). The only injury he had at the time was a steel plate in his right arm. (V28, 450). Back in June of 2000 he had the plate in his arm and his arm was rejecting it. "It was time to come out." (V28, 450-51). On Friday June 23, 2000 he drove over to Donald Silva's house. (V28, 452). He arrived at 11:00 p.m., sat down and drank beer on the porch. (V28, 453-54). Don's wife and McCrae's daughter were there. (V28, 453-54). His mother drove Snelgrove over a little later. (V28, 455). They remained there for about thirty or thirty-five minutes. McCrae thought that Snelgrove had a couple of beers. (V28, 455). McCrae left with Snelgrove sometime around 12:30 and drove to a location in Bunnell. (V28, 456). In Bunnell, "we saw somebody and got – - hate saying it - - got some drugs, some cocaine, and came back." (V28, 457). Snelgrove sat in the

[8]McCrae had been convicted of four felonies, but none were crimes of violence. (V28, 490-91).

passenger seat and had the money for drugs. Snelgrove said “he borrowed money from a neighbor.” (V28, 457).

McCrae did not observe any cuts or blood on Snelgrove. He was not actively bleeding, did not observe any scratches, or a cut on his right hand. (V28, 457, 459).

They arrived back home from buying drugs at 12:45 or 1:00 in the morning. (V28, 458). McCrae went into his mother’s room to visit but when he went out to walk the dog, observed Snelgrove outside smoking a cigarette in the drive way. (V28, 458). When he was done walking the dog, McCrae asked Snelgrove if he was going to come inside. Snelgrove responded: “no, I’m going to finish s[m]oking a cigarette.” (V28, 458). McCrae went back inside to watch TV and fell asleep. (V28, 460).

Sometime later, maybe “45 minutes, an hour” later, he heard a noise associated with someone coming in the house. (V28, 460). He thought it was Snelgrove but got up to check and observed him in the center bathroom. (V28, 461). He entered the bathroom and observed Snelgrove with a cut on his right hand. He also noticed blood on Snelgrove’s right foot or leg. (V28, 462). Snelgrove was cleaning up his hands and “wiping his, you know, like leg off and that was about it.” (V28, 463, 466). Snelgrove was wearing shorts but McCrae could not remember if Snelgrove was wearing a shirt at the time. (V28, 463). He asked Snelgrove

what happened and Snelgrove said that he got into a fight. McCrae testified: “And I’m like, fight, why didn’t you go to the hospital or something, you know what I’m saying, you look like your hand was cut but pretty bad.” (V28, 463). After he cleaned his hand, he wrapped something around it, it might have been a shirt. (V28, 464).

Snelgrove wanted to go back to Bunnell to buy drugs. (V28, 466-65). Although he didn’t want to go, McCrae said he drove Snelgrove because only he and Alice Snelgrove were allowed to use the car. (V28, 465). He called an individual he knows only as “Kimo” whose real name might be Cornelius Murphy.[9] (V28, 466-67). They went to “White View” and Snelgrove gave McCrae money to get cocaine. (V28, 467). McCrae noticed the money was wet with blood. “Yeah, well, there’s blood on the money, but I figured the blood was from his hand because his hand was bleeding, so I figured that’s what it was from.” (V28, 467). He exchanged the money for cocaine from “Kimo” and gave it to Snelgrove. (V28, 468). He did not use any cocaine and drove back to his house. McCrae went to sleep. (V28, 469).

The next day, Saturday, McCrae testified that he was going fishing. He didn’t have much money and went to pawn some old

[9]McCrae identified Cornelius Murphy in court as the person he gave the bloody money to. (V28, 475).

"Play Station" games for cash. (V28, 469-70). McCrae was going to take his mother and daughter fishing and needed money for bait. (V28, 470). He also had an old fishing pole he wanted to pawn but the first pawn shop would not take it. Snelgrove was with him and offered to take it in to the next pawn shop. McCrae agreed and Snelgrove took the fishing pole in. McCrae waited in the car for a while and wondered what was taking him so long. (V28, 470). When Snelgrove returned, he was carrying the fishing pole. (V28, 471-72).

McCrae testified that he did not hide any shirts up in the attic and did not see any one else in the house doing that. (V28, 477). McCrae identified an old knife recovered in this case. He said it was kept on the sofa table in the home. He noticed the knife was missing "probably Saturday or Sunday." (V28, 478). He said he stopped carrying the knife because the clip was broken on it. McCrae did not give Snelgrove permission to carry the knife. (V28, 479).

Misty Joiner testified that she was working at the Jiffy Food Store in Bunnell on Friday evening, June 23, 2000 to the following morning on the 24th. (V29, 555-56). At 3:00 a.m. on the 24th, a man came in wearing latex gloves. People in the community called him "Ookie." (V29, 557). He handed Misty money that was red, sticky, clotting, and beginning to dry. He told

her it was paint. (V29, 557). She dropped the money and told him that she could not take it. (V29, 557). Joiner recalled that it wasn't a "lot of money," approximately $50.00. (V29, 558).

Flagler County Sheriff's Deputy Warnell Williams testified that he was sent to investigate the report of an individual in Bunnell with bloody money after the victims' murder. (V29, 562-63). As a result of Misty Joiner's report, he sought out Cornelius Murphy. (V29, 564). He was informed that most of the money had been spent, but was able to retrieve a $20.00 bill from Mr. Murphy. (V29, 564). Deputy Williams noticed a reddish discoloration on the bill and submitted it to the evidence department for submission to the FDLE for testing. (V29, 565).

Deputy Williams also received information regarding the pawning of a necklace which might have belonged to the victims. He went to Value Pawn in Holly Hill and recovered a necklace and pawn ticket. (V29, 565-66). He identified the silver necklace he recovered from the pawn shop and testified he submitted it to the Sheriff's Department for processing. (V29, 567-68).

Suzanne Burns was employed by Value Pawn in Holly Hill, Florida. (V29, 613-14). She was working on June 24, 2000, when an individual identified as David Snelgrove, pawned a "silver braided herringbone" type necklace. (V29, 614-15). Snelgrove

wanted to sell the necklace rather than get a loan against it, stating "he just wanted to get the most money out of it." (V29, 619). A pawn slip was prepared and a fingerprint of Snelgrove was placed on the pawn slip. (V29, 614). She identified Snelgrove as the individual who pawned the necklace and placed his fingerprint on the pawn slip.[10] (V29, 616).

Flagler County Sheriff's Deputy Mark Carman, testified that he was involved in the Fowler murder investigation. (V29, 568). He searched the woods next to the Snelgrove home on June 26, 2000. He found a knife on the ground about 25 to 30 feet into the woods off of the street. (V29, 570). The knife was 72 to 75 feet from the Snelgrove residence, or a total of 79 feet from the rear porch. (V29, 591, 611). The knife appeared to have blood on it and was sent to the FDLE for analysis. (V29, 579). Carman also found two car antennas in the woods which, in his experience, looked like makeshift pipes utilized to smoke crack cocaine. (V29, 581-82). They were located some twenty-five to thirty feet from where the knife was found. (V29, 583).

Gary Mathews testified that he was not sure how many felonies he had been convicted of, but did not dispute the number 14 or 15. (V30, 721-22). In mid to late 2000 he came into

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[10]Randy Fowler, the victims' son, identified the silver herringbone necklace which was pawned by Snelgrove, as the one he gave to his mother, Vivian, on her birthday. (V29, 648-49).

contact with Snelgrove in the Flagler County jail where they shared a cell. (V30, 722, 726). When Mathews first met Snelgrove, he was nervous and did not tell Mathews anything. (V30, 722). Later, however, Snelgrove told him details of the murders, that "it shouldn't have went that way, and then he told me about getting high and drinking during, during this particular day." (V30, 722-23).

Snelgrove told him he went to a neighbor's house to borrow some money, but they wouldn't loan him any. (V30, 723). Snelgrove told Mathews that he discussed breaking into these people's house [the people that were killed] and that later that evening they "cased the house," walked around it to see what was open, "how they could get in." (V30, 723). Snelgrove couldn't find any open windows or doors, so he went to the furthest end of the house, it was far from the bedroom. "And he say that's -- he told me that's how his fingers got cut up, because when he broke the window he just pulled it out with his fingers." (V30, 724). His cousin was supposed "to have been standing at the back watching out just in case somebody drove by or drove up." (V30, 724). Mathews testified:

> And he told me the reason that he was going to these particular people house was because he had - - he was working, and sometime he would come over and borrow money from this gentlemen. And he said he usually go in the bedroom and close the door, and he would come back with a brand new 20-dollar bill or whatever he

> was borrowing.
>
> So this is why he was under the assumption that they had money there, and he was using drugs that evening and he wanted more.

(V30, 724).

Snelgrove told me he walked through the darkened house and made his way to the master bedroom, he opened the door and went right to the dresser. He started going through the dresser and he had a knife with him which he laid on the dresser. "And he say he started going through the dresser and this man jumped up, and it startled him. So I assume they got to fighting or something and he say he was beating him and he started stabbing him, and during that time the lady woke up and he started beating her and he stabbed her a few times." (V30, 725). Snelgrove admitted he stabbed the couple but his cousin remained outside. (V30, 725). After stabbing the woman, he saw a ring on her finger and wanted to take it off. But, to take the ring he would have to take the finger, "so he didn't take the ring." (V30, 725).

Snelgrove added that if he had only looked around when he came in the door he could have taken the purse, got the money, and left. He came in and looked to the right and, that if he'd only looked to the left, "he'd of never had the problem that he had as far as, you know, you know, hurting those people." (V30, 726). Snelgrove said that the man jumped up and startled him,

they began fighting, he reached back, got the knife, and "commenced to stab the man." (V30, 750-51). He did not say how many times he stabbed the man or the woman. (V30, 751-52).

Snelgrove told him the knife he carried with him belonged to his cousin. (V30, 753). He walked over to the house with his cousin who acted as the lookout. (V30, 753-54).

Mathews said that he has not been reading Flagler County newspapers and that he's been in state prison since November of 2001. (V30, 726). He is incarcerated in Chatahoochee, about four hours from "here." (V30, 727). He does not receive Palm Coast newspapers up there. Id. What he testified to in court was information provided by Snelgrove. (V30, 727). Snelgrove didn't say how much money or exactly what property he took from the victims. (V30, 728).

On cross-examination, Mathews admitted that when he first came forward he hoped it would help him: "If, if you mention as far as getting a deal, that's what I was trying to get when I first made my statement with the detective. I tried to see if they could help me." (V30, 731). But, Mathews claimed that "it seemed like - - in fact, he threw me to the dogs. I never got a deal, period." (V30, 731). But, when he made the statement "I was hoping for, yeah, a benefit. Yes." (V30, 732). The detective told him that he would talk to the State Attorney to

see if they could be “lenient” toward his sentencing and “my charge.” (V30, 732). However, they told him “they couldn’t made me any deals. They couldn’t make me any promises.” (V30, 732). Using a deposition, defense counsel impeached Mathews with a statement he made allegedly from the detective, asserting if “you got some information that’s pertinent and that will help the State’s case, I’m sure, I’m almost positive that they will speak for you and try to help you.” (V30, 734).

Mathews acknowledged he wrote a letter to his attorney, Irwin Connelly, telling him that he had information about a “certain case.” (V30, 736). Mathews denied he wrote the letter on the same day Snelgrove came to his cell. (V30, 737). Mathews claimed not to recall the date he wrote the letter. (V30, 738). Mathews said that Snelgrove did not give him much information on the first day, but that he got a little more information on the second, “so it had to be a couple days after he entered the cell before I wrote a letter.” (V30, 739-40). Mathews admitted that he also wrote a letter to the State Attorney’s Office. (V30, 740). In the letter, Mathews acknowledged telling the State Attorney’s Office that he might have information that could save them “some legwork” and aid in Snelgrove’s prosecution. (V30, 741).

Mathews acknowledged that he was charged with burglary,

petit theft, and assault. (V30, 745). He denied pleading to all three charges, claiming that the assault charge was dropped because "I never assaulted anyone." (V30, 745). Defense counsel impeached him with the court file, which indicated he did plead to all three, including the assault. (V30, 746). Mathews said he "copped" to burglary of a structure, but that he never went to trial for petit theft or assault. (V30, 746). Mathews was also questioned about statements in a deposition where he claimed not to "recall" statements Snelgrove made to him. (V30, 748-49). Mathews admitted he lied about not recalling what Snelgrove told him and testified he did that because he felt he "got messed around by the detectives and the State." (V30, 749). He was looking for "some consideration" but that "[t]hey didn't show me anything." (V30, 749). But, when he was told a judge would make him answer the questions and that he had no other "choice," "I went on and told the truth." (V30, 749). However, Mathews acknowledged he lied under oath during the deposition. (V30, 750).

Forensic Pathologist Thomas Beaver examined the victims, Vivian and Glyn Fowler. (V30, 763-64). Dr. Beaver also examined photographs documenting various injuries to Snelgrove. (V30, 764). Photographs 2, 3 and 4 document "ragged incised wounds" to Snelgrove's hand and fingers. The wounds appeared to be cut,

not torn, by “some sort of edged instrument.” (V30, 765). The wound was of a type that could have been inflicted by a black lock blade buck knife, State’s Exhibit 62. Id. The knife blade does not lock back and Dr. Beaver demonstrated how a hand might slip down or the blade could even “close on your fingers and cause that injury to occur.” (V30, 766). Dr. Beaver testified that the wounds depicted on Snelgrove’s photographs: “I think that, that these are actually wounds that are typical of the, of the hand running onto the blade of a knife.” (V30, 766). He explained that the knife was made for slashing, not stabbing and that “there’s nothing to keep your hand from running down onto the knife.” (V30, 766). With blood or water on the handle the hand would become slippery “and would slip on the grip of the knife.” (V30, 767). Snelgrove’s right hand and palm reflected those injuries. (V30, 768).

Snelgrove had injuries to his knuckles, which are the type of injury one receives when a person strikes out with his fist and strikes something hard. (V30, 767). At least one of the injuries was curved which is the type of impression on a knuckle that you see “when someone strikes a tooth.” (V30, 768). “And this is basically a very characteristic type of pattern, and that pattern is one of striking a tooth.” (V30, 768). That injury was reflected on a photograph depicting Snelgrove’s right

hand. Id.

Snelgrove had a number of injuries, mainly cuts and scrapes on the right side of his arm and body. Dr. Beaver examined the photograph of the window to the Fowler home and the broken glass in the window. He thought the injuries to the arm and leg of Snelgrove could be attributed to crawling through the broken window. (V30, 772). "If they were in contact - - crawling through the window contacting the glass or, or edges of this glass on the skin it might – - and they drag the skin along it, it might make an incised wound like that." (V30, 772). Snelgrove also had linear cuts and scrapes on his right foot. (V30, 770-71).

Victim Vivian Fowler was 80 years-old, 4 feet, 11 inches tall, and weighed 90 pounds. (V30, 773, 831). Dr. Beaver used photographs to describe the various injuries inflicted upon Mrs. Fowler. (V30, 794-95). A contusion and incised injury on Mrs. Fowler's left hand were typical defensive injuries. Dr. Beaver testified:

> Now, this incised wound is typical of those things that we see in, in - - called defensive injuries. So when a person is trying to ward off blows, they raise their hands and the kife or whatever will cut their hands, or they might strike out trying to deflect the knife and they'll receive a sharp force injury. And this is the location, a good location for that to occur.

(V30, 795-96). The incised wound on the end of the thumb is the

type of wound you get when warding off blows and the knife strikes the thumb. (V30, 796). Similarly, an incised wound on the back of Vivian's left arm could be considered a defensive wound, where the arm is put in the way in an attempt to ward off blows. (V30, 796). The wound was irregular, suggesting to Dr. Beaver that the arm was in motion when the cut was made. (V30, 796). The wound was deep enough to cut through the muscle and sever the radial artery and nerve and would bleed profusely. (V30, 797). One photograph showed Vivian's ring, with a large stone, turned "inside." (V30, 797). One injury to the back of the right hand looked like it was either from Vivian striking out or "trying to ward off blows to get a wound there on the finger." (V30, 797-98). Contusions were found on the back of her left hand and wrist. (V30, 798).

A blunt force injury was inflicted on Vivian's right shoulder. (V30, 798-99). He could not tell if she was thrown back against something or there was a stomping or a hitting. (V30, 799). Vivian's chest and neck area revealed a stab wound with a V or U shape, which reflects either the victim was moving or knife moved relative to the body. The knife wounds showed that "we're looking for a single edged knife." A wound to the sternum passed through the bone and into Vivian's heart. (V30, 800-01). The wound created a defect or hole in the muscle of

the heart and she bled internally. (V30, 801). So, the mechanism of Vivian's death was the stab wound to the heart, causing internal hemmorrhage or exsanguination. (V30, 801). The knife marked as Exhibit 61 had a bent tip, which was "consistent with hitting bone." (V30, 801). This knife was the nature and character of a weapon that could cause the fatal wound to the victim's heart. (V30, 809).

Photographs of Vivian's face reflect a number of injuries. Dr. Beaver testified:

> It shows that she's got contusions on the forehead. She's got contusions and lacerations in the facial area. She's got what's called bilateral periorbital ecchymoses. That's black eyes bi - - both sides of her head. She's got some abrasions over the nose and some contusions there.
>
> And on the side view you can see that there's - - and I, and I hope you can appreciate it, but there's some deformity to the facial bones. Her maxilla is - - that's this bone, the cheekbone. That's fractured and fragmented to the point where there's deformity and flattening of the face here. . .

(V30, 802-03). The left side of the face revealed additional blunt force injuries and he described them as "extensive injuries." However, when he looked at Vivian's brain, he did not find contusions or hemorrhages within the brain. (V30, 803). While the injuries were severe, they were not life threatening. (V30, 803-04). The injuries inflicted on Vivian were multiple blows to the face, both sides of the head, "blows to the face." (V30, 806). The mandible was fractured, indicative of a heavy

blow to the chin or cheek “because the mandible is a heavy, strong bone, and so it would require a heavy bone (sic) [blow].” (V30, 806).

Vivian’s nose cartilage was fractured and her nose was pushed over to the side. The bones leading up to the bridge and to the bone that actually forms the base of the nose were fractured. “So there’s been heavy blows to this area as well.” (V30, 807). Vivian’s lower eye lid was lacerated and the scalp above the right ear was lacerated. (V30, 807).

The internal examination of the victim’s neck revealed a fractured hyoid bone and fractured thyroid cartilage. This was accompanied by “extensive hemorrhage in the strap muscles of the neck.” (V30, 810). Dr. Beaver explained that this was evidence of manual strangulation, testifying: “And if a person grabs the neck and squeezes hard, they’ll, they’ll fracture that hyoid bone and that thyroid cartilage, and that’s telltale evidence of manual strangulation.” (V30, 810). The hemorrhage in the strap muscles of the neck indicate that this was happening when Vivian still had blood pressure. (V30, 810).

The strangulation could be tied to the other injuries as a person could grab hold of the victim’s neck with one hand and “strike with the other hand.” (V30, 811). If you stabilize the head, then striking the head will cause more precise and

powerful blows. If the head is not stabilized, the "blows tend to be glancing and they are not as powerful." (V30, 811). The victim probably had blood pressure when the blunt force trauma was inflicted because the victim showed signs of bruising. The type of blood seeping out that occurs with bruising is not usually seen when the person has no blood pressure. (V30, 812).

Based upon his examination, Dr. Beaver provided the following sequence or picture of the attack upon Mrs. Fowler:

> I think that, that there was a grasping of the throat, possible preceded by some impact to the hands, perhaps grabbing the hands or hitting the hands or hands hitting something, grabbing the throat and blows struck to the head, repeated blows struck to the head.
>
> Then at some point the knife is produced and the knife is stabbed into the chest. And perhaps after the knife is - - and it would have to be that the knife was produced and she sees the knife or realizes it and is trying to ward it off with her hands, so her hands are in the way of the knife and the knife produces those cuts on her hands.
>
> Then she's stabbed in the chest and the death was - [objection, discussion omitted]- So I think the stab wound to the chest, once it punctures the heart then blood pressure will fall to zero within a few seconds, 15 or 20 seconds perhaps, and then unconsciousness will ensue and, and death shortly thereafter.

(V30, 812-14).

Dr. Beaver then described the autopsy he conducted on Glyn Fowler. (V30, 814-15). Mr. Fowler was 84 and weighed 159 pounds at the time of his death. (V30, 815). He started by identifying injuries to Mr. Fowler's hands, injuries which suggested a struggle was invovled, "and he's either delivering blows or

warding off blows, and he's getting abrasions to the backs of his hands and his knuckles in doing so." He suffered a stab wound in "the left clavicular area." The wound was V-shaped which suggested it was inflicted by a single edged knife. Id. The wound did not penetrate the lung or major neurovascular structures and would not be fatal, "or at least not immediately fatal." (V30, 817).

The victim's lip was split open and there was evidence of laceration on Mr. Fowler's nose. (V30, 818). "He's got fractures, again, of the maxilla and mandible, fracture of the nose, and he's got fracturing of the hyoid bone and thyroid cartilage again, same as the other woman." (V30, 820). Mr. Fowler suffered trauma injuries to his head, contusions around the eyes, the top of the head, "all of these injuries are from multiple blunt force blows to the face and all the fracturing here." (V30, 821). Beneath the eyelid was a laceration which Dr. Beaver "palpated" which meant Dr. Beaver could feel the displaced fractures of the facial bones. (V30, 824). The maxilla or upper jaw was "multiply fractured." (V30, 825). The blunt force trauma caused severe brain injuries, "cerebral contusions, bruises of the brain." (V30, 821-22).

The arm had a superficial incised wound that runs from the left arm to the abdomen. (V30, 827). Mr. Fowler suffered maybe

21 separate injuries and 18 for Vivian Fowler. (V30, 847-49). Mrs. Fowler, from the time of the stab wound to the heart, would lose consciousness within “maybe 15 or 20 seconds.” (V30, 835). He could not tell whether or not Mrs. Fowler would have been rendered unconscious by the blows to the face, but they didn’t cause any brain injuries. (V30, 836). It could be consciousness was lost from 20 to 30 seconds between the blows to the face, the stab wounds and death. “It could, it could be a minute. It could be more. I just don’t know.” (V30, 838). Mr. Fowler was rendered unconscious from the blows to his head, I can’t say down to a matter of a second or so where he - - when he went unconscious.” (V30, 839). The stab wounds Mr. Fowler suffered could have been inflicted as he was struggling with his assailant. (V30, 839). Mr. Fowler had trauma to his knuckles, “indicating that he was perhaps fighting.” (V30, 839).

The cause of Mr. Fowler’s death was the blunt force trauma causing severe brain injuries. The stab wounds, although they looked superficially to be very severe, “internally they really didn’t do that much damage to his body.” (V30, 822). They would, however, “be painful, yes.” (V30, 822).

Facts relating to the penalty phase will be discussed in the argument addressing those issues below.

SUMMARY OF THE ARGUMENT

ISSUE I - The trial court did not err in denying appellant's renewed motion to withdraw filed immediately prior to trial. There was no conflict of interest or even potential conflict of interest based on another assistant public defender's brief representation of State witness Mathews. The assistant public defender immediately moved to withdraw when he learned Mathews had information about the Snelgrove case and the witness was represented by appointed counsel for his plea to charges unrelated to the appellant's case.

ISSUE II - The prosecutor did not present any false testimony. Untimely disclosure of a letter written by Mathews did not violate Brady where the information contained in the letter was already known by defense counsel and the letter largely duplicated a letter already in defense counsel's possession. Disclosure of the letter would not have changed or altered defense counsel's strategy or changed the outcome of this case.

ISSUE III - The prosecutor did not engage in improper or inflammatory conduct before the jury.

ISSUE IV - The trial court did not abuse its discretion in failing to grant a continuance or recess prior to penalty phase arguments. Penalty phase arguments were given very early in the afternoon [just after lunch] and the court noted that the trial generally did not extend beyond normal business hours and was

not unusually grueling for a capital case.

ISSUE V - Any error in the jury failing to render separate jury recommendations for each murder was harmless. The murders were committed at the same time, under identical circumstances, and, the same aggravators applied to each murder.

ISSUE VI - Florida's capital sentencing murder scheme and penalty phase instructions are constitutional.

ISSUE VII - Appellant's death sentence was proportional and properly imposed in this case.

ISSUE VIII - This Court has repeatedly affirmed admission of victim impact evidence during the penalty phase.

IX - Ring v. Arizona did not render Florida's death penalty statute unconstitutional.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW BASED UPON AN ALLEGATION OF A CONFLICT OF INTEREST? (STATED BY APPELLEE)

Appellant claims that he was denied the right to conflict free counsel in violation of the Sixth Amendment to the United States Constitution. The State disagrees.

A. Standard Of Review

"The question of whether a defendant's counsel labored under an actual conflict of interest that adversely affected counsel's performance is a mixed question of law and fact." Hunter v. State, 817 So. 2d 786, 792 (Fla. 2002)(citing Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) and Quince v. State, 732 So. 2d 1059, 1064 (Fla. 1999)). Consequently, it is subject to *de novo* review on appeal. B. The Public Defender's Office Brief Representation Of A State Witness On Unrelated Charges Did Not Create An Actual Conflict Of Interest

Section 27.53 (3) vests discretion in the trial court to deny withdrawal on a public defender's assertion of conflict where "the court determines that the asserted conflict is not prejudicial to the indigent client." Fla. Stat. (1999). The trial court in this case determined that the asserted conflict did not compromise the public defender's loyalty to Snelgrove

and in fact, obtained a waiver of any privilege from Mathews regarding his prior representation by the public defender's office. The court instructed Snelgrove's attorneys that they had no duty of loyalty to Mathews at all. Based upon this record, the trial court properly rejected the public defender's motion to withdraw.

In Hunter v. State, 817 So. 2d 786, 791 (Fla. 2002), this Court observed that the Sixth Amendment encompasses the right to representation free from "actual conflict." However, to establish a violation of this right "the defendant must 'establish that an actual conflict of interest adversely affected his lawyer's performance.'" (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). This Court provided the following elaboration on what a defendant must establish to show a violation of his right to conflict free counsel:

> A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." Cuyler, 446 U.S. 350; *see also* Quince v. State, 732 So. 2d 1059, 1065 (Fla. 1999). To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. *See* Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998). A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. If a defendant successfully

> demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation. *See* Strickland, 466 U.S. at 692, Cuyler, 446 U.S. at 350.

Hunter at 791-92.

The facts developed below do not demonstrate an actual conflict of interest which compromised the loyalty of Snelgrove's trial attorneys. See Martin v. State, 761 So. 2d 475, 476 (Fla. 4th DCA 2000)(affirming trial court's denial of public defender's motion to withdraw based upon public defender's office previous representation of state witness, noting that "[t]he public defender, as the movant, had the burden of demonstrating the conflict of interest."). Moreover, to the extent there was even a hypothetical conflict or appearance of a conflict of interest, this situation was resolved below by the fact that the testifying witness, Mathews, waived any privilege.

The defense initially filed a written motion to withdraw based upon an allegation of conflict with potential state witnesses. Although the defense had been provided an early witness list naming Gary Mathews, the written motion did not mention a possible conflict with Mathews. (R1, 70-77). In fact, during the hearing on defense counsel's motion, Snelgrove's counsel specifically asserted that their office had not represented "Mathews" and that there was no problem with him.

(V18, 33). Defense counsel were not even aware their office had briefly represented Mathews until after deposing him, and then going back to check the file, to see who originally represented him.

Appellant's written motion below and his brief before this Court reference other individuals and the "potential" for conflict. However, the State did not call those witnesses, and, appellant cannot argue that a conflict with a non-testifying witness in any way compromised his attorney's loyalty. Consequently, the first written motion asserting a conflict, which did not reference Mathews, is simply irrelevant.[11] The written motion referencing Gary Mathews was not filed until May 1, 2002, and was titled "Notice of Potential Conflict of Interest." The motion simply mentioned that defense counsel had discovered the public defender's office had represented Mr. Mathews. (R7, 1296-97).

Appellant claims that he could not interview or depose witnesses from the jail who may have been incarcerated with Snelgrove because they were former or current public defender clients. However, this is exactly the type of attenuated or hypothetical conflict [a possible conflict with "unnamed individuals"] which cannot form the basis for a conflict of

interest claim, much less establish reversible error.[12] See Owen v. Crosby, 854 So. 2d 182, 193-94 (Fla. 2003)("A possible, speculative or merely hypothetical conflict is 'insufficient to impugn a criminal conviction.'"); Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003)(reversible error cannot be predicated on "conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635 (Fla. 1974)).

Curiously, appellant's brief omits any of the facts developed during the trial court's inquiry into the allegation of conflict. An examination of the facts developed below shows that the trial court made a full inquiry into the conflict allegation before determining that no real conflict existed. A review of those facts clearly supports the trial court's decision.

Defense counsel discovered the public defender's previous representation of Mathews immediately before trial, and moved to withdraw on that basis. (V29, 676). See Hunter, 817 So. 2d at 786 (affirming trial court's conclusion that prior representation of state witness could not have affected counsel's representation of defendant where trial counsel was not even aware of public defender's prior representation of the

[12]Defense counsel never offered a credible explanation why these inmates could not be interviewed much less called as witnesses if they possessed favorable information.

witness); Accord McCrae v. State, 510 So. 2d 874 (Fla. 1987). This is the only allegation of conflict properly raised before this Court. Although not having personally represented Mathews, Mr. Novas [trial defense counsel] asserted that it would be difficult to cross-examine Mathews because he was previously represented by the public defender's office. (V29, 673). The prosecutor noted, in response, that the public defender's office initially represented Mathews but that they were soon replaced. The prosecutor argued:

> ...I would suggest to the Court that Mr. Connelly originally began representation of Mr. Mathews. He withdrew from that representation. Separate counsel was appointed for him. That counsel was the counsel that handled the case, dealt with the case and finalized the case with Mr. Gary Mathews.
>
> The defense has shown absolutely no prejudice to the Defendant from anything in connection with that case whatsoever. The original statement of Gary Mathews was given early on after his other attorney, I think it was Mr. Sapienza, was appointed. So the actual written statement I think he started even writing the State Attorney's Office was given after that period of time.
>
> The Defense in this case has taken a deposition. We've went to River Junction Correctional Institute in Chattachoochee, took the deposition. There was no Motion to Withdraw. Apparently there was no feeling of a conflict or idea of a conflict. **We get on the eve of trial and now in the middle of trial and raise those issues.**

(V29, 673-74)(emphasis added).

Defense counsel asserted that Connelly, an assistant public defender, filed his motion to withdraw from Mathews' case on

June 29th. (V29, 676). Defense counsel claimed they did not know Mr. Connelly represented Mathews at the time of Mathews' deposition because they only found out about the prior representation after looking at the court file and found Mr. Connelly's Motion to Withdraw. (V29, 679-80).

The prosecutor observed [Mr. Nelson] that "there was no negotiation with him whatsoever from the State's standpoint. There was certainly, absolutely, unequivocally no negotiation with the Public Defender's Office about anything in the case or any statement whatsoever." (V29, 677). The inquiry conducted by the trial court revealed that Mr. Mathews indicated that he was privy to something that was against Snelgrove's interest and wished to talk to the State. (V29, 678-79). At that point, Connelly moved to withdraw and special counsel was appointed to represent Mathews. (V29, 679). Mr. Mathews eventually pled guilty pursuant to a plea agreement and was sentenced as a habitual felony offender. (V29, 679).

The trial court stated that it did not see a problem here or a conflict. (V29, 680). The trial court suggested that they bring Mathews out to see if he was asserting any privilege with regard to his prior representation by the public defender's office. (V29, 683-84, 686-87). If Mathews was willing to testify truthfully and answer any questions truthfully, waiving

any claim of privilege, “then maybe we can have an abbreviated in-camera to see if any of this is in any way particular privileged if it were not waived.” (V29, 687).

Mathews testified that while he had an attorney, he on his own decided to write the State Attorney’s Office letting them know he knew something about the murders.[13] (V29, 696). He wrote the letter, State Exhibit 63, without consulting his attorney. (V29, 697). Mathews did state that when he wrote the letter he figured the State could give him some assistance or “you know, the Court not being so harsh on my sentencing.” (V29, 697). Mathews stated that he wrote a letter to Connelly explaining that he had knowledge about the Snelgrove case and in response, got a letter from Connelly stating that he could no longer represent him because of a conflict.[14] (V29, 698-99). Mathews claimed that at no time did he discuss the matter of his potential cooperation with the State, or any facts of the Snelgrove offenses with Mr. Connelly. (V29, 698).

Mathews stated that he did not wish to prevent the public defender’s office or Mr. Connelly from disclosing any materials

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[13]The State provided the defense a letter written by Mathews to the State Attorney’s Office claiming he has information on the double murder. (V29, 684-85).

[14]Mr. Novas orally represented to the court that Mr. Connelly filed his Motion to Withdraw on the basis of conflict on June 29th. (V29, 676).

or information that he had in his relationship with them. (V29, 700). There was nothing about his relationship with them that he wished to protect. (V29, 700). The Court advised Mathews that if he said something to them that could lead to being criminally prosecuted or disclosed something, that could be a problem for him. (V29, 700-701). Mathews claimed that nothing he told his defense attorney could hurt him. (V29, 701). Mathews said he held his prior attorneys to no secrecy or confidentiality. (V29, 701). Mathews said that he was very much aware that there were no promises or offers to him at this time. (V29, 701).

When defense counsel Henderson claimed that he had no questions for Mathews and simply asserted that Snelgrove had the right to conflict free counsel, the court asked counsel what conflict he was referring to. The court stated:

> Well, let's see. Mr. Mathews is asserting no rights, privileges, immunities or whatever. He wants to answer the questions that people pose to him and tell his side of the story, and he doesn't obligate the Public Defender or represent in any way he won't answer or cooperate with your questions just like Mr. Nelson's.
>
> And so what's, what's the problem, then, as far as why are you - - do you feel restrained in any way from doing whatever it is that you need to do for the benefit of Mr. Snelgrove?

(V29, 705-06). The trial court told defense counsel Henderson that if he felt restrained in any way, "feel so unrestrained"

because the witness was waiving his claim of privilege. (V29, 706).

The trial court held an in-camera proceeding, where Henderson stated that he had seen the letter sent to Irwin Connelly. He also talked to Connelly and learned that Mathews was not facing simply a burglary but that Connelly was concerned that the State might "jerk the charges up" to a first degree felony punishable by life. (V29, 709). "So our concern in using that information to impeach him if he gets up there to say, well, I was only facing a burglary charge. That's not true he was facing life felonies." (V29, 711).

In response to the in-camera proceeding, the court brought Mathews back in and the court advised him that defense counsel Connelly could be brought back in to testify "perhaps may testify contrary to your testimony." (V29, 716). Mathews reiterated that he claimed no privilege and had "no problem" with Connelly testifying, even if it was about something he said to him in confidence while he was his attorney. (V29, 717). Mathews told the court that he had nothing to hide, "so whatever they have to say they can say it. I have no problem with it."[15]

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[15]That defense counsel sought out Connelly to discuss the facts of the Mathews case might suggest that defense counsel was seeking information from which he could then assert a conflict. More likely perhaps, is that defense counsel was simply seeking out facts which might help him to cross-examine Mathews, a clear

(V29, 717-18).

The State disagrees with appellant's assertion that since defense counsel filed a motion to withdraw in the trial court all that he is required to show is "a potential conflict of interests" and that no prejudice analysis is appropriate. (Appellant's Brief at 39). This ignores the recent pronouncement from the Supreme Court in Mickens v. Taylor, 535 U.S. 162 (2002), which stated, "we think 'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance*–as opposed to a theoretical division of loyalties. It was shorthand for the statement in *Sullivan* that 'a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief.'" (emphasis in original)(quoting and interpreting Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097 (1981)). The court explained "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Mickens, 535 U.S. at 172, n.5.

Appellant apparently asks this Court to apply a *per se* reversal rule when a defendant raises a "potential" for

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indication that counsel was not conflicted or divided in his loyalty to Snelgrove. Indeed, counsel's loyalty clearly remained with Snelgrove, as opposed to Mathews, who was only briefly represented by another public defender in the office.

conflict, a position not supported by this Court or the Supreme Court.[16] See Mickens, 535 U.S. at 172-73 (rejecting an "automatic reversal" rule even where the trial court is made aware of a potential conflict but fails to make the *Sullivan* mandated inquiry). Moreover, appellant ignores the role of the trial court, which fully inquired into the asserted conflict of interest and determined that no such conflict truly existed in this case. See Fla. Stat. 27.33 (3). Where such an inquiry is made by the trial court and the court finds no conflict, the case should stand in the same position on appeal as in a case where there is no objection at trial.[17]

Mathews testified during his proffer, without contradiction, that he never discussed the information he learned from Snelgrove with Mr. Connelly. See Smith v. White, 815 F.2d 1401

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[16]In Mickens the Court questioned whether Cuyler, which it recognized had been applied by various courts to successive representation cases, should even apply in that circumstance. "In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation." Mickens, 535 U.S. at 176. It is clear that in this case the defense attorneys did not even learn about the potential for conflict until after the public defender had withdrawn from Mathews case. Consequently, this case should be considered one of successive representation, rather than concurrent.

[17]This case presents a much different situation from Holloway v. Arkansas, 435 U.S. 475 (1978), where defense counsel assigned to represent three co-defendants, moved to withdraw on the basis of conflict and the trial court denied the motion without inquiry into the allegation of conflict.

(11th Cir. 1987), cert. denied, 484 U.S. 863 (1987)("Smith has failed to show 'inconsistent interests' in this case where he has failed to adduce proof of substantial relationship or relevant confidential information or any other proof of inconsistent interests."). Moreover, to the extent that there was even a possibility of a conflict in this case, it was waived when the witness supposedly providing the basis for defense counsel's conflicting loyalty, waived it.

In Bouie v. State, 559 So. 2d 1113 (Fla. 1990), this Court addressed a similar situation where a member of the public defender's office moved to withdraw based on the office's prior representation of a State witness. This Court stated that in order for a defendant to show a violation of the right to conflict-free counsel, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Id. at 1115 (quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). This Court found that the defendant failed to meet this burden because the public defender's representation of the State witness concluded prior to the witness' testimony. Id. Additionally, Bouie's counsel conducted an extensive cross-examination of the State witness at trial, and zealously guarded Bouie's interests at the expense of the witness/prior client. Id. See also Mills v. Singletary, 161 F.3d 1273, 1287-88 (11th

Cir. 1998)(public defender's prior representation of testifying co-defendant [Ashley] did not violate the Sixth Amendment where the "public defender's alleged loyalties did not force him to forego cross-examination of
Ashley; instead, Greene [defense counsel] cross-examined Ashley extensively and attempted to elicit the statements that caused Ashley to invoke the attorney client privilege.").

Similar to Bouie, the public defender's representation of Mathews had concluded prior to appellant's trial. Indeed, the public defender assigned to Mathews' case represented him for only two months and immediately moved to withdraw when he learned that Mathews had information relating to Snelgrove's case. Mr. Connelly was not privy to any confidential communications regarding the Snelgrove case from Mathews; indeed, they never discussed it.[18] (V29, 699). Furthermore, as in Bouie, appellant's counsel conducted an extensive cross-examination of this witness at trial. Clearly, trial counsel did not have an actual conflict of interest that adversely affected his performance at appellant's trial.[19] Since Mathews

[18]When Mathews wrote Connelly a letter telling him he knew something about the Snelgrove case, Connelly immediately moved to withdraw, without talking to Mathews. (V29, 699).

[19]In Smith v. White, 815 F.2d 1401, 1404 (11th Cir. 1987), the Court noted that the Eleventh Circuit utilized a test to distinguish between actual and hypothetical conflict of

unequivocally waived any privilege, this case presents an even stronger case for the State than Bouie where no such waiver had been obtained.

The public defenders assigned to appellant's case never had an attorney client relationship with Mathews, never talked to him about the facts of his case, and, the public defender assigned to Mathews case, Connelly, immediately withdrew upon learning that Mathews had information relating to Snelgrove's case.[20] See Barnham v. United States, 724 F.2d 1529, 1532 (11th Cir.), cert. denied, 467 U.S. 1230 (1984)(affirming lower court's determination that no conflict existed, noting that the lawyer testified his prior representation of his former client did not have "the remotest connection" with defendant's trial). It cannot be said that at the time of trial the public

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interest:

> We will not find an actual conflict [of interest] unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests... Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical.

[20]As the prosecutor later noted, it was a period of only four days from the time Snelgrove was arrested, June 25th, until Connelly moved to withdraw from the representation of Mathews on June 29th. (V36, 49).

defender's office in any way actively represented Mathews or his interests. See Porter v. Singletary, 14 F.3d 554, 560 (11th Cir. 1994)("Anything less than an actual conflict 'is insufficient to impugn a criminal conviction.'"). Accord Quince v. State, 732 So. 2d 1059, 1065 (Fla. 1999).

An examination of the record confirms the fact that neither Mr. Henderson or Mr. Novas felt any loyalty to Mathews.[21] Defense counsel's cross-examination of Mathews was very aggressive, even rancorous, with Mathews commenting that he felt defense counsel had been "harassing" him. (V30, 750). See Cooper v. State, 856 So. 2d 969, 975 (Fla. 2003)(defense counsel's representation of key state witness, Skalnik, at previous sentencing hearing did not prejudice the defendant where the record reflects defense counsel "aggressively cross-examined Skalnik, eliciting testimony which severely damaged the witness's credibility."). Defense counsel cross-examined Mathews on his criminal convictions, his pending charges and potential sentence, his letters to his defense counsel and to the State, his prior inconsistent statement during a deposition, the facts of the confession, and, showed that Mathews attempted to gain a benefit by offering to provide evidence against

[21]Mr. Mathews was hardly the most important State witness. The blood left behind by the appellant and DNA evidence proved the State's case.

Snelgrove. (V30, 730-759). In closing argument, defense counsel spent a lengthy period of time attacking the credibility of Mathews, attacking his motive for testifying, his criminal record, and concluding that "he deserves no credibility whatsoever." (V31, 957-960). The record supports the trial court's conclusion that appellant's defense attorneys had no conflict of interest in this case.

II.

WHETHER THE ALLEGEDLY UNTIMELY DISCLOSURE OF A LETTER WRITTEN BY A STATE WITNESS TO THE STATE ATTORNEY REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS? (STATED BY APPELLEE)

Appellant next claims that he was surprised when the State revealed a letter Mathews had written to the State Attorney at the end of June, advising the State that he possessed information which might prove useful. He first contends that the trial court should have conducted a Richardson[22] inquiry into the alleged discovery violation. Alternatively, appellant argues the issue should be analyzed under Brady,[23] as evidence favorable to the defense, but which was not turned over by the prosecutor. Finally, based upon this letter, appellant contends

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[22]Richardson v. State, 246 So. 2d 771 (Fla. 1971).

[23]Brady v. Maryland, 373 U.S. 83 (1963).

the State presented false testimony. The record establishes that appellant is not entitled to any relief based upon the alleged discovery violation under either theory.

A. Appellant Has Not Established A Brady Violation

First, the State submits that this issue should be analyzed under Brady, not Richardson. The alleged discovery violation did not materialize until after appellant had been convicted by the jury and did not relate to evidence actually introduced against appellant for which procedural prejudice could be measured in a Richardson inquiry. See State v. Schopp, 653 So. 2d 1016, 1019 (Fla. 1995)(noting that Richardson inquiry assesses "whether defense was prejudiced by the violation and ... consider[s] ... sanctions that might have averted any prejudice."). In the State's view, a Richardson inquiry is triggered when a party seeks to use a witness or present evidence at trial which the opposing party has not had notice of and a fair opportunity to investigate or prepare for its admission.[24] See generally Richardson v. State, 246 So. 2d 771 (Fla. 1971)(when the State seeks to call a witness in violation

[24]Florida Rule of Criminal Procedure 3.220 (n) provides that if a party has not complied with various discovery rules the court can consider a number of potential remedies or sanctions, including an order to produce, grant a continuance, grant a mistrial, or prohibit the party from calling a witness or introducing evidence not disclosed.

of discovery rules, the trial court must inquire into the circumstances of the alleged violation before exercising "its discretion" to fashion a remedy); Wilcox v. State, 367 So. 2d 1020, 1023 (Fla. 1979)("The purpose of a Richardson inquiry is to ferret out procedural rather than substantive prejudice."). A Brady analysis is more appropriate where, as in this case, the defense alleges the State withheld or failed to turn over evidence which is arguably favorable to the defendant. It is also more appropriate because the document which forms the basis for the alleged discovery violation was uncovered after the jury's verdict. See generally Lugo v. State, 845 So. 2d 74, 105-106 (Fla. 2003)(noting that a post-trial Richardson inquiry was held on the allegation state failed to disclose that one of its testifying witnesses was the target of a federal investigation for medicare fraud, but analyzing the issue on direct appeal under Brady). C.f. Rose v. State, 787 So. 2d 786 (Fla. 2001)(noting that the claim of witheld or late disclosure of photographs appeared to "constitute a Richardson claim as well as a Brady issue" but finding no reversible error under either analysis.).

The State notes that while defense counsel initially asserted a discovery violation, he failed to request any remedy at that time. (V36, 51). The defense counsel failed to argue to

the court that he thought the late disclosure of the letter required the drastic remedy of a new trial, or, at the very least, an inquiry into the matter pursuant to Richardson. However, the State acknowledges that the defense later requested a new trial based upon the letter from Mathews. Nonetheless, this should not relieve defense counsel from alerting the trial court during a hearing that he believed the matter was serious enough to warrant a mistrial or at least additional inquiry by the court. Consequently, the State questions whether or not the issue is even preserved for appeal before this Court. If indeed, the trial court was of the opinion that it was a matter for another day, it was defense counsel's obligation to ask for a ruling from the trial court on this matter. See Rose v. State, 787 So. 2d at 796 ("As a general rule, the failure of a party to get a timely ruling by a trial court constitutes a waiver of the matter for appellate purposes.") (citing Richardson v. State, 437 So. 2d 1091, 1094 (Fla. 1983)). Nonetheless, even if the issue is properly before this Court, the record establishes that any error below was harmless.

"To establish a Brady violation, a defendant must show [the following]: 1) evidence favorable to the accused, because it is either exculpatory or impeaching; 2) that the evidence was suppressed by the State, either willfully or inadvertently; and

3) that prejudice ensued." Guzman v. State, ___ So. 2d ___, 29 Fla. L. Weekly S99, S101 (Fla. March 4, 2004)(citing Jennings v. State, 782 So. 2d 853, 856 (Fla. 2001)). "The test for prejudice or materiality under Brady is whether, had the evidence been disclosed, there is a reasonable probability of a different result, expressed as a probability sufficient to undermine confidence in the outcome of the proceedings." Id. (citing Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002). The determination that suppressed evidence was not material under Brady is subject to *de novo* review on appeal.

The letter from Mathews was certainly not exculpatory. It simply said that Mathews possessed information that might be useful to the State. The information contained in the letter was already known to defense counsel and essentially duplicated a letter written by Mathews in July of 2000.[25] (SR1, 82). Moreover, the appellant has failed to show that the letter constitutes impeachment material. It did not reference an agreement or any other substantive information, it simply stated that he possessed information and wanted to talk. The letter does not contradict anything that Mathews testified to on direct

[25]The letter provides no support for appellant on the conflict issue. The letter was not received by the State until June 30th, after Mr. Connelly filed his motion to withdraw on the basis of conflict. (V30, 48-50).

examination. See Vining v. State, 827 So. 2d 201, 208 (Fla. 2002)(affirming trial court's conclusion that Vining failed to establish prejudice from withheld items "because Vining did not show any inconsistencies between the times and the trial testimony nor did he show how the items could have been used to impeach the witnesses.").

First, there was no information contained in the letter written by Mathews on June 28, 2000 that the defense was not already aware of through other means. See State v. Muhammad, 866 So. 2d 1195, 1202-1203 (Fla. 2003)(noting that defendant failed to show prejudice based upon written statements of prison personnel where "there has been no demonstration that the allegedly withheld documents contained any information not already disclosed to Muhammad by other means."). The letter simply stated that Mathews learned some information about the murders from Snelgrove, that he had written a letter to his defense attorney telling him of this fact, and, that he was willing to talk to the prosecutor. (SR1, 87). During Mathews' proffer on the conflict issue, defense counsel Henderson stated that he was aware of the letter Mathews wrote to Mr. Connelly and that he had reviewed it from the [Mathews] court file. (V29, 709; V29, 699). The remaining part of the June 28th letter simply duplicated the July letter written by Mathews to the

State Attorney, which had been disclosed to the defense. (SR1, 82). See Armstrong v. State, 862 So. 2d 705, 715 (Fla. 2003)(finding no reasonable probability of a different result where "Armstrong was in fact in possession of the same information he would have had if he had received the actual transcripts of Noriega's investigative statements."). During trial, Mathews admitted on cross-examination that he sought to cooperate with the State in the hope that it might help his own case. (V30, 732).

On appeal, appellant attempts to persuade this Court that the untimely disclosure of the letter prejudiced the defense in that this letter was the first indication that Mathews claimed he had information on the Snelgrove case and that it would have contradicted Mathews' assertion that Snelgrove did not immediately open up to him and disclose pertinent facts. This argument presupposes that the June 28th letter to Mr. Nelson was the first indication that Mathews claimed to have knowledge about the facts of Snelgrove's case. However, the letter Mathews sent to his public defender, Connelly, was the first indication that Mathews possessed any information regarding the Snelgrove case. Defense counsel admitted that he had viewed the letter written by Mathews to his initial public defender and therefore was aware of the first indication that Mathews knew

anything about Snelgrove's crimes. (V29, 709). The allegedly undisclosed letter written a day or two later adds nothing to the analysis. Consequently, appellant's assertion that the June 28th letter addressed to Mr. Nelson was the means by which defense counsel could have contradicted Mathews assertion that Snelgrove did not immediately open up to him (Appellant's Brief at 43), is simply not accurate. Defense counsel was already aware of the date Mathews first claimed he had information regarding the Snelgrove case [the letter to Connelly], and, in fact, cross-examined Mathews on that very issue. (V30, 736).

On cross-examination, defense counsel claimed the letter Mathews wrote to Connelly was dated the 26th of June, and, asserted in a question that it was the same day Snelgrove came to his cell.[26] (V30, 736-37). This cross-examination was designed to contradict Mathews' assertion that Snelgrove did not immediately open up to him and disclose pertinent information about the murders.[27] (V30, 737). Consequently, the later letter to Mr. Nelson, dated June 28th, a day or two later, would add little or nothing to defense counsel's cross-examination of Mr. Snelgrove.

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[26]The record establishes that Snelgrove was arrested on June 25, 2000. (R1, 15).

[27]Interestingly enough, the letter to Mr. Nelson of June 30th indicated that Mathews wrote the letter on June 27th. (SR1, 87).

Under the facts of this case, it cannot be said the cumulative information contained in the letter would have any favorable impact upon appellant's case, much less, such an impact that it would undermine confidence in the outcome of appellant's trial. Given the fact that all the information in the June 28th letter was already known to the defense and was cumulative to the July letter in possession of the defense, any infinitesimally small benefit of possessing the letter would not have led to a different result at trial. However, even assuming *arguendo* the letter would have undermined Mathews' credibility in any way, appellant's conviction would not be subject to reversal. The evidence against Snelgrove was quite simply overwhelming even without Mathews testimony. See Strickler v. Greene, 527 U.S. 263, 144 L.Ed.2d 286, 308 (1999)("District Court was surely correct that there is a reasonable possibility that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result...however, petitioner's burden is to establish a reasonable probability of a different result). (emphasis added). Accord, U.S. v. Agurs, 427 U.S. 97, 109 (1976).

The uncontradicted circumstantial evidence established Snelgrove's guilt, not the testimony of Mathews. Snelgrove's blood was found at numerous points in the victims' house,

including the point of entry, and, even on one of the victims. The blood trail establishes that Snelgrove murdered the victims and rumaged through the house looking for money and valuables. His bloody palm print, along with another fingerprint, was found in the victims' master bedroom where the bodies were located. The police dog followed a scent trial from the victims' house and alerted on Snelgrove shortly after the murders. Snelgrove pawned a necklace belonging to one of the victims the day after the murders. When coupled with photographs depicting physical injuries to Snelgrove's hands consistent with the beating inflicted on the victims and, cuts consistent with having injured himself opening and crawling through the victims' window, it becomes clear that the evidence against appellant was truly overwhelming. His convictions were not reliant upon Mathews, who, appellant mistakenly characterizes as the State's "key witness."[28] Based upon this record, it cannot be said that this allegedly undisclosed letter could put the whole case in such a different light as to undermine confidence in the verdict. See State v. Lewis, 838 So. 2d 1102 (Fla. 2002)(even assuming the State failed to disclose potential impeachment

[28]Curiously, defense counsel used Mathews' testimony to Snelgrove's advantage during the penalty phase in closing argument. He noted Mathews testified appellant told him it wasn't supposed to happen that way, and that he couldn't cut Ms. Fowler's finger off. (V35, 675).

evidence, given the limited value of this evidence, and, the fact testifying witness had already been sentenced, and any motivation for skewing his testimony would have been limited, there was no reasonable probability of a different result).

Alternatively, if this Court were to apply Richardson to the facts of this case, the result would be the same. Under State v. Schopp, 653 So. 2d 1016 (Fla. 1995), this Court recognized that failure to hold a Richardson inquiry is subject to a harmless error analysis. The focus on the inquiry is on procedural prejudice suffered from the discovery violation, that is, if there "is a reasonable possibility that the defendant's trial preparation or strategy "would have been materially different had the violation not occurred." Schopp, 653 So. 2d at 1020. Such an analysis "takes into account the fact that errors that reasonably could affect trial preparation or strategy are 'prejudicial,' and therefore harmful for appellate purposes, only when a change in trial tactics reasonably could have benefitted the defendant by resulting in a favorable verdict." Id. at 1021. The failure to hold a Richardson inquiry in this case was harmless beyond a reasonable doubt.

Since no inquiry was made by the trial court, the record is necessarily limited. However, it is clear that any discovery violation was inadvertent. The prosecutor noted he found the

letter by looking at a separate state attorney file and offered the letter, after its discovery, in open court.[29] More importantly, the defense failed to show or even articulate how its preparation for this case or its trial tactics would have differed had the letter been disclosed. As noted above, the information contained in the letter was cumulative to information already known to the defense. The failure to hold a Richardson inquiry was clearly harmless error. See Schopp, 653 So. 2d at 1021-22.

B. The State Did Not Present False Or Misleading Testimony

Appellant maintains that the State knowingly presented false testimony based upon the June 28th letter, asserting that "the witness was fabricating his story before the court and the jury as to the circumstances and timing of the defendant's 'confiding' in him about the details of the crime."[30] (Appellant's Brief at 49). Curiously, appellant's brief fails to reference a particular statement made by Mathews which is

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[29]The assistant state attorney told the court he pulled the letter for "our separate file when I got this [post-trial motion] to, to look at this matter." (V36, 48). It is apparent the prosecutor was talking about the separate file on Gary Mathews.

[30]Defense counsel did not assert that the State presented false testimony when he learned of the alleged discovery violation. He later made the assertion in a motion for new trial, but, again, failed to state with any specificity what false statements had been presented by the State. (R9, 1559).

false. A review of the record reveals that no such false statement was made.

Mathews testified that when Snelgrove was first admitted into the jail, “they put him in the same cell with me.” (V30, 726). Mathews testified on direct examination that Snelgrove did not immediately open up to him, saying he “was just nervous” and didn’t tell him anything. (V30, 722). When specifically asked if he wrote a letter to his defense attorney the same day Snelgrove came to his cell, Mathews responded: “No, I don’t recall that. No, sir.” (V30, 739). When asked if he wrote the letter the next day, Mathews testified: “Approximately a couple of days away I, I remember writing a letter because he didn’t give me that much information that first day. And then the second day he was feeding me a little information at a time about, you know, because he, he didn’t want to, he didn’t want to tell very much about what was going on. So it had to be a couple days after he entered my cell before I wrote a letter” (V30, 739-40).

The undisclosed June 28th letter references a letter Mathews wrote to his defense attorney on June 27th. The defense had that letter [the June 27th letter] and cross-examined Mathews on it. Defense counsel asserted it was written on June 26th, but did not let Mathews see the letter. Although defense counsel

asserted that Snelgrove was arrested or put in Mathews' cell on June 26th, the prosecutor later noted that Snelgrove had been arrested on June 25th. (V36, 48). The record indicates that Snelgrove was in fact arrested on June 25th as the prosecutor represented. (R1, 15). The late disclosed letter dated June 28th, does not establish Mathews presented any false testimony. The first letter to Mr. Connelly by Mathews was written on June 27th, and this letter was in possession of defense counsel.[31] The second letter, the one dated June 28th, does not suggest, much less establish Mathews presented false testimony. This letter was written two or three days after Snelgrove had been arrested and therefore was entirely consistent with Mathews' testimony that Snelgrove did not immediately open up to him and that he must have written the letter to his attorney a couple of days after Snelgrove entered the jail.

This Court stated that to establish a violation of Giglio v. United States, 450 U.S. 150 (1972), the defense must establish the following: "1) that the testimony was false; 2)

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[31]On cross-examination, defense counsel claimed the letter to Connelly was written on June 26th. The State Attorney asked the defense to proffer the letter and allow the witness to refresh his recollection. (V30, 738). Defense counsel sidestepped the issue without letting Mathews review the letter. Id. Nor did defense counsel proffer the letter for the record. It appears that defense counsel might have mis-stated the date on the Connelly letter in an effort to bolster his cross-examination of Mathews.

that the prosecutor knew the testimony was false; and 3) that the statement was material." Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). (string cites omitted). "Further, we have repeatedly emphasized that [t]he thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and the prosecutor not fraudulently conceal such facts from the jury." (string cites omitted). "[T]he false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Guzman v. State, 29 Fla. L. Weekly at S101.

Since appellant failed to establish the first requirement, presentation of false testimony, this issue may be summarily rejected. See Tompkins v. Moore, 193 F.3d 1327, 1340 (11th Cir. 1999)("Tompkins has failed to meet the threshold requirement that he show false testimony was used."). Moreover, the State questions whether or not a witness's recollection of a particular date can be the subject of a Giglio violation. This is certainly not the type of untruthful testimony regarding a deal with the State which might motivate a witness to testify falsely, which is the scenario Giglio and its progeny are designed to address. See Routley v. State, 590 So. 2d 397, 400 (Fla. 1991). Moreover, even assuming, *arguendo*, that appellant

established false testimony was used, he has not met the materiality requirement. See Ventura, 794 So. 2d at 564 (although state presented false testimony as to the existence of an agreement with a state witness, the error was harmless where the witness was significantly impeached and his testimony was corroborated by other evidence).

The undisclosed letter is simply inconsequential. The letter does not contradict any of the State's compelling evidence against the appellant. Nor does the letter provide any support for a theory of the defense. Consequently, the defense has failed to establish a violation of Giglio and its progeny.

III.

WHETHER THE PROSECUTOR MADE IMPROPER OR INFLAMMATORY COMMENTS WHICH RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR?

Appellant complains that various prosecutorial comments rendered his trial unfair or unreliable. Appellant utilizes a shotgun approach, taking portions of the prosecutor's statements during trial and during guilt and penalty phase closing argument, to contend that he was denied a fundamentally fair trial. However, the majority of the comments he now takes issue with were not preserved for review by an objection below. The isolated references to various comments, in the context of closing argument, were not improper. And, even if one or more

of the comments were improper, they certainly do not warrant the drastic remedy of a new trial in this case.

A. Appellate Review of A Prosecutor's Comments

"Both the prosecutor and defense counsel are granted wide latitude in closing argument. A mistrial is appropriate only where a statement is so prejudicial that it vitiates the entire trial. A trial court's ruling on a motion for mistrial is within the sound discretion of the court and will be sustained on review absent an abuse of discretion." Ford v. State, 802 So. 2d 1121, 1129 (Fla. 2001)(footnotes omitted).

However, where the allegation of prosecutorial misconduct has not been preserved for review, a different standard of review is applied. "As a general rule, the failure to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review." Id. This Court has stated that for an error to be so fundamental "that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)(citing D'Oleo-Valdez v. State, 531 So. 2d 1347 (Fla. 1988); Ray v. State, 403 So. 2d 956 (Fla. 1981)). Addressing the application of fundamental error, this Court has stated that it must be error so severe it

"reaches down into the very legality of the trial itself to the extent the verdict could not have been obtained without the assistance of the error alleged." State v. Smith, 240 So. 2d 807, 810 (Fla. 1970)(quoting Gibson v. State, 194 So. 2d 19 (Fla. 2d DCA 1967)).

B. The Prosecutor Did Not Exceed The Bounds Of Proper Argument And The Objected To Comments Did Not Serve To Vitiate The Entire Trial

As for the assistant state attorney's "speaking" objection during witness Mathews' testimony, there was no contemporaneous objection to the State Attorney's conduct and no motion for mistrial. Consequently, the issue has not been preserved for appeal. (V30, 755-57). Appellant has not established the prosecutor's objection constituted misconduct, much less the type of misconduct required to constitute fundamental error.

Even if the issue had been preserved below, the record does not support the finding of error. Mathews testified that "he came in where he broke the window at. That's all I know. I don't know if the back door or not." (V30, 756-57). The State Attorney's objection did not change or alter Mathews' testimony.

Appellant next asserts that the State Attorney impermissibly "testified" to facts in evidence when he argued that the knife may have had the victim's blood on it because not every drop of

blood on the knife had been tested. (Appellant's Brief at 52). However, there was no contemporaneous objection to that comment and it is not preserved for appeal. (V31, 964). Moreover, appellant failed to show this comment was improper, much less that it rises to the level of fundamental error.

In the context of closing argument, the State Attorney was simply countering the defense argument that the State had not shown a mixture of the victims' and appellant's blood. The prosecutor argued that "a considerable amount of blood was sampled" and they took a small scraping from the knife and "found David Snelgrove's blood on it." (V31, 964). The prosecutor noted that not every drop of blood was sampled, it doesn't mean that no one else's blood was on the knife. "And the fact that they didn't scrape the entire knife and take every piece of blood off of it doesn't mean that this wasn't the murder weapon." (V31, 964).

The prosecutor's argument was a fair comment on the evidence. He was simply making the point that not every drop of blood in this case was tested and, it was possible that the victim's blood might have remained on the knife or other items of evidence. Crime Scene Technician Coughlin testified that he examined various exhibits, and would take a blood sample from it, or create a "baby" or "subsample" to submit to a DNA lab for

testing. (V28, 496). The handle of the knife did test positive for the presence of blood.[32] (V28, 516). Thus, the record in general, supports the inference the prosecutor was attempting to make from the evidence.

Appellant also asserts that the prosecutor inserted his own personal belief that the details given by Mathews had not appeared in any newspapers. This comment, unlike the previous two, was the subject of a contemporaneous objection. Nonetheless, the State submits the prosecutor's argument was a fair comment on the evidence and was a fair reply to the defense argument. The defense argued in their closing that Mathews had no credibility for a number of reasons, that he learned about the offense and saw an opportunity, that he "indicated he read it in the paper." (V31, 959-60). In response, the prosecutor argued: "And he knew things that only the killer would know, the kind of stuff that doesn't show up in the paper."[33] (V31, 976).

This brief comment did not exceed the proper bounds of

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[32]The DNA analyst testified the fact that he didn't find Snelgrove's or McCrae's blood on something does not mean that they didn't touch somebody. "I'm just talking about one particular swabbing or cutting from these items that I tested." (V29, 667).

[33]On direct examination, Mathews testified that everything he testified to came from Snelgrove's mouth, "I didn't read that in the newspaper." (V30, 727). On cross-examination, Mathews admitted that he read about the case in the newspaper and saw it on TV. (V30, 750).

argument. This was a "common sense" type argument which the jury can consider based upon their own experience and from examining Mathews' testimony. The trial court correctly overruled the objection, stating: "I think the jury can rely on their own recollections of that matter." See Thomas v. State, 326 So. 2d 413, 415 (Fla. 1975)("[C]omments of counsel in the progress of a trial before a jury are controllable in the judicial discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion unless a clear abuse thereof has been made to appear.").

Appellant next observes that the State Attorney interrupted defense counsel's closing argument to inform them he could "offer a scenario." (Appellant's Brief at 53). While the State Attorney did interrupt the defense counsel's closing, the trial court on its own interrupted him: "That would be out of order. Thank you, Mr. Tanner." (V31, 980). Consequently, the trial court avoided any error or impropriety by cutting off the State Attorney before he could offer any argument or comment.[34] There was no motion for mistrial based upon the State Attorney's conduct, and, therefore any claim of error has not been preserved for appeal.

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[34]In fairness to the State Attorney, defense counsel addressed a question personally to Mr. Tanner in his own argument, which drew the response from Mr. Tanner. (V31, 980).

Next, appellant contends that the prosecutor improperly observed that the granddaughter's letter had been redacted. (Appellant's Brief at 53). The entire objected to comment consisted of the following: "Did - - now, it has redacted portion on any matters that might be objectionable." (V32, 95).

In response to defense counsel's objection, the State Attorney properly noted: "All Mr. Nelson said was the word 'redacted,' and the jury is very well aware there is evidence offered or perhaps proffered with regularity the Court considers and sometimes says, no, you can't have that in evidence. And every time I make an objection and sustain it or vice versa, the jury is aware there are things you legally have ruled should not be before the jury and should not be considered..." (V32, 97-98). As the prosecutor noted, the jury was certainly aware that evidence is filtered through the lens of the parties and the court. The prosecutor's comment did not constitute error, let alone the type of error which would serve to vitiate the entire penalty phase.

Appellant next asserts that over defense "objections" the prosecutor denigrated the defense by implying that defendant was trying to transfer blame to the victims because they had no burglar alarm and invited themselves to be killed. Contrary to appellant's assertion, the record does not reflect an objection

to these particular comments.[35] (V31, 973-74). These are not the type of inflammatory comments that could serve to vitiate the entire penalty phase. It is apparent that the prosecutor was discussing what appellant told Mathews, that he didn't mean for it to happen that way, if he only looked in the bedroom and looked around he could have "got the money and left." (V30, 726, 758).

As for the lack of remorse comment, the prosecutor did not mention remorse, he was addressing appellant's conduct after the killings. The record reflects that his cousin wanted to go fishing and that appellant went with him to pawn some items so that he could go fishing. Admittedly, the record does not reflect appellant intended to go fishing with him. However, the fishing comment was not "a totally fabricated" story as appellant contends in his brief. Appellant was with his cousin and went to pawn shops to obtain money. (V28, 469-72). Whether or not appellant actually planned to go fishing with his cousin, is not answered by the record. Nonetheless, it is not a

[35]Defense counsel objected on the basis the prosecutor's argument appealed to the "emotions" and "passion" of the jury. However, this objection immediately followed the prosecutor's discussion of Mathews' statement, "if I'd only found the purse right away and snuck back out the window, I'd never have to kill them." (V31, 973). This objection did not relate to lack of remorse or a claim that the prosecutor was asserting the defense was attempting to transfer blame to the victims.

"fabricated" story. It was entirely reasonable to conclude that appellant intended to go fishing with his cousin because he was with him when the cousin was attempting to raise money in furtherance of that plan.

Appellant next takes issue with various penalty phase comments. Appellant first mentions an isolated comment of the prosecutor, setting the scene of "the terrifying night that left a cloud over the community and family." (Appellant's Brief at 54). This comment was not objected to, and, has not been preserved for appeal. (V35, 657-58). Similarly, the prosecutor's description of the victims as "special little old people" who were "brutally" murdered in their own home was not objected to. (V35, 657-58). Moreover, appellant does not bother to tell this Court why these comments are improper. Indeed, these were simple factual statements and fairly made under the facts of this case. [The victims were small, old, and brutally murdered in their own home]. The prosecutor did not ask the jury to place themselves in the position of the victims during the murders. The terror the victims felt in being awakened in their own home and brutally attacked is certainly an argument relevant to the HAC aggravator. See Carroll v. State, 815 So. 2d 601 (Fla. 2002)(finding prosecutor's isolated statements that defendant was the "boogie man" and a "creature that stalked the

night" who "must die" was not so prejudicial that it could vitiate the entire trial.); Burr v. State, 466 So. 2d 1051, 1054 (Fla.)(prosecutor's statements that people were afraid and that defendant "executes" people were fair comment on evidence and were not so inflammatory or prejudicial as to warrant a mistrial), cert. denied, 474 U.S. 879 (1985); Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir. 1979), cert. denied, 440 U.S. 974 (1979)(noting that prosecutor's argument asking what kind of "fiendish ghoul" could have committed such a crime and referring to "the stark terror on the little girl's face" and the "assailant's desire to hear the 'squish of her blood'" was strong language, but was in accord with the evidence).

There was no motion for a mistrial based upon the prosecutor's "speaking" objection to the defense expert's testimony based upon lack of knowledge or information. Moreover, the trial court overruled the prosecutor's objection. (V33, 378). See Sims v. State, 681 So. 2d 1112, 1116-17 (Fla. 1996)(claimed errors when prosecutor referred to the defendant as a liar, accused defense counsel of misleading the jury, and bolstered his attacks on Sim's credibility by expressing his personal views and knowledge of extra-record matters, not properly before the Court on appeal without an objection)(citing Craig v. State, 510 So. 2d 857, 864 (Fla. 1987), cert. denied,

484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988)). Consequently, the asserted error, regarding the prosecutor's objection to a defense expert's testimony, that there was "no evidence" and it's "just a story" is not preserved for appeal. (V33, 378).

Similarly, there was no objection to the prosecutor eliciting the definition of "psychobabble" from the defense expert. The defense expert testified on cross-examination: "Well, it's not a technical term. It's an informal term referring to technical sounding stuff that has little substantial meaning." (V34, 384). Neither the term "psychobabble" nor the prosecutor's reference to it in closing argument was improper or inflammatory.

As for the prosecutor's argument describing the PET scan as a slow uptake of glucose, this comment did not draw a defense objection and therefore was not preserved for appeal. In any case, the comment was not at all improper. The prosecutor argued:

> Dr. Wu, who came here from California twice for this case, once for the examination and once to testify, simply says that David Snelgrove has a brain abnormality with slow glucose uptake. That's really all he said. Took a long time to say it, but that's what he said. There was nothing else that he said. He said a lot of words, but the final bottom line was there's a brain abnormality in the temporal area, slow glucose uptake.

(V35, 649). Contrary to appellant's assertion, the prosecutor did not improperly denigrate the defense expert. (Appellant's Brief at 54).

Finally, appellant claims the prosecutor misstated the law when he claimed that drug abuse was not an "excuse" for these crimes. (Appellant's Brief at 55). This comment did draw an objection from defense counsel; however, the single use of the term excuse was not improper. The full comment of the prosecutor was as follows:

> ...The verdict is to be based on the evidence, the evidence, proof of the aggravators and the weight of those aggravators as they clearly and unequivocally outweigh the mitigators.
>
> And what does a mitigator distill down to? That he had a cocaine habit and he wanted more cocaine, and people when they're craving cocaine are likely to do most anything to try to get it. That's it. That's what it boils down to. That's the mitigator.
>
> Is that, is that the excuse for first-degree murder, prove a first degree murder to the extent - - [objection].

(V35, 654-55).

Contained within a much larger discussion of the evidence, the prosecutor was simply arguing the weight to be given the mitigation testimony on drug abuse. In this context, the single reference to "excuse" was not improper.[36] See Mann v. State, 603

[36]The defense counsel effectively made this point in his own closing: "And it's not, it's not an excuse. Mitigation is not an excuse. It's not justification..." (V35, 672).

So. 2d 1141, 1143 (Fla. 1992)(prosecutor's comments addressing defense expert's testimony, that because he is a pervert or child molester his actions are "more excusable" than a person who is not a pervert was not improper where it is clear the prosecutor made these statements to rebut the psychologist's conclusion that the statutory mitigators applied). See also Ford v. State, 802 So. 2d 1121 1131-32 n. 17 (Fla. 2001)(prosecutor's argument asserting that mitigation testimony "boils down to is that this defendant has no excuse for his actions; no excuse at all" did not require new trial where upon objection the court advised prosecutor to avoid the word excuse and the comment was not repeated).

The State notes that few prosecutors have the luxury of a well thought out script to utilize during closing argument.[37] Given the dynamics of a trial and closing argument in

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[37]Addressing a claim of "plain error" in the prosecutor's closing argument, the Supreme Court in United States v. Young, 470 U.S. 1, 84 L.Ed.2d 1, 105 S.Ct. 1038 (1985) stated:

> These standards reflect a consensus of the profession that the courts must not lose sight of the reality that "[a] criminal trial does not unfold like a play with actors following a script." Gedgers v. United States, 425 U.S. 80, 86, 47 L.Ed.2d 592, 96 S.Ct. 1330 (1976). It should come as no surprise that in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused." Dunlop v. United States, 165 U.S. 486, 498, 41 L.Ed. 799, 17 S.Ct. 375 (1897). [footnote omitted].

particular, mistakes and misstatements can and do occur. However, the two experienced defense attorneys in this case recognized that the prosecutor's argument was not unduly emotional and did not object to most of the comments appellant now finds improper. Moreover, the defense attorney commended Mr. Tanner on "his ability to keep emotion out of it because emotion shouldn't play into this, and I apologize if I get emotional." (V35, 665).

This Court has clear evidence that the jury was not unduly inflamed or impassioned by the prosecutor's penalty phase argument. Appellant brutally murdered two elderly individuals in their own home and the State presented and proved multiple, weighty aggravating circumstances. However, the jury's vote was only 7 to 5 for death. On facts such as these, a 12-0 or 11 to 1 verdict can be easily anticipated. The fact that the vote was close suggests the jury was not at all inflamed or impassioned by the prosecutor's penalty phase argument.[38]

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[38]Appellant's case is unlike Brooks v. State, 762 So. 2d 879, 905 (Fla. 2000), wherein this Court noted numerous "overlapping improprieties in the prosecutor's penalty phase closing argument comments including: impermissibly inflaming the passions and prejudices of the jury with elements of emotion and fear by using the word 'executed' or 'executing' at least six times; engaging in pejorative characterizations of the defendant; urging jurors to show the defendant the same mercy shown the dead victim; impermissibly arguing 'prosecutorial expertise' in stating that the State had already determined this was a genuine death penalty case; misstating the law regarding the merged

IV.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENSE COUNSEL'S MOTION FOR CONTINUANCE PRIOR TO PENALTY PHASE CLOSING ARGUMENT? (STATED BY APPELLEE)

A trial court's ruling on a motion for continuance is reviewed under the abuse of discretion standard. Kearse v. State, 770 So. 2d 1119 (Fla. 2000). In Kearse, this Court stated that the trial court's ruling on a motion for continuance will only be reversed when an abuse of discretion is shown and the Court further noted:

> An abuse of discretion is generally not found unless the court's ruling on the continuance results in undue prejudice to defendant. See Fennie v. State, 648 So. 2d 95, 97 (Fla.1994). This general rule is true even in death penalty cases. 'While death penalty cases command [this Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance.'

Kearse, 770 So. 2d at 1127 (quoting Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976)). Moreover, even if the trial court abused its discretion in denying the motion, a defendant "must also show that the trial court's denial was harmful; the harmless error doctrine is applicable in these situations."

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robbery and pecuniary gain aggravating circumstances; personally attacking defense counsel; and characterizing the mitigating circumstances as 'flimsy,' 'phantom,'and 'excuses.' Moore v. State, 820 So. 2d 199, 208 n. 9 (Fla. 2002)(discussing Brooks).

Barnhill v. State, 834 So. 2d 836, 847 (Fla. 2002)(citations omitted).

In the instant case, appellant failed to establish an abuse of discretion or undue prejudice resulting from the court's ruling. The trial court denied a request for continuance on Friday afternoon, which would have required the jury to come back during the weekend or wait until Monday morning to hear penalty phase closing argument. In denying the continuance, the trial court stated:

> ...I, I suppose it's common knowledge that this sort of case takes a lot out of everyone, visitor, participant, Court, deputies, staff, judicial assistant, staff attorney. I think we all expended a lot of effort and experienced, perhaps, some emotion, and that's stressful. I do note, however, I've not gone over ordinary working hours. I've let the jury go on a number of occasions early. I've not been, I don't think, unduly demanding concerning my request concerning preparation or work.
>
> I do understand you've unavoidably had to do some things outside this courtroom to prepare. I know that's inevitable, but I think I've not judged any lack of mental aptitude or thoughtfulness and any hesitancy to raise objections or any delay in doing so.
>
> I think you gentlemen are doing great and you've done well and we've worked hard and that's as it is, but all things have to come to a conclusion. I think that may well be today if the jury is able to reach a decision today. And I don't think there's any need to disrupt the jury's plans over the weekend if we can avoid it, and I think we can. And I don't see any reason to draw upon their resources and their time and their effort next week when we can do something today. I think it'd just be procrastination. . .

(V35, 615-17).

It is important to note defense counsel was not required to give his closing argument in this case late in the evening or even late in the afternoon. The penalty phase arguments began just after 1:00 pm and ended before 3:00 pm. (V35, 692). Furthermore, the court noted that the trial did not go beyond normal business hours and on some days even ended early. So, despite the fact that Mr. Henderson had to drive about an hour each way to his house, this case did not present unusually long hours or an unusually grueling schedule, particularly, for a capital case. A defense attorney should certainly expect to work during normal business hours.

Although appellant mentions that earlier the court had indicated a preference for finishing up on Monday or granting a delay (Appellant's Brief at 58), the State does not agree with this interpretation of the record. Early in the penalty phase, the court was contemplating the evidence portion not finishing until late Friday afternoon, which meant the jury might lose part of a Saturday for deliberations and the court might have to sequester the jury. (V32, 133-34). The court therefore indicated a preference not to give the case to the jury on a "late Friday afternoon." (V32, 134). However, when the court recessed Thursday evening at "5:52 pm" the court advised counsel: "Well let's do this. I'm not going to preclude us from

going into tomorrow afternoon. Be prepared. And if we get the thing over and, and I feel like we can do it and we're able, we'll do it. If not, I'm going to bring them back Monday." (V34, 514).

Since the defense finished presenting evidence early Friday afternoon, there was clearly no need for a recess. As the prosecutor noted, there is always a danger during the break of the unexpected occurring, such as "something to get them disqualified" which might occur during a break in the proceedings. (V35, 615). The court was certainly well within its discretion to deny the requested delay in the proceedings where the presentation of evidence terminated early in the day, and, delaying the trial would require bringing the jury and court personnel back on Saturday, or delaying the case until Monday. Defense counsel at all times had the benefit of an experienced co-counsel and looked alert, as the prosecutor and trial court noted, despite defense counsel's assertion to the contrary. (V35, 616, 694).

Finally, defense counsel ably argued appellant's case to the jury, telling the jury during closing: "I've talked a lot and I've certainly talked longer than Mr. Tanner, and I've tried to address those areas that I think are important. There's so much. There's so much to talk about." (V35, 680). Even a

cursory review of defense counsel's closing reveals that it was coherent and persuasive. Indeed, despite the incredibly brutal nature of the crimes, the jury's vote was only 7 to 5 in favor of death, a clear testament to counsel's effectiveness. Appellant has not established any deficiency in his closing argument or resulting prejudice from the failure to grant a continuance.

V.

WHETHER FUNDAMENTAL ERROR OCCURRED WHERE THE JURY RECOMMENDATION FORM REFLECTS ONLY ONE RECOMMENDATION FOR THE TWO MURDERS? (STATED BY APPELLEE)

Appellant contends that a single sentencing jury recommendation for the two murders in this case constitutes reversible error. The State recognizes that this Court's decision in Pangburn v. State, 661 So. 2d 1182 (Fla. 1995) provides that a new penalty phase is required where a jury returns a single sentencing recommendation for two first degree murders. However, the State questions whether or not the error, where there is no objection below, constitutes fundamental error requiring a new sentencing proceeding under the facts of this case. See State v. Schopp, 653 So. 2d 1016, 1019 (Fla. 1995)(noting that "a *per se* rule is appropriate only for those errors that always vitiate the right to a fair trial and therefore are always harmful.").

In Pangburn, this Court noted that in cases involving multiple murders juries "frequently render different recommendations for different counts." (string cites omitted). "This is because the aggravating and mitigating circumstances that apply to one count may not apply to another." Pangburn, 661 So. 2d at 1188. Consequently, this Court held that "a separate jury recommendation must be rendered for each count of first-degree murder being considered." "To hold otherwise would undermine our sentencing procedure in capital cases by allowing arbitrary and irrational results." Id.

The primary concern this Court expressed in Pangburn was that separate murders might have different aggravators applicable to each murder. That concern is not present here when each of the aggravating circumstances the jury was instructed upon applied equally to the two murder victims. Both victims were old and vulnerable. Each suffered a similar fate, being awakened late at night in their own home, and, being violently beaten and stabbed. The heinous, atrocious, or cruel [HAC] aggravator was applicable to each victim.[39] Under these specific and narrow set of facts, a single recommendation for

[39]The trial court found the same five aggravating factors applied to the murders of Vivian and Glyn Fowler and sentenced appellant to death for each murder.

both murders constitutes harmless error.[40] Simply put, there would be no rational manner for the jury to distinguish between the two murders and the two victims to support different sentences. Consequently, this Court should not find fundamental error which would excuse defense counsel's failure to object to the procedure employed by the trial court below.

VI.

WHETHER THE STANDARD JURY INSTRUCTIONS IMPERMISSIBLY PLACE A HIGHER BURDEN ON THE DEFENSE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN THE STATE MUST ESTABLISH FOR A DEATH SENTENCE? (STATED BY APPELLEE)

Appellant's claim that the standard jury instructions impermissibly shift the burden to the defendant to prove a life sentence is appropriate has been rejected by this Court. In Griffin v. State, 866 So. 2d 1, 14 (Fla. 2003), this Court stated: we have "repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence. *See, e.g.,* Sweet v. Moore, 822 So. 2d 1269, 1274 (Fla. 2002); Carroll v. State, 815 So. 2d 601, 622-23 (Fla. 2002); San Martin v. State, 705 So. 2d 1337, 1350 (Fla. 1997)(concluding that weighing provisions in Florida's death penalty statute requiring jury to determine '[w]hether sufficient mitigating circumstances exist

which outweigh the aggravating circumstances found to exist' and the standard jury instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence.)." Appellant has not shown that the standard jury instructions have proved unfair or unworkable and requires the drastic remedy of reversing years of this Court's firmly established precedent.

VII.

WHETHER THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL? (STATED BY APPELLEE)

Appellant alleges numerous sentencing infirmities which, he asserts, render his death sentence unconstitutional. The State disagrees.

A. <u>The Trial Court Did Not Instruct The Jury On Or Consider Inappropriate Aggravating Factors</u>

i) *The Trial Court Properly Instructed The Jury Upon And Considered The Community Control Aggravator*

Appellant contends that the trial court gave improper weight to the fact appellant was on community control at the time he committed the murders and inappropriately altered the standard instruction by omitting the words "under the sentence of imprisonment." The State disagrees.

An instruction given by the trial court is viewed on appeal for an abuse of discretion and reversible error occurs if the

jury was misled by the failure to give the requested instruction. Goldschmidt v. Holman, 571 So. 2d 422, 425 (Fla. 1990). Here, the trial court omitted language from the instruction that clearly did not apply in this case, "under sentence of imprisonment." Far from being misleading, the jury instruction accurately informed the jury of the portion of the aggravator which had evidentiary support. As the trial court noted in overruling appellant's objection, "[a]nd he was clearly not in prison at the time."[41] (V35, 626).

Appellant has not establish an error or resulting prejudice based upon the instruction provided by the trial court below.

The weight assigned to a mitigating circumstance is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. See Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997). In this case, the trial court properly considered the fact that appellant was under community control when he chose to break into the Fowlers' home and murder them to obtain money.

The State acknowledges that review of the aggravating and mitigating circumstances in this case is made more difficult because the trial court failed to assign a particular weight to

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[41]Defense counsel argued the point in closing that appellant was not in prison, he was on community control, "[h]e didn't kill a guard in prison." (V35, 669-70).

each circumstance. However, this does not preclude meaningful review on appeal where the order is otherwise thorough and reflects consideration of each mitigator and aggravator. See Fennie v. State, 855 So. 2d 597, 608-609 (Fla. 2003)("nonconformity [with Cambbell] in the instant case does not constitute fundamental error because the sentencing order was otherwise thorough and detailed, addressed all of the matters claimed in mitigation and aggravation, and contained a proper weighing analysis even though individual weights were not assigned.").

Even assuming, *arguendo*, this Court finds any error with regard to this aggravator, the error is clearly harmless in this case. Appellant's sentence is supported by four other weighty aggravators.

(ii) *Whether The Trial Court Properly Found That Appellant Had Previously Been Convicted Of Another Capital Felony Or Of A Felony Involving The Use Or Threat Of Violence To The Person.*

Appellant recognizes that in Lucas v. State, 376 So. 2d 1149 (Fla. 1979), this Court held that contemporaneous violent felonies could be used as prior violent felonies under Section 921.141(5)(b) of the Florida Statute because both convictions were entered prior to sentencing. (Appellant's Brief at 71). Since that time, this Court has consistently reaffirmed its

determination that contemporaneous violent felonies can be considered as an aggravator under Section 921.141 of the Florida Statutes. "This Court has repeatedly held that where a defendant is convicted of multiple murders, arising from the same criminal episode, the contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim." Francis v. State, 808 So. 2d 110, 136 (Fla. 2001)(citing Mahn v. State, 714 So. 2d 391, 399 (Fla. 1998); Walker v. State, 707 So. 2d 300, 317 (Fla. 1997)). See also Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990)("[w]e have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes." Appellant has not articulated any compelling reason for this Court to depart from this well established precedent.

(iii) *The Trial Court Properly Found And Considered That The Elderly Victims' Murders Were Heinous, Atrocious, or, Cruel.*

Appellant next argues that the victims' murders were not heinous, atrocious, or cruel because the medical examiner stated the victims might have been conscious for only a few seconds during appellant's attack. (Appellant's Brief at 74). He also maintains that this factor is only appropriate where the

defendant intends to inflict a high degree of pain or suffering, a factor that he contends is absent in this case. The State disagrees.

In Alston v. State, 723 So. 2d 148, 160 (Fla. 1998), this Court reiterated the standard of review for reviewing aggravating circumstances, noting that it "is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt - that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding," quoting Willacy v. State, 696 So. 2d 693, 695 (Fla.), cert. denied, 522 U.S. 970 (1997).

In this case, the trial court found as to the murder of Glyn Fowler:

> In this case, the evidence shows that David B. Snelgrove entered the Fowlers' bedroom and was possibly confronted and possibly surprised by Vivian Fowler. After being discovered, David B. Snelgrove visciously and deliberately attacked and took the lives of Vivian Fowler and Glyn Fowler. The victims had previously had some dealings with Mr. Snelgrove and had even loaned money to Mr. Snelgrove on previous occasions.
>
> In the early morning hours of June 24, 2000, Glyn Fowler was suddenly confronted with a terrifying situation of being attacked, along with his wife, by a much larger man in his own bedroom. It is impossible to know the exact emotions and thoughts

> that Mr. Fowler had at this time. However, the evidence reveals that Mr. Fowler was conscious during at least the first few seconds up to a minute of the attack. During this time, he received multiple blows to the head and face with such force that his facial bones were fractured. His brain received multiple severe contusions resulting in major hemorrhaging that eventually caused his death. If this were not enough, Mr. Fowler was stabbed several times, and the fractures suffered to the bones in his neck indicate that he may have been strangled or that his killer may have held Mr. Fowler by the neck to give the blows to his head maximum effect.
>
> The evidence shows that Mr. Fowler attempted to defend himself and ward off his attacker. A number of defensive wounds were identified during the autopsy, and the bedroom exhibited signs of a struggle when the scene was discovered by law enforcement personnel. Under these circumstances, the state has met its burden of proving beyond a reasonable doubt that the murder of Glyn Fowler was particularly heinous, atrocious, and cruel. Thus, this aggravator is applicable to the murder of Glyn Fowler.

(R9, 1569-70).

The court made similar findings for the murder of Vivian Fowler, noting that she was conscious through part of the attack:

> Mrs. Fowler was also stabbed repeatedly by her assailant. One of these stab wounds struck Mrs. Fowler's heart resulting in her death. Although the stab wound would have resulted in a fairly quick death, it is clear from the evidence that Mrs. Fowler was conscious for at least the first few terrifying moments of the attack, and that she received multiple, severe, and traumatic injuries during this time. Under these circumstances, the state has met its burden of proving beyond a reasonable doubt that the murder of Vivian Fowler was particularly heinous, atrocious, and cruel...

(R9, 13-14).

This Court has repeatedly affirmed the trial court's finding of HAC where, as in this case, the victims suffered numerous stab wounds. See Francis v. State, 808 So. 2d 110, 135 (Fla. 2001) ("The HAC aggravator has been consistently upheld where, as occurred in this case, the victims were repeatedly stabbed.") (citing Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998); Brown v. State, 721 So. 2d 274, 277 (Fla. 1998); Atwater v. State, 626 So. 2d 1325, 1329 (Fla. 1993)). Here, not only were the elderly victims stabbed, but they were brutally beaten, suffering numerous facial bone fractures. See Dennis v. State, 817 So. 2d 741, 766 (Fla. 2002)(affirming HAC where both victims suffered skull fractures and even though victims may have been rendered unconscious, defensive wounds suggest they were conscious during at least part of the attack).

Contrary to appellant's argument, the evidence establishes that the victims were not rendered immediately unconscious by appellant's attack. And, even if the victims were only conscious a few moments during the attack, this is sufficient for the trial court to find HAC. See Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997) (upholding HAC even though the medical examiner testified the victim was probably conscious only thirty to sixty seconds after being attacked); Peavy v. State, 442 So. 2d 200, 202, 203 (Fla. 1983) (upholding HAC where the victim

lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds). The defensive wounds on the victims indicate that they were cognizant of appellant's attack, and, attempting to fend him off. (V30, 795-96, 817). Injuries to Mr. Fowler's knuckles indicated he was either delivering blows, or, more likely attempting to fend off blows. (V30, 817). Mrs. Fowler had cuts to her arm and finger, and an injury to the back of the right hand, indicating that she was aware of the attack and attempting to fend it off. (V30, 795-96).

Neither victim died or even lost consciousness immediately. The defensive wounds noted by the medical examiner, including the signs of a struggle in the bedroom, establish this fact. Dr. Beaver testified that Mrs. Fowler was most likely alive when she received a number of powerful blows, before she was stabbed in the heart and bled to death. (V30, 814-15). While he did not know exactly when Mr. Fowler lost consciousness, the medical examiner testified consciousness may have been lost from 20 to 30 seconds or "[i]t could be a minute" maybe "more." (V30, 838). However, the stab wounds, which were not fatal, were inflicted on Mr. Fowler while he was struggling with his assailant. (V30, 839). Based upon the nature and the character of the wounds to the victims the medical examiner testified that "they were not

immediately unconscious." (V30, 851).

Appellant's argument that HAC is inapplicable because the evidence did not establish he intended to inflict pain or torture the victims is without merit. In Francis v. State, this Court rejected a similar claim:

> Finally, Francis' argument that he was mentally ill at the time of the murders, and was, therefore, incapable of forming an intent to cause prolonged suffering or torture is also without merit. "The intention of the killler to inflict pain on the victim is not a necessary element of the aggravator...[T]he HAC aggravator may be applied to torturous murders where the killer was utterly indifferent to the suffering of another." Guzman, 721 So. 2d at 1160 (citing Kearse v. State, 662 So. 2d 677 (Fla. 1995), and Cheshire v. State, 568 So. 2d 908 (Fla. 1990)). The Court has also noted that, "[u]nlike the [CCP] aggravator, which pertains specifically to the state of mind, intent and motivation of the defendant, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding death." Brown, 721 So. 2d at 277; *see also* Stano v. State, 460 So.2d 890, 893 (Fla. 1984)...

808 So. 2d at 135.

Here, appellant chose to murder the elderly victims in a horrible and painful manner, repeatedly beating and stabbing each victim. The severity and gravity of the wounds inflicted indicate, at the very least, complete indifference to the Fowlers' suffering. This factor is particularly weighty here where there was no need to inflict such injuries, or even kill the elderly victims. Based upon their age and size, he could

easily have accomplished his criminal goals without murdering them in the manner he chose.[42] Indeed, after murdering the Fowlers, he proceeded to rummage through the house, stealing cash and other items of value, indicating he was perfectly capable of executing his criminal plan for financial gain.

The trial court's ruling is supported by substantial, competent evidence, and should not be reversed on appeal.

(iv) *There Was No Improper Doubling Of The HAC And The Victims' Vulnerability Due To Age*

In Banks v. State, 700 So. 2d 363, 367 (Fla. 1997), this Court enunciated the proper analysis concerning the duplication of aggravating factors:

> Improper doubling occurs when both aggravators rely on the same essential feature or aspect of the crime. However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement. (citation omitted).

"Hence, the focus in an examination of a claim of unconstitutional doubling is on the particular aggravators themselves, as opposed to whether different and independent

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[42]The Court noted that at the time of the murders, "Snelgrove was 27 years old, over six feet tall [6'4], and weighed in excess of 200 pounds. Glyn Fowler was 84 years old, 5'6 tall and weighed approximately 160 pounds." (R9, 1570).

underlying facts support each separate aggravating factor." Sireci v. Moore, 825 So. 2d 882, 885-86 (Fla. 2002).

The facts supporting one aggravating circumstance may also support another. "The consideration of two aggravating circumstances ("doubling") is improper when they refer to the same aspect of the crime." Griffin v. State, 820 So. 2d 906, 914, 915 (Fla. 2002)(citation omitted)(e.g. murder committed to avoid arrest and murder to hinder law enforcement efforts). Here, the HAC aggravator [Section 921.141 (5)(h)] focuses on the manner of death and the pain and suffering inflicted by a defendant upon the victim. It clearly does not have an age or disability related vulnerability requirement. Section 921.141 (5)(m), focuses upon the age or disability related vulnerability of the victim. Clearly, not every HAC murder will have a victim made more vulnerable by age or disability. Nor will every murder of a disabled or age vulnerable victim be HAC. The victims' vulnerability due to age or disability was clearly not intended by the legislature to be a subset or subcategory of HAC. See generally Capers v. State, 678 So. 2d 330 (Fla. 1996)(permitting sentencing guideline departure based upon age of the victim even when age is an element of the offense).

B. Appellant's Death Sentence Is Proportional

This Court has described the "proportionality review"

conducted by this Court in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991)(citation omitted)(emphasis added); see also Terry v. State, 668 So. 2d 954, 965 (Fla. 1996); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

Appellant's death sentences are supported by the following aggravators: 1) appellant had previously been convicted of a felony and was on community control at the time he committed the murders; 2) at the time he committed each murder he had previously been convicted of another capital offense (prior murder); 3) at the time he committed the murders he was engaged in the commission of robbery and burglary; 4) murders were committed for pecuniary gain (merged with robbery/burglary; 5) the murders of Glyn and Vivian Fowler were especially heinous, atrocious or cruel; and, 6) the victims' were particularly vulnerable due to age and infirmity. Balanced against these aggravators was a single statutory mitigator of extreme emotional disturbance and a number of non-statutory mitigators relating to his low IQ, family relationships, drug abuse, and non-violent criminal record. (R9, 1564-1582).

This Court has placed the HAC statutory aggravator at the apex in the pyramid of the capital aggravating jurisprudence. See Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Indeed, the Court has approved death sentences supported only by an HAC aggravator. Butler v. State, 842 So. 2d 817 (Fla. 2003). Appellant brutally beat and repeatedly stabbed the two elderly victims in their own home. Both Glyn and Vivian attempted to defense themselves, but were overwhelmed by the younger and much larger appellant. The medical examiner detailed the list of horrific injuries appellant inflicted.

The instant case is similar to Singleton v. State, 783 So. 2d 970 (Fla. 2001), where this Court found the death sentence proportionate for a single murder based upon aggravators of prior violent felony conviction (attempted murder, kidnapping) and stabbing/HAC balanced against both statutory mental health mitigators and non statutory mitigation). See also Duest v. State, 855 So. 2d 33 (Fla. 2003)(aggravators included HAC/stabbing; prior violent felony conviction, robbery/pecuniary gain); Rogers v. State, 783 So. 2d 980 (Fla. 2001)(two aggravators of pecuniary gain and stabbing/HAC); Doorbal v. State, 837 So. 2d 940 (Fla. 2003)(HAC, pecuniary gain and prior violent felony in a double homicide case); Johnson v. State, 660

So. 2d 637 (Fla. 1995).

In Spencer v State, 691 So.2d 1062, 1063 (Fla. 1996) this Court affirmed a death sentence where the defendant murdered his estranged wife based upon prior violent felony convictions [contemporaneous convictions for aggravated battery, and attempted second degree murder] and that the murder was HAC. The sentence was proportional based upon these two aggavators even though the court found both statutory mental mitigators applied and significant non-statutory mitigating factors in Spencer's background, including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, and ability to function in a structured environment that does not contain women." Spencer, 691 So. 2d at 1063. Brown v. State, 565 So. 2d 304 (Fla. 1990)(death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators).

The State disagrees with appellant's assertion that the trial court did not fully consider appellant's addiction or alleged mental infirmity. The trial court did consider his addiction, low IQ, and asserted brain dysfunction. The court found a statutory mental mitigator, extreme emotional disturbance, and, "abnormal brain function" as a non-statutory

mitigator. (R9, 1578, 1580). Even the defense addiction expert noted that appellant could make his own choices, had free will, and was responsible for his acts. (V35, 595). While drug addiction and cocaine craving had an influence on appellant's behavior, he was capable of formulating a criminal plan, targeting the elderly victims who had previously loaned him money, stealthfully gaining entry into the victims' home, and, after viciously attacking and murdering the victims, carried through with his criminal plan, rummaging through the house for money. After obtaining money and some valuables, he fulfilled his plan by going with his cousin McCrae, to purchase crack cocaine. Appellant cleaned himself up after the murders, and hid some blood stained clothes in the attic, dousing the shirts in ammonia.[43] Under these facts, the trial court would have been well within its discretion to reject the statutory mental mitigator of extreme mental or emotional disturbance. See Davis v. State, 604 So. 2d 794, 798 (Fla. 1992)(statutory mitigating circumstances properly rejected, despite testimony of two defense experts, where defendant's methodical behavior was inconsistent with alleged drug use); Johnson v. State, 608 So.

[43]Contrary to appellant's contention that he led a relatively crime free life but for his drug addiction, as the court noted below, "Mr. Snelgrove has a significant history of prior criminal activities and convictions." (R9, 1571).

2d 4, 12, 13 (Fla. 1992)(where defendant used drugs before the murder and claimed he was going to rob someone to get money for drugs where "[t]here was too much purposeful conduct for the court to have given any significant weight to Johnson's alleged drug intoxication, a self imposed disability that the facts show not to have been a mitigator in this case.")(citing Bruno v. State, 574 So. 2d 76 (Fla. 1991)).

The HAC aggravator alone would overcome the mitigation presented by Snelgrove. However, when coupled with four additional aggravating factors, including the weighty prior violent felony conviction (contemporaneous murder), it becomes clear that death was the only appropriate punishment in this case. The death penalty imposed here is proportional for this horrendous, gruesome, double homicide.

VIII.

WHETHER THE STATE WAS IMPERMISSIBLY ALLOWED TO INTRODUCE VICTIM IMPACT TESTIMONY DURING THE PENALTY PHASE? (STATED BY APPELLEE)

This Court has consistently and repeatedly upheld the admission of victim impact evidence, as permitted by section 921.141(7) of the Florida Statutes and Payne v. Tennessee, 501 U.S. 808, 115 L.Ed.2d 720 (1991). See, e.g., Windom v. State, 656 So. 2d 432, 438 (Fla. 1995); Bonifay v. State, 680 So. 2d 413, 419-420 (Fla. 1996); Farina v. State, 680 So. 2d 392, 399

(Fla. 1996); Damren v. State, 696 So. 2d 709, 712-713, n 6 and 7 (Fla. 1997); Moore v. State, 701 So. 2d 545, 550-551 (Fla. 1997); Cole v. State, 701 So. 2d 845, 851 (Fla. 1997); Chavez v. State, 832 So. 2d 730, 767 n. 45 (Fla. 2002). Glyn and Vivian Fowler were entitled to be remembered during the sentencing of their killer.[44]

IX.

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA? (STATED BY APPELLEE)

This Court has consistently and persistently rejected appellant's claims and variants thereof in other cases. See King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Marquard v. State/Moore, 850 So. 2d 417, 431 n.12 (Fla. 2002); Chavez v. State, 832 So. 2d 730, 767 (Fla. 2002); Kormondy v. State, 845 So. 2d 41 (Fla. 2003)("Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury.").

In any case, a jury unanimously decided appellant was guilty

[44]Appellant has the temerity to contend that what happened to him during the penalty phase was an "injustice." (Appellant's Brief at 98). No, injustice is what appellant inflicted upon the Fowlers. The Fowlers were targeted by the appellant because they were generous and had loaned him money in the past. They were awakened in the middle of the night, and brutally murdered by the appellant in their own home.

of first degree murder of both Glyn and Vivian Fowler (prior violent felony convictions). In addition the jury found appellant guilty of burglary and robbery, qualifying contemporaneous felonies. Section 921.141(5)(b); 921.141 (5)(d). See Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003)(These arguments must fail because here, one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnaping, robbery, and attempted murder of Schiller.") Accord, Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the judgments and sentences entered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to James R. Wulchak, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this _____ day of April, 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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