IN THE SUPREME COURT OF FLORIDA

DAVID SNELGROVE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC02-2242
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

The Appellant relies on the statement of case and facts as set forth in the Initial Brief. The state objects to the Initial Brief's Statement of Case and Facts, contending that it "contains the argument of appellate counsel. Consequently, the State provides" its own version. (Answer Brief, p. 1) The statement of case and facts in the Appellant's initial brief contains substantially all of the facts contained in the state's version, omitting some minor irrelevant details, such as which officer was the first to arrive to speak to the neighbors (Answer brief, p. 2), or how long each particular FDLE analyst had worked for the department. (Answer brief, p. 5, 7)

What the state seems to contend is "argument" in the appellant's statement of case and facts, is simply the mention therein of certain facts and analysis missing from the court's findings and the argument of trial counsel to the court in support of his motions and objections, which the state has conveniently omitted from its incomplete version of the case and facts.

In fact, the state omits any mention of discrepancies in the testimony of jailhouse "snitch" Matthews, and omits all reference to the objections to State Attorney Tanner's numerous improper speaking objections, including coaching the

witness in making his objections.[1] In fact, the state omits any true "statement of the case," focusing only on the facts of the crime, not how the case got here and what issues were raised below and in what context. The state also fails to provide in its "statement of the case and facts" any facts relating to the penalty phase, simply stating that "facts relating to the penalty phase will be discussed in the argument addressing those issues below." (Appellee's Answer Brief, p. 33)[2] Moreover, an examination of the penalty phase argument of the appellee (Answer Brief, pp. 93-98) reveals *absolutely* ***no*** discussion of the mitigation evidence presented. Hence, it must be assumed, the appellee agrees with the appellant's statement of the facts with regard to this mitigation.

For these reasons, the Appellant stands by the statement of case and facts as contained in his initial brief as a complete, accurate, non-argumentative recitation of all of the relevant facts and proceedings below.

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[1] Again, as recounted in the initial brief, many being recognized as improper by the trial court. *See* Initial Brief, pp. 3-6, 8, 10.

[2] Contrary to Rule 9.210, *Comm. Note 1977 Amendment*, Florida Rules of Appellate Procedure, providing that parties shall place every fact utilized in the argument section of the brief in the statement of facts. Otherwise, it makes it difficult for the opposing party and the Court to know exactly which facts are in dispute. *Id*.

SUMMARY OF ARGUMENTS

I. An actual conflict of interest existed where the State sought out the defendant's fellow inmates, also represented by the public defender's office, regarding overheard statements relevant to the case. The court was required to allow the public defender's office to withdraw where the interests of the clients were adverse and where representation of one client was being effected by prior representation of other clients who were potentially major state witnesses.

II. The State misrepresented facts and failed to disclose a letter written by its key witness seeking a deal in his case if he testified against the defendant. Reversible error occurred where the State knowingly allowed the witness to testify falsely about his deal with the State and where the trial judge failed to conduct any *Richardson* inquiry whatsoever concerning the clear discovery violation.

III. The prosecutor engaged in misconduct by inflammatory, improper, and irrelevant remarks in front of the jury.

IV. The trial court abused its discretion in unreasonably denying a recess after defense counsel informed the court that he was physically, mentally and emotionally exhausted and, as a result, was unable to continue to provide effective assistance of counsel without an overnight recess.

V. A separate jury recommendation of life or death is required for *each* first

degree murder charge. A new penalty phase is mandatory.

VI. Florida's capital sentencing scheme and penalty phase jury instructions unconstitutionally shift the burden of proof to the defendant.

VII. The trial court erred in imposing the death sentence.

VIII. Victim impact evidence is unconstitutionally admitted in Florida's capital sentencing scheme.

IX. Florida's death penalty procedure violates the Sixth and Fourteenth Amendments under *Ring v. Arizona*.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING COUNSEL'S MOTION TO WITHDRAW BASED ON CONFLICT OF INTERESTS, DEPRIVING THE DEFENDANT OF HIS FLORIDA AND FEDERAL CONSTITUTIONAL RIGHTS TO COUNSEL, DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL.

The appellee cites to *Hunter v. State*, 817 So.2d 786 (Fla. 2002); *Mickens v. Taylor*, 535 U.S. 162 (2002), and other similar cases in support of its argument for Point I. (Answer Brief, pp. 37-50) However, these cases do not control for the reason stated in footnote 36 of the Initial Brief, pp. 40, to which the state does not respond. These were *post-conviction* cases where any potential conflict issue was never raised during the trial proceedings. As noted in the Initial Brief, a *different* standard applies when the court is examining a post-conviction motion raising for the first time an alleged conflict of interests, as opposed to where defense counsel raises the conflict at the trial level and the issue is being reviewed on direct appeal: In a post-conviction case where the issue is being raised for the first time, the defendant must prove actual ineffective assistance of counsel, pursuant to the two-prong test of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), affirmatively showing that the conflict actually impaired the performance of the defense lawyer. *See* Initial Brief, pp. 37-41.

Where the issue ***is*** raised at the trial level and is considered on direct appeal, it has been held to be reversible error where a ***risk*** of conflicting interest exists, even where, as in those cases, the representation of the adverse witness was in an unrelated case, especially where the alleged statements of the defendant are made to the adverse witness while the same office is still representing the adverse witness. *See Bellows v. State*, 508 So.2d 1330, 1331 (Fla. 2nd DCA 1987); *Ortiz v. State*, 844 So.2d 824, 825-826 (Fla. 5th DCA 2003); *Lee v. State*, 690 So.2d 664, 667-669 (Fla. 1st DCA 1997). *See* Initial Brief, pp. 38-41. In the case of joint representation of conflicting interests, the evil is in what the advocate finds himself compelled to *refrain* from doing, and hence the scope of the error is not readily identifiable from a review of the trial transcripts. *Lee v. State, supra* at 668; *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). *See* Initial Brief, pp. 39-40.

The other case cited by the state, *Martin v. State*, 761 So.2d 475 (Fla. 4th DCA 2000), was a pre-trial writ of certiorari, wherein the court ruled that the petition was facially insufficient in that it neither alleged the substance of the prior representation or when it terminated, noting that it could have terminated three years prior to the alleged conflict. That was not the case here; defense counsel specified exactly the nature of the representation, including that witness Mathews *was* represented by the same office at the time of the alleged conversation between

Snelgrove and Mathews and that Mathews was facing more serious charges than was actually ultimately prosecuted, which had been the subject of discussions with his lawyer. It was during this joint representation by the public defender's office that Mathews initiated discussions with the state seeking a deal in exchange for his testimony against Snelgrove.

The state also contends that simply because Mathews waived any possible conflict, it does not matter that Snelgrove, whose right to a conflict-free attorney is what we are dealing with here, refused to waive any conflict. Rule 4-1.7 (a) (2), Rules Regulating the Florida Bar, requires the waiver of *both* clients. *See also Amendments to Rules Regulating the Florida Bar*, 820 So.2d 210, 214 (Fla. 2002) (Pariente and Quince, JJ., concurring) ("We have substantial concerns as to the ethics of defense counsel's attacks on his former client."). Moreover, as argued below and in the initial brief, it was not simply a conflict with Mathews that spurred the conflict motion; rather the state affirmatively solicited information (including information about the public defender's strategy!) from many former cellmates of Snelgrove who were current or former clients of the public defender's office. (V 18, T 4-8, 25-33; SR 72, 74) *See* Initial Brief, pp. 35-37. Thus, any conflict could

not have been waived by Mathews alone.[3]

The appellee disingenuously faults the defense for failing to earlier raise the conflict issue with Mathews. As noted below and in the Initial Brief, defense counsel was specifically (and erroneously) informed by the state attorney that Mathews had NOT been represented by the public defender's office. (V 36, T 46-52; V 7, R 1296-1303, 1307-1309, 1312-1314) *See* Initial Brief, p. 35. Thus, it is preposterous and smacks of bad faith for the state to blame the defense for waiting to "the eve of trial" to raise the conflict issue with Mathews (Answer Brief, pp. 38, 40-41), when it was the affirmative actions of the state which, up until then, hid the conflict!

Snelgrove was thus denied his right to counsel, where he was forced to go on trial for his life with an attorney who felt constrained by an ethical and actual conflict of interests and could not provide adequate representation due to his divided loyalties. Snelgrove's rights to a fair trial, due process of law, and equal

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[3] The state claims that counsel "never offered a credible explanation why these inmates could not be interviewed much less called as witnesses . . ." (Answer Brief, p. 38-39 & fn. 12) Apparently, the state either did not read the motion or hearing transcripts on the motion to withdraw (or the quotes from trial counsel recited in the initial brief), or else does not fully comprehend an attorney's ethical obligations to multiple clients. As trial counsel correctly noted, "This Office ethically could not and would never initiate an inquiry into the possibility/occurrence of statements between clients it is representing." (SR 72)

protection are compromised by his court-appointed attorney's conflict and the resultant death sentences are rendered cruel and unusual punishment. A new trial with conflict-free counsel is required.

POINT II

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A *RICHARDSON* INQUIRY WHERE THE STATE FAILED TO DISCLOSE TO THE DEFENSE A LETTER WRITTEN BY A STATE'S WITNESS AND WHERE THE STATE ALLOWED FALSE TESTIMONY TO BE PRESENTED BY ITS WITNESS.

The state attempts to minimize the importance of Gary Mathews' testimony in its attempt to discount this issue and the significance of the non-disclosed letter. First, Gary Mathews is the *only* scintilla of evidence the state had in its possession that the defendant actually committed the murders, rather than the defense version that Snelgrove had merely stumbled upon the already deceased bodies of the victims from another unidentified intruder, who actually committed the killing. The fact that the defendant's blood was found throughout the house only means that the defendant was inside the house after the killings and took money and the necklace.[4] Secondly, the June 28th Mathews' letter to the prosecutor conflicted with the state attorney's personal assurances that Mathews had private counsel before contacting them about his knowledge of the Snelgrove crimes, and directly conflicted with Mathews' trial testimony (that it took days for Snelgrove to give him any

[4] After all, it must be remembered, the defendant was bleeding profusely from his entry to the house and none of his blood was on the victim's or mingled with their blood, and none of their blood was on Snelgrove, which it would have had to have been if he was the killer.

information) by stating that he had complete detailed information about the crimes from Snelgrove only a day after Snelgrove was arrested and placed in the same cell block with Mathews.[5]

This letter would have impeached Mathews story that it took a few days to gain Snelgrove's confidence and learn of the killings from him, a fact that gave his trial testimony more credibility. Yet, the letter shows this to be false. Additionally, the non-disclosed letter shows that the state attorney affirmatively misled the court and the defense when it indicated on the record that Mathews had not contacted the state attorney's office until well after Mathews had substitute counsel. (Vol. 30, T 685-686)[6]

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[5] The state cites to the arrest report to claim that Snelgrove was housed with Mathews on June 25th. (Answer Brief, p. 62) However, the state ignores the fact that the defendant was not arrested until the waning hours of June 25 (Vol. 1, R 15) and was questioned extensively and photographed before ever being placed in the cell with Mathews sometime on June 26, as was contended below. (Vol. 27, T 387-389)

[6] "The actions of the prosecutor also violated . . . established rules of conduct which recognize that our adversary system of justice has its limitations in the prosecution of criminal cases, and especially capital cases. The resolution of such cases is not a game where the prosecution can declare, 'It's for me to know and for you to find out.'" *Craig v. State*, 685 So.2d 1224, 1229 (Fla. 1996), *citing Berger v. United States*, 295 U.S. 78, 88 (1935), and the *Oath of Admission to the Florida Bar*.

The state then proceeds to argue without any record support (because there could be none absent a *Richardson* inquiry) that the failure to disclose the letter was obviously unintentional on the state's part (Answer Brief, pp. 60-61 & fn. 29), even though submitting that the letter was found in Gary Mathews' state attorney file (Gee, what a curious place to find it!). Since there was not an adequate *Richardson* or *Brady* inquiry, it cannot be conclusively determined on this record that the *Richardson* and *Brady* violations did not prejudice the defendant or that they were not willful. *Flores v. State*, 29 Fla. L. Weekly D1159 (Fla. 4th DCA May 12, 2004). This Court cannot say, beyond a reasonable doubt, that the defense was not procedurally prejudiced by the discovery, *Brady*, and *Giglio* violations.

The letter may appear "inconsequential" to the appellee (Answer Brief, p. 64), yet it showed that Mathews was lying and the state attorney, in possession of the letter, knew of the falsehood being perpetrated on the court. Mathews wrote this letter to the state seeking a deal *prior to* the time he testified in court that he had obtained the defendant's confidence – only the state knew, at the time of the testimony, that it was false. The state attorney, in possession of the letter, was aware, due to its contents, that Mathews was fabricating his story before the court and jury as to the circumstances and timing of the defendant's "confiding" in him about the alleged details of the crime. A new trial must be ordered.

POINT III

THE PROSECUTOR'S IMPROPER AND INFLAMMATORY REMARKS TAINTED THE JURY TRIAL AND RENDERED THE ENTIRE PROCEEDING FUNDAMENTALLY UNFAIR.

The state incredibly seeks to justify the *elected*[7] State Attorney's interruptions, extra-evidentiary comments, coaching a witness under cross-examination by defense, mischaracterizing of evidence and the law, and using inflammatory rhetoric, as proper prosecutorial tactics!

Appellee argues that the issues were not preserved for appeal. First, it must be corrected that all but one of the improprieties here *were* objected to by the defense. (Vol. 31, T 964-965 [objection to comments on matters not in evidence], T 973-974 [appealing to passions, emotions of jury], T 976 [another objection to comments on matters not in evidence], T 980 [even before defense could object, the trial court admonished the State Attorney for improperly interrupting defense counsel's final closing argument and offering his own personal beliefs as to the deficiencies defense counsel was pointing out]; and Vol. 32, T 95-99 [objection to

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[7] The appellee incorrectly places blame on an *assistant* state attorney for the comments and tactics complained of (Answer Brief, p. 66), where it was, in reality, the elected State Attorney John W. Tanner, Jr. (admitted to the Bar in 1967, a former assistant state attorney, a criminal defense attorney for many years, and the elected State Attorney for twelve years; in other words, obviously one who *should* know better) who engaged in these improprieties.

State Attorney's informing the jury that the victims' pre-teen granddaughter had written more in her letter read in part to the jury but that it was redacted due to defense objections])

Regarding the improper coaching of witness Mathews while on the stand being subjected to defense counsel's cross-examination, the appellee contends that the speaking objection wherein the State Attorney told the witness the "correct" answer "did not change or alter Mathews' testimony" since Mathews *did* testify Snelgrove came in the back door. (Answer Brief, p. 67) However, the state needs to note its record cites to that testimony, since the witness only testified to that fact ***after*** the improper coaching by the State Attorney. (Vol. 30, 755-756 [improper coaching of witness], 756-757 ["corrected" testimony])[8] Certainly, this transgression, although not objected to by defense, should shock the conscience of this Court such that it amounts to fundamental error, and at least, coupled with the other, properly preserved improprieties, compel a new trial.

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[8] *After* State Attorney John Tanner interrupted defense counsel's questioning of Mathews wherein Mathews testified as to the incorrect point of entry and exit (claiming it was the back door), and after Mr. Tanner coached Mathews that "What Mr. Snelgrove said is he went out the way he came in," Mathews responded, "That's what I was fixing to say." When Mathews continued to claim it was the back door or some door, Mr. Tanner continued to object, until Mr. Mathews finally got the message and "corrected" his answer that it was a broken window (somewhere). (Vol. 30, T 756-757)

The state contends that the State Attorney's comments on matters not in evidence, that the crime lab had not tested all of the blood scrapings form the knife, and thus, just because the victims' blood was not discovered on the knife, did not mean it was not in the scrapings not tested, was fair comment on the evidence. This Court surely cannot agree, for the evidence did not exist; the comment merely is asking the jury to base their verdict on conjecture of what other evidence, not presented to them by the state, *may* have shown. *See Walters v. State Road Dept.*, 239 So.2d 878 (Fla. 1st DCA 1970) (speculation and conjecture not proper basis for jury verdict).

Finally, this Court should not countenance a prosecutor who, knowing that he already has had his final opportunity for argument to the jury, deliberately interrupts the defendant's final closing argument to make an additional point for the jury:

> MR. NOVAS [defense counsel]: . . . Ladies and Gentlemen, go back there and ask yourselves why [there was none of the victims' blood on the defendant]. Try to create a scenario. I can't. Evidently Mr. Tanner can't either, or else he'd have them for you.
>
> MR. TANNER: Your Honor, I'd be glad to offer a scenario if you would like.
>
> THE COURT: That would be out of order. Thank you, Mr. Tanner.

MR. TANNER: Thank you.

(Vol. 31, T 980) "I'd be glad to offer," additional argument, speculation, and conjecture to the jury even though I know it is no longer permissible under the rules of criminal procedure for me to address them," is what State Attorney Tanner was saying. *See* footnote 7, *supra*. The trial court immediately interrupted him before he could continue, but State Attorney Tanner, having made his point to the jury, thanked the trial judge for that opportunity. (Vol. 31, T 980) The appellee claims that Mr. Tanner should be excused for this transgression, simply because defense counsel mentioned him by name during his closing (and that the state had not addressed this inconsistency in evidence). Appellant asks, though, how can a highly experienced elected State Attorney think that this outburst was proper when the rules do not provide for additional comments from him at this point of the trial? No, the experienced prosecutor knew exactly what he was doing. He should not be excused for this, his overzealousness to obtain a conviction and death sentence and the rules of court procedure be damned.

Finally, the state claims that any errors here can be deemed harmless since "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." (Answer Brief, p. 77) The Appellant objects to such a characterization of what the jury vote should have been, according to the expert assistant attorney general. Such a comment fails to recognize the serious mitigation present here. *See* Point VII of Initial Brief. Further, the close vote of the jury highlights that if only one of the seven jurors who voted for death was inflamed or improperly influenced by Mr. Tanner's objectionable comments and antics, the jury recommendation could have been for life.[9]

The improper comments of the prosecutor here so deeply implanted seeds of prejudice or confusion that reversal is required even in those instances where there was an absence of an objection. There can be little doubt the prosecutor's argument prejudiced Snelgrove. The prosecutor's actions rendered the capital trial proceeding fundamentally unfair and denied Snelgrove due process of law and renders his death sentence cruel and unusual. A new trial is required.

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[9] Generally, in other cases wherein the vote is 12-0 or 11 to 1, the appellee will argue that, since it was not even a close vote, the error was obviously harmless. How can the state have it both ways?

POINT VI

PLACING A *HIGHER* BURDEN OF PERSUASION ON THE DEFENSE TO PROVE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN IS PLACED ON THE STATE TO PERSUADE THAT CAPITAL PUNISHMENT SHOULD BE IMPOSED VIOLATES FUNDAMENTAL FAIRNESS AND DENIES DUE PROCESS.

The state does not, nor could it in good faith, claim that this issue contesting the constitutionality of Florida's statute and standard jury instructions is not preserved because it clearly is. The state does not, nor can it, counter this issue on its merits because the argument is clearly valid. The state therefore only cites four cases in the hope that inertia will cause this error to avoid correction.

The state relies on *Griffin v. State*, 866 So.2d 1, 14 (Fla. 2003), and states "the 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." (Answer Brief, p.23) This contention is faulty for several reasons. First, it addresses only the standard jury instructions and not the statute. Second, it addresses only "burden shifting" and not the claim that a *higher* burden for a life sentence than for a death sentence denies fundamental fairness and Due Process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Further, *Griffin* is wholly inapposite because it involves review of the

denial of a motion for post-conviction relief rather than direct appellate review of imposition of a death sentence. Finally, *Griffin* holds only that a generic "burden shifting" issue present there, whatever it was, was not preserved for appellate review.

Specifically, in *Griffin*, this Court observed that "substantive challenges to jury instructions should be raised on direct appeal." *Griffin* at 14. (The instant issue is brought on direct appeal). Then, listing several broad issues under the category of "Jury Instructions," this Court in *Griffin* summarily held, without identifying the specifics of the arguments, that those generic claims were ***not preserved*** for review:

> Additionally, all of the issues in this claim were facially insufficient as Griffin merely made conclusory allegations in his postconviction motion below. He did not state how the standard instructions failed to channel the jury's sentencing discretion, nor did he specify the aggravating circumstances upon which the jury was inadequately instructed. Griffin's conclusory allegations were facially insufficient to allow the trial court to examine the specific allegations against the record. *Ragsdale v. State*, 720 So.2d at 207. Thus, we affirm the circuit court's summary denial of relief on these substantive claims because they were either procedurally barred or facially insufficient.

Griffin, 866 So.2d at 14. *Griffin's* holding does not address the merits of the instant ***higher*** burden issue. *Dicta* in *Griffin* now relied upon by the state is found in the following language that clearly is not a part of the holding that Griffin's issues

were not sufficiently pled for appellate review[10]:

> [E]ven if the substantive claims of instructional error had been properly raised on appeal, they would have been denied as being without merit. . . . We have also 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 the 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).

The state relies on the foregoing three cases/dicta and wholly fails to address the merit of the arguments. (Answer Brief, p. 83) All of the cases relied on by the state suffer the same inadequacy as *Griffin.* None address the *higher* burden for life than for death. All review the denial of post-conviction relief rather than direct appellate review of a death sentence based on timely and specific objections to the trial court. The holding of all three was that a "burden shifting" issue, whatever the argument was, was *not* preserved for appellate purposes by the presence of an adequate and timely objection. *See Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla. 2002) ("Sweet did not object to this instruction at trial."); *Carroll v. State*, 815

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[10] The failure of Griffin to adequately argue his burden shifting issue means there was no argument made for this Court to analyze and reject.

So.2d 601, 622-23 (Fla. 2002) ("Trial counsel did not object to the instructions on the ground that they improperly shifted the burden. Therefore the issue is not preserved for appeal."); *San Martin v. State*, 705 So.2d 1337, 1350 (Fla. 1997) ("Initially, we note that because San Martin did not challenge the statute on this basis and raised no objection to the instruction, this issue is not preserved for review.") Interestingly, however, in *San Martin*, this Court (again in dicta) went on to state, "Further, this claim has been rejected both by the United States Supreme Court and this Court. *See Walton v. Arizona*, 497 U.S. 639, 641-51 (1990) and *Arango v. State*, 411 So.2d 172, 174 (Fla. 1982)."

Walton v. Arizona is no longer good law. *See Ring v. Arizona*, 536 U.S. 584 (2002). However, *Ring* is important because there a very conservative United States Supreme Court, notwithstanding that it had previously repeatedly rejected an issue, nonetheless again carefully reviewed and analyzed the constitutional issue properly presented again for its review and, after doing so, realized and properly acknowledged that a mistake of constitutional magnitude was made in a capital case years earlier. Mistakes happen. Because the state has not addressed the merits of the arguments Snelgrove properly raised below and on appeal, this Court will have to research the issue itself, and should conclude that *Arango* is incorrect.

However, even if *Arango* was not mistakenly decided, it is not controlling

here because it can be factually distinguished. In *Arango*, it is impossible to tell whether timely and specific objections were made below:

> Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the proceedings, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684 (1975), and State v. Dixon, 283 So.2d 1 (Fla. 1973).
>
> In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that they state must establish them. In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Arango v. State, *supra* at 174. From the foregoing, it appears there was no specific complaint at trial about the constitutionality of Section 921.141, Florida Statutes, there was no timely and specific objection made to the standard jury

instructions. And, there was no request for a special jury instruction to supplement the standard jury instructions. Snelgrove did all three.

A defendant on trial for his or her life is, as a matter of Due Process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution is entitled to a fair jury trial with clear, correct, and unambiguous jury instructions. If a timely objection is not made to claimed errors, then the appellate court may correctly require a higher showing of prejudice to justify relief. *See State v. Delva*, 575 So.2d 643, 533 (Fla. 1991) (explaining that jury instructions 'are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal *only if fundamental error occurred*.") (emphasis added). However, when timely and specific objections are made, as here, it is reversible error for a trial court to refuse to clear up uncertainty in the law. *See Williams v. State*, 863 So.2d 1189, 1189-90 (Fla. 2003) (Whether *preserved* error is harmless "is not a sufficiency-of-the-evidence, a correct result, clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence."). *See Yohn v. State*, 476 So.2d 123 (Fla. 1985) (holding that a defendant's requested instruction that more properly set forth Florida law with

respect to the burden of proof in insanity cases as the standard jury instructions did not "completely and accurately state the law."); *See also Way v. State*, 475 So.2d 235 (Fla. 1985) (trial judge erred in refusing to give requested instruction that clarified ambiguous standard jury instruction concerning trafficking in cocaine).

In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that the finder of fact must determine the existence of all necessary for imposition of capital punishment. Florida resists having the jury expressly find the presence of aggravating circumstances, apparently in the belief that a jury "recommendation" about what sentence to impose is not entitled to the same Sixth Amendment protections as is the determination of guilt. Assuming without conceding that Florida's jury "just" issues a recommendation, it is yet unconstitutional to allow the recommendation to issue after a timely and specific objection to improper jury instructions on how the jury is to decide which sentence to impose. Florida is the *only*[11] state with a statute and jury instructions that require that the mitigating circumstances outweigh the aggravating circumstances in

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[11] For example, under the current version of the Indiana Death Penalty Statute, before the jury can recommend the death penalty, it must find that "(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and (2) any mitigating circumstances that exist <u>are outweighed by the aggravating circumstance or circumstances</u>." Ind. Code § 35-50-2-9(l) (2003). (emphasis added).

order for the jury to recommend and the trial court to impose a life sentence.

This Court has *never* addressed whether Florida's statute and standard jury instructions require a *higher* burden of persuasion for life than for the death penalty. Trial judges are refusing to give proper instructions concerning the law in Florida concerning imposition of capital punishment. Here, the trial court was timely asked in writing but refused to instruct the jury that "A jury is neither required nor compelled to impose a death sentence even when the aggravating circumstances outweigh the mitigating circumstances." (SR 1-F, 2-69, fn. 4, 5, 6, 16, 43; Vol. 3, R 478, 509-510) This is a correct statement of the law that is tantamount to the defendant's theory of defense. The failure to give this timely requested instruction clearly distinguishes this case from the facts given in *Arango*, and such an instruction should be given by trial courts in order to cure the confusion created by the standard jury instructions. The statute itself is unconstitutional because it requires a higher standard for a life sentence than it requires for the death penalty and the state is otherwise relieved of its burden of ultimately proving that capital punishment is justified. Snelgrove's death sentences must be reversed and sentences of life imprisonment imposed.

POINT VII

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

A. The Trial Judge Considered Inappropriate Aggravating Circumstances

The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. §921.141(5)(b), Fla. Stat.

The state, in responding to the argument against this aggravating factor merely cites to cases (also cited by Appellant) that a contemporaneous conviction, entered prior to the sentencing phase, can suffice for this aggravator. However, the state fails to respond (and cannot) to the claim that since the court had not adjudicated the defendant of the crimes prior to the sentencing phase, the multiple murders did not fall into this statutory aggravator which requires a *conviction* "at the time the jury considered it recommendation to the trial judge."*King v. State*, 390 So.2d 315, 320-321 (Fla. 1980). *See* Initial Brief, pp. 71-72)

Especially heinous, atrocious or cruel. §921.141(5)(h), Fla. Stat.

The state, citing to *Alston v. State*, 723 So.2d 148, 160 (Fla. 1998), argues that this Court need not reweigh the aggravating circumstances in order to conduct its required appellate review of death sentences. (Answer Brief, p. 87) *If* this is

true, then this Court has rendered Florida's death sentencing scheme unconstitutional. This line of cases, if followed, shows unmistakably and unfortunately that the this Court has waffled on its review function and has broken the earlier promises of *State v. Dixon*, 283 So.2d 1 (Fla. 1973), to review *and reweigh* independently the aggravating and mitigating circumstances and conduct proportionality review of death sentences.

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. **Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.**

(Emphasis added).

It has been this promise which the United States Supreme Court has repeatedly relied upon in past decisions approving Florida's death penalty scheme. That Court has held that, "If a State has determined that death should be an

available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). The Constitution prohibits that arbitrary or irrational imposition of the death penalty. *Id*. at 466-467. The United States Supreme Court has repeatedly emphasized the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. *Parker v. Dugger*, 498 U.S. 308, 321 (1991); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242, 252-253 (1976). That Court has also held specifically that the Florida Supreme Court's system of **independent** review of death sentences minimizes the risk of constitutional error. *Id*.

> The statute provides for automatic review by the Supreme Court of Florida of all cases in which a death sentence has been imposed. § 921.141(4) (Supp. 1976-1977). The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of a death sentence with written findings, meaningful appellate review of each such sentence is made possible and the Supreme Court of Florida like its Georgia counterpart considers its function to be to **"[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great."** *State v. Dixon*, 283 So.2d 1, 10 (1973).

Proffitt v. Florida, 428 U.S. at 250-251 (emphasis added).

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which **the evidence of the aggravating and mitigating circumstances is reviewed and *reweighed* by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted.**" *Songer v. State*, 322 So.2d 481, 484 (1975).

Id. at 252-53 (emphasis added).

> Finally, the Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. **The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.**
>
> Nonetheless the petitioner attacks the Florida appellate review process because the role of the Supreme Court of Florida in reviewing death sentences is necessarily subjective and unpredictable. While it may be true that court has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary. In fact, **it is apparent that the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency.**

Id. at 258-59 (emphasis added).

The defendant submits that to follow *Alston* and its progeny would attest that what was true in 1976's *Dixon* promise is no longer true today. Intractable ambiguities in our death penalty scheme, especially in this Court's inconsistent

interpretation of its review function of aggravating and mitigating circumstances, prevent the evenhanded application of appellate review and the independent reweighing process envisioned in *Proffitt*. If this Court refuses to undertake the type of consistent independent weighing and proportionality review which it promised in *State v. Dixon, supra*, arbitrariness and capriciousness have returned in full force to Florida's capital punishment system and the statute is now unconstitutional.

B. Mitigating Factors, Both Statutory and Non-Statutory, Are Present Which Outweigh Any Appropriate Aggravating Factors.

The state fails in its brief to even address any of the mitigation arguments presented by the appellant, and, in fact, contrary to its promise at the conclusion of its statement of case and facts, never even mentions any of the facts and evidence concerning the mitigation. Hence, it must be assumed that the appellee agrees with the appellant's arguments contained in the mitigation section of the initial brief, pp. 81- 95.[12]

The trial court was incorrect in its sentencing order that the state had rebutted

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[12] *See* Fla. R. App. P. 9.210, *Committee Note 1977 Amendment* (Answer brief's statement of case and facts must show areas of disagreement with the initial brief "to the extent of disagreement."

the evidence of "substantial impairment." Since the appellee does not dispute this in its brief, it must be found. *See* Initial Brief, pp. 85-89.

In conclusion, the trial court found improper aggravating circumstances, including HAC and prior *conviction* of violent felony; and the improper doubling of HAC with vulnerability of the victims due to advanced age. As such only three aggravators are left in the equation: on felony community control (relatively weak due to only community control, rather than imprisonment, and due to minor nature of crime [swallowing his crack cocaine]), during the course of the robbery/burglary, and the advanced age of victims. The substantial statutory and nonstatutory mitigating circumstances, unrebutted by the evidence, and unrebutted (and unmentioned) in the state's answer brief, clearly tips the scale in favor of life imprisonment. Snelgrove's sentences of death, when compared to others, is disproportional and constitutes cruel or unusual punishment under the circumstances. It must be vacated.

POINT VIII

THE JURY'S RECOMMENDATION AT THE PENALTY PHASE WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

The state, in response to this argument (Answer Brief, p. 98), merely relies on *Windom v. State*, 656 So.2d 432 (Fla. 1995) and its progeny without addressing the disturbing question raised herein and by the trial court below in considering whether to allow victim impact evidence: "You, the jury may consider this victim impact evidence," they are told, "but you must only consider the aggravating and mitigating circumstances." So what is the jury to do with this irrelevant (to the weighing of aggravators and mitigators) evidence? Consider it in their weighing process (contrary to the statutory scheme of aggravators and mitigators)? Or not consider it because it has not bearing on aggravators (even though they are told they *can* consider it)?

Yes, Florida, as the state notes, *should* "remember" the victims during "the sentencing of their killer," (Answer Brief, p. 98) but that remembrance is more appropriate and is constitutional before the judge only during the actual sentencing, not where irrelevant evidence is presented to the jury for their consideration in that process. *See* Initial Brief, pp. 95-99. The state in its final concluding footnote 44

(Answer Brief, p. 98) critiques that "Appellant has the *temerity* to contend that what happened to him during the penalty phase was an 'injustice.'" If it is "foolish boldness" to proclaim that this State, in deciding that a person should be put to death, must follow the Constitution of the United States and the Constitution of Florida or risk injustice, then the undersigned counsel is proudly "temerarious." Two wrongs do *not* make a right.

Rather than making a reasoned judgment from the pertinent evidence and applicable law relating to consideration of only mitigating and statutory aggravating circumstances, the jury was told they could consider this evidence (somehow) in their advisory verdict. This type of human weighing[13] inflames the sentencing jury, infecting the entire process. A new penalty phase is required, without the emotionally charged evidence.

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[13] loving grandparents *versus* a lowly crack cocaine addict/common menial worker – who is worth more?

CONCLUSION

The appellant requests that this Court reverse and, as to Points I-III, remand for a new trial; as to Points IV-VI, remand for a new jury penalty phase; and as to Point VII-IX, remand for imposition of life sentences.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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JAMES R. WULCHAK
Chief, Appellate Division
Assistant Public Defender

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Scott A. Browne, Assistant Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, FL 33607, and Mr. David Snelgrove, Inmate # 442564, Florida State Prison, 7819 N.W. 228th St., Starke, FL 32026, this 10th day of June, 2004.

_____

JAMES R. WULCHAK
Assistant Public Defender